IN THE SUPREME COURT OF MISSISSIPPI

REGIONS BANK AND J. CLIFFORD HARRISON, TRUSTEE — APPELLANTS

V. — CAUSE NO. 2008-CA-02067

MISSISSIPPI TRANSPORTATION COMMISSION — APPELLEE

On Appeal from the Special Court of Eminent Domain
Webster County, Mississippi

BRIEF FOR THE APPELLEE

ORAL ARGUMENT NOT REQUESTED

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V. **CAUSE NO. 2008-CA-02067**

MISSISSIPPI TRANSPORTATION COMMISSION **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellees, Mississippi Transportation Commission certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal. The persons are as follows:

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6. Wayne Mann

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This the 14th day of May, 2009.

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Attorney of Record for Appellee/Mississippi
Transportation Commission

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I.

STATEMENT OF THE CASE

i) PROCEDURAL HISTORY

On October 20, 1998, the Mississippi Transportation Commission (MTC) filed a complaint for a Special Court of Eminent Domain against Sherry Mann, Deposit Guaranty National Bank, beneficiary under certain Deeds of Trust and J. Clifford Harrison, Trustee. (Vol. 1, R.1-9) A Statement of Values was filed showing a value for the taking in the amount of $14,450. (Vol.1, R.14) The stated value of $14,450 was deposited with the Court on October 20, 1998. (Vol.1, R.15) The complaint was amended by order of the court on or about June 10, 1999. (Vol.1, R. 55-64). The Court appointed its appraiser and on August 11, 1999, the court's appraisal was filed showing just compensation due of $57,400. (Vol.1, R. 81)

The trial court entered its "Amended Order Granting Plaintiff Right of Immediate Title and Possession" on September 23, 1999. The trial court gave credit for the $14,450, which was previously deposited. (Vol.1, R. 98) The Commission deposited an additional $42,950 for a total deposit of $57,400; thus, conforming to the quick-take order. (Vol.1, R.102). The court ordered disbursement of the quick-take funds of $57,400 released to the defendants. (Vol. 1, R.108).

Sherry Belinda Mann conveyed the subject property to her mother, Peggy Mann, by warranty deed dated November 5, 1999, and filed December 8, 1999; thus, the complaint was later amended to include landowners, Peggy Mann, and her husband, Wayne Mann, and BankFirst Financial Services. (Vol. II, R. 153-160). A Renunciation of Interest in Real Estate was filed by BankFirst on April 9, 2002. (Vol. II, R. 163-164).

A Notice of Trial Date was served on Peggy Mann and husband, Wayne Mann, Deposit Guaranty National Bank and J. Clifford Harrison, Trustee on February 26, 2004. (Vol. II, R.167-68). John M. Montgomery, Esquire entered his appearance as attorney of record for the defendants and moved for a continuance of the trial date. (Vol. II, R.175). The trial court entered its Order of Continuance of the Trial based on change of counsel for defendants. (Vol. II, R.177). The trial court entered its Agreed Order Allowing Withdrawal of Counsel and Substitution of Attorney Dolton McAlpin as Counsel for Defendants on April 2, 2007. (Vol. II, R.198). The case was set for trial on June 17, 2008 by order dated August 30, 2007. (Vol. II, R.199).

MTC filed its "Statement of Values" claiming total damages to be due of $14,450 on May 28, 2008. Dolton McAlpin, Esquire, Jeff Rawlings, Esquire, Deposit Guaranty National Bank, and J. Clifford Harrison, Trustee were served a copy of the pleading. (Vol. II, R. 200-01). Dolton W. McAlpin, attorney for Sherry Mann filed her "Statement of Values" on June 3, 2008 claiming total damages to be due of $79,008. Josh Freeman, Esquire, Jeff Rawlings, Esquire, Deposit Guaranty National Bank, and J. Clifford Harrison, Trustee were served a copy of the pleading. (Vol. II, R. 202-03).

Trial was held on June 17, 2008, and the jury found due compensation of $14,450. (Vol. II, R. 204). Judgment was entered on June 27, 2008. (Vol. II, R. 206-10).

