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Supreme Court of Texas.
Reid Road Municipal Utility District No. 2
v.
Speedy Stop Food Stores, Ltd.
No. 09-0396.

October 12, 2010.

Appearances:

Cary C. Charles Dippel of Andrews Kurth LLP, Houston, TX, for petitioner. Bill Russell of Bill W. Russell, P.C., Houston, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in the first cause, 09-0396 Reid Road Municipal Utility District v. Speedy Stop Food Stores.

MARSHALL: May it please the Court, Mr. Dippel will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CARY C. CHARLES DIPPEL ON BEHALF OF THE PETITIONER

ATTORNEY CARY C. CHARLES DIPPEL: May it please the Court, there are two issues in this case. First, may any person, any agent who is not licensed, who doesn't meet the requirements of rule 702 on expert testimony be able to step forward and give testimony at the market value something that's not within the common knowledge of a jury on behalf of any legal entity? In other words, does rule 701 allow anyone to testify on behalf of a legal entity, whether that's a corporation or limited partnership, any legal entity. The second issue is this is a condemnation case. In Texas, the rule has been well established before and after you determine the value of the property being taken. If it's a whole taking, you don't have to worry about before and after. If it's a partial taking, you talk about the value of the part taken as severed land. If it's a limited easement as in this case, then you determine the market value of the easement area before and after. And then if you want to assess you assess the market value of the remainder before and after. This was an issue that we raised in the trial court be-

cause the purported affidavit of Mr. LaBeff on his face did not show that he complied with this fundamental standard. He did not value the area of the easement before and after.

JUSTICE DAVID M. MEDINA: Let's talk about whether or not he's qualified to give an opinion on the market value of the company that is understated.

ATTORNEY CARY C. CHARLES DIPPEL: I don't think he's qualified; here's why. As I said, market value is not within the common understanding of jurors. That's usually something that requires expert testimony. This case and many decisions it's rendered on condemnation matters has made that point. The value of something requires the expertise of an expert.

JUSTICE DAVID M. MEDINA: Well why would we let a homeowner testify about the value of his home and not a corporate executive as it were?

ATTORNEY CARY C. CHARLES DIPPEL: A natural person?

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY CARY C. CHARLES DIPPEL: Good question. In a proper case you may have to address that. We're not urging you to overrule the so-called property owners' rule across the board in this proceeding. All we're talking about in this case is whether or not it could be extended in any legal entity.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, I mean what is the premise underlying that rule? Doesn't it have to do with specialized knowledge?

ATTORNEY CARY C. CHARLES DIPPEL: Yes.

JUSTICE DEBRA H. LEHRMANN: And wouldn't the same apply in this situation?

ATTORNEY CARY C. CHARLES DIPPEL: I think it would, Your Honor.

JUSTICE DEBRA H. LEHRMANN: Okay.

ATTORNEY CARY C. CHARLES DIPPEL: No matter who the person is, we'll get to the licensing issues later.

JUSTICE DEBRA H. LEHRMANN: Alright.

ATTORNEY CARY C. CHARLES DIPPEL: But if he's going to testify to market value, whether it's a natural person or whether or not it's someone who is a hired expert you ought to meet the requirements of rule 702. That way you can test the reliability of the opinion.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY CARY C. CHARLES DIPPEL: In errors of market value if you simply get up and say I think it's worth X or the compensation should be Y without any possible connection to the underlying facts, without any support at all, that opinion would be unreliable.

JUSTICE NATHAN L. HECHT: Would LaBeff qualify as an expert?

ATTORNEY CARY C. CHARLES DIPPEL: No.

JUSTICE NATHAN L. HECHT: Why not?

ATTORNEY CARY C. CHARLES DIPPEL: First, he's not licensed. He's not a real estate broker; he's not an appraiser. In Texas, as well as many other states, the appraisal profession is regulated. This arose out of the savings and loan bust in the late '80s. And in order to give an opinion on value, an appraiser, one must be licensed. If you're not licensed, it's a criminal offense to give that opinion.

JUSTICE DALE WAINWRIGHT: So you're saying that if LaBeff as part of a trial of valuation of a piece of realty walked into a courtroom and gave his appraised value of a piece of property, that would be a crime? Not for LaBeff to go out into the market and deal with consumers and give appraisals, but to walk into a courtroom as a designated expert, he couldn't give an opinion unless he's licensed.

ATTORNEY CARY C. CHARLES DIPPEL: That's correct. It doesn't have to be a courtroom. If he gives an.

