SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2007-CA-01308-COA

GULF SOUTH PIPELINE COMPANY, LP

Appellant/Cross-Appellee

vs.

BLANCHE MARI DOWNY PITRE

Appellee/Cross-Appellant

Appeal of the Jury Verdict and Judgment and Order on Post-Trial Motions of the County Court of Warren County, Special Court of Eminent Domain, Honorable John S. Price Jr. County Court Judge in Gulf South Pipeline Company, LP, v. Blanche Mari Downy Pitre, Cause No. 06, 0689-CO

REPLY AND REBUTTAL BRIEF OF THE APPELLANT/CROSS-APPELLEE GULF SOUTH PIPELINE COMPANY, LP

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

1) Gulf South Pipeline Company, LP, Plaintiff and Appellant/Cross-Appellee
2) Blanche Mari Pitre, Defendant and Appellee/Cross-Appellant
3) Fred E. Bourn III, Attorney for Appellant/Cross-Appellee
4) LeAnn W. Nealey, Attorney for Appellant/Cross-Appellee
5) Robert C. Galloway, Attorney for Appellant/Cross-Appellee
6) Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Counsel for Appellant/ Cross-Appellee
7) David M. Sessums, Attorney for Appellee/Cross-Appellant
8) Varner, Parker & Sessums, P.A., Counsel for Appellee/Cross-Appellant

SO CERTIFIED this 14th day of August 2008.

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STATEMENT OF NEED FOR ORAL ARGUMENT

Because of Pitre's misstatements of fact and law, as well as the legal complexities involved, Gulf South believes oral argument and the opportunity to pose questions to counsel will assist the Court in determining the issues on appeal.

THE STANDARD OF REVIEW

First, Pitre argues Gulf South incorrectly stated the standard of review, but misses the point. Even the quote from Martin v. Mississippi Transportation Commission, 953 So. 2d 1163, 1166 (Miss. Ct. App. 2007), cited by Pitre in her brief at 5, shows that once Gulf South made a prima facie case, the burden shifted to Pitre to prove greater compensation: "After a prima facie case has been established, if the party whose property is being condemned desires to receive greater compensation, then it must present evidence of higher valuation." This seems to be the point Pitre misses over and over again in her brief. As stated in Gulf South's brief at 8-9, after "Gulf South established at trial the right-of-way was worth $38,250, the burden shifted to Pitre to prove the property was worth the value claimed in her statement of values: $175,000." See Bishop v. Miss. Transp. Comm'n, 734 So. 2d 218, 221 (Miss. 1999) ("In order to receive greater compensation, the party whose property is being condemned then must present evidence."); Ellis v. Miss. State Highway Dept., 487 So. 2d 1339, 1342 (Miss. 1986) ("After a prima facie case has been made out by the condemnor, then, if the landowner expects to receive more compensation than that shown, he must go forward with the evidence showing such damage."). Pitre just did not meet her burden.

Second, the admission of testimony is within the discretion of the trial court and will be reversed only where there is an abuse of that discretion. Miss. Transp. Comm'n v. Fires, 693 So. 2d 917, 920 (Miss. 1997); Terrain Enterp., Inc. v. Mockbee, 654 So. 2d 1122, 1128 (Miss. 1995). Where a court has exercised its discretion in such a way that it misperceives the correct legal standard for the admission of evidence, however, the deference customarily afforded the lower court will be precluded because the error has become one of law. Fires, 693 So. 2d at 920; Bean v. Broussard, 587 So. 2d 908, 913 (Miss. 1991).

ARGUMENT AND AUTHORITIES

A. Gulf South's Appeal Does Not Question Hamilton's Credentials, Just His Methodology.

In an attempt to "muddy the waters," Pitre, in her reply brief, attacks Gulf South's appraiser Brent Johnston and his so-called lack of credentials. (Pitre Brief at 6-9). Pitre's argument is that Gulf South has no grounds to question the credentials of Pitre's expert, James Hamilton, when its own expert's qualifications are supposedly lacking.

However, Gulf South has never objected to, challenged, or questioned Hamilton's qualifications. The basis for Gulf South's appeal is that Hamilton did not properly rely on specific information to render his expert opinion. (Gulf South Brief at 9-19). Gulf South did not challenge Hamilton's qualifications, just the basis for his opinion.

