2008-CA-02105 E

CERTIFICATE OF INTERESTED PERSONS

The City of Gulfport is a governmental entity which is not required to supply this certificate pursuant to Rule 28 (a)(1) of the Mississippi Rules of Appellate Procedure.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OTHER AUTHORITIES v

STATEMENT OF ISSUES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

CONCLUSION 27

CROSS APPEAL 28

STATEMENT OF THE ISSUES 28

STATEMENT OF THE CASE 28

SUMMARY OF THE ARGUMENT 29

ARGUMENT 30

CONCLUSION 57

CERTIFICATE OF SERVICE 59

ADDENDUM - REPRODUCTION OF OTHER AUTHORITIES 60

TABLE OF AUTHORITIES

CASES **PAGE**

Aikens v. Whites, 8 So.3d 139 (Miss. 2008) 24

Bayer Corporation v. Reed, 932 So.2d 786 (Miss. 2006) *57*

Bear Creek Water Association, Inc. V. Town of Madison, 416 So.2d 399 (Miss.1982) 38

Burks v. Mississippi Transportation Commission, 990 So.2d 200 (Miss.Ct.App. 2008) 34

City of Jackson v. Estate of Stewart, 908 So.2d 703 (Miss. 2005) 3

City Of Jackson v. Wallace, 196 So. 223 (Miss. 1940) 51

Crocker v. Mississippi State Highway Commission, 534 So.2d 549 (Miss. 1988) 48, 49

Cruse v. Cruse, 32 So.2d 355 (Miss. 1947) 52

Dedeaux Utility Company, Inc. V. City of Gulfport, 938 So.2d 838 (Miss. 2006) 30, 45, 55

Donald v. Amoco Production Company, 735 So.2d 161 (Miss. 1999) 50, 52, 53

East Mississippi State Hosp. V. Adams, 947 So.2d 887 (Miss. 2007) 24

Estate of Grimes v. Warrington, 982 So.2d 365 (Miss. 2008) 24

Goodman v. Rhodes, 375 So.2d 991 (Miss. 1979) 55

Green v. Winona Elevator Company, 319 So.2d 224 (Miss. 1975) 53

Haggerty v. Foster, 838 So.2d 948 (Miss.2002) 21

Leake County Cooperative (A.A.L.) v. Dependants Of Barrett, 226 So.2d 608 (Miss. 1969) . . . 51

Mississippi State Highway Commission v. Blackwell, 350 So.2d 1325 (Miss. 1977) 50

Mississippi State Highway Commission v. Frierson, 240 So.2d 457 (Miss. 1970) 25

Mississippi State Highway Commission v. Hall, 174 So.2d 488 (Miss. 1965) 50

Mississippi State Highway Commission v. Hillman, 198 So. 565 (Miss. 1940) 6

Mississippi State Highway Commission v. Rogers, 128 So.2d 353 (Miss. 1961) 50, 54

Mississippi Transportation Commission v. McLemore, 863 So.2d 31 (Miss. 2003) 32, 36

Mosby v. Moore, 716 So.2d 551 (Miss. 1998) 26

MS Credit Center, Inc. v. Horton, 926 So.2d 167 (Miss. 2006) 24

Natural Gas Co. of West Virginia v. Public Service Commission, 121 S.E. 716 (W.Va. 1924) . . 7

Oktibbeha County Hosp. v. Mississippi DOH, 956 So.2d 207 (Miss. 2007) 22

Olson v. United States, 67 F.2d 24 (8th. Cir. 1933) 43

Pearl River Valley Water Supply District v. Brown, 182 So.2d 384 (Miss. 1966) 37, 43

Potters II, v. State Highway Commission, 608 So.2d 1227 (Miss.1992) 10

Powers v. Tiebauer, 939 So.2d 749 (Miss. 2005) 22

Price v. Price, 32 So.2d 124 (Miss. 1947) 52

Price v. Simpson, 205 So.2d 642 (Miss. 1968) 15

Ross v. Ross, 208 So.2d 194 (Miss. 1968) 52

Stark v. Stark, 755 So.2d 31 (Miss.App. 1999) 52

State Highway Commission v. Owen, 308 So.2d 228 (Miss. 1975) 9

Stewart v. State, 928 So.2d 945 (Miss. Ct. App. 2006) 25

Terrain Enterprises, Inc. V. Mockbee, 654 So.2d 1122 (Miss. 1995) 13

Troupe v. McAuley, 955 So.2d 848 (Miss. 2005) 3

United States v. Fuller, 409 U.S. 488 (1973) 44

United States v. Miller, 317 U.S. 369 (1943) 44

Ventures Northwest Ltd. P'ship v. State, 914 P.2d 1180 (Wash.Ct.App. 1996) 45

Wheeler v. Mississippi State Highway Commission, 55 So.2d 225 (Miss. 1951) 50

White v. Stewman, 932 So.2d 27 (Miss. 2006) 55

OTHER AUTHORITIES

STATUTES

Miss. Code Ann. §11-1-53 54

Miss. Code Ann. §11-5-1 53

Miss. Code Ann. §11-11-3 ..... 52, 53

Miss. Code Ann. §11-11-51 54

Miss. Code Ann. §11-27-1 50

Miss. Code Ann. §11-27-5 ..... 50, 53

Miss. Code Ann. §11-27-19 ..... 22, 23, 24, 27

Miss. Code Ann. §19-5-151 48

Miss. Code Ann. §75-17-7 30

Miss. Code Ann. §77-3-1 48

Miss. Code Ann. §77-3-5 48

Miss. Code Ann. §77-3-43 8

COURT RULES

M.R.C.P. Rule 24 22

M.R.C.P. Rule 60 56

M.R.E. Rule 103 ..... 13, 25

M.R.E. Rule 702 ..... 32, 35

M.R.A.P. Rule 44 22

BOOKS AND TREATISES

AMERICAN SOCIETY OF APPRAISERS, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets,* (2nd Ed. 2000) 6, 7

APPRAISAL INSTITUTE, *The Appraisal of Real Estate,* (12th Ed. 2001) 5, 6

APPRAISAL INSTITUTE, *The Dictionary of Real Estate Appraisal,* (4th Ed. 2002) 6

THE APPRAISAL FOUNDATION, APPRAISAL STANDARDS BOARD, *Uniform Standards of Professional Appraisal Practice and Advisory Opinions,* (2005 Edition) 7

Julius L. Sackman, *Nichols on Eminent Domain,* §15.08(1), (Rel.55-7/94 Pub.460) 10, 35

STATEMENT OF ISSUES

1. Whether the City's expert witness used the proper methodology in valuing the utility:

   a. Whether the reproduction cost new is a proper method to value depreciable assets;

   b. Whether capitalization of excess income is a proper method to value intangible assets.

2. Whether evidentiary rulings by the Trial Court warrant granting Dedeaux Utility Company, Inc., a new trial.

3. Whether closing argument by the City's counsel warrant granting Dedeaux a new trial.

4. Whether **Miss. Code Ann.** §11-27-19 (1972) is unconstitutional as applied to this cause.

5. Whether the City violated Dedeaux's Equal Protection rights.

SUMMARY OF THE ARGUMENT

The method used by the City's expert to value the depreciable tangible assets of the Dedeaux utility system is universally recognized in the appraisal/valuation industry as the proper method to estimate the value of such assets. The depreciated reproduction cost method requires the expert to calculate the "cost new" of the assets. It is undisputed that the City's experts determined the "cost new" of Dedeaux's utility system. It was Dedeaux's expert, not the City's, who used an improper method to value the depreciable assets.

The City's expert properly used the capitalization of excess income method to value the intangible assets of Dedeaux by arriving at a logical method to allocate a portion of Dedeaux's income to the intangible assets.

Dedeaux's assertion of numerous evidentiary errors committed by the Trial Court are not supported by the law. Even if evidentiary errors were committed, Dedeaux has failed to show that a substantial right was effected.

The closing argument made by Counsel for the City was based entirely upon the evidence presented at trial.

Dedeaux waived and abandoned its claim that **Miss. Code Ann.** §11-27-19 is unconstitutional by (1) failing to give proper notice to the Attorney General of Mississippi; (2) electing to present evidence of the estimated future value of contributions in aid of construction; (3) failing to bring the issue before the Trial Court in a timely manner; and, (4) failing to proffer any evidence relating to the type of donated property it claims to have received or the value thereof, if any. Dedeaux does not even allege that it made any compulsory expenditures to improve its system after the date of taking.

Dedeaux's allegation that the City violated Dedeaux's Equal Protection rights is not

substantiated in its brief and was not substantiated by the evidence.

ARGUMENT

I. THERE WAS NO ERROR COMMITTED BY THE TRIAL COURT RELATING TO THE ADMISSION OF EXPERT TESTIMONY.

A. JAMES STOKES IS QUALIFIED TO GIVE EXPERT OPINION REGARDING THE VALUE OF A UTILITY.

Dedeaux correctly stated that the standard of review regarding the admission or exclusion of expert testimony is abuse of discretion. *City of Jackson v. Estate of Stewart*, 908 So.2d 703 (Miss. 2005). "(A)n abuse of discretion standard means the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous." *Troupe v. McAuley*, 955 So.2d 848, 856 (Miss. 2005).

The record reflects that James Stokes is well qualified to offer an opinion regarding the fair market value of the Dedeaux utility system. Mr. Stokes has a Bachelor's Degree in Business Administration with a major in accounting. T. 755.[1] He is a Certified Public Accountant (CPA). T. 753. He is a Certified Valuation Analyst (CVA). T. 755. He received the CVA certificate after taking course work, passing an exam and submitting a sample report. T. 757. The CVA designation certifies him to value businesses. T. 757. He is regularly consulted by business people and investors for advice concerning business value for the purpose of buying and selling businesses. T. 755. As a CPA, he is qualified to express an opinion as to the reasonableness of financial statements. T. 756. He is required to have forty (40) hours of continuing education each year to maintain his CPA designation and twenty-four (24) hours of continuing education every three (3)

---

[1] The Court Reporter's transcript shall be referenced as "T"; the Clerk's Papers shall be referenced as "CP"; and, the Trial Exhibits shall be referenced as "Ex.".

years to maintain his CVA designation. T. 756-757. In the past ten (10) years he has valued approximately forty (40) businesses. T. 758. One of the valuations was a non-litigation valuation of a water and sewer system. CP. 488, T. 820.

The issue before the Court is whether the trial court's finding that Stokes has acquired the "scientific, technical or other specialized knowledge ... by knowledge, skill, experience, training or education" to express an opinion regarding the fair market value of the Dedeaux utility system was arbitrary and clearly erroneous. It does not matter that others, such as licensed appraisers or even licensed engineers, might also be qualified to express such an opinion. It does not matter if Stokes has ever before been qualified in a court of law as an expert in valuing a utility system. It does not matter if this were the first time Stokes had ever valued a utility system(which it is not the first time). The City submits that it was well within the Trial Court's discretion to accept Stokes as an expert qualified to express an opinion regarding the value of a utility business.

B. THE COST METHOD EMPLOYED BY JAMES STOKES TO VALUE THE TANGIBLE ASSETS OF THE UTILITY SYSTEM COMPLIES WITH ACCEPTED VALUATION METHODOLOGY.

The primary problem Dedeaux has with Stokes' valuation is the methodology used by Stokes. Dedeaux asserts that in applying the cost method of valuing the depreciable assets of the utility system, "... one adds up how much it would cost to rebuild the system." Dedeaux Brief, p. 19. This erroneous assertion is based on the misunderstanding of the Dedeaux expert, James Elliott, regarding the proper application of the cost method of valuation. Mr. Elliott testified that the City is required to pay the estimated cost of replacing the Dedeaux system itself considering the "constraints" (such as existing utilities, sidewalks, curbs and gutters, pavement) on the land comprising the Dedeaux service area on the date of taking because it costs a lot more to install a water and sewer system in developed land. T. 1018-1019, 1034. Mr. Elliott based his methodology on the premise of "... what

alternatives or what substitutes does a willing buyer have other than paying either the replacement cost or depreciated replacement cost." T. 1020. Mr. Elliott explained that the City wanted the Dedeaux system bad enough to condemn it. T. 1020. Mr. Elliott further explained, over the City's objection, that the "principle of alternatives and substitutes" required the City to pay what it would cost to rebuild the Dedeaux system in developed land because the City wanted a specific piece of property (the Dedeaux utility system) and could not substitute another utility system. T. 1043-1044. Not only does Mr. Elliott's method violate the rule that neither the buyer or seller is considered under a compulsion (as will be discussed in the City's cross appeal) it also violates the accepted principles relating to the cost method of valuation.

The City's expert, James Stokes, based his depreciated cost calculation on what it would cost to build a new exact duplicate of the Dedeaux utility system using 1996 prices. T. 774-775, 783-784. Stokes used an analogy relating to a house to explain that using the depreciated cost method of valuation, one determines what it would cost to build a similar house new and then reduce the new cost by the appropriate depreciation rate. T. 786-789.

