

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**DENNIS M. McLEMORE AND  
TAMMY C. McLEMORE**

**APPELLANTS**

**V.**

**CASE NO.: 2007-CA-00597**

**MISSISSIPPI TRANSPORTATION COMMISSION**

**APPELLEE**

**BRIEF FOR APPELLANTS**

**J. Walker Sims  
Attorney for Appellants  
MS Bar No.: [REDACTED]  
Martin, Tate, Morrow & Marston, P.C.  
5699 Getwell Road  
Bldg. H, Suite 1  
Southaven, MS 38672  
(662) 772-5831**

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DENNIS M. McLEMORE AND  
TAMMY C. McLEMORE

APPELLANTS

V.

CASE NO.: 2007-CA-00597

THE MISSISSIPPI TRANSPORTATION COMMISSION

APPELLEE

CERTIFICATES OF INTERESTED PERSONS

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 this Court may evaluate possible disqualifications of recusal.

Hon. Richard Noble  
Crosthwait Terney & Noble  
100 Court Street  
P.O. Box 29  
Indianola, MS 38751-0029

Hon. J. Anthony Williams  
Office of the Attorney General  
P.O. Box 1850  
Jackson, MS 39215-1850

Hon. Shea Stewart Scott  
Hon. Wilton V. Byers, III  
Daniel Coker Horton & Bell  
P.O. Box 1396  
Oxford, MS 39655-1396

Hon. Betty Sephton  
Supreme Court Clerk  
450 High Street  
Jackson, MS 39201-1082

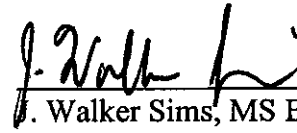
Hon. Robert P. Chamberlin  
Circuit Court Judge  
P.O. Box 280  
Hernando, MS 38632

DENNIS M. MCLEMORE AND WIFE,  
TAMMY C. MCLEMORE

TALBOT BROS. CONTRACTING CO., INC.

TALBOT BROS. GRADING CO., INC.

THE MISSISSIPPI TRANSPORTATION COMMISSION

A handwritten signature in black ink, appearing to read "J. Walker Sims", is written over a horizontal line.

J. Walker Sims, MS Bar No. [REDACTED]

Attorney for the Appellants

## **TABLE OF CONTENTS**

<b><i>Certificate of Interested Parties</i></b> .....	<b>Page No. 2</b>
<b>Table of Cases and Other Authorities</b> .....	<b>Page No. 5</b>
<b>Table of Contents</b> .....	<b>Page No. 4</b>
<b>Statement of Issues</b> .....	<b>Page No. 7</b>
<b>Statement of the Case</b> .....	<b>Page No. 8</b>
<b>Summary of the Argument</b> .....	<b>Page No. 11</b>
<b>Argument</b> .....	<b>Page No. 13</b>
<b>Conclusion</b> .....	<b>Page No. 20</b>
<b>Certificate of Mailing</b> .....	<b>Page No. 21</b>
<b>Certificate of Service</b> .....	<b>Page No. 22</b>

### STATEMENT OF ISSUES

1) Did the trial court err in granting summary judgment in favor of the Mississippi Transportation Commission dismissing the claims of the McLemores under Article 3, Section 17 of the Mississippi Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution for just compensation and damages.

## STATEMENT OF THE CASE

The case at bar arises out of the Mississippi Transportation Commission (hereinafter MTC) and Talbot Brothers Contracting Co., Inc. and Talbot Brothers Grading Co., Inc.'s (hereinafter Talbot defendants) construction work that caused flooding, siltation, and loss of crops on real property owned by Dennis and wife, Tammy McLemore (hereinafter McLemores) located in DeSoto and Tunica Counties, Mississippi.