Appellants filed their Motion to Amend Judgment or Alternatively for Relief from Judgment on July 7, 2008. (Vol. II, R. 230-36). MTC filed its Response to Regions Bank's Motion to Amend Judgment or Alternatively for Relief from Judgment on July 11, 2008. (Vol. II, R. 245-56) (Regions Bank f/k/a Amsouth Bank and Successor in interest to Deposit Guaranty). The trial court denied Appellant's motion on September 3, 2008. (Appellant's R. E., Tab 4)(Vol.

II, R. 285-287). Regions Bank and J. Clifford Harrison, Trustee filed their "Notice of Appeal" on December 5, 2008. (Vol. III, R. 305-315).

ii) STATEMENT OF FACTS:

The Mississippi Transportation Commission (MTC) in the process of relocating and reconstructing a segment of US 82 found it necessary to condemn 1.455 acres of property in Webster County. MTC filed its condemnation and named as defendants Sherry Mann, Deposit Guaranty National Bank, Beneficiary, and J. Clifford Harrison, Trustee. (Vol. I, R. 27-36).

MTC filed its "Statement of Values" and deposited $14,450 representing its estimate of due compensation. (Vol. I, R. 15). Pursuant to the "quick take" statutes, the Court appointed its appraiser and on August 11, 1999, the court's appraisal was filed showing just compensation due to the landowner of $57,400. (Vol.1, R. 81). MTC deposited an additional $42,950 for a total of $57,400. (Vol. I, R.103).

The court ordered disbursement of the quick-take funds of $57,400 released to the defendants. (Vol. 1, R.108) On November 2, 1999, a check was issued by the clerk to Sherry Belinda Mann, Ben F. Hilbun, Jr., Atty and Deposit Guaranty National Bank, Beneficiary, J. Clifford Harrison, Trustee in the amount of $57,400. (Vol.1, R. 109) On November 23, 1999, the check was endorsed by Ben Hilbun, Sherry Mann, Deposit Guaranty National Bank, by Duane R. (last name illegible), Personal Banker. (Vol. II, R. 284).

The complaint was later amended to include landowners, Peggy Mann, and her husband, Wayne Mann, and BankFirst Financial Services. (Vol. II, R. 153-160)

On February 4, 2000, AmSouth Bank, operating as Deposit Guaranty National Bank filed its "Answer and Statement of Values" claiming any distributions should be paid first to the Bank

to satisfy the indebtedness. (Vol. I, R. 135-36).

Trial was held on June 17, 2008, and the jury found due compensation of $14,450. (Vol. II, R. 204). Judgment was entered on June 27, 2008, the court noting that Sherry Belinda Mann, Deposit Guaranty National Bank, d/b/a Regions Bank, Beneficiary and J. Clifford Harrison, Trustee, withdrew FIFTY-SEVEN THOUSAND FOUR HUNDRED DOLLARS ($57,400.00) on November 2, 1999. The court further ordered that Sherry Belinda Mann, Peggy Mann and husband, Wayne Mann, Deposit Guaranty National Bank, d/b/a Regions Bank, Beneficiary, and J. Clifford Harrison, Trustee, shall immediately pay into the Circuit Clerk's account FORTY-TWO THOUSAND AND NINE HUNDRED FIFTY DOLLARS ($42,950), which amount shall be disbursed to the MTC. (Vol. II, R. 206-10).

Regions Bank (Bank) and Trustee Harrison filed their Motion to Amend Judgment or Alternatively for Relief from Judgment alleging that they were neither party to the withdrawal of the funds nor recipients of the funds deposited with the Court by MTC. (Vol. II, R. 230-36)

The Motion to Amend or Alter Judgment was denied. The trial court found that Bank and Harrison were parties to the withdrawal of the funds and the proper parties to the action. (Appellant's R. E., Tab 4) (Vol. II, R. 285-287)

II.

SUMMARY OF THE ARGUMENT

MTC filed an eminent domain action and deposited a total of $57,400 pursuant to quick-take procedure. The jury returned a verdict of $14,450, entitling MTC to a refund of $42,950. The Special Court of Eminent Domain entered a judgment, requiring the defendants to pay into the Court's registry $42,950, which represented the excess deposit.

Bank and Harrison filed a Motion to Amend Judgment or Alternatively for Relief from Judgment alleging that they had no part in the removal of the funds nor being recipients of the funds from the registry of the Court. The Court rejected Bank and Harrison's argument, and found that the Bank and Harrison were in fact parties to the withdrawal of the funds.