JUSTICE DALE WAINWRIGHT: If the statute applies that broadly then why would a natural person give an opinion about the value of their realty without being licensed? That still would be problematic?

ATTORNEY CARY C. CHARLES DIPPEL: I think it would be problematic. That's not the case we have here. It has not been briefed in this case for the party whether or not you should aggregate the property owners' rule across the board. The only issue in this case, two issues; before and after, whether or not you should extend that to any legal entity, an agent on behalf of any legal entity.

JUSTICE DALE WAINWRIGHT: I understand, but in deciding your case we have to be mindful of the breach of the rule that we're trying to establish here or the parameters that we need to draw. And so if the rule about having to be licensed as your position is to give an opinion about the appraised value of realty applies broadly, then would it or would it not apply to individual natural owners, natural persons who own their realty?

ATTORNEY CARY C. CHARLES DIPPEL: It would.

JUSTICE DALE WAINWRIGHT: So they're committing a crime when they give an appraised value of their own property, even in a court of law

ATTORNEY CARY C. CHARLES DIPPEL: Yes. Whether it's in court or out of court they're prohibited from giving an appraisal unless they're licensed.

JUSTICE DON R. WILLET: Do you agree or disagree that Mr. LaBeff's primary job was to appraise and purchase property?

ATTORNEY CARY C. CHARLES DIPPEL: No, he didn't appraise, no. Deal the property, yes. But that's not specific enough to this particular property in this particular market to qualify him as an expert. If he had expertise, if he was going to be testifying to market value then follow the rules, have him designate as an expert; we wouldn't be here now. We might have some issue whether or not his failure to have a license might disqualify him. But in this case we're talking about that no expert was designated and he was only identified as a person having knowledge of the property. That does not give us a hint that he's going to come forward and give testimony of the kind in question.

JUSTICE PAUL W. GREEN: If you are a property owner, say a vehicle, you own a vehicle and you report to want to testify as to the before and after value of a car accident say. Is that expert or that testimony considered to be expert testimony that would have to be disclosed pursuant to request for disclosure or designation?

ATTORNEY CARY C. CHARLES DIPPEL: We're not talking about market value, are we? We're talking about a property.

JUSTICE PAUL W. GREEN: Right, okay. Well, let's talk about an owner of property wants to testify as to the value, an individual. Is it your view that that person would have to be designated as an expert to give that testimony?

ATTORNEY CARY C. CHARLES DIPPEL: There are too many cases by this Court allowing testimony of individuals as to the damages they sustain say in an auto collision.

JUSTICE PAUL W. GREEN: I understand that, but that's expert testimony in a sense.

ATTORNEY CARY C. CHARLES DIPPEL: It might be. It depends upon the reliability of the testimony that's being given, Your Honor. I think the mere fact of ownership should not qualify one to give testimony with respect to valuation issues. But we don't have that case in front of this Court. What we have--

JUSTICE PAUL W. GREEN: So it doesn't matter whether the person was designated or not?

ATTORNEY CARY C. CHARLES DIPPEL: I think it must matter. If they're going to give opinion, expert testimony, they should be designated. It's a question of no ambush; it's a question of revealing the facts rather than conceiving them. And in this case there's no question; no one was designated as an expert, period. So in your hypothetical, if a land owner came forward and said I own that vehicle and I think my damages are \$2,000 because I think that's the difference in value, that's questionable but that's not our case here.

JUSTICE DALE WAINWRIGHT: So why do you think the corporate agent situation is different from a natural person situation?

ATTORNEY CARY C. CHARLES DIPPEL: Well the property owner rule, if it has any viability at all is based upon this person being intimately familiar with this property and being able to testify to market value. Mr. LaBeff did not own the property; he was not the property owner. And you can't simply say that because the corporation is a property owner that notions of fairness and equal treatment require that he be treated the same as a natural person.

JUSTICE DEBRA H. LEHRMANN: But if that person has that specialized knowledge that a property owner would have, then wouldn't it apply? I mean because if he fits the premise underlying the property owner rule then why would we treat him any different?

ATTORNEY CARY C. CHARLES DIPPEL: I don't think you should. In many of the cases from out of state that we've analyzed in our brief, they allow someone on behalf of a corporation to testify only because he qualifies as an expert. Now, if they qualify as an expert it doesn't matter. If they're designated it doesn't matter. But to simply have the mere fact that a legal entity owns property qualifies an agent on its behalf to testify is a giant leap.

