DOCKET # 2007-CA-00078
IN THE SUPREME COURT OF MISSISSIPPI

ROBERT D. ADCOCK and wife, SHIRLEY DEAN ADCOCK	)	
APPELLANTS,	)	
V.	)	
MISSISSIPPI TRANSPORTATION COMMISSION	)	CIVIL ACTION NO.
	)	CV 2007-00078
APPELLEE	)	

BRIEF OF APPELLANTS
ROBERT D. ADCOCK and wife, SHIRLEY DEAN ADCOCK,
ON APPEAL FROM THE SPECIAL COURT OF EMINENT DOMAIN
WINSTON COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

JAMES C. MAYO
MSB [redacted]
Attorney for Appellants
FAIR & MAYO, ATTORNEYS

CERTIFICATE OF INTERESTED PERSONS

Case # 2007-CA-00078
Robert D. Adcock and wife, Shirley Dean Adcock
v.
Mississippi Transportation Commission

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court are/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Robert D. Adcock and wife, Shirley Dean Adcock - Appellants
2. Mississippi Transportation Commission - Appellee
3. Fair & Mayo, Attorneys - Counsel for Appellants
4. Purdie & Metz, Attorneys - Counsel for Appellee

James C. Mayo

JAMES C. MAYO, MSB [redacted]
Attorney of record for Robert D. Adcock
And wife, Shirley Dean Adcock

STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be allowed because this case contains a serious constitutional question involving the taking of Appellants property (all frontage on Mississippi Highway 25, from property on both sides of Mississippi Highway 25), from the entire tract, without just compensation for the damage to the remaining tract.

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STATEMENT OF THE ISSUES

1. The Appellee, Mississippi Transportation Commission, filed eminent domain proceedings against 122 acres of Appellant's property fronting on each side of Mississippi State Highway 25, in Winston County, Mississippi. The condemnation proceeding took 4.65 acres which consisted of all the frontage Appellants owned on each side of Highway 25 and left landlocked approximately 7 acres of Appellants land on East side of Highway 25. Over the Appellant's objection, the Mississippi Transportation Commission appraiser, Tommy J. Madison, was permitted to testify as an expert, that the taking of all Highway 25 frontage on both sides of Appellant's property did not damage the remainder. The court erred in permitting Mississippi Transportation Commission appraiser to testify as an expert witness without awarding damages to landowners to the remainder, and the court erred in denying Appellants' motion for a new trial, or in the alternative a judgment notwithstanding the verdict, or in the alternative, an additur.

The jury did not compensate Appellants for the damage to the remainder.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

In 1998, Mississippi Transportation Commission filed eminent domain proceedings in the Circuit Court of Winston County, Mississippi against 122 acres of the property of Robert D. Adcock and Shirley Dean Adcock seeking on each side of Highway 25 a total of 4.65 acres constituting all the frontage owned by the Adcocks on Highway 25. The cause came on for trial on May 4, 2006.

B. COURSE OF THE PROCEEDINGS

The appraiser for Mississippi Transportation Commission, Tommy Madison, over objection, testified that landowners were damaged only for

TIMBER	$ 7,600.00
FENCING	4,000.00
4.65 ACRES	6,300.00
TOTAL DAMAGES	$ 17,900.00

and awarded no damages to landowner for loss of all frontage on both sides of Highway 25 and its effect on the remaining 117 acres..

The appraiser for the landowners, Larry D. Caraway, testified that all damages including damage to remainder after taking all Highway 25 frontage was $66,460.00

C. DISPOSITION IN THE COURT BELOW

The jury verdict in the exact amount of $17,900.00 did not compensate the landowners for damage to the remainder after taking of all frontage on Highway 25.

The Court entered judgment for Mississippi Transportation Commission filed July 17, 2006 in the amount of the jury verdict of $17,900.00 with adjustments for amounts previously paid in the amount of $8,271.28 to be reimbursed to Mississippi Transportation Commission..