The facts clearly showed, contrary to Bank and Harrison's allegation, they were parties to the withdrawal of the funds. The check was endorsed by Ben F.Hilburn, Sherry Mann and a stamp of "Deposit Guaranty National Bank, Post Office Drawer 919, Eupora, Mississippi 39744-0919". Further, below that features another signature "Duane R. (last name illegible)" with the title "Personal Banker" written under his name, as well as the notation "applied to ILS #9500312557.)" (Vol. II, R. 244, 284).

Bank withdrew the funds and as contemplated by *Miss. Code Ann. § 11-27-87 (1972)*, the defendants, including Appellants were on notice that any excess funds would have to be repaid.

Bank and Harrison argue for the first time on appeal that the trial court lacked statutory and/or jurisdictional authority to enter a money judgment against them pursuant to "Quicktake" provisions and/or under Rule 8 and Rule 54 of the Mississippi Rules of Civil Procedure. The trial court has not had an opportunity to rule on these issues; thus, Bank and Harrison are procedurally barred from raising these issues for the first time on appeal.

Procedural argument notwithstanding, Appellants cannot support their due process argument. They were apprised, as interested parties, of the pendency of the action and afforded an opportunity to present their objections. Indeed, they admit being aware of the pending trial. As found by the trial court, Bank and Harrison were proper parties to the action and chose not to

appear and defend their interests in the trial. Further, when presenting their objections, represented in their Motion to Amend Judgment, they failed to address statutory and/or jurisdictional authority; thus, due process was available, but voluntarily unexercised. Finally, MTC clearly satisfied the pleading requirements of Rule 8 and Rule 54 of the Mississippi Rules of Civil Procedure.

III.

ARGUMENT

1. WHETHER THE TRIAL COURT ERRED IN ENTERING A JUDGMENT AGAINST BANK AND TRUSTEE WHO WERE ALLEGEDLY NOT PARTIES TO THE REMOVAL OF FUNDS DEPOSITED BY MTC WITH THE COURT AND ERRED WHERE PARTIES WERE ALLEGEDLY NOT PROPERLY NOTIFIED.

Mississippi Code Annotated, § 11-27-5 (1972) provides as follows:

> "Any person or corporation having the right to condemn private property for public use shall file a complaint to condemn with the circuit clerk of the county in which the affected property, or some part thereof, is situated and shall make all the owners of the affected property involved, and any mortgagee, trustee or other person having any interest therein or lien thereon a defendant thereto. . . ."

As required by statute, Mississippi Transportation Commission (MTC) in its complaint deemed Deposit Guaranty National Bank ("Bank") and J. Clifford Harrison, Trustee ("Harrison") as defendants.

MTC deposited $14,450 into the registry of the Court, representing its estimate of due compensation. (Vol. I, R. 15). The trial court appointed its appraiser pursuant to the "quick take" statutes and on August 11, 1999, the court's appraisal was filed showing just compensation due to the landowner of $57,400. (Vol.1, R. 81). MTC deposited an additional $42,950 for a total of $57,400. (Vol. I, R. 103).

> Upon return of the verdict and entry of the judgment, the applicant shall pay to defendants, or to the clerk if defendants absent themselves, the difference between the judgment and deposits previously made, if any; shall pay the costs of court, including the cost of jury service as is otherwise provided by law for the court in which the case is tried. Then, ownership of the property described in the petition shall be vested in petitioner and it may use said property as specified in the petition. If deposits previously made exceed the judgment, **then the clerk or defendant** to whom disbursement thereof has been made, as the case may be, shall pay such excess to the petitioner. (emphasis added).
>
> *Miss. Code Ann. § 11-27-27 (1972)*

The jury found due compensation of $14,450 which represented MTC's stated value. (Vol. II, R. 204). Obviously, pursuant to the jury's determination of just compensation and MCA 11-27-27, MTC is entitled to a refund of $42,950 from the clerk or the defendants to whom disbursement was made.