MTC and the Talbot defendants have been constructing an interstate highway between U.S. Interstate 55 at Hernando, Mississippi and U.S. Highway 61 at Robinsonville, Mississippi. The McLemores filed a Complaint in the Circuit Court of DeSoto County, Mississippi against the MTC and the Talbot defendants in December 2004 alleging that there was taking without just compensation in violation of Article 3, Section 17 of the Mississippi Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and alleging negligence against the Talbot defendants. (R.6; R.E.6)

There was an earlier eminent domain case filed by the MTC to obtain a 174 acre portion of the McLemores' DeSoto County property. On November 30, 1999, the MTC filed a Complaint with an organization of a Special Court of Eminent Domain in DeSoto County, Mississippi. A DeSoto County jury returned the verdict for the McLemores on March 23, 2001. That jury verdict was reversed by the Mississippi Supreme Court in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003). Prior to the retrial of the eminent domain case, the MTC filed a Motion In Limine on December 23, 2004 seeking to prohibit the McLemores from introducing proof regarding flooding, drainage and erosion damages. The Honorable, County Court Judge Mills E. Barbee granted that MTC's motion and ordered as follows:

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiff's Motion in Limine is hereby sustained and the Court orders that Counsel for the Defendants, the Defendants and witnesses for the Defendants shall refrain from mentioning or stating during the trial of this cause all matters pertaining to claims of post-acquisition damages to Defendants' property caused by the construction of the highway which is the subject of this lawsuit.

All such parties shall not refer in their statements and/or testimony to damages incurred by Defendants as a result of the action of the contractor or any other party from the construction of the highway, including but not limited to erosion, siltation, crop damage and remediation efforts. The Court finds that such reference or mention of post-acquisition damages is not a proper element of damages and therefore cannot be considered in the eminent domain action. (Said order is attached as Exhibit C to the deposition of Dean Kidd whose deposition is attached hereto as Exhibit B and is attached separately as Exhibit D hereto.) (R.254; R.E.753)

The eminent domain case went to a final jury verdict on February 16, 2005 in favor of the McLemores. (R.336)

The MTC's construction of the highway itself through its contractors, the Talbot defendants caused numerous flooding, drainage, and siltation problems for the remainder of the McLemore's land. The property of the McLemores is located adjacent to Loess Bluffs which border the flat delta. Contractors, Talbot defendants, excavated fill dirt for the highway from barrow pits located on the bluffs. This excavation caused severe erosion and siltation as water rushed down from the bluffs causing silt and mud to stop up ditches and flood fields. (R.136)

In an attempt to cure some of these flooding and drainage problems, MTC built a bridge over the drainage ditch and took out a culvert that it had previously installed to allow greater flow of water. Flooding damage had been done prior to the MTC's effort to remediate by putting in a bridge. (R.310-311; R.E.56-57) The Talbot defendants were fined for their practices which caused siltation, storm water run off and erosion by the Mississippi Department of Environmental Quality (hereinafter MDEQ). (R.136)

The present litigation was brought by the McLemores alleging a taking without just compensation of the McLemores property by the MTC due to flooding and siltation and also alleging negligence against the Talbot defendants. It was not brought up in the Tort Claims Act

against the MTC. The McLemores have sustained damage to the crops caused by flooding and by erosion of the bluffs sending silt into the fields in the delta below.

In the case at bar, the MTC answered and immediately filed a summary judgment motion asserting that the action against the MTC should have been brought under the Tort Claim Act rather than as a taking under the Mississippi and United States' Constitutions. (R.90; R.E.36) The McLemores responded to the motion arguing that there was a taking. (R.118; R.E.44) The trial court found that there was no taking and that the case should have been brought under the Tort Claim Act. (R.356; R.E.58) The decision did not apply to the Talbot defendants.



## SUMMARY OF ARGUMENT

The trial court erred in granting summary judgment and dismissing Dennis M. McLemore and wife, Tammy C. McLemore's complaint against the Mississippi Transportation commission for compensation for a taking without just compensation caused by the MTC's construction of an interstate highway resulting in flooding, siltation, and loss of crops on the McLemore's real property. The McLemore's alleged compensation was due under Article 3, Section 17 of the Mississippi Constitution and under the Fifth and Fourteenth Amendment of the United States Constitution. The trial court held that the McLemore's should have brought the case under the Mississippi Tort Claims Act or not at all against the Mississippi Transportation Commission.

This decision contradicts a recent Court of Appeals decision. In *B&W Farms v. Mississippi Transportation Commission*, 922 So. 2d 857 (Miss. Ct. App. 2006), the Court of Appeals upheld a summary judgment for the Mississippi Transportation Commission in a case alleging flood damage to crops sustained during expansion and construction of U.S. Highway 61. The Complaint alleged that B&W Farms had a cause of action under the Tort Claims Act and that the defendants unlawfully and negligently obstructed the natural flow of surface water. The Court of Appeals held that a claim for compensation under the Mississippi Constitution had not been adequately pled and that a summary judgment was the correct decision.