On July 18, 2006, Adcocks filed a motion for a new trial, or in the alternative a judgment notwithstanding the verdict, or in the alternative, an additur.

On December 27, 2006, the Court denied the motion.

D. STATEMENT OF THE FACTS

The Mississippi Transportation Commission condemned 4.65 acres of Adcock property which included all frontage of landowners on both East and West side of Highway 25. Landowners residence was on West side of Highway 25 fronting the highway with a driveway or road a short distance to Highway 25 for exit, ingress and egress. After the taking of all highway frontage the Adcocks could only exit to the rear onto Highway 19, some mile or two from their residence.

Kent Reeves, Mississippi Transportation Commission engineer, testified on direct as to the taking of the 4.65 acres and on cross testified as to the taking that Adcocks had no access to Highway 25 on the West side and no access on the East side to Highway 25 (TR 59, RE 31) (TR 66, RE 38), a total loss of all highway frontage with access and land locking 7 acres on East side of Highway 25.

Tommy Madison, Mississippi Transportation Commission appraiser on voir dire states that Adcocks would have no access to Highway 25 after the taking (TR 74, 75, RE 41, 42) and give no credence to the loss of access on Highway 25 (TR 76, RE 43).

Adcocks objected to the qualification of Tommy Madison as an expert (TR 76, RE 43). Tommy Madison, on cross, gave no damages to the land owner for the loss of 3,200 feet of frontage (all) and to the resulting damage to the remainder of the 117 acres. (TR 104, RE 54)

The summary of Mr. Madison's testimony on damages (TR 102, 103, RE 52, 53) was:

TIMBER	$ 7,600.00
FENCING	4,000.00
4.65 ACRES	6,300.00
TOTAL DAMAGES	$ 17,900.00

(No damages for remainder) The 4.65 acres was valued by Madison at $1,350.00 per acres

or $6,300.00

Robert Adcock, landowner, testified that after the taking and loss of all frontage on both sides of the road to travel from his house to property on East side of Highway 25, instead of direct access across Highway 25, he had to drive 2.2 miles because of the loss of frontage and access in front of his residence on West side of Highway 25 (TR 114, RE 63).

Larry Caraway, expert appraiser for landowners, awarded damages to the remainder of the property after taking of all frontage and other damages totaling $66,460.00 (TR 144, RE 81).

The jury returned a verdict of $17,900.00 which was exact amount testified by Mississippi Transportation Commission employee, Tommy Madison, and did not include damages to the remainder after taking of all frontage on both sides of Highway 25 (TR 103, RE 9, 53)

The Court denied landowners motion for a new trial, or in the alternative a judgment notwithstanding the verdict, or in the alternative, an additur (RE 15).

SUMMARY OF THE ARGUMENT

The Court erred in permitting the appraiser for the Mississippi Transportation Commission to qualify and testify as an expert appraiser when the witness wholly failed to provide an estimate of damages to the remaining property when all of the frontage on Mississippi Highway 25 was taken on both sides of the highway and provided Appellants no access to Mississippi Highway 25 on either side of the highway.

The Court erred in overruling Appellants objection to the testimony of the Mississippi Transportation Commission's appraiser, Tommy J. Madison (TR 74 RE 41).

The jury returned a verdict in the amount of $17,900.00, based upon the appraisal of Mississippi Transportation Commission as follows:

TIMBER	$ 7,600.00
FENCING	4,000.00
4.65 ACRES	6,300.00
TOTAL DAMAGES	$ 17,900.00

The jury award gave no compensation for the damage to the remaining land when ALL ACCESS to Mississippi Highway 25 has been taken, (TR 103,RE 9, 53).

The verdict of the jury was violative of the Constitution of the State of Mississippi, Article 3, Section 17, and the Constitution of the United States of America in that the State took Appellant's property without just compensation as required by law.