The City has been unable to find any authoritative source for Mr. Elliott's "principle of alternatives and substitutes" which would require the City to pay an enhanced cost because there is no alternative or substitute for the desired property. The actual appraisal principle upon which the cost approach to valuation is based is known as the "principle of substitution".

> The principle of substitution is basic to the cost approach. This principle affirms that a prudent buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability. Older properties can be substituted for the property being appraised, and their value is also measured relative to the value of a new, optimal property. In short, the cost of property improvements on the effective date of the appraisal plus the accompanying land value provides a measure against which prices for similar improved properties may be judged.

APPRAISAL INSTITUTE, *The Appraisal of Real Estate,* p. 350 (12th Ed. 2001). This principle of

appraisal applies not only to the valuation of real estate but also to the valuation of personal property such as machinery and equipment. AMERICAN SOCIETY OF APPRAISERS, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets,* P. 43 (2nd Ed. 2000). The true principle of substitution upon which the cost method of valuation is based assumes that the buyer has a choice. This principle goes hand in hand with the long standing legal requirement that in condemnation cases, neither the buyer or seller is assumed to be under a compulsion to act. "The seller must be one who desires but is not obligated to sell, and the buyer must be under no necessity of having the property." *Mississippi State Highway Commission v. Hillman*, 198 So. 565, 571 (Miss. 1940).

The cost approach encompasses two separate and distinct cost bases, these being reproduction cost and replacement cost. APPRAISAL INSTITUTE, *The Appraisal of Real Estate,* p. 349-350 (12th Ed. 2001). Although these terms are many times used interchangeably, there is a difference between the two. Reproduction cost is defined as "The estimated cost to construct, at current prices as of the effective date of the appraisal, an exact duplicate or replica of the building being appraised, using the same materials, construction standards, design, layout, and quality of workmanship and embodying all the deficiencies, superadequacies, and obsolescence of the subject building." APPRAISAL INSTITUTE, *The Dictionary of Real Estate Appraisal,* p. 244 (4th Ed. 2002). Replacement cost is defined as "The estimated cost to construct, at current prices as of the effective appraisal date, a building with utility equivalent to the building being appraised, using modern materials and current standards, design, and layout." *Id.* See also, AMERICAN SOCIETY OF APPRAISERS, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets,* P. 44 (2nd Ed. 2000). Both James Stokes and James Elliott actually used the reproduction cost base even though they both sometimes referred to it as replacement cost.

Dedeaux's assertion that under the cost method "... one adds up how much it would cost to rebuild the system" is not found in either the reproduction cost or replacement cost base.

The correct valuation standard is to determine the "cost new" (not the cost to rebuild) of the property, whether it is real property or personal property. "Replacement cost is the current cost of a similar **new** property having the nearest equivalent utility as the property being appraised, whereas reproduction cost is the current cost of reproducing a **new** replica of the property being appraised using the same, or closely similar, materials." AMERICAN SOCIETY OF APPRAISERS, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets,* P. 44 (2nd Ed. 2000). (Emphasis added). The Appraisal Standards issued by the Appraisal Standards Board, (Standard 1-4(b)(ii) dealing with valuation of real property and Standard 7-4(b)(I) dealing with valuation of personal property) require an appraiser to "analyze such comparable cost data as are available to estimate the cost new" of the property being appraised. THE APPRAISAL FOUNDATION, APPRAISAL STANDARDS BOARD, *Uniform Standards of Professional Appraisal Practice and Advisory Opinions*, p. 19, 60 (2005 Edition). Both the reproduction cost and replacement cost methods require the appraiser to calculate the cost of a new substitute facility in order to value the existing facility which the buyer is considering. Dedeaux's expert, James Elliott, agreed that the term "cost new" means that the water and sewer lines are installed when the subdivisions are built and that Dax Alexander (upon whom James Stokes relied) calculated the cost new of the Dedeaux facilities. T. 1080.

Dedeaux cited *Natural Gas Co. of West Virginia v. Public Service Commission*, 121 S.E. 716 (W.Va. 1924) in support of its argument regarding the proper method of determining the reproduction cost of the Dedeaux physical facilities. This West Virginia rate regulation case is readily distinguished from the present condemnation case. The valuation of assets for rate purposes

is completely different from the valuation of assets for condemnation purposes. It may be reasonable under West Virginia law to consider the cost to rebuild the existing facilities for rate making purposes. However, such reasoning does not apply to a Mississippi condemnation case. It is undisputed in this case that, under Mississippi law, Dedeaux is entitled to have facilities which have been donated to it before the date of taking to be considered in calculating the just compensation due for the taking of its facilities. It is also undisputed that, under Mississippi law, the value of property donated to Dedeaux cannot be considered in establishing the rate Dedeaux may charge its customers. See, **Miss. Code Ann.** §77-3-43. Simply stated, establishing the value of utility facilities for condemnation purposes differs significantly from establishing the value of the same facilities for rate purposes. The decision in 1924 of a foreign court regarding the process for valuing utility facilities for rate purposes has no precedential value for a current day Mississippi condemnation case. The current appraisal standards and methodologies which have evolved in the appraisal field should carry much more weight regarding the value of the Dedeaux physical facilities.

Dedeaux cannot cite one modern day authoritative source in support of its assertion that the correct valuation methodology is to compute the cost to rebuild the Dedeaux system in place. Dedeaux simply misunderstands the proper meaning of the term "replacement cost" as used in the appraisal/valuation industry. Replacement cost does not mean an estimate of what it would cost to replace all of the existing Dedeaux physical facilities with new facilities as James Elliott claims. Mr. Elliott estimated the cost of rehabilitating the existing facility instead of the current cost of a similar new facility having the nearest equivalent utility as the property being appraised. Mr. Elliott's confusion regarding the true meaning of replacement cost and reproduction cost is understandable inasmuch as Mr. Elliott's qualifications (T. 978-988) do not include even one course relating to appraisal or valuation.

Even when the proper methodology is used, the reproduction cost "... can also be dangerous and its use may lead to unjustifiably high verdicts, because the reproduction cost approach tends to set the very highest market value." *State Highway Commission v. Owen*, 308 So.2d 228, 231 (Miss. 1975). Dedeaux's expert, James Elliott, did not use the proper methodology which resulted in a distortion of the indicated value of the physical facilities. Mr. Elliott testified that in 1996 Dedeaux received from a developer 1,283 linear feet of water main and 1,319 linear feet of sewer main which he valued as of December 3, 1996, at $75,975.00. T.1099-1103. Mr. Elliott admitted that the cost of these water and sewer lines in 1996 (cost new) was approximately $37,500.00. T.1104-1105. When asked to explain how the value of these water and sewer lines installed in 1996 went from $37,500.00 to $75,975.00 Mr. Elliott was unable to do so and admitted that using replacement cost for a fully developed area in valuing these 1996 additions was an error. T. 1105. In closing argument, counsel for Dedeaux admitted "... so he was probably about twice as much as he should have been on that total of $75,000.00." T. 1225. The City submits that if Mr. Elliott's methodology is incorrect and results in the facilities installed in 1996 being valued at twice what they should be, then this methodology is also incorrect for facilities installed in all years prior to 1996.

Dedeaux's complaint that Stokes reproduction cost methodology did not assume the system would be replicated in a developed area as the Dedeaux service area existed on the date of taking is disingenuous. Dedeaux's expert, James Elliott, based his cost calculations on an assumption that there were no water and sewer lines existing on the date of taking. T. 1076-1079. Mr. Elliott had to admit that if the water and sewer lines were not in place, the subdivisions, streets and driveways would also not exist. T. 1079.

James Stokes used the correct valuation methodology by determining (through Dax Alexander) the cost new of the Dedeaux physical facilities. He then applied the appropriate

depreciation to obtain the depreciated cost new of the facilities. The Trial Court did not abuse its discretion in allowing Mr. Stokes testimony regarding the value of the physical facilities.

C. THE INCOME METHOD EMPLOYED BY JAMES STOKES TO VALUE THE INTANGIBLE ASSETS OF THE UTILITY SYSTEM COMPLIES WITH ACCEPTED VALUATION METHODOLOGY.

Dedeaux erroneously characterized the methodology used by James Stokes to value the intangible assets of the utility as unreliable and pulled out of thin air. The fact is that the income approach to valuing an asset is universally recognized in the valuation industry. Stokes properly allocated a portion of the estimated future income of Dedeaux to the intangible assets and properly capitalized the estimated future income to arrive at an estimate of the value of the intangible assets.

The income approach to valuation has long been accepted as a proper method for valuing property or assets. *Potters II, v. State Highway Commission*, 608 So.2d 1227, 1231 (Miss.1992). A treatise on eminent domain recognizes that the income approach may be a proper method of assigning a separate value to the franchise of a public utility. Julius L. Sackman, *Nichols on Eminent Domain*, §15.08(1), at 15-58 (Rel.55-7/94 Pub.460). Sackman suggests that one income method of valuing a franchise (certificate of convenience and necessity) is "by capitalizing income that would probably be earned during is existence over and above a fair return upon the tangible property in the plant." *id.* In other words, if the past and projected earnings of the utility exceed what the valuation expert deems a "fair return" on the value of the tangible property, this "excess" income may fairly be attributed to the existence of the franchise. By capitalizing the "excess" income, the valuation expert may arrive at a stated value for the franchise itself. This method of allocating income to the franchise is purely subjective, requiring the valuation expert to predict the "income that would probably be earned" in the future and to select a proper capitalization rate. Sackman does not state that calculating the excess income over a fair return on tangible property is the only method which

may be used to allocate or attribute "excess" income to the franchise.

James Stokes made the calculations necessary to determine if Dedeaux's future earnings would produce income over and above a fair return upon the tangible property in the plant. CP. 478-479, T. 848-849. The calculation revealed that Dedeaux did not have any earnings in excess of a reasonable rate of return on tangible assets, resulting in a zero value for intangibles using Sackman's suggested method. CP. 479. Stokes determined another method of calculating whether Dedeaux had any "excess" earnings which could be attributable to the existence of its intangible assets, including the franchise or certificate.

Stokes compared the regulated rates that Dedeaux charged its customers to the unregulated rates paid by the City of Gulfport customers which surrounded the Dedeaux service area and found that Dedeaux charged higher rates than the City. T. 795. Stokes explained that the rates charged by the City are "regulated" through the election process rather than the Public Service Commission - but regulated nevertheless. T. 796-797. Stokes made a logical conclusion that the "... rate differential is related to them (Dedeaux) having the exclusive rights to water and sewer...". T. 797. In other words, since Dedeaux's certificate of convenience allowed it to operate inside the City limits without having to compete with the City of Gulfport, Dedeaux was able to charge the Gulfport citizens located in it's service area rates which were higher than those paid by the Gulfport citizens being served by the City. If Dedeaux had not had a monopoly in its franchised area, it would have had to lower its rates to keep its customers from switching to the City's water and sewer service.

Stokes calculated that average Dedeaux customer paid $8.16 more for water and sewer services than did the average City customer. T. 799, Ex. 16, CP 480. Stokes then projected the annual rate differential through infinity and computed the present value of the rate differential to be $255,202.30. T. 801-803, Ex. 17, CP. 481.

Stokes capitalization technique is in complete compliance with the traditional income method of valuing property and assets. Dedeaux's real complaint is about the manner in which Stokes determined the "excess" income to be capitalized. The City submits that Stokes method, even if it has never been used before, is just as logical and reliable as the method stated by Sackman in the treatise. Sackman's method requires an assumption that the income generated in excess of a fair return on the tangible assets is attributable to the existence of the franchise. Stokes method requires no assumption because is based on hard and fast facts. The intangible assets of Dedeaux, including the franchise, allowed Dedeaux to receive more income from its customers than that received by the City even though the customers homes may only be separated by the invisible line designating the boundary of Dedeaux's certificated service area. This rate differential can only be the attributed to the intangible assets of Dedeaux, including the exclusive service feature of Dedeaux's certificate of convenience. The fact is that Sackman's method of computing "excess" income produced a result indicating that the Dedeaux's franchise had no value. Stokes method produce a reliable indication of the value of the intangible assets of Dedeaux.

Dedeaux also complained that Stokes did not calculate a separate "going concern value". Dedeaux Brief, p. 23. Stokes calculated a value of all the intangible assets together whether they are called a franchise, good will or going concern. T. 793. The City submits it would be extremely difficult, if not impossible, to compute a separate value for each intangible. Dedeaux's expert placed a value of only $20,000.00 on the going concern element. T. 1070. The City submits that the going concern value, if capable of being calculated, is insignificant to the overall value placed on the utility system by the City's expert.

Dedeaux contends that it was erroneous for Stokes to fail to include the present value of future contributions in aid of construction in his valuation of the intangible assets. The City submits

that Dedeaux is not entitled to be paid any money for an anticipated increase, after the date of taking, in the value of its assets based on the hope that developers will install water and sewer facilities in the future and donate these facilities to Dedeaux. This issue is covered in detail in the City's cross appeal and the City defers to its argument and authorities therein.