If the trial court's decision in the case at bar is allowed to stand, then landowners will have no remedy for flooding and siltation caused by the Mississippi Transportation Commission. Both the Mississippi and United States Constitution have protected land owners whose land is damaged and subjected to flooding and siltation caused by a public entity. In the Mississippi Supreme Court case, *Potters II v. State Highway Commission of Mississippi*, 608 So. 2d 1227 (Miss. 1992). The Court stated:

The Constitution of this state provides: Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof,...Miss. Const. Art. 3, §17 (1890). It becomes important to remember the Constitution commands due compensation for property taken "or damaged." *Parker v. State Highway Commission*, 173 Miss. 213, 162 So. 162 (1935), reminds us the words "or damaged" were added to the Constitution to secure a private property owner for damages not covered by the actual taking. *Parker*, 173 Miss. at 219, 162 So. at 163.

*Potters II v. State Highway Com'n of Mississippi*, 608 So.2d 1227, 1230 (Miss. 1992).

In *Jacobs v. U.S.*, 290 U.S.13 (1933), the U.S. Supreme Court upheld the Fifth Circuit Court of Appeals' decision that a landowner whose property became subject to increased flooding by construction was entitled to just compensation. The U.S. Supreme Court stated as follows:

A servitude was created by reason of intermittent overflow which impaired the use of the lands for agricultural purposes. 45 F. (2d) page 37; 63 F. (2d) page 327. There was a partial taking of lands for which the government was bound to make just compensation under the Fifth Amendment. *United States v. Cress*, 243 U.S. 316, 327-329, 37 S.Ct. 380, 61 L.Ed. 746; *United States v. Lynah*, 188 U.S. 445, 470, 23 S.Ct. 349, 47 L.Ed. 539; *Hurley v. Kincaid*, 285 U.S. 95, 104, 2 S.Ct. 267, 76 L.Ed. 637.

*Jacobs v. U.S.*, 290 U.S. 13 (1933), at 16.

Both the Mississippi and the United States Constitution require just compensation for the McLemores.

## ARGUMENT

The trial court erred in granting summary judgment. The trial court decided that the cause of action should have been brought against the MTC under the Mississippi Tort Claims Act. The trial court did not believe that there was an action for compensation under the Mississippi Constitution or the United States Constitution. An appeal from summary judgment is reviewed de novo. *Jacox v. Circus Circus Mississippi, Inc.*, 908 So. 2d 181, 183 (4) (Miss. Ct. App. 2005) (citing *Cossitt v. Alfa Ins. Corp.*, 726 So. 2d 132, 136 (19) (Miss. 1998). The standard by which this Court reviews the grant or denial of summary judgment is the same standard as is employed by the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. *Id.* (citing *Dailey v. Methodist Medical Ctr.*, 790 So. 2d 903, 906-07 (3) (Miss. Ct. App. 2001). The evidence must be viewed in the light most favorable to the non-moving party in order to determine whether any genuine issue of material fact exists. *Id.* (citing *Dailey*, 790 So. 2d at 907).

In *B&W Farms v. Mississippi Transportation Commission*, 922 So. 2d 857 (Miss. Ct. App. 2006), the Court of Appeals upheld a summary judgment for the Mississippi Transportation Commission in a case alleging flood damage to crops sustained during expansion and construction of U.S. Highway 61. The Complaint alleged that B&W Farms had a cause of action under the Tort Claims Act and that the defendants unlawfully and negligently obstructed the natural flow of surface water. The Court of Appeals held that a claim for compensation under the Mississippi Constitution had not been adequately pled and that a summary judgment was the correct decision.

If the trial court's decision in the case at bar is allowed to stand, then landowners will have no remedy for flooding and siltation caused by the Mississippi Transportation Commission.

Neither the United States Constitution nor the Mississippi Constitution have been construed in the past to provide no compensation for land owners whose land is flooded and filled with silt caused by a government entity.