The verdict of the jury was against the overwhelming weight of the evidence and evinces passion, bias and prejudice against Defendants.

ARGUMENT

ISSUE ONE:

THE TRIAL COURT ERRED WHEN IT DENIED THE ADCOCKS' MOTION FOR NEW TRIAL AND J.N.O.V., SINCE THE STATE FAILED TO OFFER EVIDENCE SUFFICIENT TO ESTABLISH ITS POSITION THAT NO DIMINUTION IN VALUE RESULTED WHEN THE STATE TOOK ALL OF THE ADCOCKS' FRONTAGE.

Prior to the condemnation, Appellants, Robert D. Adcock and Shirley Dean Adcock, owned 122 acres of land located on both sides of Highway 25 in Southern Winston County, Mississippi, just South of the intersection of Mississippi Highway 19 and Mississippi Highway 25. The family residence of the Adcocks is located on the West side of Highway 25 facing East or directly toward Highway 25. Mr. and Mrs. Adcock's primary exit, access, ingress and egress was on a gravel driveway a few yards going East to Highway 25 where a left turn would take them North on Highway 25 or a right turn going South to Carthage; or if they desired to cross to their property on the East side of Highway 25, access was easy and direct with a road on both sides of Highway 25 for full and free ingress and egress to all of the Adcock property, being the entire 122 acres of land.

In July of 1998, Mississippi Transportation Commission filed to condemn 4.65 acres being ALL (emphasis added) of the Adcock frontage on both sides of Highway 25. Adcock no longer had access nor could Adcock ingress and egress his 122 acres on either side of Highway 25. The cause came on for trial in May 2006 with the Mississippi Transportation Commission engineer verifying the complete and total taking of all frontage being approximately 3,200 feet belong to the landowners. (RE 27) Mr. And Mrs. Adcock did not have an inch of frontage after

the taking. The Mississippi Transportation Commission engineer also verified 7 acres on the East side of Highway 25 belonging to the Adcocks would be land locked.

The Appellee used as their appraiser an inhouse employee, Tommy Madison, and prior to qualification as an expert, the Court permitted voir dire on the witness qualifications. (TR 72, RE 39)

> (TR74, RE 41)
> Q. Mr. Madison, you purport to testify, do you not, in support of Exhibit 9 that you have in your hand.
> A. YES, sir.
> Q. And you've already testified that, that there is no access after the taking by Mr. Adcock on to Highway 25 on either side of the road.
> A. No access as into 25?
> Q. Yeah. All of the frontage has been removed. It is a no access to go directly on to 25 there.
> A. There is no direct access to 25, but he does have access.
> Q. Oh, I understand. My question is on 25.
>
> (TR 75, RE 42)
> A. As I said, none to 25.
> Q. Okay. And you – you've made no allocation of any reduction in value for the lack of access on to 25 as shown by this report, have you?
> A. That's correct
>
> (TR 76, RE 43)
> Q. Exhibit 9, you give no credence to the loss of access on Highway 25, either side, do you?
> A. That's correct.
> Q. You said no.
> A. That's correct.
>
> (TR 76, RE 43, line 16 et seq)
> Q. But you gave it no appraisal.
> A. That's correct.
> Q. And no damage.
> A. That's correct.
>
> MR. MAYO: Your Honor, we would object to him being qualified as an expert for those reasons that he testified to.