The evidence presented by Stokes regarding the valuation of the intangible assets follows methodology accepted in the valuation industry. Stokes allocation of "excess" income to the intangible assets was based on indisputable facts logically applied in order to obtain an indication of value of the intangible assets. The Trial Court did not abuse its discretion in allowing Mr. Stokes testimony regarding the value of the intangible assets of Dedeaux.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ITS OTHER EVIDENTIARY RULINGS.

A. STANDARD OF REVIEW FOR EVIDENTIARY RULINGS.

Dedeaux alleged several erroneous Trial Court evidentiary rulings on pages 26-33, inclusive, of its brief. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected ...". M.R.E. 103(a). The Trial Court has broad discretion when ruling on the relevancy of evidence and will not be reversed unless the ruling results in "prejudice and harm or adversely affect(s) a substantial right of a party." *Terrain Enterprises, Inc. V. Mockbee*, 654 So.2d 1122, 1131 (Miss. 1995).

B. DEDEAUX FULLY EXPLORED THE BASIS FOR STOKES OPINION.

Dedeaux contends that it "was prevented from discovering the basis for Stokes' opinion." Dedeaux Brief, p. 26. The basis of Dedeaux's contention is not clear. The City would guess that Dedeaux is referring to the Order entered by the Trial Court on March 17, 2008, denying Dedeaux's Motion to Compel. CP. 148-151. The Trial Court found that the information sought by Dedeaux

in the Motion to Compel concerning activities occurring eight (8) years after the date of taking and after the City began operating the system was inadmissible and that Dedeaux had no valid reason for requesting the information. *id.* Dedeaux was certainly allowed to cross examine Stokes at length at the trial. The City submits that Dedeaux has made no showing the ruling adversely affected a substantial right. One of Dedeaux's expert witnesses was Aaron Harris whose address is 608 34th Street, Gulfport Mississippi. T. 908. The City suggests that if Dedeaux needed information concerning the City's water and sewer rates then Dedeaux should have examined the water and sewer bill of Mr. Harris.

C. THE LAW OF THE CASE DOES NOT APPLY TO STOKES TESTIMONY AT THE SECOND TRIAL.

The City does not understand the reasoning behind Dedeaux's assertion that the "law of the case" precluded James Stokes from testifying at the second trial. It appears that Dedeaux's position is that if an appellate court deems an expert's conclusions to be unreliable, then the expert is forever barred from testifying at any new trial. That is simply not the law. Stokes used different methodology to come to different conclusions in the new trial. The "law of the case" was simply not applicable to Stokes revised testimony based on the Supreme Court's opinion in the appeal.

D. THE SUPREME COURT'S EVIDENTIARY RULING IN THE FIRST APPEAL WAS INADMISSIBLE AT THE SECOND TRIAL.

Dedeaux's contention that the Trial Court erred in refusing to allow cross examination of James Stokes regarding the fact that Stokes prior opinion as to value was ruled inadmissible by the Supreme Court is unfounded. The Trial Court explained its position prior to any testimony being taken at the trial. T. 597-601. The "proffer" which Dedeaux claims was denied was untimely in that it was made in the middle of Dedeaux's case in chief, not during its cross examination of Stokes. T. 991-993. The City understands Dedeaux's position to be that Stokes cannot testify about his

opinions using the prior methodology but Dedeaux can cross examine him about his opinions using the prior methodology. The danger of allowing such "impeachment" evidence is that it puts into evidence the very testimony that the impeaching party moved to exclude. Furthermore, if Dedeaux had been allowed to offer evidence that the Supreme Court found Stokes methodology unacceptable in order to impeach Stokes, the City should be allowed to bolster Stokes credibility by showing that the Trial Court at the first trial thought the methodology was proper. The Supreme Court's decision in the first appeal of this case is not a matter of which Dedeaux could have presented as evidence in its case in chief. In a civil case, a witness may not be impeached on a collateral or immaterial matter. *Price v. Simpson*, 205 So.2d 642 (Miss. 1968). The Trial Court did not abuse its discretion in refusing to allow the cross examination of James Stokes regarding the prior Supreme Court opinion in this case. Any probative value of such evidence, if any, would be substantially outweighed by the danger of unfair prejudice, confusion of the issues and/or misleading the jury. M.R.E. 403. Dedeaux complained that the Trial Court allowed the City to cross examine its expert, James Elliott, regarding prior public utilities valuation. Dedeaux Brief, p. 28. The trial transcript reveals that Dedeaux allowed this cross examination without objection. T. 1084-1092. Dedeaux should not blame the Trial Court when it did not object.

E. THE TRIAL COURT PROPERLY ALLOWED THE TESTIMONY OF DAX ALEXANDER.

1. DEDEAUX NEVER CHALLENGED THE QUALIFICATIONS OF DAX ALEXANDER TO OFFER THE EXPERT OPINIONS.

Dedeaux gave three (3) reasons why the Trial Court should have granted its Motion to Strike the testimony of Dax Alexander, the first reason being "... Mr. Alexander is not qualified to offer such opinions...". Dedeaux Brief, p. 30. The problem is that Dedeaux never challenged Mr. Alexander's qualifications before the Trial Court. When Dax Alexander was tendered as an expert,

no objection was made and no *voir dire* was conducted relating to his qualifications. T. 696. In fact, the trial record does not reflect any objection whatsoever was made regarding Mr. Alexander's testimony. Dedeaux did file a Motion in Limine regarding Mr. Alexander (CP. 329-341) but there was nothing in the motion challenging either Mr. Alexander's qualifications or expertise. Regardless, the record is clear that Mr. Alexander was qualified to render his opinions at trial.

Mr. Alexander has a Bachelor of Science degree in civil engineering (T. 693); is a licensed professional engineer in the State of Mississippi (T.693-694); has worked as an engineer for over thirteen (13) years (T. 694); spends a good part of his work dealing with construction of water and sewer projects (T. 695); has prepared estimates of projected construction cost of water and sewer projects for owners (T.694-695); has prepared plans and specifications for water and sewer projects (T. 695); has analyzed bids from contractors to advise the owner regarding the advisability of accepting such bids (T. 695); has observed and inspected construction of water and sewer projects (T. 695); has been associated with about 20 major water and sewer construction projects in South Mississippi and some smaller projects (T. 695); and, has experience with repair and rehabilitation of existing systems (T. 695-696).

Mr. Alexander's expert testimony related to the estimated cost of reproducing a duplicate water and sewer system and the estimated useful life of components of such a system. T. 696, 713. Mr. Alexander was not asked to make a valuation of the water and sewer system. T. 696. The City submits that Dax Alexander is qualified "by knowledge, skill, experience, training or education" pursuant to M.R.E. 702 to express the opinions to which he testified.

2. MR. ALEXANDER PROPERLY ESTIMATED THE REPRODUCTION COST BASED UPON THE COST NEW OF REPRODUCING A SYSTEM IDENTICAL TO THE DEDEAUX SYSTEM.

The second reason given by Dedeaux as to why the Trial Court should have granted its

Motion to Strike the testimony of Dax Alexander is "... Mr. Alexander inaccurately estimated the replacement cost based upon installation on raw, undeveloped land ...". Dedeaux Brief, p. 30. This issue is covered in detail earlier in this brief relating to the testimony of James Stokes. The accepted valuation methodology requires that the reproduction cost be based on the cost new of a duplicate system. Dedeaux's expert, James Elliott, agreed that the term "cost new" means that the water and sewer lines are installed when the subdivisions are built and that Dax Alexander calculated the cost new of the Dedeaux facilities. T. 1080.

3. MR. ALEXANDER'S REPRODUCTION COST ESTIMATES WERE ACCURATE AND BASED ON ACTUAL CONSTRUCTION BIDS.

The third reason given by Dedeaux as to why the Trial Court should have granted its Motion to Strike the testimony of Dax Alexander is "... Mr. Alexander's opinions regarding the per unit replacement costs individual (sic) components of Dedeaux are inaccurate, speculative and lack any factual foundation." Dedeaux Brief, p. 30. Mr. Alexander proceeded to estimate the cost of reproducing the Dedeaux system in the same manner as he would normally estimate the cost of a project for a client, except that he had the benefit of looking at actual projects which were built in the same time period. T. 697. Mr. Alexander explained how he examined bid tabulations for actual water and sewer projects which were built in the time frame and explained in detail how he arrived at his opinions regarding the estimated cost. T. 697-712. There was no objection made by Dedeaux to this testimony or the exhibits reflecting this information. The City submits that there is no better way to estimate the costs relating to the installation of water and sewer systems than by analyzing actual water and sewer construction projects. At best, it was up to the jury to decide the reliability of the cost numbers upon which Mr. Alexander based his opinions.

4. MR. ALEXANDER'S ESTIMATE OF THE USEFUL LIFE OF THE VARIOUS COMPONENTS OF THE UTILITY SYSTEM WAS BASED ON HIS EXPERIENCE AND KNOWLEDGE OF THE VARIOUS CONDITIONS WHICH AFFECT THE USEFUL LIFE OF UTILITY SYSTEMS ON THE MISSISSIPPI GULF COAST.

The only complaint Dedeaux makes about Mr. Alexander's estimate of the useful life of the various components is his estimate of the useful life of the PVC pipes. Dedeaux Brief, p. 32. Mr. Alexander testified in detail concerning the process he went through and the factors he considered in forming his opinions, including the possibility of obsolescence. T.713-718. Mr. Alexander explained that he was not representing the numbers as an exact useful life of the components, including the 50 year life assigned to the PVC pipes, because some portions of the pipe will last longer than others, depending on the circumstances. T. 718-719. Dedeaux's expert, James Elliott, admitted that his estimate of 100 years for the useful life of PVC pipe cannot be proven because PVC pipe has not been in existence for 100 years. T. 374-375. Dedeaux takes issue with Mr. Alexander's reliance on his experience and judgement in forming his opinions regarding the useful lives of the various components. Dedeaux's expert, James Elliott, admitted when he was first deposed concerning his opinions of the useful lives of the assets, that his opinions were based upon his experience and judgment. T. 477. The City submits that the question of the useful life of the various components was a jury issue based on disputed facts and opinions.

5. THE COURT PROPERLY EXCLUDED DEDEAUX'S ATTEMPTS TO INTRODUCE EVIDENCE WHICH WAS NOT RELEVANT AND WHICH WAS, AT BEST, CUMULATIVE.

Dedeaux asserts error by the Trial Court for sustaining the City's objection to Dedeaux's tender of two items, these being, (1) CH2M Hill Utility Valuation Report of Orange Grove Utilities, Inc., and (2) Gulfport Master Plan. The Court properly excluded these documents.

Dedeaux believes that it can somehow impeach James Stokes use of "cost new" in

calculating the depreciated reproduction cost of Dedeaux's tangible assets by proving that the CH2M Hill valuation did not use "cost new". The City does not understand how James Stokes can be impeached with a valuation with which he had nothing to do. The fact is that James Stokes use of "cost new" is the accepted proper method of computing the reproduction cost. It matters not that one or more prior valuations on other utilities which may have been commissioned by the City and prepared by other experts did not use the proper method. The CH2M Hill valuation simply has no probative value for any reason. James Stokes did not prepare it and there is no evidence that Stokes ever agreed with the methodology therein. The CH2M Hill valuation was irrelevant to the issues being tried.

As to the "Master Plan", Dedeaux asserts that it "would have established that Gulfport considers existing constraints when estimating replacement cost of existing utility systems." Dedeaux Brief, p. 33. This was not a contested issue. The City readily admitted that it costs more to refurbish or rebuild an existing system if the work entails tearing up and repairing streets, driveways and other existing improvements. James Stokes testified that "If you had to replace what was already there you would have to dig up streets and driveways and everything else to replace it and it would cost a lot more." T. 841. The "Master Plan" dealt, in part, with the costs the City might incur in refurbishing some existing water systems. The Trial Court noted that there was no dispute regarding the additional cost involved in developed areas and also noted that the "Master Plan" was done in 2000, four (4) years after the date of taking. T. 789-790.

The City submits that some confusion was created by the consistent use of the term "replacement cost" by all of the experts when they were actually referring to "reproduction cost". As mentioned earlier in this brief, "replacement cost" is defined as the estimated cost to construct, at current prices as of the effective appraisal date, an asset with utility equivalent to the asset being

appraised. Dedeaux has all along incorrectly assumed that "replacement cost" means the cost of replacing in its entirety the existing asset rather than reproducing "new" an equivalent asset. The fact is that the city's expert, James Stokes, was computing the "reproduction cost" of the Dedeaux system, this term being defined earlier in this brief as the estimated cost to construct, at current prices as of the effective date of the appraisal, an exact duplicate or replica of the asset being appraised, using the same materials, construction standards, design, layout, and quality of workmanship and embodying all the deficiencies, superadequacies, and obsolescence of the subject asset. The costs associated with repairing and refurbishing existing water lines was not relevant to computing the "cost new" of the Dedeaux system. Even if such costs were relevant, the fact is that there was no dispute between the parties that it is much more expensive to rehabilitate an existing utility system than it is to build a new system.