B. Gulf South Preserved Its Daubert Challenge to Hamilton's Expert Testimony for Appellate Review.

Contrary to Pitre's suggestion that Gulf South waived its right to challenge the trial court's decision to allow Hamilton to testify (see Pitre Brief at 11-16), Gulf South properly and timely raised its Daubert objections to Hamilton's expert testimony before, during (the Court considered Gulf South's Daubert challenge mid-trial), and after trial. (Gulf South Brief at 4-5). Moreover, although Pitre makes much of the trial court's pre-trial statement that it would let Hamilton testify first and then decide whether to exclude his testimony, (Pitre Brief at 12, 13, &15), she ignores the fact that the trial court subsequently changed its mind. The trial court ruled on Gulf South's motion before Hamilton testified: "I have last night and early this morning considered the Motions that are before the Court." (Tr. 263). After an examination of Daubert and Rule 702, the trial court denied Gulf South's motion. (Tr. 268). As a result of the trial court's order, Hamilton testified later that day. (Tr. 424).

Thus, Gulf South explicitly challenged Hamilton's testimony under Daubert both before,

during, and post-trial[1]; Gulf South also obtained a direct ruling from the trial court that Hamilton's testimony would be allowed. (Tr. 268). The trial court was given ample opportunity to exercise its "gatekeeping" responsibility and elected not to do so with respect to Hamilton's testimony. Gulf South preserved this issue and has now properly raised it on appeal.

As such, there is no basis for Pitre's argument that Gulf South somehow waived its right to appeal this issue. Indeed, the cases Pitre relies upon to make this specious argument are simply inapplicable. For example, the case Cole v. State, 525 So. 2d 365, 369 (Miss. 1987), which Pitre cites at 13, is a case in which no ruling was ever obtained by Cole from which to appeal -- obviously not the situation here.

Pitre also cites cases in which no objection whatsoever was raised at trial on the grounds later raised on appeal.[2] Again, that is not what occurred in this case. To be clear, Gulf South moved the trial court to limit or strike the testimony of Hamilton because his opinions had no factually reliable foundation under Miss. R. Evid. 702 or Daubert v. Merrell Dow Pharm., Inc.,

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[1] In its reasoning and ruling on Gulf South's motion to exclude Hamilton's testimony, the trial court specifically referred to Daubert 13 times (albeit once mistakenly referring to Pitre's motion, Tr. 264). (Tr. 236, 243-45, 247, 249, 264-66, & 268). Pitre cannot make a straight-faced argument Gulf South waived its right to appeal because it did not make a Daubert challenge at trial.

[2] See Pitre's brief at 14-15, citing Ballenger v. State, 667 So. 2d 1242, 1251 (Miss. 1995) (no objection made to "lower court's action of moving venireman Curtis Johnson to the end of the list of potential jurors" which Ballenger argued on appeal was in contravention of her due process rights); Lang v. State, 931 So. 2d 689, 691 (Miss. Ct. App. 2006) (no objection made to admissibility of videotape, though on appeal Lang argued it was "gruesome, graphic, and repetitive, and that the trial judge abused its discretion in admitting the videotape into evidence."); Washington v. Kelsey, 2008 WL 1795051, at *4 (Miss. Ct. App. 2008) (hearsay issue never before the trial court and was thus not an issue preserved on appeal. Specifically, "Washington's only objection to Harmon's deposition testimony was based on Mississippi Rules of Evidence 402, 403, and 404, as presented to the trial court in his motion in limine. Further, no hearsay objection was made at trial either prior to or during the reading of the deposition.").

Likewise, the case Pitre cites in her August 11, 2008, letter to the Mississippi Supreme Court clerk, Daley v. Hughes, 2008 WL 2969282, at *2 (Miss. Ct. App., August 5, 2008), again addresses a party's complete failure to challenge the evidence at issue and, thus, has no application here. Daley failed to make any objection to "Holley being admitted as an expert on bridges traversing field roads," but merely refused to stipulate to the admissibility of this testimony. Refusal to stipulate, of course, is not a proper objection. On this basis -- wholly inapplicable here -- the Court of Appeals held the inadmissibility of Holley's testimony had not been preserved for appeal. In short, Pitre's insistence that these cases apply is completely misplaced.