The obligation of the defendants to pay the excess deposit has been acknowledged by the Supreme Court. The Court in *Mississippi State Highway Commission v. Nancy L. Herban, et al*, 522 So. 2d 210, 212 (Miss. 1988), stated:

> At the conclusion of the case, the condemning authority is required to pay to defendants, or the clerk of the court if the defendants absent themselves, the differences between the judgment and deposits previously made, if any; . . .If deposits previously made exceed the judgment, then the clerk or defendant to whom disbursement thereof has been made, as the case may be, shall pay such excess to petitioner.
>
> *Miss. Code Ann. § 11-27-27 (1972).*

Appellants rely on *Miss. Code Ann. § 11-27-87 (1972)* which states in part, ". . .[i]f plaintiff takes title to and possession of the land condemned pursuant to the order of the court and the amount of the compensation as determined upon final disposition of the case is less than the amount of the deposit, the plaintiff shall be entitled to a personal judgment against the owner for the amount of difference."

Both statutes concern payment of excess deposits and/or judgment for the excess from the defendants or owner. MTC, unquestionably, is entitled to repayment of the excess deposit.

Bank and Harrison in their Motion to Amend Judgment or Alternatively for Relief from Judgment stated, ". . .Bank and Harrison were neither party to the withdrawal of the funds nor recipients of the funds deposited with the Court by MTC" (Vol. II, R. 237). However, the record, as acknowledged by the trial court, shows otherwise. The trial court observed, "They seek this relief contending that the Bank and Harrison were not parties to the withdrawal of funds that the plaintiff has deposited with this court." The trial court further noted, "this court finds that the Bank and Harrison were in fact parties to the withdrawal of funds." (Vol. II, R. 285).

Appellants assert that regardless of the fact that the check was made out to Sherry Belinda Mann a/k/a Sherry Mann, Ben F. Hilburn, Jr., Atty., Deposit Guaranty National Bank, Beneficiary, and J. Clifford Harrison, Trustee, that they were not parties to the withdrawal of funds.(Vol. II, R. 241).

As further support for the trial court's ruling, the check was endorsed by Ben F.Hilburn, Sherry Mann. In addition to those signatures, the back of the check also features a stamp of "Deposit Guaranty National Bank, Post Office Drawer 919, Eupora, Mississippi 39744-0919," and below that features another signature "Duane R. (last name illegible)" with the title "Personal Banker" written under his name, as well as the notation "applied to ILS #9500312557.)" (Vol. II, R. 244, 284).

In an effort to distance themselves from the endorsement, Bank and Harrison state, "[t]hereafter, Mann endorsed the check and apparently presented the check to a teller at the Deposit Guaranty National Bank in Eupora, Mississippi. Mann had the check applied toward

payment of indebtedness owed to the Bank." (Appellant's brief, p.8). Bank does not cite the record in its effort to establish that endorser was a teller or to identify the loan to which the funds were applied. Indeed, the alleged teller may have been a Bank Officer with total authority and the loan may have been any loan. These facts are left to speculation.

At minimum, the Bank admits that its teller endorsed the check for the funds. Bank does not argue and did not argue that a teller cannot endorse the check on behalf of the Bank. The trial court was correct in its determination that Appellants were parties to the withdrawal of funds.

Furthermore, the Bank on February 4, 2000, filed its "Answer and Statement of Values" claiming any distributions, compensation or awards should be paid first to the Bank to satisfy the indebtedness. (Vol. I, R. 135-36). Apparently, had Mann been successful at trial and recovered her stated value of $79,000, the Bank was claiming those additional funds. Indeed, the Bank was making a claim for any additional funds that might be awarded as a result of the trial.

The Bank was in control of the funds, obviously, if the Bank had refused to endorse the check, the funds could not have been disbursed. In short, the Bank was *owner* of the funds as contemplated by *Miss. Code Ann. § 11-27-87 (1972)*. All parties knew or were charged with knowing that the funds were subject to a jury determination of true value; thus, all defendants were on notice that any excess funds would have to be repaid. *Miss. Code Ann. § 11-27-27 (1972)* and *§ 11-27-87.*

Indeed, if one were to accept the claim of the Bank that the funds were applied to a loan, the loan would be reduced or extinguished. Therefore, the fee simple landowner could be in a position where repayment would be an impossibility. The encumbered funds would have been used to extinguish a loan; thus, the funds simply would not exist for repayment purposes. *Miss.*

Code Ann. § 11-27-27 (1972) contemplates this possibility; thus, the declaration that "[i]f deposits previously made exceed the judgment, **then the clerk or defendant** to whom disbursement thereof has been made, as the case may be, shall pay such excess to the petitioner." (emphasis added). Therefore, the trial court had jurisdictional authority to enter judgment against the defendants in this case as contemplated in *Miss. Code Ann. § 11-27-27 (1972).*

Bank and Harrison also take issue with the trial court's finding, "[t]his court, having considered the matter, finds that the Bank and Harrison were proper parties to this action and chose not to appear and defend their interests in the trial that was conducted on June 17, 2008." (Vol. II, R. 285). Appellants allege that the record shows that they were not properly notified of the trial date; however, the Bank admits to receiving notice before the trial. (Appellant's Brief, p.10).