III. THE CITY'S CLOSING ARGUMENT WAS PROPER AND BASED ENTIRELY ON THE EVIDENCE.

Dedeaux's claim that the closing argument by the City's counsel was improper is without merit. The City presented, without objection, Exhibits 12-A and 12-B, which reflected the revenues and expenses of Dedeaux from 1988 through 1996. T. 767-769. James Stokes testified, without objection, that the average net income was approximately $25,000.00 per year. T. 769. Stokes opinion that the value of the utility system was $3,691,328 was also in evidence. T. 805.

Closing argument gives the attorneys for the parties an opportunity to advocate their clients position by explaining, interpreting and arguing the evidence, including presenting reasonable conclusions that may be drawn from the evidence. Appellate courts are loathe to find error in closing argument.

> Attorneys are allowed wide latitude in closing arguments. (Citations omitted). In addition, the "court should also be very careful in

> limiting free play of ideas, imagery, and personalities of counsel in their argument to [a] jury." (Citation omitted). Any alleged improper comment must be viewed in context, taking the circumstances of the case into consideration. The trial judge is in the best position to determine if an alleged objectionable remark has a prejudicial effect, (Citation omitted) and a "trial judge has wide discretion in controlling remarks and argument of attorneys." (Citation omitted).

Haggerty v. Foster, 838 So.2d 948, 962 (Miss.2002). The City submits that on page 34 of its brief Dedeaux misstated its objections and the Court's response. Dedeaux did not object to Stokes testimony that Dedeaux would not have any lost income because Dedeaux was getting cash and could generate income from the cash. T. 805-806. The only thing that Dedeaux objected to was Stokes testimony as to the rate Dedeaux could earn from U. S. Treasury Bills on the cash it received. T. 807. The Trial Court noted the extent of Dedeaux's objection and refused to strike the entirety of Stokes testimony. T. 809-810. The only testimony the Trial Court instructed the jury to ignore was "... the testimony about Mr. Stokes as to the investments of the $3,691,000 some odd dollars concerning investment at a certain percent ...". T. 810.

Counsel's argument that the City was swapping $3,691,328.00 for Dedeaux's assets is supported by the evidence. Counsel's argument that Dedeaux could earn a lot more money by investing the cash than the amount Dedeaux had been earning was not only supported by the evidence but was nothing more than fair comment on the evidence. Counsel's comment that at $25,000.00 per year it would take Dedeaux about 140 years to earn $3,600,000.00 was nothing more than simple division based on the undisputed evidence. Counsel's comments had nothing to do with the methodology to be used for valuing the utility. There was nothing improper, much less prejudicial, about the closing argument presented by Counsel for the City.

IV. THE TRIAL COURT PROPERLY DENIED DEDEAUX'S CLAIM THAT MISS. CODE ANN. §11-27-19 (1972) IS UNCONSTITUTIONAL.

A. DEDEAUX IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE BECAUSE IT FAILED TO PROPERLY NOTIFY THE MISSISSIPPI ATTORNEY GENERAL AS REQUIRED BY THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

Rule 24(d) M.R.C.P. requires notice to be given to the Attorney General of the State of Mississippi if a party challenges the constitutionality of any statute of the State of Mississippi. Rule 44(a) M.R.A.P. also requires notice be given to the Attorney General when the constitutionality of a statute is challenged. Failure to comply with these rules precludes a party from raising the constitutionality of a statute on appeal. *Oktibbeha County Hosp. v. Mississippi DOH*, 956 So.2d 207 (Miss. 2007). Failure to comply with Rule 24(d) M.R.C.P. will preclude a constitutional challenge to a statute even if the party serves the Attorney General with a copy of the appellate brief pursuant to M.R.A.P. 44(a). *Powers v. Tiebauer*, 939 So.2d 749 (Miss. 2005).

Dedeaux first raised the constitutionality of **Miss. Code Ann.** §11-27-19 with its Answer to the eminent domain petition, filed April 11, 1997. Dedeaux next raised the constitutionality of **Miss. Code Ann.** §11-27-19 with its Motion to Dismiss filed July 2, 1997. Dedeaux next raised the constitutionality of **Miss. Code Ann.** §11-27-19 with its pleading styled Dedeaux Utility Company's Motion to Dismiss, or, Alternatively, For Declaratory Judgment on the Issue of Contributions in Aid of Construction After December 3, 1996, And Other Matters Constituting Inverse Condemnation, filed April 30, 2008.

The Certificate of Service relating to Dedeaux's Answer to the eminent domain petition does not reflect that Dedeaux served the Attorney General. CP. 288. The Certificate of Service relating to Dedeaux's Motion to Dismiss filed July 2, 1997, does not reflect that Dedeaux served the Attorney General. CP. 293. The Certificate of Service relating to Dedeaux Utility Company's Motion to Dismiss, or, Alternatively, For Declaratory Judgment on the Issue of Contributions in Aid

of Construction After December 3, 1996, And Other Matters Constituting Inverse Condemnation does not reflect that Dedeaux served the Attorney General. CP. 283.

Dedeaux gave no notice to the Attorney General until it filed it appellate brief on September 30, 2009. The City submits that Dedeaux is procedurally barred from arguing the unconstitutionality of **Miss. Code Ann.** §11-27-19 because of Dedeaux's failure to comply with the mandatory provisions of Rule 24(d) M.R.C.P.

B. DEDEAUX VOLUNTARILY ABANDONED ITS CLAIM REGARDING THE UNCONSTITUTIONALITY OF MISS. CODE ANN. §11-27-19.

In the motion filed by Dedeaux on April 30, 2008, Dedeaux was requesting that **Miss. Code Ann.** §11-27-19 be declared unconstitutional only "If this Court does not allow future contributions-in-aid-of-construction to be recovered as an element of damage ...". CP. 281. Counsel for Dedeaux confirmed its position at oral argument when the Trial Court was advised that if the Trial Court allowed Dedeaux to present evidence of the estimated value of future contributions in aid of construction then Dedeaux was making no claim regarding the unconstitutionality of the statute. T. 250-253, 349-351.

Over the City's objection, the Trial Court allowed Dedeaux's expert, James Elliott, to testify regarding his opinion as to the present value of the future contributions in aid of construction Elliott predicted Dedeaux would receive after 1996. T. 975-976. This calculation included the value of future contributions in aid of construction for the years 1997 through 2004, inclusive. Ex. 57. Dedeaux voluntarily abandoned any claim it had that **Miss. Code Ann.** §11-27-19 was unconstitutional and any claim of inverse condemnation.

C. DEDEAUX ABANDONED ANY CLAIM IT HAD REGARDING THE UNCONSTITUTIONALITY OF MISS. CODE ANN. §11-27-19 BY FAILING TO RAISE THE ISSUE BEFORE THE TRIAL COURT FOR OVER ELEVEN (11) YEARS.

On April 11, 1997, Dedeaux raised the issue of the constitutionality of **Miss. Code Ann.** §11-27-19 as its Fifth Defense in the answer it filed to the eminent domain petition. CP 284-288. On July 2, 1997, Dedeaux filed a Motion to Dismiss (CP 289-292) alleging in Paragraph 5 of its motion that the action should be dismissed based on its Fifth Defense. CP. 291. Dedeaux did not bring this issue before the Trial Court prior to the first appeal in this case and did not raise this issue in the appeal.

The Mandate of the Supreme Court of Mississippi regarding the first appeal of this case was issued on October 19, 2006. CP. 25. Dedeaux did not raise the issue of the constitutionality of **Miss. Code Ann.** §11-27-19 until April 30, 2008. The City submits that Dedeaux abandoned or waived its affirmative defense regarding the constitutionality of **Miss. Code Ann.** §11-27-19 by failing to timely bring the issue before the Trial Court or the Supreme Court in the first appeal. *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006); *East Mississippi State Hosp. V. Adams*, 947 So.2d 887 (Miss. 2007); *Estate of Grimes v. Warrington*, 982 So.2d 365 (Miss. 2008); *Aikens v. Whites*, 8 So.3d 139 (Miss. 2008).

D. DEDEAUX FAILED TO PRESERVE FOR APPEAL ANY CLAIM IT HAD RELATING TO INVERSE CONDEMNATION.

Dedeaux's claim regarding the alleged inverse condemnation relates solely to contributions in aid of construction Dedeaux asserts it received between the date of filing the complaint and the date the City actually took possession of the system. CP. 280-282. Dedeaux stated in its brief that it "estimated that it added at least $1,000,000.00 in assets" in that time period. Dedeaux Brief, p. 36. A review of the record cited by Dedeaux in support of its estimate reveals that the estimate of the amount of contributions in aid of construction was stated by Dedeaux's attorney while arguing Dedeaux's motion for a new trial. T. 1250-1252. The City can find in the record no evidence of any

document or admissible testimony offered prior to or during the trial which shows that someone donated property to Dedeaux after December 3, 1996. Likewise, there was no evidence offered before or during the trial upon which the Trial Court or the jury could determine the value of any alleged property donated to Dedeaux after December 3, 1996. In short, Dedeaux never made a proffer regarding the items of property donated to it after December 3, 1996, or the alleged value of any such donated property. Rule 103(a)(2) M.R.E. requires a party to make an offer of proof to preserve for appeal any ruling made by a trial court excluding evidence. Failure to make an offer of proof precludes the issue from being raised on appeal. *Stewart v. State*, 928 So.2d 945 (Miss. Ct. App. 2006).

E. DEDEAUX MADE NO COMPULSORY IMPROVEMENTS AFTER THE DATE OF TAKING.

All of the cases from foreign jurisdictions cited by Dedeaux in its brief in support of its argument dealt with utilities which were required to expend money after the date of taking to make compulsory improvements. Dedeaux does not argue , nor did it submit evidence, that it was required to expend any significant sum after the date of taking to expand or improve its system. Dedeaux's constitutional claim deals only with alleged contributions in aid of construction after the date of taking. At best, Dedeaux alleged that its utility system increased in value after the date of taking due to donations made to it by others. Any increase in value of the system after the date of taking is not compensable under Mississippi law. "The intent of the rule establishing the date of the filing of the eminent domain proceeding as the proper date to be used in determining land values in eminent domain cases was to create a specific date for evaluation purposes and therefore to add specificity to the "before and after" rule used to determine such values." *Mississippi State Highway Commission v. Frierson*, 240 So.2d 457 (Miss. 1970).

The City submits that it cannot "take" a tangible asset that does not exist on the date of taking. Any property received by Dedeaux by donation, if any, after the date of taking could not be taken by the City as of the filing of the eminent domain petition. If an inverse condemnation occurred relating to property donated to Dedeaux after the date of taking, it occurred in December 2004 when the City took possession of the Dedeaux water and sewer system.

V. THE TRIAL COURT PROPERLY DENIED DEDEAUX'S MOTION RELATING TO EQUAL PROTECTION.

Dedeaux failed to cite any support for its proposition that the Trial Court should have dismissed this action because of the City's alleged violation of the Equal Protection Clause of the United States Constitution. Dedeaux Brief, p. 43. The City understands Dedeaux's position to be that the City used different litigation/settlement tactics with another utility which was acquired by the City. It appears that Dedeaux divided the total settlement with the other utility by the number of customers served by the other utility and believes the City should offer the same amount per customer to Dedeaux. T. 337-338. The Trial Court noted that there were substantial differences between the two utilities, including service area size and number of customers. T. 347-348. The Trial Court expressed concern that upholding Dedeaux's position would have an adverse effect on other eminent domain cases. T. 348. The Trial Court found that a big difference between the per customer amount paid to the other utility and the amount offered to Dedeaux was insufficient to find a violation of the equal protection clause of the Constitution. T. 348.

Mississippi Courts have recognized that decisions regarding the best use of public funds are legitimate areas of concern and public bodies may allocate the resources in a manner which does not provide the same level of benefits to all without violating equal protection rights. *Mosby v. Moore*, 716 So.2d 551,555-556 (Miss. 1998). Dedeaux simply cannot support its proposition that the City

should pay the same amount per customer for every utility it acquires. If that were the case, the City would complete the taking of the least valuable utility first and offer that per customer amount to every other utility.

CONCLUSION

The primary basis of Dedeaux's appeal is its contention that James Stokes, CPA, CVA, is so incompetent he valued Dedeaux's tangible utility system by determining the cost to build a new duplicate system rather than the cost to rebuild the Dedeaux system itself in the exact location of the current system as developed. Stokes method of valuation is the method accepted in the appraisal /valuation industry based on the principle of substitution. It is Dedeaux's method which violates the accepted valuation principles.

Stokes method of valuing the intangible assets of Dedeaux, i.e., the process of capitalizing the income that can be attributed to an individual asset, is also accepted in the appraisal/valuation industry. Stokes devised a logical procedure for allocating a portion of Dedeaux's income to the intangible assets.