509 U.S. 579 (1993). (R. at 236-43). Gulf South also moved to exclude Hamilton because his testimony would not be sufficiently reliable and would not assist the jury or the trial court because the probative value of his testimony is outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, and wasting the time of the trial court and jury. (R. at 236). At trial, when Gulf South raised its motion and again objected to Hamilton's testimony, the court denied Gulf South's motion, ruling from the bench that as a matter of law Hamilton was qualified under Miss. R. Evid. 702 and Daubert to testify as an expert witness on behalf of Pitre. (Tr. 268).

Gulf South argued its motion and obtained a ruling at trial **before** Hamilton was allowed to testify. (Tr. 268). Gulf South also raised this ruling in its motion for a judgment notwithstanding a verdict. (R. at 358-443). Gulf South properly and timely sought to exclude Hamilton's expert testimony at trial and wholly preserved its right to challenge on appeal the trial court's decision to allow the jury to hear his testimony at trial.

C. Pitre Did Not Challenge Johnston's Qualifications at Trial.

Pitre did not challenge Johnston's qualifications or challenge the admissibility of Johnston's expert testimony in any way, and, thus, **cannot do so here**.[3] Martin v. Miss. Transp. Comm'n, 953 So. 2d 1163, 1168 (Miss. Ct. App. 2007); see Copeland v. Copeland, 904 So. 2d 1066, 1073 (Miss. 2004) (failure to make contemporaneous objection waives objection); Evans v. City of Aberdeen, 926 So. 2d 181, 185 (Miss. 2006) (same). Furthermore, the trial court

[3] Before trial, Pitre did move to exclude Johnston because he allegedly "used an incorrect method for appraising the value of the property." (R. at 325-26). In her motion, Pitre never cited Daubert or Miss. R. Evid. P. 702 and never attempted to prove any of the Daubert or Rule 702 factors at trial; Pitre merely relied on the trial court's decision to allow both Hamilton and Johnston to testify, but never objected at trial or post-trial. (Tr. 236-68). When a party makes an objection on specific grounds, it is considered a waiver regarding all other grounds. Copeland v. Copeland, 904 So. 2d 1066, 1073 (Miss. 2004) (citing Burns v. State, 729 So. 2d 203, 219 (Miss. 1998)). Nonetheless, Pitre admitted she did not even object to Johnston's method of appraisal at trial: "Because the jury in this case totally rejected Brent Johnston's testimony it was not necessary to assign as error the lower court allowing Mr. Johnston to base his opinion testimony on such an erroneous pro rata per acre basis ...." (Pitre Brief at 11).

excluded comparables offered by Johnston (Pitre Brief at 9-11), so the jury never even heard this evidence. These are issues improperly brought before this Court, and, as a result, the Court should disregard all references to Johnston in Pitre's brief.

D. Under the Hillman Rule and Exception, Gulf South's Appraiser Did Not Have To Prove Damage to the Remainder, but Pitre's Appraiser Did.

As stated in Gulf South's original brief, the trial court allowed Hamilton to present his opinion on the percentage of damages to the remainder of the property (the "after value") without proof of any comparable land sales. (Gulf South Brief at 9-10). The trial court justified its decision by reasoning that Johnston's opinion -- no damage to the remainder -- was also not based on comparables. (Tr. 266-68). As shown below, respectfully, the trial court was wrong in its reasoning because Gulf South, through Johnston, and Pitre, though Hamilton, had different standards to meet to substantiate their values.

There is no requirement in eminent domain proceedings that an expert appraiser regard a taking as damaging to the remainder. Green Acres Mem. Park v. Miss. Highway Comm'n, 153 So. 2d 286, 289-90 (Miss. 1963). On the other hand, a landowner who wants to receive greater compensation must present specific evidence of the damage as a result of the taking. Bishop v. Miss. Transp. Comm'n, 734 So. 2d 218, 221 (Miss. 1999); Ellis v. Miss. State Highway Dept., 487 So. 2d 1339, 1342 (Miss. 1986).