THE COURT: Mr. Madison, are you going to sit here with a straight face and tell me and the jury that property is worth as much today as it was when they could have on any stretch of that property, 1,500 feet on each side of the highway, could have entered that highway at any place they wanted to and now you are going to say that wouldn't reduce the value of it any?
THE WITNESS: Would you like me to explain that?
THE COURT: Yeah, I would. I mean if you are going to be an expert, I would like to know how an expert would have been able to arrive at a conclusion that seems illogical to the Court and something that I think any individual off the street could come in and recognize that there would have been some damage.
THE WITNESS: Well, to show damage, you got to prove it. I looked at sales all over the county, not just the three I used. And I could determine no difference in the unit value of properties that were sold that were in areas, which I would call very remote because they're agricultural properties. And agricultural – the main point in agricultural property is having access to get your crops, cows, corn, whatever, in and out to market. If it's commercial property that would be a totally different story. Then I would have to say there were damage.
THE COURT: Well, like, if this landowner wanted to sell places for people to buy houses or something.
THE WITNESS: I considered that. I looked –
THE COURT: You know, is anybody going to want to pay the same amount for a house lot out there on where they wouldn't have any access to a highway?
THE WITNESS: I considered that too. I said I checked the records for housing permits back in that area in '98. The demand for housing is just not there right now. You can sell a house on any property. I could carve out a acre on my cotton field and sell it for a house. But whether or not that makes it residential, I'd say no.
THE COURT: I find that he meets the qualifications to testify as an expert, but I certainly think the jury can reject outright his testimony, as I expect they probably will. But nevertheless, I will allow him to testify as an expert.

The paid employee witness, Mr. Madison, broke down the damages for the taking (RE 28)

TIMBER	$ 7,600.00, timber harvesting
FENCING	4,000.00,curing of fence
4.65 ACRES	6,300.00, per acre

TOTAL DAMAGES $ 17,900.00

Appraiser, Madison, erroneously awarded NO (emphasis added) damages to the remaining 117 acres as a result of the condemnation of all frontage on Mississippi Highway 25 and valued the 4.65 acres at $1,350.00 per acres or $6,300.00.

The strong comments from the bench by the court as to the testimony of Mr. Madison echo the reason for this appeal. (TR 76, RE 43)

> THE COURT: Mr. Madison, are you going to sit here with a straight face and tell me and the jury that property is worth as much today as it was when they could have on any stretch of that property, 1,500 feet on each side of the highway, could have entered that highway at any place they wanted to and now you are going to say that wouldn't reduce the value of it any?

The trial court then erroneously over Adcock's objection allowed Tommy Madison to testify as an expert.

The landowners testified that after the taking of all of the frontage on both sides of the highway, for him to access his property on the East side of the highway, he had to travel about 2.2 miles, even though it was directly across from his home. (TR 114, RE 63)

Mr. Larry Carraway, appraiser on behalf of the landowners, gave his total damages estimate at $66,460.00 (TR 144, RE 81) which included damages to the remainder resulting from loss of all frontage.

The jury returned a verdict in the amount of $17,900.00 (RE 9, 53). This verdict was exactly the amount of the erroneous Mississippi Transportation Commission appraisal of $17,900.00 and afforded no damages to the remainder of the Adcock's 117 acres with the frontage gone and no access to Highway 25. The court entered judgment.

Adcocks properly presented a motion for a new trial, or in the alternative a judgment notwithstanding the verdict, or in the alternative, an additur. The court DENIED (emphasis added).

This Honorable Court should reverse the verdict of the trail court below, as the jury's decision to provide no compensation to the remainder of the Adcocks' property, where the taking by the State deprived the Adcocks of the entirety of their frontage, was based on insufficient evidence and was against the overwhelming weight of the evidence offered at trial. Accordingly, the verdict of the jury was violative of the Constitution of the State of Mississippi, Article 3, Section 17 of the Constitution of the United States of America in that the Mississippi Transportation Commission Took Defendants- Appellants, Robert D. Adcock and Shirley Dean Adcock, property without just compensation as required by law.