There was no evidentiary error committed by the Trial Court which would warrant reversible error for Dedeaux.

Dedeaux abandoned and/or waived any claim that **Miss. Code Ann.** §11-27-19 is unconstitutional and any claim regarding inverse condemnation. Dedeaux failed to proffer any evidence regarding the type or quantity or the value of any property donated to it after the date of taking.

CROSS APPEAL OF THE CITY OF GULFPORT

STATEMENT OF THE ISSUES

This cross appeal presents the following issues:

Whether the Trial court erred by refusing to award the City interest on the prior overpayment to Dedeaux.

Whether the Trial Court erred by refusing to exclude Dedeaux' expert witness testimony regarding the value of Dedeaux's certificate of convenience and necessity.

Whether the Trial Court erred as a matter of law by allowing the Defendant to introduce evidence of the value of the subject utility to the condemning authority rather than limiting the evidence to the value of the utility to its owners as of the date of taking.

Whether the Trial Court erred by allowing evidence of and instructing the jury that the highest and best use of the subject utility was as an unregulated utility.

Whether the Trial Court erred by allowing evidence that the value of the utility was increased because the City was under a compulsion to purchase the system.

Whether the Court erred by granting certain jury instructions which singled out different elements of damage and which were improper comments on the evidence.

Whether the Court erred in originally changing the venue of this cause to the Second Judicial District of Harrison County and further erred by refusing to grant the City relief from its prior order changing the venue.

STATEMENT OF THE CASE

The City accepts Dedeaux's Statement of the Case with one exception. Dedeaux asserted that "In addition to condemning those assets which existed on the date of filing, the Complaint also sought to condemn 'additions, extensions and/or supplements.'" Dedeaux Brief, p. 3. Dedeaux also

asserted "The Final Judgment specifically referenced at Exhibit A that the taking included 'any additions, extensions and/or supplements.'" Dedeaux Brief, p. 4. These statements are inaccurate. The language "including any additions, extension and/or supplements" related only to the Mississippi Public Service Commission water certificate (CP. 1176) and the Mississippi Public Service Commission sewer certificate (CP. 1176-1177), not any other asset(s). The City was attempting to describe the original water and sewer certificates issued to Dedeaux along with any additions, extensions and/or supplements to the original certificates. The City could not take any assets which did not exist when the Complaint was filed.

SUMMARY OF THE ARGUMENT

The City overpaid Dedeaux by almost Seven Hundred Dollars ($700,000.00) which Dedeaux used for over two (2) years. The City was entitled to recover interest from Dedeaux on this overpayment but the Trial Court refused to award any interest to the City.

The Trial Court committed numerous errors in ruling on evidentiary matters which deprived the City of its right to a fair trial. The Trial Court allowed Dedeaux's expert to (1) value assets which did not exist on the date of taking; (2) assume that all of the potential future income of the utility should be attributed to the Certificate of Convenience and none to the physical facilities; (3) value the utility based on its value to the City, including benefits the City might receive from the condemnation, and not the value to the owner; (4) give an opinion that the highest and best use of the utility was an unregulated utility without any supporting evidentiary basis; and, (5) testify that the City should pay a higher price because the City was under a compulsion to buy the utility.

The Trial Court erred by instructing the jury that the highest and best use of the utility was an unregulated utility to be purchased by an unregulated purchaser. The Court further erred by instructing the jury regarding separate elements of damage and commenting on the evidence.

The Trial Court erred by transferring the venue of this action and refusing to reconsider the transfer of venue.

ARGUMENT AND AUTHORITIES

I. THE COURT ERRED BY REFUSING TO AWARD THE CITY INTEREST ON THE PRIOR OVERPAYMENT TO DEDEAUX.

In the first appeal of this case, the Court reversed the Trial Court's award of compound interest to Dedeaux. *Dedeaux Utility Company, Inc. V. City of Gulfport*, 938 So.2d 838, 846 (Miss. 2006). The City filed a Motion to Recover Excess Interest requesting the Trial Court to enter a judgment in favor of the City for the excess interest paid by the City of Six Hundred Ninety Eight Thousand Six Hundred Four and 86/100 Dollar ($698,604.86) plus eight percent (8%) simple interest from the date the City paid the additional interest to Dedeaux. CP 40-42. The Trial Court entered two (2) orders on the motion, both of which denied the City any interest on the overpayment to Dedeaux, the Trial Court being of the opinion that there was no authority for awarding the City interest. CP 66-69, 70.

The City was entitled to a judgment against Dedeaux for the amount of the excess paid to Dedeaux. The City submits such a judgment is one to which **Miss. Code Ann.** §75-17-7 is applicable. Accordingly, the Trial Court could have determined a fair rate of interest to be paid by Dedeaux from the date it received the overpayment. It seems only fair that Dedeaux should pay the City the same interest rate, eight percent (8%) that the City is required by statute to pay Dedeaux. Dedeaux received a windfall by using the City's money for a long period of time before being required to pay it back to the City. The Trial Court erred in failing to award the City any interest at all on the overpayment.

II. THE COURT ERRED IN DENYING THE CITY'S MOTION IN LIMINE REGARDING THE VALUATION TESTIMONY OF JAMES ELLIOTT, P.E.

A. INTRODUCTION

Dedeaux retained Mr. James Elliott (hereinafter Elliott) with Diversified Consultants, Inc., to value its utility system. Mr. Elliott has taken an asset based approach to his valuation, assigning a separate value to different categories of assets and adding these separate values together to arrive at a total value for the utility system. CP. 182. The City filed a Motion in *Limine* (CP. 173-234) concerning Elliott's value assigned to Dedeaux's Certificate of Necessity and Convenience (hereinafter the Certificate). The Trial Court denied the City's motion. CP. 562. The City renewed its motion in *limine* at trial which was again denied but the Trial Court granted the City a continuing objection to Elliott's testimony. T. 874-876.

Elliott's value of the Certificate is broken down into two (2) elements, these being the present value of future Contributions in Aid of Construction (hereinafter CIAC) and the present value of future cash flow. CP. 182. Elliott speculated as to the amount of CIAC Dedeaux would receive in the fifteen (15) years **after** the date of taking, speculated as to the value of this future CIAC and calculated what he terms the "present value" of the alleged future CIAC. Elliott opined that the "present value" in cash of the future CIAC is $1,494,700.00. Elliott then estimated the future income of the utility for the next fifteen (15) years, estimated the amount of total cash flow which would be generated by such income and calculated the "present value" of the future cash flow to be $800,388.00. It is Elliott's opinion that the value of the Certificate is the total of the two (2) "present values" or $2,295,088.00. CP. 182.

B. AN EXPERT OPINION MUST MEET THE REQUIREMENTS OF MRE RULE 702.

A person who is qualified as an expert witness in a particular area may express an opinion only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702. Mississippi has adopted the "modified Daubert rule", *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 35 (Miss. 2003) in which the trial court is vested with a "gatekeeping responsibility." *id.* at 36. "(T)here is universal agreement that the *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony." *id.* at 38.

The Court in *McLemore* adopted Daubert's "non-exhaustive, illustrative list of reliability factors for determining the admissibility of expert witness testimony." *id.* at 36-37. "These factors include whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high 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 a relevant scientific community." *id.*

C. ELLIOTT'S OPINION AS TO THE VALUE OF THE CERTIFICATE OF CONVENIENCE IS NOT THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS.

i. ELLIOTT USED AN ERRONEOUS COMBINATION OF TWO SEPARATE AND DISTINCT METHODS TO VALUE THE CERTIFICATE.

The utility system owned by Dedeaux and being acquired by the City is an income producing asset comprised of two (2) primary parts, these being (1) the physical facilities of the water and

sewer system and (2) the Certificate which allows Dedeaux to sell the water and sewer services. The land and other assets which Elliott valued at a total of $45,200.00 are insignificant. Elliott admitted that the physical facilities and the certificate work together to produce the income for Dedeaux. CP. 219-220. Elliott also admitted that the combination of the physical facilities and the certificate of convenience allow for the future growth in the certificated area. CP. 220. Elliott cannot say what percent of the future growth can be allocated to the physical facilities and what percent can be allocated to the certificate. CP.221. Since his estimate of future income and cash flow is based on his estimate of future growth, it follows that he cannot allocate the future cash flow between that pertaining to the Certificate and that pertaining to the physical facilities. Simply put, Dedeaux could not sell water and sewer services without the authority of the Certificate and without the physical facilities to deliver the services. The relation of the Certificate and the physical facilities to producing income is analogous to the income producing relation of a rental building and the land the building sits on, that is, there is little or no income without both.

It should be obvious that if two components of an asset combine to produce the income or growth and, if the percentage of income or growth allocable to each component cannot be established, then it would be impermissible to assign all of the income or growth to one component. Yet that is exactly what Elliott did in his valuation.

In purporting to value the Certificate, Elliott computed the present value (Table 7 in his report, CP. 201) of the entire cash flow which he predicted would be produced by Dedeaux's operations during the fifteen years after the date of taking. CP. 223-224. Elliott included in his calculation the entire projected income and cash flow for this fifteen (15) year period. CP. 226. Elliott calculated that the present value of the projected entire cash flow for Dedeaux for this period was $800,388.00. CP. 201. Elliott used this number as part of the value of the Certificate. CP. 182.

By using all of the projected income and resulting cash flow to value the Certificate, Elliott inexplicably assigned all of the production of the income and cash flow to the Certificate, simply ignoring the admitted contribution of the physical facilities to this cash flow stream.

Elliott compounded his error by using the same method to arrive at a purported present value of his projected future CIAC (Table 8 in his report, CP. 202) to add to his alleged value of the Certificate. Elliott equates the "value" of CIAC to income. CP 212-213. Elliott predicted the value of the amount of CIAC which developers might contribute to Dedeaux in the fifteen (15) years **after** the date of taking and then calculated the present value in cash of this future CIAC. CP. 200. As with the cash flow, Elliott allocated all of the predicted future CIAC to the Certificate, crediting none of the future growth to the admitted contribution of the physical facilities. Elliott then added this "present cash value of future CIAC" of $1,494,757.00 to his present value of future cash flow of $800,388.00 to arrive at his value of the Certificate (CP. 182, 216), which is $2,295,145.00 (CP. 182).

There are three (3) generally accepted separate and distinct approaches (methods) to value property, these being "the income approach, the cost approach and the market data or sales comparison approach." *Burks v. Mississippi Transportation Commission,* 990 So.2d 200, 203 (Miss.Ct.App. 2008) (Citations omitted). It is permissible to "mix" two or more of these approaches under the proper circumstance, if such mixing is allowed by "established appraisal principles and guidelines" such as in valuing improved real property. *id.* at 204. In *Burks*, the appraiser for the Highway Department valued the improvements using the cost approach and valued the land using the sales comparison approach, which the Court of Appeals found to be an acceptable valuation method. The City submits that it is not unusual to see an appraiser determine the value of improved real property considering the method approved in *Burks* and compare the result to the value reached

by considering the income approach. This gives the appraiser two separate and distinct indications of value from which the appraiser may form his opinion as to the ultimate value to be assigned to the property. The City submits that there cannot be found in caselaw or established principles and guidelines, any authority to value the improvements using the "cost approach" and value the land using the "income approach" and assign all of the income produced by the property to the land! It might be possible to value the land using the "income approach" to capitalize the amount of income which could be, with reasonable certainty, allocated only to the land but it is certainly not permissible to simply assume all of the income is produced by the land and none by the improvements.

What Elliott did was use the "income approach" of valuation to value the Certificate, assigning all of the estimated future income for fifteen (15) years to the Certificate, simply ignoring the admitted contribution of the physical facilities to the production of that income. Elliott used the "cost approach" to value the physical facilities. He then added the two values together to get a total value of the utility system. This is exactly the same as valuing rental property by allocating all of the income to the land and none to the building. The City submits the value of the utility system obtained by this indefensible approach is not the product of reliable principles and methods as required by MRE 702.

ii. ELLIOTT'S METHOD OF VALUING THE CERTIFICATE CANNOT BE FOUND IN ESTABLISHED APPRAISAL PRINCIPLES AND GUIDELINES.

Section (§15.08) of Julius L. Sackman, *Nichols on Eminent Domain, at 15-56 through 15-61 (Rel. 55-7/94 Pub. 460)* pertains to the methods of valuing a utility franchise a/k/a Certificate of Convenience. Section 15.08 lists four (4) methods of valuing a franchise, these being:

[1] – Income as a Criterion of Value.

[2] – Use as a Criterion of Value.

[3] – Statutory Provisions.

[4] – Unit Rule.

Notably missing from Sackman's accepted methods of valuing the Certificate is the method used by Elliott, that is, the present value of fifteen (15) years of total cash flow plus the present value of fifteen (15) years of estimated future CIAC.