In *Jacobs v. U.S.*, 290 U.S.13 (1933), the U.S. Supreme Court upheld the Fifth Circuit Court of Appeals' decision that a landowner whose property became subject to an increase in overflows from Jones Creek a tributary of the Tennessee River caused by the construction of a dam along the Tennessee River was entitled to just compensation. The U.S. Supreme Court stated as follows:

A servitude was created by reason of intermittent overflow which impaired the use of the lands for agricultural purposes. 45 F. (2d) page 37; 63 F. (2d) page 327. There was a partial taking of lands for which the government was bound to make just compensation under the Fifth Amendment. *United States v. Cress*, 243 U.S. 316, 327-329, 37 S.Ct. 380, 61 L.Ed. 746; *United States v. Lynah*, 188 U.S. 445, 470, 23 S.Ct. 349, 47 L.Ed. 539; *Hurley v. Kincaid*, 285 U.S. 95, 104, 2 S.Ct. 267, 76 L.Ed. 637.

*Jacobs v. U.S.*, 290 U.S. 13 (1933), at 16.

In *Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871), the U.S. Supreme Court interpreted the Wisconsin Constitution in accord with sound eminent domain principals and announced:

...it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectively destroy or impair its usefulness, it is a taking, within the meaning of the Constitution and that this proposition is not in conflict with the weight of judicial authority in this Country, and certainly not with sound principle.

*Id.* at 181.

The Mississippi case of *Parker v. State Highway Commission*, 173 Miss. 213, 162 (1935)

gives a property owner rights against the MTC when work on adjoining real property party damages the owner's property. The Mississippi Supreme Court held as follows:

Section 17 of the Constitution of 1890 is as follows: **"Private property shall not be taken or damaged for public use except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public."** [Emphasis and italics added][1] Prior to the adoption of the Constitution of 1890, a citizen was only protected against the taking of this property for public use without due compensation; he had no protection against injuries to his rights as owner of private property, less than the appropriation of the property itself. The words "or damaged" were inserted in the section of the Constitution, above referred to, in order to remedy this wrong, and it was the manifest purpose of the framers of the Constitution to protect the citizen in the use and enjoyment of his property, and to guarantee, to him those damages which were not embraced within the actual taking of the property. Prior to that time his damages were *damnum absque injuria*, but since the adoption of this Constitution the burden formerly resting upon the citizen rests upon the agency damaging the property, as well as the appropriation thereof. Since the lawful construction of the highway in question occasioned damage to the private owner, separate and distinct from that borne by the general public, such damage is embraced within the terms and plain language of Section 17 of the Constitution. Municipalities as well as all persons, natural or artificial, are included within its prohibitions, and a municipality which lowers an established grade of a highway and causes abutting lots to be injured must compensate the owner for all damage sustained thereby. *City of Vicksburg v. Herman*, 72 Miss. 211, 16 So. 434. This case has been approved by this court a number of times. *Ham v. Board of Levee Commissioners*, 83 Miss. 534, 35 So. 943; *Yazoo & M.V. R. Co. v. Lefoldt*, 87 Miss. 317, 39 So. 459; *King v. Vicksburg Railway & Light Co.*, 88 Miss. 456, 42 So. 204, 1 L.R.A. (N.S.) 1036, 117 Am. St. Rep. 749; *City of Jackson v. Williams*, 92 Miss. 301, 46 So. 551; *Tishomingo County v. McConville*, 139 Miss. 589, 104 So. 452; *Whites' Garage, Inc. v. Town of Poplarville*, 153 Miss. 683, 1221 So. 295; *City of Kosciusko v. Jerkins*, 164 Miss. 235, 144 So. 467. In the *Herman* Case, *supra*, this court said, relative to the words "or damaged" in our Constitution: "The words are without limitation or qualification. They embrace within their inhibition all those attempting to convert private property to public use,--artificial as well as natural persons, municipal and other corporations alike,--and they cover all damages of whatever character. "Injury to the adjoining property by the change of grade is damage within the constitutional sense. We understand counsel for that state highway commission to concede that the damages here alleged to have been sustained by the appellant are within the meaning of the words "or damaged" in Section 17 of the Constitution.[2][3] Under subdivision (b), Section 5006, Code of 1930, the powers of the state highway commission are defined so as to include the performance of such a contract as the one involved in the case at bar. The