A basic tenant of Mississippi eminent domain law is that a landowner is entitled to due compensation "not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking." Miss. State Highway Comm'n v. Hillman, 198 So. 565, 568 (Miss. 1940). Due compensation includes damages accruing to the residue of the land resulting from the taking, and the measure is the damage done to the fair-market value of the entire tract by the taking. Id. at 569. This is known as the Hillman rule. Green Acres Mem. Park, 153 So. 2d at 289; see

Trustees of Wade Baptist Church v. Miss. State Highway Comm'n 469 So. 2d 1241, 1244 (Miss. 1985) (recognizing Hillman rule); Lee v. Indian Creek Drainage Dist. No. 1 of Panola, Quitman & Tunica Counties, 148 So. 2d 663, 666 (Miss. 1963) (same); Miss. State Highway Comm'n v. Strong, 129 So. 2d 349, 351 (Miss. 1961) (same).

However, the Hillman Court also pointed out exceptions to that rule. Hillman, 198 So. at 569-70. One of these exceptions occurs when the failure to appraise the part of the property not taken has no effect on the resulting damages. Green Acres Mem. Park, 153 So. 2d at 289[4]; Morris v. Miss. State Highway Comm'n, 129 So. 2d 367, 370-71 (Miss. 1961).[5] In such circumstances, appraisers are "entitled to their opinion that the land remaining ... was not damaged by the taking." Morris, 129 So. 2d at 371. In this case, Johnston applied the proper fair-market-value rule for the land being taken. He did not have to prove, though, through comparables or otherwise, that no damage would occur to the remainder. As in Morris, Johnston was entitled to his opinion that the land remaining was not damaged by the taking.

In contrast, after Gulf South made its prima facie case, the burden shifted to Pitre to prove through specific evidence that damage would occur to the remainder. Martin, 953 So. 2d at 1166. Pitre, through Hamilton, had to prove damage through comparable sales relating to and possessing similar qualities to the land involved in the sale. Miss. Highway Comm'n v. Daniels, 108 So. 2d 854, 859-60 (1959). In this case, although Hamilton did rely on comparables to

[4] The Green Acres Court was faced with a situation when one acre of a 103-acre cemetery was condemned. The expert value witness testified there was no damage to the remaining part of the tract of land after the taking of one acre on the "back side" of the land. Green Acres Mem. Park, 153 So. 2d at 288. The Court held that it was not error for the appraiser to fail to appraise the entire parcel when he believed that the remainder was not damaged as a result of the taking of one acre, causing no change in the result. Id. at 290.

[5] In the Morris case, the Highway Commission condemned all of the property on the north side of a highway and did nothing to affect the property on the south side of the highway. Morris, 129 So. 2d at 368. The Commission's appraisers did not appraise the property on the south side because it was not affected in any way by the taking of the property on the north side. Id. The Court found that because the "before value" and the "after value" of the land south of the new facility would be the same, the failure of the witnesses to appraise that part of the land had no effect on the resulting damages. Id. at 370-71.

determine the "before" value of the property, he did not rely on any comparables to determine the "after" value, i.e., damage to the land, the house, and the shop. (Tr. 461). He instead opined the pipeline would damage these elements or structures without providing any valid basis. As a result, the jury should not have been allowed to base its verdict on Hamilton's valuation and should have been directed to return a verdict for Gulf South's value of $38,250.

E. Gulf South Made Its Prima Facie Case at Trial.

Pitre argues Gulf South did not establish a prima facie case because Hamilton arguably has better credentials than Johnston. (Pitre Brief at 6-9). As stated above, this is not an argument properly before this Court because it was not raised by Pitre at trial. Also as shown above, Johnston properly applied the fair-market-value rule for the land taken. Under Green Acres and Morris, he did not have to prove, through comparables or otherwise, that no damage would occur to the remainder. Green Acres Mem. Park, 153 So. 2d at 289; Morris, 129 So. 2d at 371. Because Johnston was qualified and his opinions were admissible, Gulf South made a prima facie case.

F. Pitre Misstates Holding in Trowbridge.

In her brief, Pitre cites Trowbridge Partners v. Mississippi Transportation Commission, 954 So. 2d 935 (Miss. 2007), for the assertion that an expert can testify to the value of a land without any proof whatsoever because "it is a matter of common sense." However, Pitre conveniently forgets to include the very next paragraph in Trowbridge:

> [The] testimony that smaller parcels are worth more per square foot was relevant to the issue of the fair market value of the remainder property. ... [T]here is no evidence that Wells testified that the highway expansion project would enhance the value of the remainder property or that he reduced his assessment of compensation by the alleged enhancements... .