The City's attorney questioned Elliott at length concerning his valuation method in an attempt to discover any caselaw, treatise, industry publication or any other authoritative source for Elliott's present value of future CIAC method of valuing the Certificate. CP 204-215. All to no avail. Elliott and his client, Dedeaux, have failed to produce one authoritative source which states that a Certificate should be valued by computing the present value of future contributions in aid of construction. When asked what factors he used in determining that this method should be used to value the Certificate, Elliott stated "That's my professional judgment." CP. 205. "The party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." *Mississippi Transportation Commission v. McLemore*, supra, at 36.

Likewise, there is no authoritative source which supports Elliott's present value of fifteen (15) years cash flow method of valuing the Certificate. As noted above, Sackman does recognize an income method of valuing a Certificate. The theory is that the owner or investor first expects to earn a fair return on the value of the physical facilities. Any earnings above that amount can be attributed to the monopolistic character of the Certificate. Of course, the problem with assigning all of the income to the Certificate is that it leaves no income return

at all on the value of the physical facilities. Elliott's valuation method has the buyer paying $7,506,000.00 for the water and sewer physical facilities with absolutely no cash return on this investment for fifteen (15) years!

C. ELLIOTT HAS NOT APPLIED THE PRINCIPLES AND METHODS RELIABLY TO THE FACTS OF THIS CASE.

i. ELLIOTT DID NOT LIMIT HIS VALUATION TO THE DATE OF TAKING AS REQUIRED BY MISSISSIPPI LAW.

At least since *Pearl River Valley Water Supply District v. Brown*, 182 So.2d 384 (Miss. 1966), it has been settled law in this State that (1) property taken by eminent domain is valued as of the date of taking and (2) the date of taking is the date the condemnation petition was filed. The date of taking the Dedeaux utility system is December 3, 1996. In his valuation, Elliott has attempted to value assets which he predicted Dedeaux "might" obtain by donation in the fifteen (15) years **after** the date of taking. In the guise of valuing the Certificate, Elliott has "valued" assets which did not exist on the date of taking.

As stated earlier, Elliott estimated the amount of development which would occur **after** the date of taking, the amount of physical facilities which would be constructed **after** the date of taking and donated to Dedeaux **after** the date of taking. Elliott considers this future CIAC as being "value" to Dedeaux. Elliott calculated the "present value" of the future CIAC. The problem is that the future CIAC did not exist on the date of taking, therefore, it cannot be considered in valuing the business on December 3, 1996. To get around this clear violation of the "value at the date of taking" rule, Elliott declared that this "value" Dedeaux would obtain from development occurring **after** the date of taking was in reality part of the value of the Certificate which was in existence at the date of taking. This method of valuation is

contrary to the established rule that evidence of development occurring after the date of taking a water and sewer utility is not admissible.

In *Bear Creek Water Association, Inc. V. Town of Madison,* 416 So.2d 399 (Miss.1982), the trial Court had sustained a motion *in limine* concerning five (5) areas of evidence, number four (4) being "any matters pertaining to the development activities occurring after the filing of the petition in the area covered by the portion of the certificate condemned". *id.* at 401. The Court stated:

> We therefore think the trial court erred in sustaining Madison's motion *in limine* hereinabove set forth, **except section (4)**, which, in accord with *Pearl River Valley Water Supply District v. Wright,* 186 So.2d 205 (Miss.1966), specifies values in eminent domain proceedings as of the date suit is filed, and not thereafter. (Emphasis added).

id. at 402. The City submits that the Court could not more clearly state that development after the date of taking is not admissible evidence regarding the value of the utility system. This clear exclusion of post-taking development should not be confused with the Court's position in *Bear Creek* regarding pre-taking development. In its statement of the pertinent facts, the Court stated:

> When the petition was filed on January 14, 1980, there were no water customers residing on the 245 acres and Bear Creek was receiving no revenue from it. However, the developer of the subdivision had installed water distribution facilities in the condemned portion at an approximate cost of $85,000.00. Moreover, it appears to be common practice for subdivision developers to install water distribution facilities which are later dedicated to the person or concern owning the right to serve the area. **At the time the petition was filed, however, the developer had not conveyed the facilities to anyone although Bear Creek appeared to be the only logical recipient because it owned the exclusive right to serve the area, at least until Madison filed the eminent domain proceedings.** (Emphasis added).

id. at 400. With regard to these pre-taking existing water distribution system facilities, the Court held that "... the probability of its (Bear Creek) receiving the water facilities installed by

the subdivision developer ..." (which had been excluded by the trial court in area number three (3) of the motion in *limine)* was admissible to determine the value of the system as of the date of taking. *id.* at 402.

Contrary to the assertions of Elliott and Dedeaux, the Court in *Bear Creek* did not say development (CIAC) occurring after the date of taking should be included in the value of the system. The City submits that if Dedeaux can use the "present value" of the increase in value of its water and sewer lines by way of donated property occurring **after** the date of taking, then Dedeaux could also get an appraiser to estimate how much its land will increase in value **after** the date of taking and calculate the "present value" of the future increase in value of the land.

ii. ELLIOTT'S CERTIFICATE VALUE IS BASED ON MERE SPECULATION.

Elliott's opinion, like the appraiser's opinion in *McLemore*, supra, is nothing but rank speculation. In *McLemore*, the appraiser testified that the land suffered greater loss in an area from 500 to 1,000 feet from the highway and decided to use 750 feet as the "line" at which greater damage should be assessed. The Court found this arbitrary choice of the number of feet to use was nothing more than speculation. Elliott has testified in this cause that he could have used anywhere from ten (10) years to thirty (30) years to value the future CIAC and cash flow but it was just his "judgment" to use fifteen (15) years. CP. 224-225. Based on his schedules, the value of the Certificate could have been a low (present value of 10 years CIAC and cash flow) of $1,758,370.00 or a high (present value of 20 years CIAC and cash flow) of $2,655,791.00. Elliott's adopted Certificate value of $2,295,088.00 is nothing more than splitting the difference, which the *McLemore* Court found to be speculation. Elliott is unable to give any logical explanation for his choice other than it is just his judgment.

E. ELLIOTT'S OPINION FAILS TO SATISFY ANY OF THE DAUBERT FACTORS FOR EVALUATING EXPERT TESTIMONY.

The Daubert factors for evaluating expert witness testimony adopted by the Mississippi Supreme Court in *McLemore* are listed earlier in this brief. Elliott's proposed opinion testimony fails to satisfy any of these factors, as discussed below.

i. WHETHER IT HAS BEEN SUBJECTED TO PEER REVIEW AND PUBLICATION.

Despite requests by the City, Dedeaux has failed to produce even one publication or peer review regarding Elliott's method of valuing a utility certificate of convenience by adding the present value of fifteen (15) years of estimated future CIAC to the present value of fifteen (15) years of estimated future cash flow.

ii. WHETHER THE THEORY OR TECHNIQUE ENJOYS GENERAL ACCEPTANCE WITHIN A RELEVANT SCIENTIFIC COMMUNITY.

There was absolutely no evidence that Elliott's method of valuing a utility certificate of convenience enjoys general acceptance within the appraisal or valuation community. The City is unaware of any other valuation expert who has used Elliott's method of valuing a utility certificate of convenience. Dedeaux failed to come forward with the names of any others who use the same method of valuing a certificate as Elliott.

iii. WHETHER THE THEORY OR TECHNIQUE CAN BE AND HAS BEEN TESTED.

It appears that Elliott's method has not been tested in the appraisal field since there is no evidence that anyone other than Elliott has used the method. Like the 750 foot line in *McLemore*, Elliott's fifteen (15) year capitalization period is not capable of being tested since Elliott chose the period at random, simply splitting the difference between his ten (10) year and

twenty (20) year calculations.

iv. WHETHER THERE ARE STANDARDS CONTROLLING THE TECHNIQUE'S OPERATION.

As with the 750 foot line in *McLemore*, since Elliott arbitrarily chose the fifteen (15) year capitalization period, it is the result of speculation. It is thus clear, as in *McLemore*, that no standards control this method.

v. WHETHER THERE IS A HIGH KNOWN OR POTENTIAL RATE OF ERROR.

There is a high potential rate of error. First, the capitalization of future CIAC is based entirely on Elliott's speculation as to the quantity and cost of water and sewer facilities which may be built by others in the fifteen (15) years **after** the date of taking. Dedeaux has absolutely no control of the numerous factors which could affect the rate, cost and extent of future development. Second, Elliott, without any particular reason, chose a fifteen (15) year capitalization period which, according to his testimony, could have been any period between ten (10) years and twenty (20) years. It is clear that his method carries a ninety (90) percent chance of error since any of the other ten (10) years could have been chosen.

III. THE COURT ERRED BY ALLOWING DEDEAUX TO PRESENT EVIDENCE THAT THE VALUE OF THE SUBJECT UTILITY WOULD BE INCREASED BY ATTRIBUTES OF THE CONDEMNING AUTHORITY RATHER THAN LIMITING THE EVIDENCE TO THE VALUE OF THE UTILITY TO ITS OWNER AS OF THE DATE OF TAKING.

The City filed motions in *limine* relating the Dedeaux's proposal to offer evidence regarding the highest and best use of the subject utility (CP. 564-590) and regarding the benefits the City would receive by acquiring the utility (CP. 591-597). The Trial Court reserved ruling on the City's motion regarding the evidence of the highest and best use. T.

289. As to the motion regarding benefits to the City, the Court granted the portion of the motion relating to "benefits ... such as an increase in the City's ad valorem and sales tax revenue, franchise fees, and other sources of municipal revenue or an increase in the City's tax base" and denied the rest of the City's motion. CP. 644-645. The City renewed its motions in *limine* at trial which were denied but the City was granted a continuing objection to any testimony by James Elliott covered by the motions. T. 874-876. At trial, over the City's objection, the Trial Court allowed James Elliott to testify that:

> 1. He highest and best use would be to be incorporated into a larger system that had benefits other than the water revenue, the sewer revenue and the contributions in aid;
>
> 2. By selling the utility system to a much larger water and sewer company operating costs would be reduced through economy of scale; capital could be acquired a much lower rates; there would be no taxes on income; the cost of acquisition could be spread over a larger number of customers; higher rates could be charged; growth could be facilitated; fire protection could be improved; the need to extend water and sewer mains through the Dedeaux service area would be eliminated; and, the indirect benefits could be substantially more than the direct benefits.

T. 1000-1004.

A. THE COURT ERRED BY ALLOWING TESTIMONY THAT THE HIGHEST AND BEST USE OF THE SUBJECT UTILITY WAS TO BE INCORPORATED INTO A LARGER SYSTEM THAT HAD BENEFITS OTHER THAN THE WATER REVENUE, THE SEWER REVENUE AND THE CONTRIBUTIONS IN AID.

1. THERE WAS NO REASONABLE PROBABILITY ON THE DATE OF TAKING THAT UTILITY SYSTEM WOULD BE ACQUIRED BY A LARGER SYSTEM.

It is undisputed that, on the date of taking, the utility system was being operated as a regulated utility. The City recognizes that, under the proper circumstances, the highest and best use of assets may be something different than the use of the asset on the date of taking. "The rule of evidence that the jury may consider not only the value of the land as it is presently used by the owner, but also the possibility of its use for other purposes is subject to the qualification that possibilities which are so remote and speculative as to require prospective occurrence of many extrinsic conditions and happenings that have no perceptible effect upon the present market value of the land, should be excluded from the jury." *Pearl River Valley Water Supply Dist. V. Brown*, 182 So.2d 384, 388 (Miss. 1966). "To warrant admission of testimony as to the value for purposes other than that to which the land is being put ... the landowner must first show: (1) that the property is adaptable to the other use, (2) that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time, (3) that the market value of the land has been enhanced by the other use for which it is adaptable ...". *id.*

The highest and best use determination must be made with to regard "a use by which the owner would pass to a buyer of the land and of which the owner is deprived by the taking." *Olson v. United States*, 67 F.2d 24, 31 (8th. Cir. 1933). "The things we deem material to bear in mind ... are that existing uses influence values; that potential uses are not considered if they are remote and speculative; that they are remote and speculative if the use depends upon the union of numerous tracks, variously owned, and such union is improbable; and that in determining such probability the power of eminent domain must be excluded." *id.* The issue is whether, on the date of taking, the owner of the utility system, Dedeaux Utility Company, Inc., could have incorporated the existing system into a larger system that had benefits other

than the water revenue, the sewer revenue and the contributions in aid. James Elliott admitted in his deposition that as long as Dedeaux Utility, Inc., owned the system it was not reasonably probable that the system would be incorporated into a much larger, unregulated publicly owned utility. CP. 586-587. The Trial Court erred by not granting the City's motion in *limine* regarding the highest and best use and by allowing Elliott's testimony at trial over the City's objection.