Mississippi Transportation Commission filed its "Statement of Values" claiming total damages to be due of $14,450 on May 28, 2008. Dolton McAlpin, Esquire, Jeff Rawlings, Esquire, Deposit Guaranty National Bank, and J. Clifford Harrison, Trustee were served a copy of the pleading. (Vol. II, R. 200-01). Dolton W. McAlpin, attorney for Sherry Mann filed her "Statement of Values" on June 3, 2008, claiming total damages to be due of $79,008. Josh Freeman, Esquire, Jeff Rawlings, Esquire, Deposit Guaranty National Bank, and J. Clifford Harrison, Trustee were served a copy of the pleading. (Vol. II, R. 202-03). Obviously, Bank and Harrison were aware of the various "Statement of Values" that were filed. Indeed, by their own admission, they were aware of the trial date as admitted in their brief. The trial judge was correct, the Bank and Harrison were proper parties to this action and chose not to appear and defend their interests in the trial.

2. WHETHER THE TRIAL COURT LACKED STATUTORY AND/OR JURISDICTIONAL AUTHORITY TO ENTER A MONEY JUDGMENT AGAINST BANK AND TRUSTEE UNDER THE EMINENT DOMAIN "QUICKTAKE" PROVISIONS.

Bank and Harrison filed their "Motion to Amend Judgment or Alternatively for Relief from Judgment" as grounds for relief, they argued that they were neither party to the withdrawal nor recipients of the funds. (Vol. II, R. 230).

Bank and Harrison argue for the first time on appeal that the trial court lacked jurisdiction to enter a money judgment against them. In *Williams v. Skelton, M.D., et al*, 2009 Miss. Lexis 138 (Miss. 2009), the Supreme Court stated:

> This Court finds that Williams's assertion that *section 15-1-36(15)* is unconstitutional is procedurally barred because she raises this issue for the first time on appeal, and she did not give the trial court the opportunity to rule on this issue.

In *Alexander v. Daniel*, 904 So. 2d 172, 183 (Miss. 2005), we stated:

> > We have been consistent in holding that we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review. *See,e.g., Triplett v. Mayor & Alderman of Vicksburg*, 758 So.2d 399, 401 (Miss. 2000) (citing *Shaw v. Shaw*, 603 So. 2d 287, 292 (Miss. 1992)).

Alexander, 904 So. 2d at 183.

In the present case, Appellant's argument to the trial court was based on the factual allegation that they had no part in the removal of the funds. This argument does not address jurisdiction to grant a monetary judgment, but is limited to the claim that neither were party to the withdrawal; thus, the trial court was deprived of the opportunity to rule on the issue of jurisdiction. (Vol. II, R 230). Stated another way, the trial court rejected the Bank's allegation that it was not a party to the removal of funds. The legal argument concerning jurisdiction was

never presented to the trial court. Bank and Harrison are procedurally barred for raising this issue for the first time on appeal.

However, for the sake of argument, MTC will brief the claim of lack of jurisdiction. As admitted by Bank and Harrison, they were named defendants in the eminent domain action. They argue that there were no allegations against the Bank or Harrison giving them sufficient due process or notice that MTC would seek to obtain a Judgment against Bank and Harrison.

Bank and Harrison were on notice that the funds disbursed to the defendants were subject to a jury determination of actual value. Further, they were aware that MTC would seek reimbursement of any disbursed excess funds after establishing actual value. It does not stretch the imagination to assume that the funds would be collected from those to whom the funds were paid.

Bank and Harrison seek to control the funds, have them applied to their loan to Mann and avoid any responsibility for reimbursement of the excess. Obviously, the Bank and Harrison, as required by statute, were made defendants for a reason. As defendants, Appellants had the opportunity to protect their interest by submitting proof at trial of the value of the property. Indeed, had the appellants participated at trial, the results may not have been the same. In leu of participation, however, Bank and Harrison seek to have their cake, and eat it too. As a mandatory endorser of the check for the funds, the Bank can require the funds to be applied to its loan; thus, reap the benefit. Now, Bank seeks to escape any possibility of reclamation by MTC. Succinctly stated, the Bank seeks to have MTC become the guarantor of its loan to Mann.

