IN THE SUPREME COURT OF MISSISSIPPI

GULFSOUTH PIPELINE COMPANY, LP	APPELLANT
VS.	CAUSE NO. 2007-CA-01308
BLANCHE MARIE DOWNEY PITRE	APPELLEE

BRIEF OF APPELLEE

FROM THE WARREN COUNTY COURT OF EMINENT DOMAIN

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following have an interest in this action. These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal:

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Respectfully submitted,

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STATEMENT OF ISSUES ON CROSS APPEAL

1. Trial court erred in it's ruling of April 24, 2007, holding that because Defendant did not file her Motion to Dismiss within five (5) days prior to trial that pursuant to §11-27-15 Miss Code Ann. (1972) Defendant had waived her right to do so.

2. The Court erred in it's Order of April 24, 2007, where it ruled that there was no issue before the Court except as to the value of the property.

3. The Court erred in it's Order of April 24, 2007, granting Gulfsouth the right of entry.

4. The Court erred in its evidentiary rulings at trial prohibiting Defendant from introducing evidence of fire, leaks and explosions in natural gas pipeline as same relate to and effect the value of real property.

SUMMARY OF THE ARGUMENT

The majority of Appellant's case is premised upon the trial court erring in allowing the trial testimony of James C. Hamilton, Defendant's expert witness.

However, a trial court's evidentiary findings may only be reversed when there is a demonstrable abuse of the trial court's desecration in the admission or exclusion of evidence and there was no error by the trial court in allowing the testimony of James C. Hamilton.

Appellant has also attempted to impermissibly shift the burden of proof from Appellant to the Appellee land-owner in this case and while the burden of going forward with evidence may shift, the burden of proof in eminent domain cases never shifts to the land owner but remains at all times upon the party seeking condemnation.

Gulfsouth also erroneously argues to this Court that it "established" the value of the subject property but this argument ignores the fact that the testimony of two experts found qualified by the Court was before the jury. Appellant's expert did not "establish" the value of the land any more than did Appellee's expert and it was up to the jury to decide what was the "established" value of the condemned land.

James C. Hamilton as the Appellee land owner's witness was far more qualified to render and give expert opinion testimony than the one for the pipeline company and neither expert presented any evidence of after the fact "comparables" with pipelines across them. The pipeline's argument that it "established" the value of the subject property is totally without merit.

Perhaps most crucial to this case is that Gulfsouth has waived its right to complain of any alleged error by the trial court allowing the expert witness testimony of James C. Hamilton. Gulfsouth did not make any contemporaneous objection to same at trial. While Gulfsouth did object

to Hamilton's testimony at the interrogatory stage of the lawsuit and again after Hamilton's deposition was taken, when the court at trial stated that it would take Hamilton's testimony and "see how it went" Gulfsouth failed to make any contemporaneous objection to Hamilton's testimony and clearly waived any objection to same or any right to raise same on appeal.

The land-owner Appellee's expert, Hamilton, testified at trial that he had testified in forty (40) to fifty (50) eminent domain cases, that his testimony was a product of reliable principles and methods based upon his eminent qualifications in the field of real estate appraisal, his voluminous testimony before courts of eminent domain around the State of Mississippi and that his testimony was the product of reliable principles and methods. Hamilton testified that the value of the land without any buildings upon it was $5,000.00 per acre to which he added the value of the Pitre home and Pitre workshop and rendered his opinion that $175,000.00 was just compensation to Marie Pitre. There was no error in the lower court allowing such testimony.

Further, Hamilton's testimony and opinion is backed up by the principles set out in "Appraisal of Real Estate" published by the Appraisal Institute and quoted with approval in Potters II v. State Highway Commission, 608 So. 2d 1227 (Miss. 1992) and Adcock v. Mississippi Transportation Commission, 2008-WL-732795 (Miss. 2008)

The aforesaid treatise confirms that the current value of property is not based on its historical prices but rather the value is based on a market participant's perceptions of the future benefits of acquisition and that environmental considerations affect such value, which considerations include size, type, density as well as topicgraphical features, open space, nuisances and hazards emanating from nearby facilities as well as odor, smoke, dust and noise from commercial enterprises and that man made conditions may involve the presence of underground storage tanks and the like which can

reduce the value of a property to only a fraction of its potential value and that expert witnesses can not assume that green real properties that appear clean are actually free of environmental liabilities such as easements, rights-of-way, and public restrictions which affect property value. The testimony of James C. Hamilton reflects that he took just such considerations in to account in rendering his opinion as to the diminished value of the subject property and the lower court did not commit error in allowing the jury to hear the testimony of James C. Hamilton.

On cross appeal Mrs. Pitre contends that the trial court committed error as a matter of law when it ruled on April 24, 2007, that because Mrs. Pitre did not file her Motion to Dismiss pursuant to § 11-27-15 (Miss. Code Ann.) within five days before the then pending trial date that she had waived her right to do so and also erred in that same order by ruling that the only issue before the Court was the value of the taking of the subject property and then granting Gulfsouth the right of immediate entry on April 24, 2007. Mrs. Pitre's Motion to Dismiss was filed well prior to the eventual and actual trial date of June 13, 2007.

Finally, the lower court erred in its evidentiary ruling preventing Mrs. Pitre from introducing evidence before the jury of fires, leaks and explosions from pipelines as same obviously affect the value of property through which they pass and in particular prevented Mrs. Pitre from introducing evidence of a recent natural gas pipeline leak which had caused the evacuation of several subdivisions in the Vicksburg Warren County area just months prior to trial and prevented her from introducing at trial a brochure by Gulfsouth as these matters obviously affected the desirability, marketability and value of property through which a pipeline passes.

ARGUMENT

STANDARD REVIEW

Simply stated the standard of review in eminent domain cases regarding the admission or suppression of evidence is that of an abuse of discretion. Martin v. Mississippi Transportation Commission, 953 So. 2d 1163 (Miss. Court App. 2007). As stated by the Martin court:

> "The standard of review for the admission of suppression of evidence is abuse of desecration. Mississippi Transportation Commission v. McLemore, 863 So. 2d 31 (Miss. 2003) (Citing Haggerty v. Foster, 838 So. 2d 948, 958 (Miss. 2002)). Further the decision of the trial court must stand "unless we conclude that the desecration was arbitrary and clearly erroneous amounting to an abuse of desecration." McLemore 863 So. 2d at 34 (Citing, Pucket v. State, 437 So. 2d 322, 342 (Miss 1999)). Therefore, the Martins in Martin Outdoor have a heavy burden to over come." 953 So. 2d at Page 1166

Just as did Martin and Martin Outdoor in Martin v. Mississippi Transportation Commission, supra, Gulfsouth Pipeline Company, LP has a heavy burden to overcome in this case.

And, while Gulfsouth erroneously represents to this Court that the burden of proof in this case shifted to Marie Pitre the burden of proof never shifts as explained by the Martin court:

> "The burden of proof in an eminent domain case is unique, because the government is depriving the citizen of his or her property. Sarphie v. Mississippi State Highway Commission, 275 So. 2d 381, 383 (Miss. 1973). Therefore, the State has the "non-delegable" burden to establish the prima facie case of the value of the property taken. Id. If the condemner fails to establish the prima facie case, a dismissal of the proceedings would be required. Mississippi State Highway Commission v. Fisher, 249 Miss. 198, 201-202, 161 So. 2d 780, 781 (1964). The Supreme Court explained that "the reason for placing the burden on the condemner is that if it offers no evidence of the value of the property taken there is no basis for awarding any damages and there would be no compliance with §17, Mississippi Constitution." Id. 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 a higher valuation. Ellis v. Mississippi State Highway Commission, 487 So. 2d 1339, 1342 (Miss. 1986)." 953 So. 2d at Page 1166

And, the heavy burden on Gulfsouth as described by the Martin court requires that it

demonstrate exactly how the trial court abuses its discretion in allowing the land owner's expert witness testimony in this case, or as stated by the Court in Dobbins v. Vann, 2006-CA-02104-COA (Miss. Ct. App. 2008)

> "Reversal of a trial court's evidentiary findings may only occur when there is demonstrable abuse of the trial court's discretion. Farris v. State, 764 So. 2d 411, 433 (Miss. 2000) (Citing Johnston v. State, 567 So. 2d 237, 238 (Miss 1990))

Gulfsouth cannot overcome its "heavy burden" by showing a "demonstrable abuse of the trial court's discretion."