commission is further authorized to acquire by gift, purchase, condemnation, or otherwise, land or other property whatsoever, that is necessary for a state highway system as therein provided. By Section 4998, Code of 1930, the state highway commission is vested with authority to institute proceedings to acquire land necessary for road purposes, by condemnation in conformity with the statutes on eminent domain, being chapter 26, Code of 1930 (Section 1480 et 164 seq.). Section 4998 also contains the following provision: "The amount of such compensation and damages, if any, awarded to the owner in such proceedings, shall be paid out of the state highway 'construction fund.' The authorities constructing such highway under the authority as is provided for in this section, shall use diligence to protect growing crops and pastures, and to prevent damage to any property not taken. "Section 1491, Code of 1930, provides that the justice of the peace shall instruct the jury that compensation is not only allowed for the value of the property actually taken, but also for the damages, if any, which may result to the owner as a consequence of the taking. By subdivision (c) of Section 5006, Code of 1930, the highway commission is vested within the following power: "To enforce by mandamus, or other proper legal remedies, all legal rights or rights of action of the state highway commission with other public bodies, corporations, or persons, and the state highway commission shall be a body corporate, and as such may sue and be sued, plead and be impleaded, in any court of justice having jurisdiction of the subject matter of any such suit." After examination of these statutes on the powers of the highway commission, we are convinced that express power and privilege is given the state highway commission to condemn land, to make compensation therefore, and to pay the award out of a certain fund, and all the power granted to public bodies taking private property for public use under the chapter on eminent domain is expressly granted to the state highway commission; and if not by express terms it is clearly implied that private property damaged for public use may be condemned, although there may not be an actual appropriation of any part of the land.

*Parker v. State Highway Commission*, 162 So. 162, 163-164 (Miss. 1935).

In *Parker*, the Court goes on to elaborate the Constitutions' protections for individual's property rights:

We have considered the case of *State Highway Commission v. Mrs. V.S. Chatham*, 161 So. 674, decided by Division B, on Monday, May 20<sup>th</sup>, and find nothing therein which conflicts with the conclusion reached here; this question being there specially reserved. We say here that by implication the statute authorized the payment not only of compensation for the land, but for damages as well, and conferred all the powers embraced within the eminent domain chapter upon the state highway commission. But, if we should be mistaken in this view, Section 17, Constitution of 1890, is self-executing. Prior to the adoption of this Constitution the Legislature could limit a landowner's recovery to compensation for the land appropriated for public use, but as Section 17 now exists it is quite clear that any effort on the part of the Legislature to shield the government or any arm thereof from payment of damages occasioned by it on the appropriation of land would be futile and of no effect. Before our Constitution was adopted, sections similar to the one here under consideration had been construed by the courts of other states as being self-executing. Section 17 of the Constitution is