JUSTICE PHIL JOHNSON: Who all, who actually owns this property?

ATTORNEY CARY C. CHARLES DIPPEL: Speedy Stop Stores Limited.

JUSTICE PHIL JOHNSON: And who is Mr. LaBeff employed by?

ATTORNEY CARY C. CHARLES DIPPEL: He is employed as a vice president of the corporate general partner of the limited partnership.

JUSTICE PHIL JOHNSON: So he's actually not employed by the owner of the property.

ATTORNEY CARY C. CHARLES DIPPEL: No. The property is owned by the limited partnership. And [inaudible]--

JUSTICE PHIL JOHNSON: How far a field are we supposed to go on this? I know it's not your issue or you're not advocating for him, but it seems like there may be a problem if you have an owner and then someone employed by an entity separate and apart from the owner. I think you mentioned that in your brief at some point that he's not even the owner here or [inaudible]

ATTORNEY CARY C. CHARLES DIPPEL: It entitled anyone on behalf of a governmental entity to testify because there's no limit placed upon the idea that if it's a legal entity that owns property then someone on behalf of it without being qualified under rule 702 is entitled to express an opinion on market value.

CHIEF JUSTICE WALLACE B. JEFFERSON: The rule and the exception seem to have split the courts of appeals and there is a lot of discussion here on the bench about the validity of that rule. Why wouldn't, if we were to agree with you at least in part, why wouldn't we send it back down for a new determination based on an expert that qualifies to give market value evidence?

ATTORNEY CARY C. CHARLES DIPPEL: To the trial court?

CHIEF JUSTICE WALLACE B. JEFFERSON: Right.

ATTORNEY CARY C. CHARLES DIPPEL: To the trial court?

CHIEF JUSTICE WALLACE B. JEFFERSON: Sure.

ATTORNEY CARY C. CHARLES DIPPEL: The before and after rule precludes that, Your Honor. The before and after rule has been the law in Texas forever. This was intentionally set up so that Mr. LaBeff says my total compensation is \$62,000. If given at trial, that testimony would not be any evidence consistent with the before and after rule. Again, that is something we raised in the Trial Court, it was sustained by the Trial Court. The Trial Court did not abuse its discretion in following well-established law. It's not mentioned in the court of appeals.

JUSTICE NATHAN L. HECHT: I'm not sure I understand. I know you argue that, but I'm not sure I understood the brief on that point. Excuse me. He did say the difference in the fair market value of the property in question immediately before and immediately after condemnation of this easement was \$62,000. Why isn't that?

ATTORNEY CARY C. CHARLES DIPPEL: That's comparing the entire property before and after, Your Honor. This is a limited easement. It's *Zwahr* in the *Bulanek* case. Both instances the Court emphasized that when you're talking about a limited easement you talk about the area of the easement before and after. That determines the lender's compensation irrespective of anything else that happens--

JUSTICE NATHAN L. HECHT: Well, but--

ATTORNEY CARY C. CHARLES DIPPEL: --and then the remainder before and after.

JUSTICE NATHAN L. HECHT: Well isn't that, didn't he just collapse those?

ATTORNEY CARY C. CHARLES DIPPEL: No, he did not.

JUSTICE NATHAN L. HECHT: Why not?

ATTORNEY CARY C. CHARLES DIPPEL: Because the case law in Texas says that in a limited easement you simply don't look at the property before and after; that's the federal rule. You come--

JUSTICE NATHAN L. HECHT: If the easement area is reduced this much and the damage to the remainder is this much and you say the whole thing is \$62,000, why isn't that competent evidence of that?

ATTORNEY CARY C. CHARLES DIPPEL: I'm repeating myself, but the before and after rule operates to protect the land owner. It also operates so that you have a division between the value of the easement being taken and the damages to the remainder. You can then test it. A guy comes in and says--

JUSTICE NATHAN L. HECHT: You can what?

CHIEF JUSTICE WALLACE B. JEFFERSON: Test.

JUSTICE NATHAN L. HECHT: Test. I'm sorry.

ATTORNEY CARY C. CHARLES DIPPEL: if there's no division between the value of the easement and the damages to the remainder it's no evidence. It's nothing more than a conclusion without support and it's unreliable. I'm on my yellow. Any other questions before I sit down? I want five minutes in rebuttal. Thank you, Your Honor.

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. Russell will present argument for the respondent.