2. ANY INCREASE IN VALUE ATTRIBUTABLE TO THE CONDEMNING AUTHORITY MAY NOT BE CONSIDERED IN VALUING THE ASSET.

The Trial Court allowed James Elliott to enumerate several benefits and/or advantages the City would receive by acquiring the Dedeaux utility system "which would make it valuable to a willing buyer in the market place". T. 1001. By admitting this evidence, the jury was allowed to value the utility system using elements which were not owned or available to Dedeaux. Such evidence violated "... the general principal that the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created ...". *United States v. Fuller*, 409 U.S. 488, 492 (1973). Dedeaux is not entitled to be paid by the City for any value attributable the benefits the City by acquiring the utility system. "Since the owner is to receive no more than the indemnity for his loss, his award cannot be enhanced by any gain to the taker." *United States v. Miller*, 317 U.S. 369, 375 (1943). Dedeaux was allowed to present evidence of the special value of the utility system to the City rather than the value of the system to Dedeaux. This was error. "Thus the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from other who may or may not possess the power to condemn, must be excluded as an element of market value." *id.*

3. THE ADMISSION OF EVIDENCE REGARDING THE HIGHEST AND BEST USE AFFECTED A SUBSTANTIAL RIGHT OF THE CITY.

The City was entitled by law to have the jury consider only the value of the utility system in the hands of Dedeaux as of the date of taking. The Trial Court allowed the jury to consider the value of the utility system based on elements of value which were attributable to the City after the date of taking. The City submits that it was deprived of a substantial right which affected the outcome of the jury verdict.

IV. THE COURT ERRED IN BY ALLOWING EVIDENCE AND INSTRUCTING THE JURY THAT THE HIGHEST AND BEST USE OF THE DEDEAUX UTILITY SYSTEM WAS AS AN UNREGULATED UTILITY.

A. THERE WAS NO RELIABLE EVIDENCE THAT REGULATION DIMINISHED THE VALUE OF THE DEDEAUX UTILITY SYSTEM.

In the prior appeal, the Court stated:

> If reliable evidence shows that regulation diminishes the value of a utility, the jury should consider an opinion that the utility's highest and best use would be as a non-regulated utility. (Citation omitted). The converse is also true: if reliable evidence shows that regulation increases the value of a utility, the jury should consider an opinion that the utility's highest and best use would be as a regulated utility. The determination of the utility's highest and best use should be based on expert testimony offered under M.R.E. 702.

Dedeaux Utility Company, Inc. v. City of Gulfport, 938 So.2d 838, 844-845 (Miss. 2006). The case cited by the Court in support of this statement, *Ventures Northwest Ltd. P'ship v. State,* 914 P.2d 1180 (Wash.Ct.App. 1996) was an inverse condemnation case where the plaintiff alleged that regulation by the government resulted in a loss of use of the property.

The City filed a motion in *limine* to exclude any evidence by Dedeaux to the effect that

the highest and best use of the utility system was as an unregulated utility. CP. 564-590. The Trial Court reserved ruling on the City's motion regarding the evidence of the highest and best use. T. 289. At trial, the City objected to the testimony of James Elliott that it was his opinion that the highest and best use of the system was as an unregulated water and sewer company because there was no foundation laid. T. 1000-1001. The City's objection was overruled. T. 1001.

In the immediately preceding section of this brief, the City cited authority for the rules that (1) the highest and best use is determined by what use of the property may be made by the condemnee, and, (2) if such use is different that the use on the date of taking, it must be reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time. Dedeaux failed to meet its burden with regard to these rules regarding highest and best use. James Elliott admitted in his deposition (CP. 586-587) and at trial (T. 1111) that as long as Dedeaux owned the utility system, it could not operate as a unregulated utility. Elliott also admitted that, in order to operate as an unregulated utility (other than being acquired by the City), some other entity would have had to be created to purchase the system. CP. 586. There was no reliable evidence that the Dedeaux utility system could ever be unregulated.

There was also no reliable evidence that regulation by the Public Service Commission diminished the value of the Dedeaux utility system. The fact is that just the opposite is true. James Elliott testified that the Certificate of Public Convenience and Necessity granted to a regulated utility guarantees the holder a certain income and allows the holder to get contributions in aid of construction. T. 1058-1059. Elliott went into great detail about how he valued the Certificate. T. 1060-1069. Elliott valued the Certificate of Convenience issued

to Dedeaux by the Public Service Commission by valuing the projected contribution in aid of construction at $1,494,700.00 and the projected cash flow at $800,388.00. Ex. 58. This is evidence that regulation increased the value of the Dedeaux utility system. Dedeaux should be not be allowed to argue that the value of the certificate is over 2.2 million dollars but the highest and best use of the utility system is as an unregulated utility.

B. AT BEST, THERE WAS CONFLICTING EVIDENCE REGARDING THE HIGHEST AND BEST USE OF THE UTILITY SYSTEM, PRECLUDING THE TRIAL COURT'S PEREMPTORY INSTRUCTION ON THE ISSUE.

In Jury Instruction D-1, the Trial Court instructed the jury "that the highest and best use of Dedeaux Utility Company, Inc., for the purpose of creating the highest rate of return would be as a non-regulated utility, that provides water and sewer services to an exclusive service area and whose rates are not regulated by any governmental agency, and it would be your duty to determine the fair market value of Dedeaux Utility Company, Inc. as a going business concern as of the date of taking by the City of Gulfport on December 3, 1996, as if the buyer was an unregulated utility." CP. 1043, T. 1192. The City objected to this instruction. T. 1176. This instruction is erroneous for several reasons.

As stated in the preceding section of this brief, there was no reliable evidence that Dedeaux could have operated the system as an unregulated utility and there was no reliable evidence that regulation diminished the value of the utility. This instruction is inconsistent in that it tells the jury to value the system as a non-regulated utility "... that provides water and sewer services to an exclusive service area and whose rates are not regulated by any governmental agency... ". This instruction describes an entity that did not, and could not, exist on the date of taking. The only providers of both water and sewer services which are exempt

from regulation by the Public Service Commission are those provided by a municipality [**Miss. Code Ann.** §77-3-5(a)] and "nonprofit corporations or associations where the governing body of such corporation or association is elected by the consumers thereof or appointed by the county board of supervisors". [**Miss. Code Ann.** §77-3-5(c)]. The City of Gulfport is the only municipality which could operate the Dedeaux utility system without regulation by the Public Service Commission. All other municipalities acquiring the Dedeaux system would be regulated by the Public Service Commission pursuant to **Miss. Code Ann.** §77-3-1 which provides regulation of municipal rates for service outside of one (1) mile from the City Limits. No nonprofit corporation or association could escape regulation under **Miss. Code Ann.** §77-3-5(c) because such entities are limited pursuant to **Miss. Code Ann.** 19-5-151 to areas "... not being situated within the corporate boundaries of any existing municipality ...". It was impossible for any potential purchaser of the Dedeaux system, other than the City of Gulfport, to have an exclusive service area but whose rates would be unregulated.

This instruction did not deal with the highest and best use of the Dedeaux utility system but instead dealt with the status of the buyer. The jury was told that they must value the utility "as if the buyer was an unregulated utility." The effect of this instruction was to limit any potential buyer to the City of Gulfport since there is no other entity which could purchase the utility without regulation. The Trial Court excluded entirely from the jury's consideration all potential regulated buyers. The City submits this instruction violates the long standing rule that the value must be determined by assuming a willing buyer and seller, neither of whom is under duress or compulsion. *Crocker v. Mississippi State Highway Commission,* 534 So.2d 549 (Miss. 1988).

The City's expert, James Stokes, testified that if the utility was unregulated then there would not be any value assigned to the Certificate of Convenience. T. 831. As stated earlier in this brief, Dedeaux's expert assigned a value of over 2.2 million dollars to the Certificate. Assiging value to the Certificate of Convenience is inconsistent with the position that the highest and best use of the utility is unregulated. At the very least, a jury issue was made on the issue precluding the peremptory instruction granted by the Trial Court.

V. THE COURT ERRED BY ALLOWING EVIDENCE THAT THE VALUE OF THE UTILITY WAS INCREASED BECAUSE THE CITY WAS UNDER A COMPULSION TO PURCHASE THE SYSTEM.

Over the City's objection, the Trial Court allowed James Elliott to testify that the reason the City should pay the cost of reproducing the utility system in developed land, as opposed to cost new in undeveloped land, is that the City had no other option because the City had to have that specific piece of property. T. 1042-1044. Elliott stated that the City "can't substitute another piece of land or another utility system for this utility system because he wants the hole in the donut." T. 1044. This testimony allowed the jury to consider that the City should pay more for the utility system than anyone else because the City is under a compulsion to purchase the system. This is contrary to the rule that neither the buyer or seller should be considered under a compulsion. *Crocker v. Mississippi State Highway Commission*, supra.

VI. THE COURT ERRED IN GRANTING JURY INSTRUCTIONS NO. D-3, NO. D-4, NO. D-6A AND NO. D-7.

The Trial Court granted Dedeaux's instructions D-3 (CP. 1045), D-4 (CP. 1046), D-6a (CP. 1048-1049) and D-7 (CP. 1050-1051). The City objected to each of these instructions as being an improper emphasis on various elements of damages and improper comment by the

Court on the evidence. T. 1177-1183. Although it may be proper to allow evidence relating to separate elements of damage, it is not proper for the Court to instruct the jury regarding separate elements of damages. *Wheeler v. Mississippi State Highway Commission*, 55 So.2d 225 (Miss. 1951); *Mississippi State Highway Commission v. Hall*, 174 So.2d 488 (Miss. 1965); *Mississippi State Highway Commission v. Blackwell*, 350 So.2d 1325 (Miss. 1977).

VI. THE COURT ERRED INITIALLY IN CHANGING THE VENUE OF THIS CAUSE TO THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY AND FURTHER ERRED REFUSING TO GRANT THE CITY RELIEF FROM ITS PRIOR ORDER CHANGING THE VENUE TO THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY.

A. VENUE IN EMINENT DOMAIN CASES IS JURISDICTIONAL.

The City acknowledges that in an eminent domain case the Court once held that it was error for the trial court to refuse a request for a change of venue. *Mississippi State Highway Commission v. Rogers*, 128 So.2d 353 (Miss. 1961). However, the City submits that the *Rogers* Court failed to recognize the jurisdictional roadblock to ordering a change of venue in an eminent domain case. The City also submits that the Court has effectively overruled *Rogers* in *Donald v. Amoco Production Company*, 735 So.2d 161 (Miss. 1999).

The question before the Court is jurisdiction, not venue. The acquisition of property through the Special Court of Eminent Domain is a statutory procedure. **Miss. Code Ann.** §11-27-1 et seq. The petition to condemn the property must be filed "...with the circuit clerk of the county in which the affected property, or some part thereof, is situated...". **Miss. Code Ann.** §11-27-5. Jurisdiction cannot lie in any other county. One cannot file an eminent domain proceeding in Stone County to condemn land located entirely in Harrison County. The only court with jurisdiction over eminent domain proceedings is the Special Court of Eminent Domain of the County in which the land is situated.

In order to grant a motion for a change of venue, the Court must transfer the case to another court which has subject matter jurisdiction. Eminent domain jurisdiction is extremely limited. Circuit Judges who sit in Harrison County Circuit Court may hear eminent domain cases in Stone County and Hancock County (these counties do not have a County Court), but not in Harrison County. The County Court of Harrison County has exclusive jurisdiction over eminent domain actions in Harrison County.

There is a distinct difference between jurisdiction and venue. The Court has noted that there are some proceedings in which the jurisdictional issue limits the venue of the action to one court.

> The distinction between "jurisdiction" and "venue" has been plainly established and has been frequently recognized. Jurisdiction connotes the power to decide a case on its merits, while venue connotes locality, the place where the suit should be heard. The word "venue", **unless it is given jurisdictional effect by localizing the action,** relates only to the place where, or the territory within, either party may require the case to be tried, **and unless it is a local action,** the question of jurisdiction of subject matter is not involved.

Leake County Cooperative (A.A.L.) v. Dependants Of Barrett, 226 So.2d 608, 615 (Miss. 1969) (emphasis added). An action is "localized" when, by statute or common law, jurisdiction is proper in only one county. This is sometimes referred to as "geographical" jurisdiction.

In *City Of Jackson v. Wallace*, 196 So. 223 (Miss. 1940) it was held that the City of Jackson could only be sued in Hinds County because, even though venue as to a co-defendant was proper in Walthall County, by common law, a municipal corporation may only be sued in the county in which it is located.

Another example of a "localized" action is a divorce action. The Court has repeatedly held that jurisdiction in a divorce action lies only in the county in which the defendant resides.

A divorce action filed in the wrong county cannot be transferred to the proper county - it must be dismissed. *Price v. Price*, 32 So.2d 124 (Miss. 1947); *Cruse v. Cruse*, 32 So.2d 355 (Miss. 1947); *Ross v. Ross*, 208 So.2d 194 (Miss. 1968). Even if the defendant is the party asking that the case be transferred to the county of proper jurisdiction, the case must be dismissed because, without jurisdiction, the court has no legal authority to transfer the case. *Stark v. Stark*, 755 So.2d 31 (Miss.App. 1999). "Where a statute creates a cause of action which has not previously existed, the conditions upon which such right of action may be pursued are an integral part of the right granted and must be followed." *Ross v. Ross*, supra, at 195.