Indeed, Mann is in a precarious position, the Bank requires, as a price for its endorsement, that the compensation be applied to the loan. The loan is reduced; however, the

excess funds are not available to reimburse MTC. Equity requires that Bank and Harrison make the funds available for reimbursement. At a minimum, the parties have had interest-free use of the funds until trial, which as in this case, can be a substantial length of time.

In support of their appeal, Bank and Harrison mistakenly rely on *Mississippi State Highway Commission v. Prescott*, 346 So. 2d 924 (Miss. 1977). The facts in the two cases are not even remotely similar. In *Prescott*, the Judgment was entered on the jury verdict on February 8, 1974. However, it was not until January 27, 1975, after the Special Court of Eminent Domain had expired, that the Commission filed a petition to enroll a personal judgment against Prescott for the difference between the deposit and the jury verdict.The *Prescott* Court observed as follows:

> An eminent domain court is a special court and when it is convened and concluded the matter or matters for which it was convened and a final judgment is entered, it automatically goes out of existence and no longer has jurisdiction to determine any matters filed thereafter, unless an order has been entered on its minutes granting additional time within which to file such matters. *Mississippi State Highway Commission v. Gresham*, 323 So.2d 100 (Miss.1975); *Mississippi State Highway Commission v. First Methodist Church of Biloxi*, 323 So.2d 92 (Miss.1975); *Mississippi State Highway Commission v. Taylor*, 293 So.2d 9 (Miss.1974).

In the case *sub judice*, the eminent domain court was properly convened when the subject judgment was entered; thus, there exists no jurisdictional question. Indeed, the filing of the subject judgment concluded the court's existence. On the contrary, in *Prescott*, the Commission sought to resurrect a court in order for it to enter a judgment.

Another glaring difference between the cases is that Prescott was the only party against whom relief was sought while the record showed that the deposit was disbursed to George O. Prescott, et. al. While the facts in the decision are minimal, the decision appears to support

MTC's position. The Court apparently took issue with entertaining a judgment against only George O. Prescott when the disbursement was to George O. Prescott et al. Unlike *Prescott*, the judgment in the present case was against all the parties that were recipients of the excess funds.

Bank and Harrison argue, "[i]nterpreting the quick-take provisions which allow for a personal judgment against the owners to also be effective against the lienholder renders the statute unconstitutional for failure to provide due process and/or notice that lienholders could be subject to such a judgment." (Appellant's Brief, p.12). Bank and Harrison argue for the first time on appeal that the court's statutory interpretation that a personal judgment against the owners is also effective against the lienholder is unconstitutional for due process reasons. As addressed above, the Supreme Court has consistently held that matters raised for the first time on appeal, are not properly before the Court. The Rule avoids depriving the trial court of the opportunity to first rule on the issue, so that the appellant court can review such trial court ruling under the appropriate standard of review.

For the sake of argument, MTC will address the issue. Bank and Harrison were properly served as defendants in the action. Bank and Harrison were served with MTC's "Statement of Values" claiming total damages to be due of $14,450. (Vol. II, R. 200-01). Bank and Harrison were served with Mann's "Statement of Values" claiming total damages to be due of $79,008. (Vol. II, R. 202-03). Moreover, the Bank filed its "Answer and Statement of Values" claiming any distributions, compensation or awards should be paid first to the Bank to satisfy the indebtedness. Further, they admit to prior notice of the trial. The Bank and Harrison were on notice that MTC and Mann were at odds and that evidence would be presented at trial supporting the parties differing interests. The trial court found that Bank and Harrison were proper parties to

this action and chose not to appear and defend their interests in the trial that was conducted on June 17, 2008. (Vol. II, R. 285).

Bank and Harrison complain that they were not granted a right of due process. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Mississippi Board of Veterinary Medicine, et. al. v. Geotes, D.V.M.*, 770 So. 2d 940 (Miss. 2000) (citing *City of Tupelo v. Mississippi Employment Sec. Comm'n*, 748 So. 2d 151, 153 (Miss. 1999) (citing *Booth v. Mississippi Employment Sec. Comm'n,* 588 So. 2d 422, 427-28 (Miss. 1991) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L. Ed. 2d 865 (1950)). Bank and Harrison had the opportunity to appear and protect their interest by testimony and/or any other way acceptable to the court; thus, the right of due process was available and they were not denied same.