ORAL ARGUMENT OF BILL RUSSELL ON BEHALF OF THE RESPONDENT

ATTORNEY BILL RUSSELL: May it please the Court, Bill Russell on behalf of Speedy Stop Food Stores and we respectfully submit that the Court of Appeals should be affirmed. In this case there's three types of testimony by which value can be, or in any case, value can be established. One testimony is the property owner rule. The second method is rule 701, the lay opinion rule. And the third method is the expert witness rule under rule 702. It's been long recognized in Texas jurisprudence any one of those three methods may be used and does constitute evidence.

JUSTICE DAVID M. MEDINA: But this witness is neither one of those. He's not the property owner, he's not qualified to testify, and he didn't meet the other exception.

ATTORNEY BILL RUSSELL: Your Honor, we would respectfully submit he is entitled to testify on behalf of the owner. The owner is Speedy Stop Food Stores, a partnership. Partners act through their partners and the general partner is a corporation, C.L. Thomas, Inc. Corporations act through their officers.

JUSTICE DON R. WILLETT: So you're thinking it's no difference whether the testifying agent is acting or speaking on behalf of a partnership or a corporation.

ATTORNEY BILL RUSSELL: Your Honor, that's correct. Your Honor, we believe that in the case of an entity an entity should have, there's no difference in terms of the reason for the rule between an entity and a natural person and any one of the entities, whether it be a limited liability company. The property owner rule Has served Texas jurisprudence well for well over a hundred years.

JUSTICE DON R. WILLETT: But here you're talking about extending that rule to non-owners. Does the properties owned by as you say the limited partnership, and Mr. LaBeff doesn't own the property and neither does the general partner, C. L. Thomas that employs him. And so I'm kind of following-up on Justice Johnson's question; why should the exception be extended to non-owners?

ATTORNEY BILL RUSSELL: Well, Your Honor, of course an entity cannot testify except through its officers and its owners and its representatives. And as this Court even in the last term announced in the State v. Central Expressway sign case in which corporation owners, the two principles, were recognized to testify. A corporation can only testify through the individuals that it designates and it represents.

JUSTICE PAUL W. GREEN: Let's assume that's true. Depending on the circumstances, there could be dozens of agents of an entity, either a partnership or a corporation. And without designating one as a person who's going to testify as to the value, where does that leave the other side? Aren't you required to designate okay, well we do have all these agents and some of them have knowledge of the values and some don't, but we're going to pick this guy because he really is. So you need to know in the designation that this is the expert who is going to testify as to values.

ATTORNEY BILL RUSSELL: Well, Your Honor, two answers to that. Number one, neither lay witness nor owner is an expert under 702 and is required to be designated.

JUSTICE PAUL W. GREEN: So it could be anybody?

ATTORNEY BILL RUSSELL: So, they, no, sir. The owner rule itself, in going back in Texas jurisprudence the owner rule speaks of a person. The reason for the rule is because they have to show they have familiarity with the property. It's not just anybody. An owner in North Carolina that's never seen the property, never been to a property, wouldn't qualify even as a natural person because they would not have shown the familiarity. The reason for the rule is that the person that owns the property is presumed to know its value better than anyone else and sometimes better than what an expert would know.

JUSTICE PHIL JOHNSON: So how much is this property worth did Mr. LaBeff say?

ATTORNEY BILL RUSSELL: Your Honor, the value of the taking was \$62,000.

JUSTICE PHIL JOHNSON: No, no. My question was how much did Mr. LaBeff say the property's worth if he's presumed to know its value?

ATTORNEY BILL RUSSELL: Your Honor, there was no testimony in terms of what its actual value was.

JUSTICE PHIL JOHNSON: Okay, so he didn't give any, he didn't give an opinion based on how much it's worth.

ATTORNEY BILL RUSSELL: Your Honor, he did not.

JUSTICE PHIL JOHNSON: As I understand it.

ATTORNEY BILL RUSSELL: Yes sir, that is correct. His opinion was strictly an opinion which was the difference between the fair market value of the property immediately before the taking of the easement and the fair market value immediately after the taking of the easement.

JUSTICE PHIL JOHNSON: Well if he's presumed to know the value of the property, do we then have to assume that even when he doesn't say it he somehow calculates this instead of just pulling it out of the air? It seems like that's a little conclusory, isn't it?

ATTORNEY BILL RUSSELL: Well, Your Honor, we would submit that it would be some evidence more than a scintilla of evidence to overcome a no evidence summary judgment.

