

# IN THE SUPREME COURT OF TEXAS

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No. 05-0661  
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FKM PARTNERSHIP, LTD., A TEXAS LIMITED PARTNERSHIP, PETITIONER

v.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS  
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**Argued March 21, 2007**

JUSTICE WILLETT, concurring in part and dissenting in part.

I agree with all but Part II(B)(2) of the Court's opinion, which disregards the language of the governing statute. The unambiguous text of Property Code Section 21.019(b) provides no basis for awarding fees and expenses to FKM. I understand perfectly the Court's concern about condemnor abuse, but if the legal deck is stacked, the Legislature should reshuffle the equities, not us.

Fee-shifting statutes must contain express authorization,<sup>1</sup> particularly those effecting a waiver of sovereign immunity.<sup>2</sup> The Court accepts FKM's extra-statutory argument that the University's

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<sup>1</sup> See, e.g., *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex. 1999).

<sup>2</sup> As to immunity waivers, two things are axiomatic: (1) they must be clear and unambiguous, TEX. GOV'T CODE § 311.034; *Tooke v. City of Mexia*, 197 S.W.3d 325, 329 n.2, 333 (Tex. 2006); and (2) uncertainties over legislative consent must be resolved in favor of retaining immunity, *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). The Court infers waiver from Section 21.019(b), and while I agree the statute is clear, its clarity cuts in a direction contrary to the Court's holding. At the very least, Section 21.019(b) is a slender reed upon which to conclude the Legislature waived immunity beyond all doubt.

amended petition scaling back the acquisition's size effected a partial dismissal of the condemnation suit, thus entitling FKM to fees and expenses under Section 21.019(b). By its very language, however, that fee-shifting provision does not apply here.

Section 21.019 begins "[a] party that files a condemnation petition may move to dismiss the proceedings, and the court shall conduct a hearing on the motion."<sup>3</sup> Subsection (b) reads:

A court that hears and grants a motion to dismiss a condemnation proceeding made by a condemnor under Subsection (a) shall make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and photographers and for the other expenses incurred by the property owner to the date of the hearing.<sup>4</sup>

We must take the Legislature's language as we find it and not judicially rewrite the statute under the guise of construction, however unjust or imperfect we believe the statute to be.<sup>5</sup> Our confined role is to interpret unambiguous text according to its terms, reading the Legislature's words as enacted, not revising them as desired.<sup>6</sup> In departing from our oft-professed adherence to plain language, the Court has treated the University to a classic Inspector Clouseau moment.<sup>7</sup>

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<sup>3</sup> TEX. PROP. CODE § 21.019(a).

<sup>4</sup> § 21.019(b).

<sup>5</sup> See *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920).

<sup>6</sup> *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651-52 (Tex. 2006).

<sup>7</sup> Clouseau: Does your dog bite?  
Hotel Clerk: No.  
Clouseau: [bowing down to pet the dog] Nice doggie.  
[dog barks and bites Clouseau on the hand]  
Clouseau: I thought you said your dog did not bite!  
Hotel Clerk: That is not my dog.

THE PINK PANTHER STRIKES AGAIN (United Artists 1976), available at <http://youtube.com/watch?v=SXn2QVipK2o>.

On its face Section 21.019(b) requires three things, not one of which happened in this case:

1. a motion to dismiss filed by the condemning authority,
2. a hearing on the motion, and
3. an order granting the motion.

None of these procedural steps occurred: no motion, no hearing, no order. I would apply the statute as written, and absent these mandatory triggering events, a court has no authority to award fees and expenses.

Nor can Section 21.019 be construed as encompassing a “partial dismissal” of the proceeding. Subsection (a) covers a motion “to dismiss the proceedings,” and Subsection (b) applies where the court grants the “motion to dismiss a condemnation proceeding.” Similarly, Subsection (c) covers “a motion to dismiss a condemnation proceeding” filed by the landowner. The use of the term “condemnation proceeding” throughout the rest of Chapter 21 confirms the Legislature means the entire case.<sup>8</sup> The statute speaks to total dismissal and makes no provision for anything less.

The Legislature could, of course, enact a fee provision that covers partial dismissals. Several states have done so,<sup>9</sup> and Section 1303(b) of the Model Eminent Domain Code authorizes fee shifting “[i]f the scope of the property to be taken is reduced as the result of . . . a partial dismissal.”<sup>10</sup> In that

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<sup>8</sup> The term is used repeatedly throughout Chapter 21 in provisions related to everything from initial filing, TEX. PROP. CODE § 21.012, to venue, § 21.013, to the special commissioners’ procedures, §§ 21.042(a), .0421(a), .047, to trial to the court, § 21.018, to the procedure governing reinstatement of condemnation proceedings, § 21.020, to the rules covering possession of the land pending litigation, § 21.021, to the procedures governing final judgments, §§ 21.061-.063. Each and every reference makes evident the Legislature’s intended meaning.

<sup>9</sup> *E.g.*, ALA. CODE § 18-1A-232; ALASKA R. CIV. P. 72(i), (k); CAL. CIV. PROC. CODE § 1268.610; 26 PA. CONS. STAT. § 308.

<sup>10</sup> MODEL EMINENT DOMAIN CODE § 1303(b) (1984).

instance, the model code provides “the court shall award the defendant the portion of his litigation expenses attributable to the property within the scope of the reduction.”<sup>11</sup> The model code was adopted by the National Conference of Commissioners on Uniform State Laws in 1984, but Texas lawmakers, while twice substantively amending the fee-shifting provisions since then, have declined to authorize fee shifting in partial-dismissal cases.<sup>12</sup>

Chapter 21 of the Property Code is the Legislature’s comprehensive rulebook governing the taking of private property for public use. And while I understand the Court’s concerns about condemnors’ artful dodging of otherwise-recoverable fees, the statute focuses on actions, not motives; it says what it says, not what the Court says it says. Landowners recover when the court grants a condemnor’s motion dismissing the entire proceeding or determines the condemnor lacked the right to acquire the property,<sup>13</sup> not when the condemnor amends to take less property. The Legislature has defined the specific circumstances under which a landowner may recover fees and expenses, and those circumstances—“a matter of legislative grace rather than constitutional command”<sup>14</sup>—are simply absent in this case. Here, the University amended its petition to shrink the project; it did not dismiss its petition to abandon the project.

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<sup>11</sup> *Id.*

<sup>12</sup> Act of June 1, 1997, 75th Leg., R.S., ch. 1171, § 1.46, 1997 Tex. Gen. Laws 4427, 4447 (codified at TEX. PROP. CODE § 21.0195); Act of May 30, 1987, 70th Leg., R.S., ch. 483, § 1, 1987 Tex. Gen. Laws 2091, 2091 (amending TEX. PROP. CODE § 21.019).

<sup>13</sup> TEX. PROP. CODE §§ 21.019, .044.

<sup>14</sup> *United States v. Bodcaw Co.*, 440 U.S. 202, 204 (1979).

I understand that Part II(B)(2) of the Court's opinion aims to work an eminently fair result, but as it upends the balance lawmakers struck in the controlling statute, I respectfully dissent.

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Don R. Willett  
Justice

Opinion delivered: June 6, 2008