A. Applicable Law

Under Mississippi Law, the State bears the burden of establishing the value of condemned property, in order to make its prima facie case in all eminent domain proceedings. *Ellis v. Miss. State Hwy. Commission*, 487 So. 2d 1339, 1342 (Miss. 1986). If the State fails to prove this value, dismissal of the proceedings is required. *Id.* When the government condemns only a portion of property, the law requires that the appraiser for the government utilize the "before and after rule," in order to determine what compensation is due a condemnee. *Sanderson Farms v. Miss. State Hwy. Commission,* 324 So. 2d 243, 244 (Miss. 1975). In cases involving a partial taking of property the Mississippi Supreme Court has held that just compensation generally is "the value of the part taken plus all the damages which the residue of the property suffers, including a diminution in the remainder. *Anything less than the forgoing would*

encroach upon the constitutional guarantee of just compensation." *Howell v. State Hwy. Commission,* 573 So. 2d. 754, 757 (Miss. 1990). (Emphasis added). Finally, the Mississippi Supreme Court has held that the State must compensate a defendant, if the State limits a defendant's right of access to his property, as the result of a taking. *Simmons v. Miss. State Hwy. Commission*, 717 So. 2d 300, 301 (Miss. 1998).

The case at bar, however, is distinguishable from the facts of *Leflore* and, actually, more closely resembles the circumstances present in *Sanderson Farms v. Miss. State Hwy. Common,* 324 So. 2d 243, 244 (Miss. 1975).

In that case, the appraiser for the State contended that the defendants were not entitled to compensation for alleged damages to their remaining property, even though the defendants' lost a portion of a parking lot, as a result of the take. The lack of remaining parking space required the owner to move the parking facility to another part of the property. *Id.* The jury returned a verdict that did not take the diminution alleged by the defendant's, in that case, into account. The Mississippi Supreme Court, in reversing the jury's verdict, held that the Highway Commission could not "establish fair market value by merely having a witness state that the property was not affected by the take because the taking of a portion of a parking lot *does* affect the use and value of the remaining property." 573 So. 2d. at 757 (*discussing Sanderson v. Miss. State Hwy. Comm. supra*). In short, no reasonable person could find that the loss of a desired use on the property did not detract from the residual estate's value. Accordingly, the State's "before and after" appraisal was insufficient to meet its burden of proof.

B. Application of law to Facts of this Case

In the case at bar, the State took all of Defendants' frontage on Highway 25 and severely

limited their access thereto. Just as the remaining parking lot was rendered useless by the take in *Sanderson*, the Adcock's property would be useless, as to any future improvements that would need to utilize the lost frontage. In addition, it defies logic to assert that property that was once set back from the road is worth the same as property that is now a stone's throw away from oncoming traffic. No reasonable jury could have afforded the defendant just compensation, if the jury's award failed to take the diminution in value of the residual estate into account. Accordingly, the defendant is entitled to have this cause reversed and remanded for a new trial on damages or, in the alternative an additur.

The Trial Court should disturb the verdict, if the verdict is manifestly wrong.

While a jury's verdict should not be disturbed, in most cases where the property at issue has be viewed by the jury, this Court should not allow the verdict in this case to stand, as it is totally devoid of common since and is based on a valuation method contrary to precedent. *See supra.*

In *Mississippi State Highway Commission v. Colonial Inn, Inc.* (246 Miss. 422, 149 So2d 851) (Miss 1963) the Court said:

> "Where part of a tract is physically appropriated, the condemnor should pay severance damages, i.e., the depreciation in the fair market value of the remaining area....."

The Supreme Court earlier stated in *Colonial Inn:*

> "The just compensation in cases involving a partial taking is generally the value of the part taken plus all damages which the residue of the property suffers, including a diminution in the value of the remainder by reason of the lawful use to which the portion acquired will be put. Anything less than the foregoing would encroach upon the constitutional guarantee of just compensation."

Accordingly, the defendant is entitled to have this cause reversed and remanded for a new

trial on damages or, in the alternative an additur.

ISSUE TWO

THE TESTIMONY OF APPRAISER, TOMMY MADISON , SHOULD HAVE BEEN DISALLOWED.