GULFSOUTH DID NOT CONCLUSIVELY "ESTABLISH" THE VALUE OF THE SUBJECT PROPERTY

Notwithstanding Gulfsouth's repeated claim that it "established" the value of the land Gulfsouth did not conclusively "establish" the value of the subject property (although it apparently believes that repeating this phrase often enough makes it so) as Gulfsouth conveniently omits several factors which belie such erroneous claim.

First, Pitre's expert, James Hamilton was the far more qualified of the two (2) experts that testified to the jury regarding value, holding higher designations and more experience than that of Gulfsouth's expert, Brent Johnston.

Mrs. Pitre's expert, Mr. Hamilton, in addition to holding a general license (GA) from the State of Mississippi also holds a MAI (Member of Appraisal Institute) certification. (Vol. 7, Pg. 424-425) Mr. Johnston holds only a GA designation.

Mr. Hamilton is licensed as a MAI in the States of Tennessee, Louisiana, and Mississippi and is a member of the Appraisal Institute. (Vol. 7, Pg 425-427)

An MAI designation takes a lot longer to achieve than Mr. Johnston's GA designation and

is harder to get. (Vol. 7, Pg. 427) Mr. Hamilton had been President of the Warren County Board of Realtors several times and had previously been the President of State Home Builders Association. (Vol. 7, Pg. 427-428) In addition to being accepted as an expert in the courts of Mississippi he has also been accepted as an expert in appraisal before the courts of Louisiana and Tennessee. (Vol. 7, Pg. 428) He has testified in some forty (40) to fifty (50) eminent domain cases and had previously been accepted as an expert in the field of appraisal by the Court of Eminent Domain of Warren County. (Vol. 7, Pg. 428-429).

In contrast Brent Johnston, Gulfsouth's expert appraiser, does not even maintain an office but instead works out of his home. (Vol. 7, Pg. 337) And although he testified that at one point he had "began" studying to become an MAI he never did so and last worked on his MAI in 1970. He had done nothing towards becoming an MAI between the years of 1970 and 2007. (Vol. 7, Pg. 338)

Obviously it was a factor for the jury to decide which of the two experts, Mr. Hamilton or Mr. Johnston, they believed and to whose testimony they gave the more weight.

While contending that the testimony of Brent Johnston was the only evidence which "established" the value of the property Gulfsouth omits that its expert sat and testified to a disbelieving jury that he gave zero (-0-) dollars damage to the remainder of the Pitre property after a forty-two inch (42") eight hundred pound per square inch (800 psi) pipeline dissected the Pitre property. (Vol. 7, Pg 360) This, of course, was in direct contrast to the testimony of James Hamilton.

The jury also heard Brent Johnston testify that he did not bother to discuss his fee up front with Gulfsouth when Gulfsouth was hiring him and that instead Gulfsouth gave him a "blank check" when it came to his fee. (Vol. 7, Pg. 340-341) This jury heard Mr. Johnston state that he did not submit a competitive bid to get the appraisal job from Gulfsouth (Vol. 7, Pg. 346) and also heard Mr.

Johnston admit that the Pitres had done extensive erosion control on the subject property and that the pipeline would go right through these improvements. (Vol. 7, Pg. 346)

The jury heard Johnston testify that he accepted the value of the Pitre house and shop assigned by James Hamilton (Vol. 7, Pg. 360) but then incredibly heard Mr. Johnston admit that he himself did not do a full appraisal of the Pitre property. (Vol. 7, Pg. 346)

Although Johnston testified that he did in fact take safety factors into account in reaching his evaluation (Vol. 7, Pg. 361-362) the jury did not hear Johnston testify that he knew of no danger at all that existed from a forty-two inch (42") eight hundred pound per square inch (800 psi) pressurized gas pipeline going through property. (Vol. 7, Pg. 365)

When it came to his opinions regarding safety factors Johnston could not cite to any authority other than his own personal opinion. (Vol. 7, Pgs. 367-369)

The jury did hear Mr. Johnston's testimony when he testified that he awarded zero (-0-) dollars damages for severance (ie: splitting the Pitre property into two parcels) (Vol. 7, Pg. 372) and the jury heard that the Pitres would have to get Gulfsouth's permission to build a road over the pipeline to access the north (severed) part of their property. (Vol. 7, Pg. 372-376) The jury also heard Mr. Johnston forget about the amount of acreage the Pitres' owned that would be north of the proposed pipeline. (Vol. 7, Pg. 372-376) The jury also heard Mr. Johnston state that he did not offer any value for the loss of timber as in his personal opinion it was "insignificant." (Vol. 7, Pg 371) In short, Mr. Johnston had a credibility problem.

Gulfsouth complains that James Hamilton had no "comparables" which had pipelines passing through them but fails to mention neither did Brent Johnston.

While Hamilton stated that he would have liked to have some comparables with pipelines

through them he was unable to find same. (Vol. 8, Pg. 461)

Brent Johnston stated to the jury that he did not have to look "very hard for comparables" as he had "a lot in Warren County." (Vol. 7, Pg. 349) but for some reason he did not have any with pipelines through them.

Notwithstanding this testimony Brent Johnston did not produce evidence of a single comparable having a large pressurized gas transmission line through it. (Vol. 6, Pgs. 237-238) In other words, neither James Hamilton nor Brent Johnston produced any comparables to the jury regarding property having a gas transmission pipeline through the property. Their testimony stands therefore equal with regard to such comparables. Nevertheless, Gulfsouth contends that Johnston's testimony "established" the value of the taken Pitre property.

With trial set to begin on June 13, 2007, Gulfsouth on June 8, 2007, tried to do an end run regarding comparables. On June 8, a Friday, Gulfsouth forwarded alleged comparables, supposedly of properties with pipelines through them, which had not been produced by Mr. Johnson at his earlier deposition on June 4th. The interrogatory and production discovery previously produced by Gulfsouth did not have such comparables. The alleged information forwarded on Friday, June 8, 2007, before trial set to commence on Wednesday, June 13, 2007, was not received by counsel for Marie Pitre until June 11, 2007. (Vol. 6, Pgs. 243-244)

Mrs. Pitre properly and promptly moved to exclude such last minute, and alleged, evidence of comparables which Johnston admittedly had not relied on in reaching his values. With the purported last minute comparables not being received by Mrs. Pitre's counsel on June 11, 2007, two days before trial, there was no way to verify or contradict the veracity of such purported and last minute comparables. The trial court correctly excluded same from evidence as a discovery violation.

(Vol. 6, Pgs. 239, 262, 263, 264)

Thus, while at the same time Gulfsouth complains that the value opinion of James Hamilton did not have any proposed comparables (because there was no pipelines running through Mr. Hamilton's comparables) this is exactly the same situation with Brent Johnston, Gulfsouth's expert.

And even though Mr. Johnston did accept Mr. Hamilton's values assigned to the Pitre home and Pitre shop (Vol. 7, Pg. 360) he said there was absolutely zero (-0-) damage to the remainder of the Pitre property (Vol. 7, Pg. 360) instead using a simple "per acre" method of valuing the property.