Id. at 940 (citations omitted). In other words, the appraiser was explaining why he made adjustments to the sales comparables **on which he relied** in determining an "after value" to the

remaining land. Id. In this case, Hamilton relied on no comparables to reach his "after" value to the remaining land -- it was just his opinion. The Trowbridge Court went on to recognize the leeway appraisers are given in making such adjustments to comparable land sales:

> Moreover, recognizing the difficulty in finding comparable real estate transactions with similar size, location, topography, and other like factors, this Court allows appraisers to make adjustments to comparable sales to determine the value of the subject property in eminent domain proceedings. Therefore, the trial court did not err in allowing Wells during his determination of value of the remainder property to consider only the comparable sales similar in size to the remaining parcels.

Id. at 940 (citations omitted). The Trowbridge Court was addressing "common-sense" adjustments to "similar" comparable land sales on which an appraiser may rely when determining a property's fair-market value. In this case, although Hamilton did rely on comparables to determine the "before" value of the property, he **did not rely on any comparables** to determine the "after" value. (Tr. 461). This is the key issue Pitre seems to keep forgetting. Hamilton arbitrarily placed percentages of diminution in value on the remaining property without any proof whatsoever. It is not just a matter of "common sense" that the pipeline would damage the remaining property for Hamilton's arbitrary percentages. Pitre had to show Hamilton's opinion as to the "after" value of the property was based upon scientific methods and procedures, not unsupported speculation. Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942, 947 (Miss. 2008) (citing Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31, 36 (Miss. 2003)).

GULF SOUTH'S REPLY TO PITRE'S CROSS-APPEAL

STATEMENT OF ISSUES

A. Pitre failed to file a motion to dismiss five days before the April 12, 2007, trial setting. (R. at 137). Pursuant to Miss. Code Ann. § 11-27-15 (Supp. 2007), Pitre waived her right to move to dismiss.

B. Pitre waived her ability to assign as error on appeal the trial court's exclusion of exhibits 2 and 3 filed as part of Pitre's "Brief Exhibits."

C. This Court should strike the articles included as Pitre's "Brief Exhibits."

D. The trial court correctly excluded all references to the safety of pipelines.

E. Pitre does not ask for any relief in her cross-appeal.

STATEMENT OF THE CASE

Pitre failed to file a motion to dismiss five days before the April 12, 2007, trial setting. (R. at 137). The trial court ruled that, pursuant to Miss. Code Ann. § 11-27-15 (Supp. 2007), Pitre had waived her right to move to dismiss. (R. at 137). The trial court also continued the April 12 trial, but specifically stated the continuance had no effect on Pitre's waiver, reasoning that to allow Pitre another continuance -- her third -- and to allow her the opportunity to re-open the period to move to dismiss would unfairly prejudice Gulf South. (R. at 137).

As part of her cross-appeal and as "exhibits" to her Brief, Pitre has submitted nine newspaper articles. Pitre is attempting to assign as error the trial court's purported exclusion of two of these articles included in Pitre's Brief Exhibits. (Pitre Exs. 2 & 3). These two articles ran in The Vicksburg Post prior to trial and addressed a gasline rupture in the Hamilton Heights neighborhood, which Pitre describes as being in "Vicksburg-Warren County, Mississippi." (Pitre Brief at 35). Prior to trial, the trial court sustained Gulf South's motion in limine to exclude "evidence relating to . . . injuries, fatalities, or property damage resulting from pipeline

accidents" in the United States or world, unrelated to the specific property at issue here. (Tr. 4-14). At no time during that hearing did Pitre address or call to the trial court's attention these two articles (Pitre Exs. 2 & 3), nor did she make an offer of proof at trial as to these two articles. As such, Pitre preserved no grounds for error with respect to these two articles, leaving this Court with no basis for appellate review. In addition, as to Exhibits 2 and 3, Pitre never attempted, in any way, to make them a part of the appeal record pursuant to Miss. R. App. P. 10.