mandatory. In 12 C. J. 732, §114, we find the following provision: "A constitutional prohibition against taking private property for public use without just compensation therefore is self-executing, even though the method of ascertaining such compensation is left for legislative determination. When the constitution forbids damage to private property, and points out no remedy and no 165 statute affords one for the invasion of the right of property thus secured, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance. But it has also been held that property may not be taken under such a clause until the legislature has provided a mode of assessing compensation." See case notes. In the case of *Swift & Co. v. City of Newport News*, 105 Va. 108, 52 S.E. 821, 824, 3 L.R.A. (N.S.) 404, the court had this question under consideration, and we think the following quotation therein from an Illinois court is pertinent here: "The right of property thus intended to be secured cannot depend upon the mere will of the Legislature. The prime object of the Bill of Rights is to place the life, liberty, and property of the citizen beyond the control of legislation, and to prevent either Legislatures or courts from any interference with or deprivation of the rights therein declared and guaranteed, except upon certain conditions. It would be the merriest delusion to declare a subsisting right as essential to the acquisition and protection of property, and make its employment depend upon legislature will or judicial interpretation." As sustaining this view, see *Householder v. City of Kansas*, 83 Mo. 488; *Johnson v. City of Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Miller v. Marx*, 55 Ala. 322; *City of Vicksburg v. Herman*, supra. While not so decided, the conclusion reached here is foreshadowed in the case of *Dick v. Atchafalaya Drainage & Levee District*, 147 Miss. 783, 113 So. 897, wherein the court said that a public corporation, created in invitum for the purpose of discharging a public function, is liable only for authorized acts of its officers and agents, in the absence of a statute otherwise providing. In the case at bar the action of the highway commission, relative to the reconstruction of this highway, was authorized, the contract was authorized, and the action is not based upon a negligent act of any officer or agent of appellee. The distinction is that this court has held consistently that, in the absence of a statute, corporations created in invitum and supported by taxation are not liable for the negligence of officers, and agents, as clearly set forth in the *Knight Case*. The common-law remedy existing in favor of the property owner for damages to his property, beyond the appropriation thereof, is clear in this case. The Legislature has granted the highway commission in express terms the right to use and to be sued. The contention of counsel for the appellee in this case, followed to its ultimate, conclusion, would be to deny the right of any citizen to sue even upon contract, because there is no express language in the entire act giving specific authority to sue the state highway commission upon any specific account. It is urged upon us that the result of holding the state highway commission liable for damages in this class of cases would be a very great financial burden upon the state highway commission. Section 17 of the Constitution replies to this argument firmly, positively, decisively, and unequivocally. The courts of the land, in order to preserve the liberty and rights of the people, must adhere to the plain stipulations of that documents, and it would be a sad day in the history of a democratic constitutional form of government if the courts should swerve from the plain mandates of the organic law, which all the people are bound together in solemn compact to uphold and preserve. It is no unusual occurrence for litigations to assert to this court that direct, painful, and destructive results will follow in the event of an adverse decision to the particular litigant. The building of good roads is now thought to be a most desirable object to be attained;

but even so, we are convinced that the maintenance of the home, and the right to go in and out of it, travels far toward the goal of this government in its effort to secure for its citizens life, liberty, and the pursuit of happiness.

*Parker v. State Highway Commission*, 162 So. 162, 164-165 (Miss. 1935)

In the *Parker* case, the land owner, L.L. Parker owned land, and the Highway Commission took property adjacent to his land and changed the grade damaging his land. This case is directly analogous to the case at bar in which the State through its contractor is using adjacent land as a borrow pit and causes erosion. *The principles regarding erosion, flooding and drainage as a taking are particularly important because of the many pieces of property in Mississippi which have a fragile balance regarding drainage which can be permanently and severely damaged by construction.* Furthermore, the principles set forth in *Parker* have been reaffirmed in the Mississippi Supreme Court case, *Potters II v. State Highway Commission of Mississippi*, 608 So.2d 1227 (Miss. 1992). The Court stated:

The Constitution of this state provides: Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof,...Miss. Const. Art. 3, §17 (1890). It becomes important to remember the Constitution commands due compensation for property taken "or damaged." *Parker v. State Highway Commission*, 173 Miss. 213, 162 So. 162 (1935), reminds us the words "or damaged" were added to the Constitution to secure a private property owner for damages not covered by the actual taking. *Parker*, 173 Miss. at 219, 162 So. at 163.

*Potters II v. State Highway Com'n of Mississippi*, 608 So.2d 1227, 1230 (Miss. 1992).

This Court affirmed the protections afforded property owners whose property is damaged by the State. This protection is even more important given the expansive nature of the right of the State to take property for a public purpose as set forth in *Kelo v. City of New London, Connecticut*, 125 S. Ct. 2655 (2005).

Johnny Sanders, an expert hydrologist who worked for many years for the U.S. Army Corps. of Engineers at Vicksburg, Mississippi testified to the following matters:

Q. Tell me about your report. What did you determine regarding Mr. McLemore's property and the highway?



- A. My report basically said that, during construction of this highway project, there was a lot of sediments that came out of the hills at the location where the borrow was being taken and along the roadway that comes out of the hills going down into the land owned by Mr. McLemore and there was lots of sediments that came out of those hills.
- Q. Out of the bar pit, borrow pit they call it?
- A. Some of it came out of the borrow pit. Some of it came out of just erosion along the roadside ditch that went from the borrow pit to the canals that drain through Mr. McLemore's farm.  
(Deposition of Johnny Sanders at page 6) (R.338)
- Q. Is water standing in his fields or what?
- A. Having a field that is functional and then have a project like this highway coming in and obstructing small drainage ditches that has historically been used to drain his field and then have the influx of sediments deposited on his property like he has experienced and then moving forward in the future of now going back to trying to make this farm functional like it used to be. I think --
- Q. Are you saying his farm is lost?
- A. I'm saying that there is a -- there's going to be a permanent impact on drainage off of his property that he has yet to have to deal with in growing and producing and harvesting a crop.  
(Deposition of Johnny Sanders at page 30) (R.341)