Mr. Johnston stated that he considered the Pitre property as one hundred fifteen (115) acres and assigned at $6,000.00 an acre value of $690,000.00 (Vol. 7, Pg. 325). In other words he calculated nothing more than by multiplying $6,0000.00 an acre times 115 acres. (V0l. 7, Pg 326)

Although Johnston accepted Hamilton's value of $180,000.00 for the house and $85,000.00 for the shop/barn he simply used the value of the raw acreage in determining the value of the Pitre property, including improvements. (Vol. 7, Pg. 626).

Brent Johnston considered the size of the permanent easement (5.59 acres) and the temporary easement work area (4.51 acres) and applied the $6,000.00 per acre figure to reach his evaluation of $33,450.00. (Vol. 7, Pg. 327)

He reached his opinion as total just compensation to Mrs. Pitre ($38,250.00) as being the difference between his opinion of the value of the Pitre property before the pipeline of $955,000.00 and his opinion of the value after the pipeline of $916,750.00 (Vol. 7, Pg. 336)

Obviously this methodology of Gulfsouth's expert flies in the face of the Court's ruling in Oughton v. Gaddis, 683 So. 2d 390 (Miss. 1996) where the court ruled:

"Generally the market value of the particular part of a tract expropriated is

determined by the actual market value of the portioned taken, and not by its average per acre or square-foot value as a pro rata portion of the parent tract. State Through Department of Highways v. LeDoux, 184 So. 2d 604, 610 (La. Ct. App. 1966)" 683 So. 2d at Page 395.

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 but same was nevertheless error. Harmless error as it turned out, but nevertheless error.

In contrast to Mr. Johnston assigning a zero (-0-) diminished value to the remaining property Hamilton testified that in his professional opinion the value of the Pitre home and the value of the Pitre shop/barn had been reduced by the pipeline passing through the Pitre land (Vol. 7, Pg. 450)

While Gulfsouth on appeal squabbles much, as it did at trial, regarding how Hamilton reached his opinion the lower court correctly recognized that Brent Johnston had reached his opinion in exactly the same manner as Hamilton had reached his, the only difference being they reached different conclusions. (Vol. 6, Pgs 236-252)

All this is to say that Gulfsouth did not conclusively "establish" the value of the damage to the Pitre property as the court considered testimony of two (2) expert witnesses exercised its discretion and the jury, understandably, totally rejected the testimony for Gulfsouth.

GULFSOUTH HAS WAIVED ANY RIGHT TO COMPLAIN OF ANY ALLEGED ERROR

Once Marie Pitre had filed her Responses to Gulfsouth's interrogatories and identified James C. Hamilton as her expert witness and filed her expert witness responses, Gulfsouth (on May 24, 2007) filed its Motion to Prevent or Limit the Testimony of James C. Hamilton. At that time

the only thing existent was the Defendant's response to Plaintiff's expert witness interrogatories.

As a result of Gulfsouth's May 24, 2007, motion (Vol. 2, Page 162) objecting to the interrogatory responses as they related to the testimony of James C. Hamilton, the trial court allowed Gulfsouth to take the discovery deposition of James C. Hamilton which was taken on June 4, 2007.

On June 8, 2007, Gulfsouth filed yet another motion again asking the trial court to limit or exclude Hamilton's testimony based on the questions Gulfsouth chose to ask Hamilton during his deposition. (Vol. 2, Pg. 236)

When the actual trial began on June 13, 2007, the Court took up the pre-testimony objections of the parties including Gulfsouth's objections to Hamilton's anticipated testimony. At that time the Court stated "**Let's let Hamilton testify and see what he says and then I will make a ruling on whether the jury should hear it**." (Vol. 5, Pgs. 21-26)

In response to the Court's decision to withhold ruling, when Hamilton actually testified before the jury (Vol. 7, Pg. 424) Gulfsouth made only two objections to Hamilton's testimony.

Gulfsouth's only two trial objections to Hamilton's testimony and appraisal are found in Volume 8 at Page 451 where Gulfsouth stated its two objections. (Vol. 8, Pg. 451)

Gulfsouth's first objection at trial was that a cover letter attached to Hamilton's appraisal was not a part of the appraisal itself. Its second objection to Hamilton's trial testimony was that Hamilton's appraisal included a comparable number three (which the court subsequently did not allow because it occurred after suit was filed). (Vol. 7, Pgs. 437, 438, and 445)

Once the Court had responded to Gulfsouth's only stated objections to the trial testimony of Hamilton the Court ruled that the cover letter to which Gulfsouth had objected would be taken

out of Hamilton's appraisal and that comparable number three (3) in Hamilton's appraisal would be stricken. (Vol. 8, Pgs. 451, and 454)

Once these two objections were addressed the Court then inquired of Gulfsouth if there were any other objections to which Gulfsouth replied, "**No, Your Honor**." (Vol. 8, Pg. 454)

Gulfsouth never made any other objections to Hamilton's testimony at the trial of this matter. Gulfsouth has waived any and all other objections to Hamilton's testimony.

In Cole v. State, 525 So. 2d 365 (Miss. 1987) a situation occurred where defense counsel objected to three instances of alleged prosecutorial misconduct. However, after making such objections counsel failed to obtain a ruling from the trial court regarding same. Holding that the objectionable three instances had been waived the Supreme Court stated:

> "Defense counsel did object to three (3) instances of alleged prosecutorial misconduct, but on each of the three (3) points, he failed to obtain a ruling from the trial court. When the district attorney told jurors, during voir dire, that they should not be influenced by sympathy, defense counsel objected, but no ruling on the objection appears in the record. Similarly, when defense counsel, during voir dire, told potential jurors they could consider mercy in deciding the case, the district attorney objected. Instead of ruling on the objection the trial court once again gave the rather cryptic instruction, "Move on." Finally, when the district attorney reminded the jurors during closing arguments that they had promised him that they would not "look for an excuse," defense counsel objected, but did not obtain a ruling from the trial court. Because the record includes no ruling by the trial court on any of these objections, they are waived. Hemmingway v. State, 483 So. 2d 1335 (Miss. 1986), Cummings v. State, 465 So. 2d 993 (Miss. 1985)." 525 So. 2d at Page 369.

Before trial Gulfsouth had made objections to Hamilton's interrogatory responses and Hamilton's deposition testimony. However, at trial when the Court took up pre-testimony objections, including Gulfsouth's anticipated objections to Hamilton's trial testimony, the Court stated, "**Let's let Hamilton testify and see what he says and then I will make a ruling on whether the jury should hear it**." (Vol. 5, Pg. 26)

Once Hamilton began his trial testimony the only objections brought up by Gulfsouth were to a cover page included in the appraisal (which was stricken) and a comparable number three (which was also stricken), the Court satisfying all of Gulfsouth's stated objections. Any other objections not made to the trial court at the time of trial are waived and Gulfsouth can not now raise same on appeal.

In Ballenger v. State, 667 So. 2d 1242 (Miss. 1995) the Court continued to apply this waiver rule where it observed:

> "Ballenger made no contemporaneous objection to having Johnson moved to the end of the selection list. Since no objection was made the issue was not properly preserved for appeal. Cole. V. State, 525 So. 2d 365, 369 (Miss. 1987); Irving v. State, 498 So. 2d 305 (Miss. 1986); Cannaday v. State, 455 So. 2d 713, 718-719 (Miss. 1984)." 667 So. 2d at Page 1251

After the trial court had responded to, and sustained, the only two objections made at trial by Gulfsouth to Hamilton's testimony the Court inquired if there are any other objections to which Gulfsouth replied, "No, Your Honor." (Vol. 8, Pg. 454) Since no contemporaneous objection was made any other objections are not properly preserved for appeal.