Pitre's Brief Exhibits also include seven articles that ran post trial. (Pitre Exs. 1, 4-9). Pitre never attempted to make the seven other newspaper articles a part of the appeal record pursuant to Miss. R. App. P. 10.

Gulf South moved to prevent evidence at trial regarding blast zones of a 36" to 42" pipeline, as well as evidence of injuries, fatalities, and property damages, resulting from pipeline accidents in the United States and in other parts of the world, which the trial court rightfully granted. (R. at 54-56; Tr. 4-14). This included a Gulf South brochure Pitre's counsel attempted to introduce into evidence during the direct-examination of Pitre, which the trial court properly excluded. (Tr. 400-05).

In her cross-appeal, Pitre does not request any relief.

ARGUMENT

A. Pitre Missed Her Deadline To File a Motion To Dismiss.

Pitre argues that even though she missed her deadline to file a motion to dismiss before the April 12, 2007, trial setting, because the trial was continued, the motion to dismiss deadline was void. Her argument is unsupported by Mississippi law.

Pitre failed to file a motion to dismiss five days before the April 12, 2007, trial setting. (R. at 137). The trial court ruled that, pursuant to Miss. Code Ann. § 11-27-15 (Supp. 2007),[6]

[6] In her brief, Pitre states Miss. Code Ann. § 11-27-15 is "obviously governed under the

Pitre had waived her right to move to dismiss. (R. at 137). The trial court also continued the April 12 trial, but specifically stated the continuance had no effect on Pitre's waiver, reasoning that to allow Pitre another continuance[7] and to allow her the opportunity to re-open the period to move to dismiss would unfairly prejudice Gulf South. (R. at 137).

In her brief, Pitre cites Morley v. Jackson Redevelopment Authority, 632 So. 2d 1284, 1291 (Miss. 1994), for her contention that it is not the day the trial is **set**, but the day on which the trial is actually **held**, that dictates the five-day deadline. However, nowhere in Morley does the Mississippi Supreme Court state this to be the rule.

In fact, such a contention is in direct conflict with Coleman v. Mississippi State Highway Comm'n, 289 So. 2d 918, 920 (Miss. 1974). There, the landowner did not file the statement of values by the 10-day deadline. Id. When the Court remanded the case, it did not allow the landowner to file a statement of values and did not allow the landowner to present any evidence on the value of the subject land. Id. The Coleman Court, then, in essence ruled that the deadline ran from the day the trial was **set**, not from the day it was **held**. In other words, the Court calculated the date from the original trial date, not the new trial date after remand.

Pitre's argument is also in direct conflict with the plain language of the statute itself. The statute says the deadline for the landowner to file her motion to dismiss is five days before the date "fixed" for trial. Miss. Code Ann. § 11-27-15 (Supp. 2007). Nowhere in the statute does it say five days prior to when the trial is actually held, and no court has ever suggested otherwise.

Mississippi Rules of Civil Procedure" and specifically Rule 12(b)(6). (Pitre Brief at 26). This is actually not true. Under Miss. R. Civ. P. 81(a)(7), the Mississippi Rules of Civil Procedure have limited application to eminent domain proceedings, "which are generally governed by **statutory procedures** ..." (emphasis added).

[7] This was Pitre's third motion for a continuance. (R. at 44, 48, & 94-96).

Instead, the Mississippi Supreme Court has held that eminent domain statutory deadlines were not to be taken lightly. The Coleman court discussed the necessity of parties complying with the eminent domain pleading requirements:

> [P]rior to the enactment of Chapter 27 of Mississippi Code Annotated section 11-27-1 et seq. (1972) the pleadings in [eminent domain] cases were few indeed. In many instances this scarcity left both the condemnor and the condemnee in a dilemma as to the values which would be elicited from the witnesses in the cause, the situation lending itself to a swearing contest without value limitations.

Coleman, 289 So. 2d at 920. The Coleman Court specifically stated that circumstances such as the one before this Court were no excuse to ignore eminent domain deadlines.[8] This Court should not allow the landowner to render § 11-27-15 meaningless. Pitre missed the deadline to move to dismiss; consistent with Coleman, this Court should affirm the trial court's ruling that a change in trial date does not extend the motion filing deadline.