JUSTICE PHIL JOHNSON: But even with expert witnesses don't we say conclusory evidence is no evidence?

ATTORNEY BILL RUSSELL: Your Honor, with regard to expert witnesses we do.

JUSTICE PHIL JOHNSON: So we're going to let someone who's not an expert, not qualified, give them more leeway to be conclusory? Is that where we're headed with this?

ATTORNEY BILL RUSSELL: The standard in Texas has been that the owner in giving their value has not been required to go through the technical terms that an expert would because an expert giving expert opinion generally is someone that doesn't have the personal familiarity as does an owner with their own property.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well even the property owner rule doesn't guarantee personal familiarity. I mean let's say that my grandfather owns a home in Michigan and passes away and I get the property through his will, and the next day or the next month there's a question about the value of that home. I have no, I've never been there, have no idea what its value is but you're saying I could testify because I'm the property owner?

ATTORNEY BILL RUSSELL: Well we respectfully submit that under the property owner rule it does require showing a familiarity with the property, but that is all it requires showing is familiarity.

CHIEF JUSTICE WALLACE B. JEFFERSON: What does familiarity mean?

ATTORNEY BILL RUSSELL: Your Honor, I would submit that means that you basically understand where the property is, what it is, the impact in this instance of the condemnation.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me put this to you and see how you answer it. It's time to scrap the property owner rule and require expert testimony whether you're a natural person that owns a home or a corporation, that you've got to designate an expert who meets the qualifications of 702. What is wrong with the Court adopting that?

ATTORNEY BILL RUSSELL: Your Honor, several things. For one thing, in a condemnation case or a property tax case, for example, hundreds of thousands of property tax owners each year protest their property taxes. And sometimes the amount in controversy is not that great; maybe it's just a little easement, maybe it's just a minor thing. But to have to spend the money to go hire appraisers, you don't get attorney's fees in cases like this, you don't recover your litigation costs as a practical matter. It puts the citizens in a position where they have little recourse at all in a number of situations. But secondarily, we would respectfully submit that the lay opinion rule is a very good rule and one that is also time tested. And the lay opinion rule function and purpose was largely because as my opposing said, jurors may not have the ability to understand that, but that lay person who maybe doesn't have the expertise, but that lay person who knows the value of surrounding properties and knows what in his or her neighborhood the properties have been selling for and what the value is, that person can help the jury. Certainly they're subject to cross-examination, certainly they're subject to the factual insufficiency rule. But in terms of there being more than a scintilla of evidence, we respectfully submit that for the people of Texas that the ability to have lay testimony is we shouldn't in every instance have to go out and hire an appraiser.

JUSTICE NATHAN L. HECHT: But why should the rule be different than 701?

ATTORNEY BILL RUSSELL: Your Honor, I recognize that an argument can be made that really combines the two and basically impose--

JUSTICE NATHAN L. HECHT: But they can't really be combined because 701 does have some standards to it.

ATTORNEY BILL RUSSELL: Yes, sir. I understand.

JUSTICE NATHAN L. HECHT: And the trial court might look at a witness who was trying to testify on a property owner rule and say you just don't meet 701.

JUSTICE DEBRA H. LEHRMANN: Aren't you basically saying that 701 and the property owner rule are basically the same because of the premise underlying it?

ATTORNEY BILL RUSSELL: Your Honor, they're very similar. They're very similar. In reading the cases a lot of times.

JUSTICE NATHAN L. HECHT: Are they the same or not?

ATTORNEY BILL RUSSELL: No, Your Honor. I would say they're slightly different. The property owner rule gives less of a requirement. There's less of a requirement with regard to the property owner rule.

JUSTICE NATHAN L. HECHT: So coming back to the Chief Justice's question, why doesn't 701 afford all of the protection that's necessary for the little cases and the circumstances that you raise?

ATTORNEY BILL RUSSELL: Your Honor, I suspect this is obviously a matter of public policy for the Court. My argument would be is that the citizens of Texas over the years have taken great pride in they're being able to as to their property to be able to testify about it, to speak to it.

JUSTICE NATHAN L. HECHT: Do you agree with the petitioner that Mr. LaBeff could not have testified as an expert?

ATTORNEY BILL RUSSELL: I do not, he wasn't offered as an expert, not intended to be an expert.

JUSTICE NATHAN L. HECHT: You agree that he could not testify, he couldn't offer himself because he's not licensed?