Continuing this well settled and unbroken line of authority the Court in Lang v. State, 931 So. 2d 689 (Miss. App. 2006) stated:

> "There is no objection on the records to the admissibility of the video tape. Likewise, there was no objection on the record before the video was played for the jury. It is well-settled law that the failure to make a contemporaneous objection waives the right of raising the issue on appeal. Ballenger v. State, 667 So. 2d 1242, 1259 (Miss. 1995)" 931 So. 2d at Page 691.

In the case of Washington v. Kelsey, 2008 WL 1795051 (Miss. Ct. App. 2008) decided by the Court of Appeals on April 22, 2008, in a situation almost identical to that of the instant matter, a situation arose where the only objection to the witnesses testimony was to deposition testimony,

which objection had been raised in the complaining party's motion in limine. Finding that the failure to make a contemporaneous objection at trial waived any alleged error the Court stated:

> "However, Pursuant to Rule 103, error may not be based on a ruling admitting evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . ." M.R.E. 103 (a)(1). In this regard, "it is well settled law that the failure to make a contemporaneous objection waives the right of raising the issue on appeal." Lang v .State, 931 So. 2d 689, 691 (Miss. Court App. 2006) (citing Ballenger v. State, 667 So. 2d 1242, 1259 (Miss. 1995)).
>
> In the instant case, Washington's only objection to Harmon's deposition testimony was based upon 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. Therefore, the issue of Harmon's unavailability was not before the trial court, and is not a proper issue for this Court to consider on appeal."

In the instant matter Gulfsouth objected to Defendant's response to expert witness interrogatories as they related to James C. Hamilton. It also objected to Hamilton's deposition testimony (keeping in mind that Gulfsouth chose which questions to ask and not to ask during Hamilton's deposition). But no point did Gulfsouth make any objection to Hamilton's trial testimony.

Gulfsouth made two (2) specific objections to Hamilton's trial testimony. Both objections were satisfied by the Court, after which the Court asked if Gulfsouth had any further objections to which Gulfsouth replied "No, Your Honor."

The trial court specifically advised both Gulfsouth and Marie Pitre, "Let's let Hamilton testify and see what he says and **then** I will make a ruling on whether the jury should hear it." (Vol. 5, Pg. 26) Gulfsouth never obtained a ruling on any objection which appears in the record and under any conceivable view of the facts, top to bottom, bottom to top, side to side, Gulfsouth has waived

any right to complain regarding the trial testimony of James C. Hamilton as Marie Pitre's expert witness.

WHAT JAMES HAMILTON ACTUALLY SAID

As seen above, and as recognized by the trial court, neither Hamilton nor Brent Johnston had any comparables with a pipeline actually passing through them and both based their opinions on their experience and comparables actually used, with Brent Johnston assigning a zero (-0-) diminishment to the remaining portion of the Pitre property and Hamilton determining that the value of the house and lot suffered in addition to the actual loss of acreage. When he was asked to compare the fields of engineering or physics involving exact measurements and things of that nature to the field of appraisal Hamilton testified, as only commons sense would dictate, that in the field of appraisal just about everything that is done is the opinion of the appraiser which is backed up with education and experience, and all the information that the appraiser can get, to arrive at their opinion but that when it comes down to it, it is the appraiser's opinion as to value. (Vol. 8, Pg. 456)

Hamilton testified that his opinion to the jury was based on sufficient facts and data and was a product of reliable principles and method which he had applied reliably to the facts of the case. (Vol.7, Pg. 430)

Hamilton testified (without objection) that his opinion to just compensation to the Pitres was $175,000.00 (Vol. 8, Pg. 455).

Hamilton testified that the effect of the pipeline on the value of the barn and house was that with the pipeline in place, that a conservative estimate was to reduce the value of the shop by thirty percent (30%) and the house by twenty percent (20%). (Vol. 8, Pg. 456)

Hamilton stated that these reductions were based upon sufficient facts and data and that his testimony was the product of reliable real estate appraisal principles and methods which he had applied faithfully to the facts of this case. (Vol. 8, Pgs. 456-457)

The trial court after reviewing M.R.E. 701 and 702 and the principles announced in Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993) allowed Hamilton's testimony before the jury.

As noted previously, "reversal of a trial court's evidentiary findings may only occur when there is demonstrable abuse of the trial court's discretion." Farris v. State, 754 So. 2d 411, 433 (Miss 2000) (Citing Johnston v. State, 567 So. 2d 237, 238 (Miss 1990)) See also Dobbins v. Vann, supra.

In Adcock v. Mississippi Transportation Commission, 2008 WL 732795 (Miss 2008), decided March 20, 2008, the Supreme Court stated:

> "Under the modified Daubert the trial court must first determine whether expert testimony is relevant and, second, whether the proper testimony is reliable. Daubert 509 U.S. at 589; McLemore, 863 So. 2nd at 38.

In an eminent domain case expert testimony is obviously relevant so the second inquiry is whether the proffered testimony is reliable. Addressing what evidence is relevant the Adcock court explained:

> "Relevant evidence is that which has "any tenancy 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." M.R.E. 401. Rule 401 favors admission if the evidence had any probative value at all."

Continuing, the Adcock court stated:

> "The party offering the expert testimony also must show that the expert's opinion is based upon scientific methods and procedures, not unsupported speculation. Id at 36

(citing Daubert, 509 U.S. at 590). Factors to consider **may** include "whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether . . . there is a high known or potential rate of error: whether there are standards controlling the technique's operation: and whether the theory or technique enjoys general acceptance" within the expert's particular field. McLemore, 863 So. 2d at 37 (citing Dalbert, 509 U.S. at 592-594)"

Bear in mind at this point that both experts, Johnston and Hamilton, testified ultimately that their opinions on value were based upon their personal opinions after considering comparables found to be such by the trial court, none of which had gas pipelines running through them. Gulfsouth believes that Johnston's opinion is valid while that of Hamilton is not.

The Adcock court noted that the term "comparable" properties does not mean identical properties stating:

"The comparable properties do not have to be identical in every respect. Howell v. State Highway Commission, 573 So. 2d 754, 757 (Miss 1990) (citing Miss. State Highway Commission v. Franklin County Timber Co., Inc., 488 So. 2d 782, 785 (Miss. 1986)). To require exact similarities would make it impossible to find a comparable tract of land for sale. Miss Transportation Commission v. Fires, 693 So. 2d 917, 923 (Miss. 1997) (citing Pearl River Valley Supply District v. Wood, 252 Miss 580, 172 So. 2d 196 (Miss 1965)).

A trial judge has wide discretion in allowing testimony of comparable sales, and this court encourages "liberal cross-examination to permit testing of the true utility of the comparable sales."