Bank and Harrison argue, "had Bank and Trustee known that MTC sought personal monetary relief against them, obviously they would have contested that MTC was entitled to any relief as to Bank and the Trustee." (Appellant's Brief, p. 12). Bank and Harrison further complain of never having received notice that MTC sought relief against them. On February 4, 2000, AmSouth Bank, operating as Deposit Guaranty National Bank filed its "Answer and Statement of Values" claiming any distributions should be paid first to the Bank to satisfy the indebtedness. (Vol. I, R. 135-36). The Bank demands to be paid the funds, however, rejects any responsibility for repayment. The eminent domain statutes are not ambiguous, due compensation is determined by a jury, and any excess deposit that is disbursed must be repaid. Bank and Harrison cannot dictate the use or application of the funds and deny any responsibility for repayment.

Bank and Harrison summarily argue that they were not afforded due process; however, that argument is for naught. Appellants were afforded due process, when they filed their "Motion to Amend Judgment or Alternatively for Relief from Judgment." In their motion, Appellants argued that they were not a party to the withdrawal of funds and ignored the other issues which are now raised for the first time on appeal. Obviously, Bank and Harrison had their opportunity to raise all issues in addition to the factual argument and simply chose not to do so.

3. WHETHER THE TRIAL COURT LACKED JURISDICTION TO ENTER A PERSONAL JUDGMENT AGAINST BANK AND TRUSTEE IN LIGHT OF RULE 8 AND RULE 54 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

For the first time on appeal, Appellants, Bank and Harrison complain that MTC's pleadings and amended pleadings did not plainly state that MTC sought relief against Bank and Harrison in the form of a personal judgment. Appellants rely on Rule 8 and Rule 54 of the Mississippi Rules of Civil Procedure. The trial court has not had an opportunity to rule on this issue; thus, Bank and Harrison are procedurally barred for raising this issue for the first time on appeal. Notwithstanding the procedural bar, MTC will address the issue.

MTC filed its Second Amended Complaint and identified Bank and Harrison as Defendants having an interest in the subject property. Further, MTC plead that it be allowed credit for deposited funds; and, that upon final hearing hereof, a determination be made as to the amount Plaintiff shall pay the Defendants as due compensation. (Vol. II. R. 153-61).

Appellants argue that Under Rule 54 of the Mississippi Rules of Civil Procedure, a final judgment shall not be entered for a monetary amount greater than the pleader requested in the pleadings or amended pleadings. MTC clearly identified Bank and Harrison as Defendants

having an interest in the subject property. Further, MTC plead that it be allowed credit for deposited funds disbursed to Defendants; and, that upon final hearing, a determination be made as to the amount Plaintiff shall pay the Defendants as due compensation.

MTC is clear in its pleadings, it simply wants to recoup the excess funds disbursed to the defendants. MTC did not and could not dictate how the funds were used, that decision was made by the parties to whom the funds were disbursed and such finding was supported by the record. The trial court found that Bank and Harrison were parties to the withdrawal of the funds. Bank and Harrison are not allowed to dictate the use of the funds, yet, avoid any responsibility for their recovery. No judgment was entered for a monetary amount greater than that requested. Indeed, all parties knew that the funds were encumbered by a final determination of value; thus, any claim of surprise by Bank and Harrison is invalid.

IV.

CONCLUSION

MTC respectfully requests that this Court affirm the Special Court of Eminent Domain's Order Denying Motion to Amend Judgment or Alternatively for Relief from Judgment filed by Regions Bank f/k/a AmSouth Bank and successor in interest to Deposit Guaranty Bank and J. Clifford Harrison, Trustee.

MISSISSIPPI TRANSPORTATION COMMISSION

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CERTIFICATE OF SERVICE

I, the undersigned James T. Metz, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief for Appellee by placing the same in the United States mail, postage paid and properly addressed to the following:

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Honorable Joseph H. Loper, Jr.
Webster County Circuit Court Judge
Post Office Box 616
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This the 14th day of May, 2009.

James T. Metz