The United States Supreme Court has held that *Federal Rule of Evidence 702* imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony ... is not only relevant, but reliable." *Daubert v. Merrill Dow Pharm. Inc.,* 509 U.S. 579, 589 (1993). Mississippi Rule of Evidence 702 was amended in May 2003 in response to *Daubert* in order to address the reliability of expert opinion testimony. *Daugherty v. Conley*, 906 So2d 108,111 (Miss.App.2004). The Mississippi Supreme Court has subsequently held that the *"Daubert* rule is not limited to scientific expert testimony-rather, the rule applies equally to all types of expert testimony." *Id.* (Citing *Mississippi Transp. Comm'n v. McLemore,* 863 So2d 31,38 (Miss, 2003). Mississippi Rule of Evidence 702 as emended on May 29, 2003, states that:

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Under Rule 702, expert testimony should be admitted only if it withstands a two-prong inquiry. *Mississippi Trtansp. Comm'n v. McLemore,* 863 So2d at 35 (citing *Kansas City S. Ry. v. Johnson,* 798 So2d 374, 382 (Miss. 2001). Mississippi now employs a "modified *Dubert* standard" in determining the admissibility of expert testimony which requires compliance with the following two prong inquiry by the trial court: (1) The court must determine whether the

evidence is relevant **and** (2) the court must determine whether the proffered testimony is reliable. *Id.* at 37 (emphasis added). There must be a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* (citing *Dubert,* 509 U.S. at 592).

The party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation. *Id.* (citing *Dubert,* 509 U.S. at 590). Furthermore, neither *Dubert* nor the Federal Rules of Evidence requires that a court "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert," as self–proclaimed accuracy by an expert is an insufficient measure of reliability. *Id.* (citing *Kumho Tire Co., v. Carmichael,* 526 U.S. 137 at 157 (1999)). The court in *Dubert* adopted an extensive, though not exhaustive, list of reliability factors for determining the admissibility of ex pert witness testimony, which includes "whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether in respect to a particular technique, there is a high know or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or techique enjoys general acceptance within a relevant scientific community." *Id* at 36, 37.

In analyzing MRE 702 and *Dubert,* it has been noted that the key to admissibility is reliability and whether the principals and methods used by the expert are reliable depends on more than a purported expert's opinion. See Judge Leslie Southwick, *Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony,* 23 Miss. C. L. Rev., 1, 29 (2003). Judge Southwick stated that "[reliability] is the key factor in distinguishing between what colloquially is called 'junk science' and what is sufficiently

validated for admission as evidence in litigation." *Id. Dubert* "requires a preliminary assessment of whether the reasoning or methodology underlying a testimony is scientifically valid and whether the reasoning or methodology can properly be applied to the facts in issue." *Id.* Judge Southwick goes on to explain that an opinion is not based on scientific knowledge unless it is within the methods and procedures of science, *i.e.,* it must be tested. *Id.* Further, "it is not enough that the offered expert says, "trust me, I can tell from this data." *Id.* The Honorable Trial Court should have sustained the objection and disallowed the testimony of Mr. Madison as an expert witness because it is purely speculative and not grounded by any reasonable basis.

CONCLUSION

The Mississippi Transportation Commission clearly failed to meet its burden of proof in the case at bar, given the insufficient testimony of their appraiser at trial. The appraiser's failure to account for the loss of value to the remainder estate amounts to a violation of the "before and after rule." Over objection, the Court erroneously permitted the Mississippi Transportation Commission appraiser to testify as an expert Accordingly, the jury's verdict was the product of improper and insufficient evidence. No amount of viewing the property can change this simple fact. The jury's verdict should be overturned, and the Appellants should be granted a New Trial, or in the Alternative, an Additur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the above and foregoing document upon all counsel fo record in this cause, U. W. Mail, postage prepaid, to their proper office addressed, as shown below, on July 31, , 2007.

Judge Joseph H. Loper, Jr.
Circuit Court Judge
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Respectfully submitted,

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