When challenged on his cross-examination why his comparables had no gas pipeline passing through them Hamilton testified that he looked for same (Vol. 8, Pg. 461) and when Johnston was deposed on June 4, 2007, none of Johnston's comparables had gas pipelines on them either. On Friday, June 8. 2007, Gulfsouth attempted to trot forth some alleged comparables located in or next to a subdivision, (the Pitre property is not subdivision property) but due to Gulfsouth's gross discovery violation the trial court correctly excluded this testimony. Both Johnston and Hamilton

used comparables which did not have gas pipelines going through them but in all other respects the comparables of Hamilton and the comparables of Johnston were practically identical. At no point did Johnston quarrel with Hamilton's comparables. (Vol. 7, Pg. 359)

In Adcock the court approved the testimony of the Mississippi Transportation Commissioner's appraiser, Tommy Madison, observing that Madison had explained that he adjusted the sales prices for the comparable properties because of distance and proximity to two highways, the court observing that such adjustment for dissimilarities are appropriate when applying the comparable sales method. (Citing the American Institute of Real Estate Appraisers, The Appraisal of Real Estate, 9th Edition 1987)

The Adcock court also noted with approval Madison's explanation for why he assessed no damages to the Adcock's property for the lost access to Highway 25 and the lost frontage based upon Madison's professional determination that the remaining access was reasonable or as stated by the court, "Madison stated that the Adcock's maintained reasonable access to and from their property from Highway 19 and that mere inconvenience was not a compensable damage." The court also noted that Madison taking into account for improvements and allocations to damages for the cost to cure fencing was appropriate holding:

> "We find that the trial court did not abuse its desecration in allowing the expert testimony of MTC's appraiser, Madison. Madison's testimony was both relevant and based upon established appraisal methods. The comparable properties Madison used were similarly situated to the Adcock's property, and his **estimates** were not based upon mere speculation. Furthermore, he was subjected to cross-examination to test the true utility of the comparable sales. See Howell, 573 So. 2d at 757 (citing Franklin County Timber Co., Inc., 488 So. 2d at 785)."

In this case Hamilton used comparables which the trial court found to be valid comparables (one comparable was thrown out at the objection of Gulfsouth because it occurred after the taking

of the Pitre property) and Hamilton then applied and made adjustments (ie: estimates in the words of the Adcock court) in reaching his opinion as to the diminished value of the Pitre property.

Brent Johnston informed the jury that a forty-two inch (42") eight hundred pound (800 psi) gas transmission pipeline passing through the middle of the Pitre property and in close proximity of their residence would have no effect at all on the value of the remaining Pitre property. Hamilton testified to the opposite.

Citing Mississippi Highway Commission v. Havard, 508 So. 2d 1099 (Miss, 1987) the Mississippi Supreme Court in Trowbridge Partners, LP v. Mississippi Transportation Commission, 954 So. 2d 935 (Miss 2007) held:

> "The fair market value of the remainder of the property following the taking is a matter of common sense (sic) a product of the influence that numerous specifics respecting the taking may have on the market place. Accordingly, witness may testify concerning any specific quality, item, or change in the property or attributes so long as this is ultimately related to the value of the property remaining after the taking." 954 So. 2d at Page 940

The jury in this case was free to believe Johnston when he testified that the forty-two inch (42") eight hundred pounds per square inch (800 psi) pressurized gas pipeline would not have any effect at all on the remaining Pitre property or it was free to believe Hamilton when he testified that it did have a detrimental effect. The jury's decision on who it believed was not surprising.

As noted in Adcock, supra, the "Appraisal of Real Estate" published by the Appraisal Institute has been recognized as authoritative in numerous decisions of the Mississippi Supreme Court. As testified to by James Hamilton, many factors are utilized by appraisers in reaching their ultimate opinion as to value or, as set forth in "The Appraisal of Real Estate":

> "Both natural and man-made environmental forces influence real property values. Environmental forces that may be analyzed for real estate purposes include . . . toxic

> contaminates . . . barriers to future development . . . and the nature and desirability of the immediate area surrounding a property." The Appraisal of Real Estate Page 44

Obviously when Hamilton was testifying that the presence of a forty-two inch (42") eight hundred pound per square inch (800 psi) pressurized gas transmission pipeline would affect the desirability of the property he was taking into account a man-made environmental force.

The Appraisal of Real Estate also provides:

> "Environmental considerations consist of any natural or man-made features that are contained in or affect the neighborhood and its geographic location. Important environmental considerations include . . . topicgraphical features; open space; nuisances and hazards emanating from nearby facilities . . ." Appraisal Institute at Page 178-179

Obviously Hamilton's testimony takes into account, and Johnston's ignores, the hazard emanating from a forty-two inch eight hundred pound per square inch pressurized gas transmission pipeline.

The Appraisal Institute's authority also provides:

> "A neighborhood environmental characteristics can not be judged on an absolute scale; rather they must be compared to the characteristics of other, competing neighborhoods." Appraisal Institute at Page 179

Explaining the obvious, (stated another way, common sense) The Appraisal of Real Estate continues:

> "Man-made conditions may involve the presence of underground storage tanks . . . or other hazardous materials. The existence of one or more of these conditions can reduce the value of a property to only a fraction of its potential value." Appraisal of Real Estate at Page 181

To accept the testimony of Brent Johnston that the forty-two inch gas pipeline would have absolutely zero (-0-) effect on the value of the remaining Pitre property is to ignore both common sense and the authority set forth in "The Appraisal of Real Estate", supra. To accept the testimony

of Hamilton would be to apply common sense and to adopt the authority set forth in "The Appraisal of Real Estate", supra.

James Hamilton actually reached a lower price per acre value than did Brent Johnston ($5,000.00 verses $6,000.00) and using his comparables found valid by the trial court, his appraisal of the Pitre home and Pitre shop/barn, the value of which was accepted by Brent Johnston, stated that in his professional opinion the remaining value of the Pitre home and shop had been diminished by twenty and thirty percent respectively. Applying his many years of experience (which exceeded that of Johnston) and qualifications (which exceeded those of Johnston) Hamilton reached an opinion supported not only by not only common sense but one also recognized by accepted appraisal principles and determined that the remaining Pitre property had been diminished in the sum of $175,000.00. As stated above, this opinion was heard without objection by the jury. (Vol. 8, Pgs. 454, 455)

The lower court carefully considered the provisions of M.R.E. 701 and M.R.E. 702, carefully weighed the provisions of Daubert and McLemore, supra, heard the testimony of both Johnston and Hamilton and found that both were qualified and their opinions admissible under Daubert and McLemore. It certainly can not be said that there has been a "demonstrable abuse of the trial court's discretion" or that the lower court's decision to allow Hamilton's opinion (and Johnston's identically based opinion) "was arbitrary and clearly erroneous amounting to an abuse of discretion." McLemore, 863 So. 2d at Page 34.

As further stated by the court in Potters II v. State Highway Commission, 608 So. 2d 1227 (Miss 1992):

"When, as here, an expert witness opines that certain factors have to be considered

> in order to properly establish fair market value, we necessarily accord the expert substantial discretion. Attacks upon his foundational opinions often confuse admissibility with credibility." 608 So. 2d at 1234

In this case Gulfsouth has mistaken and confused admissibility with credibility and, to Gulfsouth's dissatisfaction, the jury found Mr. Hamilton to be more credible than Mr. Johnston but the lower court definitely did not abuse its discretion in allowing the expert witness testimony of James Hamilton.

In Trowbridge, supra, Trowbridge alleged that the trial court committed error by allowing the condemners expert to make "adjustments" to comparable sales in order to determine the value of the property before the taking, complaining that the expert did not make any adjustment to the comparable sales use to determine the value of the remaining property. Rejecting Trowbridge's arguments the Supreme Court, through Chief Justice Smith, stated:

> "Obviously, the extent to which the categories are narrowed is a matter of professional judgment and, within limits, experts may give their opinion regarding the appropriate level of specificity. (Emphasis added by the court)"
>
> * * *
>
> The trial court did not err in denying Trowbridge's motion to strike the testimony of Wells, the Commission's expert appraiser. Where the testimony of the expert appraisers is competent and relevant, the jury has the responsibility of considering the weight and credibility of their testimony. Hancock, 309 So. 2d at 870. Wells is a competent expert appraiser, and his testimony regarding a fair market value of the property was relevant to the issue of just compensation. The jury evaluated the weight and credibility of Well's testimony and returned a verdict in favor of Trowbridge in the amount of $1,180,941.00. This Court has a long standing history of not disturbing jury verdicts in eminent domain proceedings, especially when the jury has viewed the property being taken and the evidence in the record supports the jury's finding." 954 So. 2d at 943-944.