Brian Copeland, a professional engineer and employee of the Mississippi Transportation

Commission testified:

- Q. Did Talbot undertake stabilization measures?
- A. Yes
- Q. Describe those to me.
- A. Well, we executed the plan that we presented to you when we had our meeting that March.
- Q. Okay. And then I guess you continued to have the problems with one side of the box culvert stopping up.
- A. We cleaned that one out at some point after that March meeting, and we should have had both cells open there after that meeting.  
MR. NOBLE: When you say "we," I don't -- I need to know who "we" is.
- A. The contractor cleaned out the box. They pulled a concrete bucket through the cell and cleaned it out.
- Q. (BY MR. SIMS) And there was sedimentation that got in the fields from the borrow pits.
- A. That's correct.
- Q. And there was sedimentation that got in the drainage canal from the borrow pits.
- A. That's correct.
- Q. Tell me how it was decided to put this bridge in.
- A. Like I said earlier, it was decided above me.
- Q. Okay. Well, you're the project engineer, right?
- A. Yes. (R.310-311; R.E.56-57)

There can be little doubt that serious flooding, drainage and erosion problems were caused by the construction of the interstate highway through the McLemore's farm. The Mississippi Transportation Commission's change from a box culvert to a bridge over one of the drainage ditches demonstrates the depth of the problem.

The Mississippi and United States Constitutions should require compensation for the McLemores.

### CONCLUSION

Appellants, Dennis M. McLemore and wife, Tammy C. McLemore respectfully submit that Article 3, Section 17 of the Mississippi Constitution and the Fifth and Fourteenth Amendments of the United States Constitution require the Mississippi Transportation Commission pay just compensation and damages for flooding, erosion, and siltation caused by its construction of interstate highways. Both the federal and Mississippi authorities support this proposition. The Appellants, Dennis M. McLemore and wife, Tammy C. McLemore respectfully request that this Court reverse the summary judgment of the Circuit Court of DeSoto County, Mississippi in favor of the Mississippi Transportation Commission and remand the case to the Circuit Court.

Respectfully submitted,



J. Walker Sims, Attorney for Appellants


OF COUNSEL:  
MARTIN, TATE, MORROW & MARSTON, P.C.  
5699 Getwell Road  
Bldg. H, Suite 1  
Southaven, MS 38672  
Telephone: (662) 772-5831  
Facsimile: (662) 772-5834

CERTIFICATE OF MAILING

I, J. Walker Sims, the attorney for the Appellants, Dennis M. McLemore and Tammy C. McLemore, hereby certify that I have this day sent by Federal Express the original and three (3) copies of the foregoing attached Brief for the Appellants to the following:

Hon. Betty Sephton  
Supreme Court Clerk  
450 High Street  
Jackson, MS 39201-1082

This the 17<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
J. Walker Sims, MS Bar No. [REDACTED]  
Attorney for the Appellants

CERTIFICATE OF SERVICE

I, J. Walker Sims, Attorney for the Appellants, Dennis M. McLemore and Tammy C. McLemore, do hereby certify that I have this day mailed, via first class mail, a true and correct copy of the above and foregoing document to the following:


Hon. Richard Noble  
Crosthwait Terney & Noble  
100 Court Street  
P.O. Box 29  
Indianola, MS 38751-0029

Hon. J. Anthony Williams  
Office of the Attorney General  
P.O. Box 1850  
Jackson, MS 39215-1850

Hon. Shea Stewart Scott  
Hon. Wilton V. Byers, III  
Daniel Coker Horton & Bell  
P.O. Box 1396  
Oxford, MS 39655-1396

Hon. Robert P. Chamberlin  
Circuit Court Judge  
P.O. Box 280  
Hernando, MS 38632

This the 19<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
J. Walker Sims, MS Bar No.: [REDACTED]  
Attorney for the Appellants