ATTORNEY BILL RUSSELL: Oh, Your Honor not for that reason. Under that rule it's noteworthy as the Court has pointed out, as Justice Wainwright has pointed out that that would mean that every time not only a property owner tested a property tax they would commit a criminal act, but I would point out that our appraisal districts that take care of the property tax of our state are not licensed under that chapter either. They're licensed under Chapter 1150, which is a separate act. So it would criminalize our appraisal districts to go out and appraise property as well. The criminality of that says under this chapter and this chapter is 1103. And the appraisal districts and the appraisers are licensed under 1150.

JUSTICE DON R. WILLET: What would it cost? Do you have an idea? If we were to hire an expert and have them go out and appraise it and then testify in Court, what would the cost of that be?

ATTORNEY BILL RUSSELL: Your Honor, the last appraisal I hired for a condemnation case in Austin was \$15,000. It varies depending on how good of an appraiser you get. You can certainly get appraisers for much less than that I'm assuming and you could get an appraisal for \$2,000.

JUSTICE DALE WAINWRIGHT: Tell me that's a commercial property.

ATTORNEY BILL RUSSELL: Oh yes, Your Honor.

JUSTICE DALE WAINWRIGHT: Okay, thank you.

ATTORNEY BILL RUSSELL: Yes Your Honor, it is.

JUSTICE PHIL JOHNSON: Counsel, let me probe just a little on how far down the chain we can go and still, assuming that this is a representative of Speedy Stop. Speedy Stop is a limited partnership and your position is its general partner, [inaudible] as general partner is considered an owner for purposed of this testimony, correct?

ATTORNEY BILL RUSSELL: Yes, sir.

JUSTICE PHIL JOHNSON: Alright. How about the limited partners; could one of the limited partners then come in and testify not on behalf of the limited partner itself, assuming its corporation, but on behalf of Speedy Stop?

ATTORNEY BILL RUSSELL: We don't think that any person just because they happen to be an employee or happen to be a limited partner necessarily allows them to qualify on the owner property rule. But the owner of the property, in this instance the limited partnership which acts through its general partner we believe should have the right to designate their representative, which in this instance Carlton LaBeff is the person who since 1982 has been involved with all of these properties.

JUSTICE DON R. WILLETT: So some limited partner agents might be able to testify, but not others? I'm confused on what your answer is.

ATTORNEY BILL RUSSELL: Your Honor, I haven't completely thought through the limited partnership portion of it. I would envision a possible situation because of the limited partners' role perhaps in the general partnership, but I don't think necessarily the mere fact that they're a limited.

JUSTICE PHIL JOHNSON: But could the Speedy Stop be here say we designated that limited partner? Where do we stop is the difficulty I'm trying to get to here. For example, let's not even go to limited partner. The general partner has a property manager who's not an officer. Could Speedy Stop then have that property manager of the general partner file an affidavit as Mr. LaBeff has? Still be the owner.

ATTORNEY BILL RUSSELL: Your Honor, and I understand the Court's looking in terms of writing a rule how broad to reach. And I would think--

JUSTICE PHIL JOHNSON: But if we assume it's the property owner rule--

ATTORNEY BILL RUSSELL: Yes sir.

JUSTICE PHIL JOHNSON: --doesn't that kind of restrict it to certain people, officers of the property owned?

ATTORNEY BILL RUSSELL: The-I know-- I don't know, that it, Your Honor, it should be within a designated, certain class.

JUSTICE PHIL JOHNSON: Well then how will we know who can testify under the owners rule for an entity?

ATTORNEY BILL RUSSELL: Your Honor, a rule or a methodology perhaps is the fact that within that entity which acts through its individuals, the individual who has the authority and jurisdiction and the responsibility over that particular property should be the one to draw a strong, wide comparison. Small families, limited partnership, mother and dad, general partners, children are limited partners but one of the children is involved in that particular property, then it would make sense for that child to be the one to be designated to testify. That's on local corporation.

JUSTICE PHIL JOHNSON: Well, how about Wal-Mart; who could testify on Wal-Mart's behalf?

ATTORNEY BILL RUSSELL: Yes, sir. With regard to Wal-Mart Corporation, certainly we're not suggesting that every employee, officer, or director of Wal-Mart, but if they show and designate as did Speedy Stop here, we have this individual who's in charge of the management of this real estate, who's in charge of this particular property, then that particular individual would be the person who could speak for that corporation as a corporation does speak through its people.

JUSTICE PHIL JOHNSON: But would they have to be an employee of Wal-Mart?