CROSS APPEAL

THE COURT ERRED IN ITS ORDER OF APRIL 24, 2007

Gulfsouth initiated this matter by filing its Complaint to Exercise Right of Eminent Domain on November 22, 2006 (Vol. 1, Pg. 5). On November 27, 2006, the Court of Eminent Domain issued its Fiat setting trial for March 13, 2007. (Vol. 1, Pg. 26) On February 5, 2007, Marie Pitre filed her Motion to Dismiss and Answer (Vol. 1, Pg. 29) and on that same date issued her Interrogatories and Request for Production to Gulfsouth. (Vol. 1, Pg. 32)

On February 21, 2007, Gulfsouth filed its Statement of Values (Vol. 1, Pg. 42) and on February 23, 2007, Marie Pitre filed her Motion for Continuance acknowledging that the matter was presently set for trial on March 13, 2007, advising that recently retained counsel for Marie Pitre had a previously existing conflict with the March 13, 2007, trial date and requesting that the March 13, 2007, trial date be continued (Vol. 1, Pg. 44).

On March 1, 2007, the trial court entered its Order of Continuance continuing the March 13, 2007, trial until such further date as might be set by the court. (Vol. 1, Pg. 46) On March 5, 2007, the trial court entered its Amended Fiat resetting the trial date for March 29, and 30, 2007. (Vol. 1, Pg. 47)

On March 19, 2007, Marie Pitre filed her Motion for Continuance stating that Defendant's expert witness, James Hamilton, had a previously existing conflict with the trial dates of March 29 and 30, 2007, and also stating that Gulfsouth's responses to discovery, which were due March 5, 2007, had not yet been received by Marie Pitre. (Vol. 1, Pg. 48)

On March 20, 2007, Marie Pitre filed Motion to Compel Gulfsouth to respond to her Interrogatories and Request for Production (served upon Gulfsouth on February 5, 2007) and representing that due to the time differential between the date Gulfsouth filed its unsigned Responses to Interrogatories on March 19, 2007, and also because Gulfsouth's Interrogatories and Request for

Production responses were non-responsive, that the matter should be continued. (Vol. 1, Pg. 62)

On March 27, 2007, the Court issued its Second Amended Fiat resetting the trial date for April 12 and 13, 2007, (Vol. 1, Pg. 93) and on April 4, 2007, Marie Pitre had to file her Second Motion to Compel and Motion for Continuance stating that Gulfsouth still did had not provided proper discovery responses and alleging that Gulfsouth still had not produced a copy of any comparable sales or comparable sales amounts as claimed by Gulfsouth. (Vol. 1, Pg. 94)

On April 10, 2007, Gulfsouth filed its Motion to Exclude Marie Pitre from introducing any evidence of value of the subject property (Vol. 1, Pg. 103) and Defendant filed her Statement of Values on April 10, 2007. (Vol. 1, Pg. 108)

On April 24, 2007, the Court held that under the provisions of §11-27-15 Miss. Code Ann (1972) that because Marie Pitre had not filed her Motion to Dismiss five (5) days prior to the "date fixed for hearing of the Complaint" that her motion to dismiss was waived and that the only issue to be tried at trial was the dollar amount of damages to be awarded to Marie Pitre.

The lower court erred in its Order of April 24, 2007, (Vol. 1, Pgs. 137-138) where it held that because Marie Pitre did not file her Motion to Dismiss under any of the three grounds listed in § 11-27-15, supra, with in five (5) days of the scheduled trial date of April 12, 2007, that she had waived her right to move to dismiss and also erred in holding that there remained no issue before the court except the value of the property.

§ 11-27-15, supra, provides that, "Any defendant may not less than five (5) days prior to the date fixed for the hearing of the complaint and in the same court where the complaint is pending, serve and file a motion to dismiss under the Mississippi Rules of Civil Procedure for failure to state a claim upon which relief may be granted" or on the grounds that "there is no public necessity for

the taking."

§11-27-15, supra, is obviously governed under the Mississippi Rules of Civil Procedure and Rule 12(b) of said Rules of Procedure provides:

> "defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."

Paragraphs 5, 9, and 12 of Gulfsouth's Complaint allege that there is a public need for the requested easement while Paragraphs 5, 9, and 12 of Marie Pitre's Answer deny that there is any need for the requested easement thus providing in a responsive pleading, the necessary objection and defense.

Also, § 11-27-15 uses the statutorily permissive term "may" and it is a basic tenant of statutory construction that the word "shall" is mandatory while the word "may" is discretionary. McNeil v. Hester, 753 So. 2d 1057 (Miss. 2000) Pannell v. Guess, 671 So. 2d 1310(Miss. 1996). The provisions of § 11-27-15, supra, are not mandatory as said section uses the permissive term "may" instead of the mandatory term "shall."

Further, "the date fixed for the hearing" does not refer to any of the many or various dates for which a trial may be scheduled, and then continued, but instead relates to the date trial is actually held. In this case trial was not actually held until June 13, 2007, and Marie Pitre's Motion to Dismiss was filed well prior to that date.

In Morley v. Jackson Redevelopment Authority, 632 So. 2d 1284 (Miss 1994) that court stated:

> "Although Mississippi Code and Section 11-27-7 does state that the owners will not be required to submit their statement of values within ten (10) days before trial, that does not mean that expert opinions and basis therefor are not discoverable." 632 So. 2d at 1291

The term "the date fixed for the hearing" as used in § 11-27-15, utilizes the same exact words as §11-27-7 and obviously refers to the actual date trial is held and not to any particular date trial might have previously been scheduled, but not held. Marie Pitre having filed her Motion to Dismiss well prior to the date trial began on June 13, 2007, same was timely filed and the trial court erred in holding her motion to dismiss waived and in holding that value was the only issue for trial.

THE COURT ERRED IN EXCLUDING TESTIMONY RELATING TO SAFETY FACTORS

(CROSS EXAMINATION OF BRENT JOHNSTON)

Gulfsouth's expert, Brent Johnston, testified that he did take safety factors into account in reaching his opinion. At trial Mr. Johnston first attempted to evade a question as to whether or not he took safety factors into account in reaching his opinion. (Vol. 7, Pg. 361) Upon being referred to his deposition taken on June 4, 2007, (starting on page 25 at line 21) he admitted to previously having testified that he did in fact take safety factors into account in reaching his opinion:

> Q: Well, read it to the jury Mr. Johnston.
> A: "Did you take any safety factors into account in reaching your opinion?"
> Q: What was your answer?
> A: "I did."
> Q: That is not what you told us a while ago. You said you're not an environmentalist.
> A: Well, I'm not. But I took the value in consideration in relation to safety.
> Q: All right. Now that we have established that you did take safety factors into consideration, what were those safety factors that you took into consideration? (Vol. 7, Pgs. 361-362)
>
> On objection by Gulfsouth the jury exited the courtroom. (Vol. 7, Pg. 362)
>
> Outside the presence of the jury Mr. Johnston testified:
>
> Q: Mr. Johnston, we just established at point blank when I asked you the question: Did you take any safety factors into account in making or reaching your opinion. The full extent of your answer was: "I did." Tell us what safety - - what were the safety factors you took into account?

A: **My <u>limited knowledge</u> is the fact that I know of no danger that exist from a pipeline of the property**. (Vol. 7, Pgs. 364-365)

Had the jury heard Johnston state that he had "limited knowledge" and that he knew of "no danger from a pipeline on the property" they may have laughed out loud instead of just not believing him.