B. Pitre Waived Her Ability To Assign as Error on Appeal the Trial Court's Exclusion of Exhibits 2 and 3 Filed as Part of Pitre's "Brief Exhibits."

As part of her cross-appeal and as "exhibits" to her Brief, Pitre submitted nine newspaper articles. See "Brief Exhibits of Appellee" filed May 23, 2008 ("Brief Exhibits"). Pitre attempts to assign as error the trial court's purported exclusion of two articles included in Pitre's Brief Exhibits. (Pitre Exs. 2 & 3). These two articles ran in The Vicksburg Post prior to trial and addressed a gasline rupture in the Hamilton Heights neighborhood, which Pitre describes as being in "Vicksburg-Warren County, Mississippi." (Pitre Brief at 35).

Pitre argues on cross-appeal the trial court erred in failing to allow her to present these articles to the jury and admit them into evidence. (Pitre Brief at 35). Prior to trial, the trial court, upon sound grounds, sustained Gulf South's motion in limine to exclude "evidence

[8] Even though the Coleman Court was specifically addressing § 11-27-7, and not § 11-27-15, the same logic applies.

relating to . . . injuries, fatalities, or property damage resulting from pipeline accidents" in the United States or world, unrelated to the specific property at issue here. (Tr. 4-14). At no time during that hearing, however, did Pitre address or call to the trial court's attention the two articles she now addresses on cross-appeal (Pitre Exs. 2 & 3), nor did she make an offer of proof at trial as to these two articles. As such, Pitre preserved no grounds for error with respect to these two articles, leaving this Court with no basis for appellate review.

In particular, as Pitre's own counsel acknowledged (in proffering other evidence during trial): "[T]here's two ways to make a proffer. . . [o]ne would be through excluding the jury and letting Ms. Pitre testify to it. The other way I could simply state, on the record, what we would expect to prove." (Tr. 404). As to Exhibits 2 and 3, however, Pitre did neither. Having failed to proffer these two articles, Pitre did not preserve as error the trial court's purported failure to admit them as evidence. See Miss. R. Evid. 103(a)(2) ("Error may not be predicated upon a ruling . . . which excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer [of proof]. . . ."). Because Pitre did not first allow the trial judge to determine the admissibility of the evidence, this Court's precedent precludes Pitre from now putting the trial court in error on appeal. Brown v. State, 338 So. 2d 1008, 1009-10 (Miss. 1976) (without proffer, party "cannot put the trial court in error" for refusing to admit testimony); see King v. State, 374 So. 2d 808, 812 (Miss. 1979).

C. This Court Should Strike the Newspaper Articles Included as Pitre's "Brief Exhibits."

Pitre's Brief Exhibits also include seven articles that ran post trial. (Pitre Exs. 1, 4-9). For the reasons identified below and in Gulf South's separate motion to strike, these articles should be disregarded by this Court.

Just as to Exhibits 2 and 3, in addition to failing to offer them into evidence at trial, Pitre never attempted, in any way, to make them a part of the appeal record pursuant to Miss. R. App.

P. 10. For this same reason, the seven other newspaper articles (Pitre Exs. 1, 4-9) included as Pitre's Brief Exhibits, should likewise be ignored. Even Pitre acknowledges that "[a]dmittedly, these articles are post-trial and were not seen [by] the jury." (Pitre Brief at 35). Just as with Exhibits 2 and 3, Pitre never attempted to make Exhibits 1 and 4 through 9 a part of the record on appeal pursuant to Miss. R. App. P. 10.

As this Court recently reiterated: "We cannot consider evidence that is not in the record." Pratt v. Sessums, --- So. 2d ----, 2008 WL 2139543, at *2 (Miss. May 22, 2008), citing Shelton v. Kindred, 279 So. 2d 642, 644 (Miss. 1973). As the party seeking reversal on cross-appeal based on these articles, it was Pitre's "duty to 'see to it that the record contained all data essential to an understanding and presentation of matters relied upon for reversal on appeal.'" Id. Pitre failed to meet this duty, and all nine Brief Exhibits of the Appellee should be disregarded.