ATTORNEY BILL RUSSELL: Your Honor, under the owner property rule I think they would need to be an officer, director, or an employee. And if they were going to be--

JUSTICE PHIL JOHNSON: Of Wal-Mart.

ATTORNEY BILL RUSSELL: If they were going to be outside of the ownership structure if you will, Wal-Mart being a one corporation, being a subject of C Corporation, if they were outside of this structure then they would need to fallback on the rule 701 in order for someone to testify. On the other hand like with a case at bar with Speedy Stop, its general partner is the corporation and so therefore Carlton LaBeff was acting on behalf of the partnership through the general partner.

JUSTICE DALE WAINWRIGHT: You said Counsel that for Justice Johnson's hypothetical involving Wal-Mart that the person, the familiarity would have to be within the ownership structure of Wal-Mart. Officers and directors aren't owners; shareholders are.

ATTORNEY BILL RUSSELL: Your Honor is correct and I said something I didn't mean to say. What I meant within the structure, within the structure in my opinion, there would be a director, officer, or an employee. The mere fact that someone might be a shareholder of Wal-Mart, which could be any one of us in this room, would not justify they are to be designated. But if it's the person that is representing as a part of, that's employed by Wal-Mart as part of that corporation then they certainly should be able to.

JUSTICE NATHAN L. HECHT: Let me be sure I understand. You don't say a non-owner could testify under 701, do you?

ATTORNEY BILL RUSSELL: Yes, sir. A non-owner, 701 a non-owner can testify under 701.

JUSTICE NATHAN L. HECHT: As to the value of the property?

ATTORNEY BILL RUSSELL: Absolutely. Yes, Your Honor.

JUSTICE NATHAN L. HECHT: So you just think anybody in any kind of a case, a person who does not qualify as an expert and is not the owner can testify as to value?

ATTORNEY BILL RUSSELL: Your Honor, if they meet the qualifications of rule 701, which is pretty well outlined very well in the case law and in McCormick, then McCormick [inaudible] and in Justice Green's opinion and the [inaudible] opinion of the San Antonio Court that we've cited, Barraza v. Koliba, those requirements are in place and the lay witness rule definitely applies to them.

CHIEF JUSTICE WALLACE B. JEFFERSON: If we disagree with you and say that there has to be an expert that qualifies under 702 or under a more exacting standard and LaBeff doesn't meet that standard, what do we do? I mean do you lose completely or do we have to send it back down to the trial court to give you the chance to designate an expert or what do we do?

ATTORNEY BILL RUSSELL: Well, Your Honor, we would respectfully submit that if this Court does change the law in some regard as the Court did in *Porras v. Craig*, in the interest of justice if you remanded, that we not be hit with a no-evidence summary judgment.

CHIEF JUSTICE WALLACE B. JEFFERSON: Would you remand even if the new expert gives exactly the same evidence as LaBeff did and we consider that evidence to be no evidence of value for the reasons that your opponent has argued this morning?

ATTORNEY BILL RUSSELL: Well, Your Honor, of course, our difficulty on the remand is because the amount in controversy, all of a sudden the cost factor becomes affect in terms of what do we do. But in terms of the valuation, I would say that our testimony has been very consistent with this honorable Court's in *Westgate v. State*, 1992 decision 843 S.W.2d, 448 and also very consistent with the *Calleio* decision that cited that it's difficult sometimes as this Court has said to value severed land when maybe it's a unique tract or a particular tract or it has unusual features and therefore a better test is to say what's the difference between the whole property immediately before versus the property immediately after.

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

ATTORNEY BILL RUSSELL: Thank you.

REBUTTAL ARGUMENT OF CARY C. CHARLES DIPPEL ON BEHALF OF PETITIONER

ATTORNEY CARY C. CHARLES DIPPEL: Let me put aside any concerns the Court may have about property tax valuation. A land owner is not prohibited in getting before the appraisal review board and testifying. The legislature has expressly permitted that. That's a policy decision by the legislature. When you get into court it may be a different matter. But before the appraisal review board and the protest protocol, anyone can go up there and testify to their property. And there's really no limitation on corporations or others. But the legislature has expressed.

JUSTICE DON R. WILLETT: But if it advances to the trial court stage, the property owner might have to go out and hire an expert?

ATTORNEY CARY C. CHARLES DIPPEL: Yes.

JUSTICE DON R. WILLETT: And could not testify themselves?