This testimony continued:

Q: Alright. On June 4th, Mr. Johnston, when I asked you the question: "And what would those safety factors have been that you took into account?" Your answer was - - page 26 line 1 - - That to my knowledge I don't know but of one example that there has been in a pipeline that went bad in this whole area here that I am aware of. And pipelines tend to go straight up if something breaks rather than out." So you had a little bit different story - -

A: And that's all I know about them is that gas is lighter than air, and gas goes up. And that is all I know about it." (Vol. 7, Pg. 364)

The trial court then held: "If that is the point you are trying to make then, I think, it is proper for you to ask the first part. You've already impeached him. You can ask the first part. But when you start talking about explosion and stuff I am going to exclude that testimony. He can not talk about the fear factor and all of that. (Vol. 7, Pg. 365)

Continuing at (Vol. 7, Pg. 367) the Court stated:

By the Court: Alright.

Q: What were those safety factors? You told him you took the factors in - -

A: I took in consideration the safety factor in that I know of - -

By the Court: Wait a minute. You already said that. I am asking what the factors are. You said at that deposition under oath I took safety factors into consideration on my valuation. Mr. Sessums question is: List those factors. And your answer as I understood it a second ago was my experience.

By the witness: My experience - -

By the Court: Not what he said at the deposition. What he just said in court.

(Note: Here the court specifically recognized the difference between deposition and trial testimony.)

(Cont.) By the Witness: My experience in what appraisers are concerned with in the market.

By the Court: And that is exactly the opposite of what Hamilton is going to say my experience in 35 years. You see, what I am saying?

By Mr. Bourn: Yes, Your Honor.

By the Court: He ain't got no basis. He's just saying - - he is saying - - the only factor you took - - what factor did you take **other than your personal opinion**?

By the Witness: My personal opinion that's it. I mean that's not a - - that's not something factual.

By the Court: Now, you can ask him that and that's fine. I think that's based on my previous ruling because that's all Hamilton's going to do is say in my opinion the otherwise. But I don't want to hear anything about pipes exploding and whether they go straight up or straight out. That's beyond your expertise and that's getting into the fear factor. (Vol. 7, Pg. 367 - 369)

(Jury returns to courtroom Vol. 7, Pg. 369)

The lower court erred in excluding testimony or evidence of gas line leaks and/or explosions as they affect or relate to value of the real property which they cross.

Gulfsouth's own expert was explicit that he took safety factors into consideration in reaching his opinion as to value. He made it an issue.

In Ford v. Destin Pipeline Co., LLC., 809 So. 2d 573 (Miss. 2000) the landowner claimed that the presence of Destin's pipeline had an unavoidable effect on the remainder of the property owners land. Addressing such contention the Supreme Court by implication held that evidence of explosions and their affect on value are admissible, stating:

> "The Trust claims that the trial court committed reversible error by excluding certain evidence of alleged pipeline dangers which purportedly limit the use of the Trust's land outside the right-of-way. Prior to trial, Destin filed a motion in limine asking the court to deny the Trust the opportunity to introduce into evidence of pipeline explosions and accidents. The court granted the motion with one exception: "If there is competent testimony from a witness with a requisite experience as to comparable and purchases that demonstrate that the land value would be diminished by the presence of the pipeline, then that may be admissible." The court also cautioned

> Destin that if it introduced evidence of a good safety record or benefits to the remainder from the presence of the pipeline, the Trust would be allowed to introduce pipeline explosion evidence.
>
> The record shows that Destin never introduced such evidence. Nevertheless, even if Destin did "open the door"the Trust never proffered any pipeline explosion evidence. This Court has held that an eminent domain appellant must show that an alleged error in the trial court was prejudicial by proffer so that the appellate court can determine for itself whether the exclusion was actually harmful. Foster v. Mississippi State Highway Commission, 244 Miss 57, 140 So. 2d 267, 271 (1962).
>
> The Trust claims that the presence of Destin's pipeline had an "unavoidable effect" on the remainder of the Trust land and "imposes an immediate, non-speculative limitation on the development of the remainder." The Trust, however, did not support this claim under any evidence. The Trust real estate appraiser was permitted to testify concerning his opinion of damage to the remainder resulting from access limitations across the pipeline, and surely, if he had such an opinion he could have testified to any alleged damage which may have occurred to the remainder by the mere presence of the pipeline on the property." 809 So. 2d at Page 579

In this case Hamilton testified that the presence of the pipe's presence did damage the remainder of the Pitre property. (Vol. 7, Pg. 450)

And, Gulfsouth's expert, Johnston, was specific that while he did take safety factors into account in reaching his opinion that there had been absolutely no (ie: 0%) damage to the remainder of the Pitre property caused by the presence of the pipeline. The jury did not believe him.

Thus, Gulfsouth itself made safety an issue in this case as it affected value and it was error for the lower court to exclude evidence of pipeline explosions or other safety factors.

That it was error to refuse to allow cross examination of Johnston regarding explosions is found in the language of the court in State Highway Commission v. Havard, supra, where the court noted:

> "None of this means that witnesses may not be questioned regarding the specifics of the impact of the taking upon the value of the property. Indeed, the fair market value of the remainder of the property following the taking is as a matter of common sense

> a product of the influence that numerous specifics respecting the taking may have in the market place. Accordingly, witnesses may testify concerning any specific quality, item or change in the property or its attributes, so long as this is ultimately related to the value of the property remaining after the taking." 508 So. 2d at 1101-1102

Hamilton made it clear that the presence of the pipeline affected his opinion as to value. The lower court should have allowed the cross examination of Johnston regarding the specifics of the impact of the taking (ie: the danger posed by the pipeline) upon the value of the property.

(DIRECT EXAMINATION OF MARIE PITRE)

Not only did the trial court err in denying Mrs. Pitre the opportunity to cross examine Brent Johnston regarding the specifics of safety factors it also erred in preventing Mrs. Pitre from presenting direct evidence regarding safety factors by sustaining Gulfsouth's Motion in Limine filed March 20, 2007, (Vol. 1, Pg. 54) where Gulfsouth moved to exclude evidence of pipeline accidents and similar events.

At the beginning of trial on June 13, 2007, the Court took up said Motion in Limine (Vol. 5, Pg 3-12) ultimately sustaining said Motion in Limine. (Vol. 5, Pg. 12).

On June 13, 2007, Marie Pitre argued that safety factors and evidence of accidents and things of that nature should be allowed into evidence and specifically requested to be allowed to introduce into evidence a brochure sent to her by Gulfsouth giving specific warnings about matters relating to safety. (Vol. 1, Pg. 7)

Even though the Court sustained Gulfsouth's Motion in Limine before trial began Marie Pitre, unlike Gulfsouth, preserved her objection in the record because during her direct testimony the safety brochure forwarded to Mrs. Pitre by Gulfsouth was tendered to her for identification in anticipation of being offered into evidence. (Vol. 7, Pg 400)

When Gulfsouth objected to the introduction of this brochure into evidence Mrs. Pitre asked to be allowed to make her record and made her proffer regarding her anticipated testimony as related to the brochure. (Vol. 7, Pgs. 405-406)

This brochure was marked as D-2 for identification purposes only (Vol. 7, Pg 423). This brochure entitled "Pipeline Safety in Your Community" provides, inter alia;

"What to Do if you suspect a leak."

1. Immediately leave the area.
2. If possible turn off any equipment being used in or near the suspected leak. Abandon any equipment being used and move upwind from the suspected leak.
3. From a safe location call 911 or your local emergency response number and the pipeline company. Call collect, if needed, and give your name, phone number, description of the leak, and its location.
4. Warn others to stay away when possible.

"What NOT to do if you suspect a leak."