D. The Trial Court Was Correct in Excluding all References to the "Safety" of Natural Gas Pipelines.

Pitre argues that the trial court erred in granting Gulf South's motion in limine to exclude references to the safety of pipelines. (Pitre Brief at 27-33). Specifically, before trial Gulf South moved to prevent evidence at trial regarding blast zones of a 36" to 42" pipeline, as well as evidence of injuries, fatalities, and property damages, resulting from pipeline accidents in the United States and in other parts of the world, which the trial court rightfully granted. (R. at 54-56; Tr. 4-14). Gulf South also objected to a brochure Pitre's counsel attempted to introduce into evidence during the direct-examination of Pitre, which the trial court then properly excluded. (Tr. 400-05).

The only issue to be determined at an eminent domain trial is the fair-market value of the property to be condemned; no evidence of pipeline accidents or fear arising therefrom can be admissible unless it is demonstrated, through expert testimony, to have an impact on market value. Ford v. Destin Pipeline Co., 809 So. 2d 573, 579 (Miss. 2000). Although Pitre claimed,

as discussed above, that the pipeline would diminish the value of the remainder of the property, there was never any attempt to prove through her expert that the "safety" of the pipeline would impact the market value of the land. Indeed, as discussed above, Pitre, other than her expert's "opinion," never offered **any** specific evidence that the fair-market value of the land would be affected in any way.

Furthermore, such evidence, if admitted, would have contravened the relevance requirements of Rules 401 and 403 of the Mississippi Rules of Evidence because it is irrelevant with absolutely no probative value. There was also a very real danger of unfair prejudice, as well as the very real potential for confusion of the issues and misleading the jury through stating that all pipelines were unsafe. Under the Mississippi Rules of Evidence,

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Miss. R. Evid. 401. Furthermore, evidence is irrelevant if it is "of collateral or other facts that are incapable of affording any reasonable presumption or inference as to a principal fact or matter in dispute." 29 Am. Jur. 2d Evidence § 308 (Supp. 2007). The well established policy behind the exclusion of irrelevant evidence is to avoid drawing the jury's attention away from the issues that it has been called to resolve. None of the facts that are of consequence to the determination of this action can be made more or less probable by unnecessary references to natural gas pipelines' safety. In addition, Miss. R. Evid. 403 is applicable here:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue waste, waste of time, or needless presentation of cumulative evidence.

Miss. R. Evid. 403. In addition to the lack of relevance, the trial court properly excluded any such unacceptable references because its probative value was substantially outweighed by the

danger of unfair prejudice, confusion of the issues, and misleading the jury, which included the Gulf South brochure. (Tr. 4-14 & 400-04).

E. Pitre Did Not Ask for Any Relief in Her Cross-Appeal.

In her cross-appeal, Pitre did not request any relief. Regarding the motion to dismiss, if Pitre means for this Court to require Gulf South to dig up its entire pipeline, she should state so along with any authority she has for such an oppressive and overly burdensome remedy.

As to the other issues, even if the trial court erred with respect to the issues addressed, it could only be harmless error since the jury awarded the entire amount sought.

CONCLUSION

For the foregoing reasons, Gulf South respectfully requests this Court to reverse the jury verdict and decision of the trial court denying Gulf South's Motion for Judgment Notwithstanding the Verdict and direct the trial court to enter a judgment that $38,250 be paid to the defendant as full and complete compensation for the taking of the pipeline easement. Gulf South further requests that the Court dismiss Pitre's Cross-Appeal.

THIS 14th day of August 2008.

Respectfully submitted,

GULF SOUTH PIPELINE, LP

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CERTIFICATE OF SERVICE

I, Fred E. Bourn III, hereby certify I have this day caused a true and correct copy of the foregoing Reply/Rebuttal Brief of the Appellant/Cross-Appellee Gulf South Pipeline, LP, to be delivered by United States mail, postage prepaid, to the following:

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COUNTY COURT JUDGE,
SPECIAL COURT OF EMINENT DOMAIN

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SO CERTIFIED this 14th day of August 2008.

Fred E. Bourn III
FRED E. BOURN III

CERTIFICATE OF FILING

I, Fred E. Bourn III, certify that I have had hand-delivered the original and three copies of the Brief of Appellant Gulf South Pipeline, LP, and an electronic diskette containing same on August 14, 2008, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

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