ATTORNEY CARY C. CHARLES DIPPEL: Now I haven't explored that fully. [Inaudible] The property tax code provides for an initial administrative proceeding in a protest.

JUSTICE DON R. WILLETT: The appraisal board.

ATTORNEY CARY C. CHARLES DIPPEL: If you want to go to court, if it has to do with market value, I think you're required to get an expert because it is not within the common understanding of yours.

JUSTICE DALE WAINWRIGHT: If being licensed as an appraiser is not required to be qualified as an expert to give an opinion about property value, is LaBeff qualified to give an opinion on the damages in this case?

ATTORNEY CARY C. CHARLES DIPPEL: No.

JUSTICE DALE WAINWRIGHT: I went back and pulled his, was looking at his affidavit. He says since 1982 I've been involved in the sale of all convenience stores of the company. So he's been involved in this purchase

of this piece of property for Speedy Stores I imagine, or Speedy Stop, right?

ATTORNEY CARY C. CHARLES DIPPEL: I would assume so.

JUSTICE DALE WAINWRIGHT: He says since 2000 he was involved in the purchase or sale of more than 200 tracts of commercial real estate in South Texas, including Harris Country. This property was in Harris County, correct?

ATTORNEY CARY C. CHARLES DIPPEL: Correct.

JUSTICE DALE WAINWRIGHT: And then he had been involved in negotiating and attempting to purchase or sell no less than 500 tracts, including deals that went through and deals that didn't. He speaks frequently with real estate brokers, he attends workshops and seminars to stay informed, and he's aware of current market values. What about his background precludes him from being qualified as an expert if licensing was not required?

ATTORNEY CARY C. CHARLES DIPPEL: Let's assume he was an expert and let's lay aside my argument on licensing. Forget about that. It didn't impress the court of appeals and it doesn't appear to impress this court. But [inaudible] designate [inaudible]--

JUSTICE DALE WAINWRIGHT: Well the breadth of that argument is what got our attention in particular. But let's put that to the side. Assuming licensing isn't required, is LaBeff qualified as an expert given the things that are in his affidavit?

ATTORNEY CARY C. CHARLES DIPPEL: I'm assuming he would if he meets rule 702. But then he's a testifying expert and we're not playing ambush anymore. We asked them, designate your testifying experts.

JUSTICE DALE WAINWRIGHT: Granted he wasn't designated as an expert under 702. You said assuming he's an expert. My question is, given what I've just told you, would he be qualified as an expert to give an opinion about the damages in this case?

ATTORNEY CARY C. CHARLES DIPPEL: Without talking about the substance of his testimony, yes I would say so. Alright. Now, getting further because this gets into Justice Hecht's argument and your question, Your Honor, concerning whether or not it be remanded or simply the trial court affirmed. The before and after rule is a rule of substance. It is a standard. It has been the law in Texas forever. There is no change in that rule suggested by this case. While the property owner rule may or may not be extended or may or may not survive this case, while that might justify as in the Bulanek case sending it back to the trial court because you've overruled something. Here what you're doing is not changing the before and after rule. That's a rule of substance. They went all in on two issues; that the property owner rule should be extended and that the before and after rule doesn't really mean anything. Having gone all in, they've lost that bet. And we're not going to suffer for it. This case has been going on for five years. There is a cost associated to government in trying to run to ground what it's going to be confronted with at time of trial. There was no adequate designation of this person to give this testimony as he did in his affidavit. And the trial court could not have abused its discretion on any of the grounds we asserted in striking that evidence.

JUSTICE DALE WAINWRIGHT: What about Ambrose's testimony in the condemnation hearing?

ATTORNEY CARY C. CHARLES DIPPEL: That wasn't even reached by the Court of Appeals. It's adequately answered in the dissent. I would say this; no one designated experts. If you're going to have that testimony admitted, it's going to have to be an expert testimony submitted. We objected on the grounds it was hearsay. No one had designated him. If you're going to designate him, do so. There's no prohibition on a land owner having designated that expert.

JUSTICE DALE WAINWRIGHT: So you're saying Ambrose was not designated as an expert in the trial court. In the condemnation hearing was he proffered as an expert?

ATTORNEY CARY C. CHARLES DIPPEL: Yes and, of course, an appeal from that is de novo, which means it didn't happen.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions?

ATTORNEY CARY C. CHARLES DIPPEL: Thank you, Your Honors.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted, and the Court will take a brief recess.

MARSHALL: All rise.

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