1. Do not touch, breath or make contact with leaking liquids or gas. Stay upwind if possible.
2. Do not light a match, start an engine, use a telephone, turn on or off any electrical switch such as a light, garage door opener, etc or do anything that may create static or spark.
3. Do not attempt to extinguish any pipeline fire that may start.
4. Do not drive into a leak or vapor cloud area. Automobile engines may ignite the vapors.
5. Do not attempt to operate the valves. (Exhibit D-2 for identification purposes; Vol. 7, Pg. 423)

Among other things this brochure sent to Marie Pitre advised her;

"Potential hazards of pipeline products."

"Besides liquid petroleum and natural gas, pipelines transport a variety of products for our everyday lives such as oxygen for hospitals. They may contain other types of gases, chemicals, hazards, hazardous liquids, refined products or crude oil, as well as nonflammable products. If a leak would occur on a pipeline some of these materials could cause environmental damage. Or the products may be highly flammable, or harmful if inhaled, cause eye or skin irritation and possible difficulty in breathing. Because of these potential hazards it is important to be able to recognize a pipeline leak." (Exhibit D-2 for identification)

Now does anyone seriously contend that these factor do not affect the value of the Pitre property?

Transmitted under separate cover as Exhibit "1" is a copy of an ad run directly by Gulfsouth in the Vicksburg Post, the local newspaper in Warren County, published on Wednesday, June 20, 2007, (coincidentally just after the Pitre trial was concluded.) advising the public "**If you suspect a gas leak on a Gulfsouth pipeline take these precautions**."

* Leave the area by foot

* Warn others to stay away

* Avoid flames or other sources of ignition

* Turn off and abandon equipment in the immediate area

Please call Gulfsouth immediately if you notice any of the following signs along its rights-of-way:

* Hissing or roaring that may be caused by escaping gas

*Unusual blowing of dust, dirt, grass, or leaves near the pipeline

* Dead plants or vegetation amid healthy ones

* Flames coming from the ground or from valves along the pipeline route."

Again, does anyone seriously contend that this information to the public does not affect the value of property through which such a pipeline passes?

Transmitted under separate cover as Exhibit "2" is copy of a front page article appearing in the Vicksburg Post on February 4, 2007, captioned "**Natural gas leak forces about 150 from homes**."

Transmitted under separate cover as Exhibit "3" is a front page article from the Vicksburg Post on February 5, 2007, captioned "**Shifting soil blamed for gas - line crevass**."

Transmitted under separate cover as Exhibit "4," as other examples of publicity regarding gas pipelines, is a copy of a front page article from the Clarion Ledger on November 2, 2007, "**Explosion Kills Two**."

Transmitted under separate cover as Exhibit "5," and again from the Vicksburg Post, the Warren County news paper, the headline from November 2, 2007, "**Investigators Seek Cause of Pipe Blast that Killed Two**."

Transmitted under separate cover as Exhibit "6," again from the Vicksburg Post, is a headline from November 29, 2007, (admittedly post trial) entitled "**Landowner questions 'gas blasts'**."

Transmitted under separate cover as Exhibit "7" is a headline from the December 15, 2007, front page of the Vicksburg Post entitled "**Blast on Interstate Near Delhi kills one, injures one**." (Delhi is past Vicksburg on I-20 West.)

Transmitted under separate cover as Exhibit "8" from the December 16, 2007, edition of the Vicksburg Post "**Probe Underway in Pipeline Blast**."

Transmitted under separate cover as Exhibit "9" from the December 19, 2007, front page

pf the Vicksburg Post "**Corroded Pipe Blamed in Fatal Delhi Explosion.**"

Admittedly these articles are post trial and were not seen to the jury but they emphasize what this Court was stating in Mississippi Highway Commission v. Havard and Trowbridge Partners, LP v. Mississippi Transportation Commission, supra, that:

> "The fair market value of the remainder of the property following a taking is a matter of common sense a product of the influence at numerous specifics respecting the taking may have on the market place." Trowbridge Partners, LP at Page 940

But for the trial court sustaining Gulfsouth's Motion in Limine and Gulfsouth's trial objections Marie Pitre would have been able to introduce into evidence the headlines from the February 4, 2007, and February 5, 2007, edition of the Vicksburg Post, regarding a natural gas pipeline leak forcing an evacuation of 150 homes in the immediate Vicksburg-Warren County area.

And, since Marie Pitre made her record on the Gulfsouth brochure, it was obvious error for the lower court to refuse said brochure to be allowed into evidence for consideration by the jury.

And, isn't it a matter of pure coincidence that Gulfsouth's ad and notice to the public about what to do, "if you suspect a gas leak on a Gulfsouth pipeline" was not run in the Vicksburg Post until June 20, 2007, the week after the Pitre trial had been concluded?

The lower court erred in refusing to allow Marie Pitre to cross examine Brent Johnston regarding safety factors, explosions and leaks and erred in refusing to allow the brochure mailed to Marie Pitre to be used in her direct examination as the exclusion of these safety factors, as well as the safety factors which the court did allow into evidence only serve to underline the testimony of James Hamilton that the pipeline does in fact have a detrimental effect on the value of the remaining Pitre property.

SUMMARY

Gulfsouth has waived any right to present as error the testimony of James Hamilton. There is no way around this. That should be the end of this case under long standing, clear and well established precedent of this court.

Even without waiver, which is uncontrovertible, the testimony of James Hamilton was carefully considered by the lower court under Rules 701and 702 of the Mississippi Rules of Evidence, and Daubert and McLemore and correctly found to be reliable.

James Hamilton had the same type of comparables as did Brent Johnston and Hamilton was the more qualified and experienced of the two appraisers.

Brent Johnston did not even do a full appraisal of the Pitre property and went so far as to accept the values Hamilton assigned to the Pitre home and barn/shop.

The problem with Brent Johnston's testimony is that his testimony was simply not believable under any view of the facts. The jury, to which no challenge was made by Gulfsouth, sat patiently and listened to Brent Johnston swear to them that there was absolutely no impact on the Pitre property caused by a forty-two inch (42") eight hundred pounds per square inch (800 psi) gas pipeline passing within several hundred feet of the front door of the Pitre property. They simply did not believe him.

In contrast, the jury heard James Hamilton testify that the existence of such a pipeline did in fact have an impact on the remainder of th Pitre property and quite properly, and understandably, believed Hamilton's testimony and returned a jury verdict based upon same.

Brent Johnston used an erroneous pro rata per acre means of reaching value by simply providing a per acre value of the condemned property but fortunately, the trial court allowing such

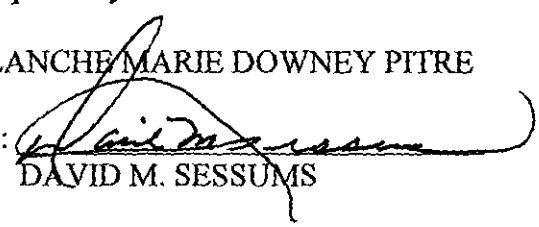
erroneous testimony is harmless error given the jury verdict.

In contrast the court erred in refusing Marie Pitre to cross examine Brent Johnston regarding safety factors such as leaks and explosions and fires especially when Gulfsouth was sending a brochure to landowners such as Marie Pitre describing just such dangers.

Under any view of the facts and law the judgment of the court of eminent domain must be affirmed with interest and costs assessed to Gulfsouth.

Respectfully Submitted:

BLANCHE MARIE DOWNEY PITRE

By: 
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CERTIFICATE OF SERVICE

I, DAVID M. SESSUMS, do hereby certify that I have this date mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

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Hon. John S. Price, Jr.
Court of Eminent Domain
Warren County Courthouse
Vicksburg, MS 39183

THIS the 23rd day of May, 2008.

DAVID M. SESSUMS