In *Donald v. Amoco Production Co.*, supra, the Supreme Court had occasion to examine the venue/jurisdiction question regarding a statute containing almost the exact jurisdictional language as in the eminent domain statute. At the time this case was decided, **Miss. Code Ann. §** 11-11-3 (this code section has now been substantially changed) stated:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue and, if the defendant is a domestic corporation, in the county in which said corporation is domiciled or in the county where the cause of action may occur or accrue, **except where otherwise provided, and except actions of trespass on land, ejectment and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof is situated.** If a civil action is brought in an improper county, such action may be transferred to the proper county pursuant to section 11-11-17.

(Emphasis added). In discussing the jurisdictional restrictions §11-11-3 provided for certain causes of actions pertaining to land, the Court stated:

> In explaining the local action doctrine under the old venue statute, this Court said that "(t)hey must be brought in the county in which the land lies. All other actions must be brought with reference to the person of the defendant." (citations omitted). Furthermore, "The statute alone governs. The only local

> actions with us are ejectment and trespass on land. They must be commenced in the county in which the land lies." (citation omitted). **The effect of the local action doctrine on venue is "jurisdictional", i.e. subject matter jurisdiction lies only where the property is located and objections to venue cannot be waived.** (citations omitted).

(Emphasis added). *Donald v. Amoco Production Co.*, 735 So. 2d at 181. When a statute provides for only one county of venue for an action, venue then is jurisdictional. The action may not be filed in another county and, if the action is filed in the proper statutory venue, the venue cannot be changed since no other court would have jurisdiction.

The Chancery Court venue statute, **Miss. Code Ann.**§ 11-5-1, has an "otherwise provided" exception which "localizes" actions where venue is specifically stated in § 11-5-1 or another statute. In *Green v. Winona Elevator Company*, 319 So.2d 224 (Miss. 1975), the court held that the language "...(S)uits respecting real or personal property may be brought in the chancery court of the county in which the property , or some portion thereof, may be;..." contained in § 11-5-1 restricted venue, and therefore jurisdiction, to the county in which the subject personal property was located.

The eminent domain statutes created a "localized" action in which venue and jurisdiction lie only in the county in which the land is located. The condemning entity "...shall file a complaint to condemn with the circuit clerk of the county in which the affected property, or some part thereof, is situated...". **Miss. Code Ann. §** 11-27-5. This language is almost identical to that in **Miss. Code Ann.** § 11-11-3 which the Court in *Donald v. Amoco Production Co.*, supra, found to create a "localized" action. The only differences are that §11-27-5 says "shall file a complaint" while §11-11-3 said "shall be brought" and §11-27-5 says "the county in which the affected property , or some part thereof, is situated" and §11-11-3 said

"the county where the land or some part thereof is situated".

The Court in *Mississippi State Highway Commission v. Rogers*, supra, did not address the jurisdictional issue when it said the Trial Court should have granted a change of venue in an eminent domain case. The eminent domain statutes create a localized action to which the change of venue statute, **Miss. Code Ann.** §11-11-51 does not apply - just as this statute does not apply to cases involving cities and counties, divorce cases and cases involving trespass, ejectment and trees. It makes no sense that venue cannot be changed in an action for trespass but venue can be changed in an action to take the whole property. It is submitted that if the case had been properly briefed and argued, the *Rogers* Court would not have ordered a change of venue in an eminent domain case.

The error of the Trial Court in transferring the venue of this case is not diminished by the fact that the case remained in Harrison County. Harrison County has two judicial districts which are treated as if they are two separate counties.

> In Harrison County, a county having two (2) judicial districts, all civil actions shall be commenced in each of the two (2) judicial districts against defendants as if each district were a separate county, and a change of venue from either of such districts, shall be made according to the procedure provided for by the Mississippi Rules of Civil Procedure; and **the jurisdiction of said courts of said districts shall be the same as if each district were a separate county...**

(Emphasis added) **Miss. Code Ann.** §11-1-53. The Trial Court's order transferring the venue of this case from the First Judicial District of Harrison County to the Second Judicial District equated to transferring the case to another separate county. The trial Court had no authority to transfer the venue of this case anywhere.

The City asked the Court to address this issue when this case was appealed the first time but the Court determined that the City had not raised this issue before the Trial Court and

held that the issue was procedurally barred. *Dedeaux Utility Company, Inc. v. City of Gulfport*, 938 So.2d 838, 846 (Miss. 2006). The City is not procedurally barred from raising this issue on the current appeal. The Court ordered a new trial in this cause. *id.* The City therefore can raise this issue again before the Trial Court and this Court. The effect of a grant of a new trial was stated by the Court in *White v. Stewman*, 932 So.2d 27, 33-34 (Miss. 2006) as:

> A new trial provides a clean slate. The issues must be retried, and the parties may thus present evidence differently. As such, a new trial requires its own law, and the judge is once again empowered to make judgments concerning Mississippi law as required by the evidence. All judgments as a matter of law then become reviewable at the conclusion of the case as does the trial court's grant of the new trial itself.

Additionally, if the Second Judicial District of Harrison County, Mississippi, did not have subject matter jurisdiction, such jurisdiction cannot be conferred by the parties or waived by the parties. *Goodman v. Rhodes*, 375 So.2d 991, 992 (Miss. 1979).

B. THE TRIAL COURT ERRED AS A MATTER OF LAW BY REFUSING TO GRANT THE CITY RELIEF FROM THE PRIOR ORDER(S) TRANSFERRING VENUE.

A brief history of the events leading to the venue of this cause being transferred to the Second Judicial District necessary. This cause was filed on December 3, 1996, in the First Judicial District of Harrison County, Mississippi, the judicial district in which the subject property is located. CP. 152. On April 4, 2002, Dedeaux filed a Motion For Change of Venue, alleging that Dedeaux could not receive a fair trial in Harrison County due to publicity concerning the acquisition by the City of another utility company, Orange Grove Utilities. CP. 152. A hearing was held on this motion before the Hon. Robin Alfred Midcalf on May 21,2002. CP. 152. At the May 21, 2002, hearing, Dedeaux offered fourteen (14) newspaper articles covering a period from June 3, 2001 through May 19, 2002. CP. 153. Only one (1) of these articles mentioned Dedeaux, some of the articles mentioned Orange Grove Utilities

and the majority of the articles did not mention any utility by name. CP. 153. Dedeaux also offered the opinions of two (2) witnesses that Dedeaux could not get a fair trial but both of these witnesses based their opinion on negative comments they had heard concerning the City's purchase of Orange Grove Utilities. CP. 153. On May 24, 2002, Judge Midcalf entered an Order taking the matter under advisement and requesting letter briefs from the parties. CP.152. On October 7, 2002, Judge Midcalf entered an Order of Recusal. CP. 153. This cause was assigned to the present Trial Judge by the Supreme Court. CP. 153. The Trial Court considered the motion based on the transcript of the May 21, 2002, hearing along with letter briefs submitted by the parties. CP. 153. On December 15, 2003, the Court entered an Order Changing Venue which changed the venue from the First Judicial District of Harrison County to the Second Judicial District of Harrison County but no specific reason for the change of venue was specified in the order. CP. 153. On December 16, 2003, the Court entered another Order regarding the change of venue stating that "the Court feels that attempting to select a jury from the First Judicial District would be hindered because of the number of potential jurors who are or might be customers of Dedeaux Utilities." CP. 153.

On April 2, 2008, the City filed a Motion To Reconsider Change Of Venue. CP. 151-154. This motion should have been styled as one for relief from judgment or order pursuant to Rule 60 MRCP. This error in nomenclature was corrected by counsel for the City at oral argument before the Trial Court. T. 70. In addition to the jurisdictional argument above, the City's motion sought relief from the prior order under Rule 60(b)(5) because the facts had changed so that it is no longer equitable that the order should be enforced. T. 70-71

It is unclear from the two (2) orders entered on December 15 and 16, 2003, whether the Trial Court based its ruling on the evidence of adverse publicity offered by Dedeaux at the May

21, 2002, hearing. Dedeaux's sole reason for seeking a change of venue was because it could not get a fair trial because of adverse publicity. All of the newspaper articles offered into evidence by Dedeaux on May 21, 2002, pertained to the City's acquisition of another utility, Orange Grove Utilities. Not one article cast any disparaging remark about Dedeaux. In order to justify a change in venue, any pre-trial publicity must be specific to the party requesting the change or specific to the particular lawsuit. *Bayer Corporation v. Reed*, 932 So.2d 786,790 (Miss. 2006). Additionally, the last article offered by Dedeaux was published May 15, 2002. The City's motion was argued over six (6) years from the date of the last publicity. The City submits that if the Trial Court relied on adverse publicity to change the venue and to deny the City's motion for relief from the prior order, the Trial Court should have conducted a new hearing to determine if any prejudice still lingered despite the long period of time which had passed since the last publication.

CONCLUSION

Dedeaux received a windfall by being awarded compounded interest after the first trial resulting in it having the use of almost Seven Hundred Thousand Dollars ($700,000.00) of the public's money for about two (2) years. The Trial Court should have awarded the City interest on the overpayment. The City requests the Court to remand this case with instructions that the Trial Court make a determination of the percentage of interest which should be awarded to the City.

The City of Gulfport did not get a fair trial because of numerous errors by the Trial Court. Dedeaux's expert witness was allowed to use improper methods for valuing Dedeaux's Certificate of Convenience by valuing assets which did not exist on the date of taking and by assigning all of the estimated future income to the Certificate and no income to the physical

facilities. These improper methods resulted in a gross exaggeration of the estimated value of the Certificate. The Trial Court allowed Dedeaux to present its case as if the City was the only potential buyer of the utility and should be required to pay an additional amount because the City needed the utility so badly. The Trial Court allowed Dedeaux to present an opinion that the highest and best use of the utility was as an unregulated utility when there was no reliable evidence to support such an opinion. The Trial Court compounded its error by instructing the jury that the highest and best use of the utility was as an unregulated utility and that the only buyer the jury could consider was an unregulated buyer. The Court improperly instructed the jury regarding individual areas of damages and improperly commented on the evidence. The City requests the Court to remand this case for a new trial on the issue of damages.

The Trial Court erred by refusing to reconsider its previous transfer of venue to the Second Judicial District of Harrison County. The City requests the Court to remand this case with instructions to the Trial Court to rescind its order transferring venue.

Respectfully submitted this the 30th day of December, 2009.

CITY OF GULFPORT, MISSISSIPPI,
APPELLEE/CROSS APPELLANT

BY: Gary White
GARY WHITE

GARY WHITE, MSB NO. [redacted]
2309 17TH STREET (39501)
P. O. BOX 700
GULFPORT, MS 39502-0700
TELEPHONE 228-864-6657
FACSIMILE 228-864-6658
EMAIL garywhiteattorne@bellsouth.net

CERTIFICATE OF SERVICE

I, Gary White, do hereby certify that I have this day delivered, by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Hon. T. Larry Wilson
County Court Judge
P. O. Box 998
Pascagoula, MS 39567

Hon. Jim Hood
Mississippi Attorney General
P. O. Box 220
Jackson, MS 39205

Peter C. Abide, Esq.
925 Tommy Munro Drive, Suite H
Biloxi, MS 39532

Harry R. Allen, Esq.
P. O. Drawer 4108
Gulfport, MS 39502-4108

This the 30th day of December, 2009.

Gary White
GARY WHITE

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2008-TS-02105

DEDEAUX UTILITY COMPANY, INC. APPELLANT

VS.

CITY OF GULFPORT, MISSISSIPPI
A MUNICIPAL CORPORATION APPELLEE

APPEAL FROM THE SPECIAL COURT OF EMINENT DOMAIN

HARRISON COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT

ADDENDUM TO BRIEF - REPRODUCTION OF OTHER AUTHORITIES

11-1-53
TITLE 11 CIVIL PRACTICE AND PROCEDURE
CHAPTER 1 PRACTICE AND PROCEDURE PROVISIONS COMMON TO COURTS

11-1-53. Harrison County; commencement of civil actions, change of venue and transfer of cases between districts.

In Harrison County, a county having two (2) judicial districts, all civil actions shall be commenced in each of the two (2) judicial districts against defendants as if each district were a separate county, and a change of venue from either of such districts to the other, and from either district to any county of the state, and from any county to either of said districts, shall be made according to the procedure provided for by the Mississippi Rules of Civil Procedure; and the jurisdiction of said courts of said districts shall be the same as if each district were a separate county; provided, however, that any suit or action which may be brought in either of said districts may be commenced by filing a declaration or complaint or other pleading with the clerk of said courts at either Gulfport or Biloxi, and the said clerk shall issue process thereon, returnable to the court of the proper district, and shall deposit the papers in the case in the office of the proper district; and provided further, that no suit or action shall be dismissed because of the fact that the defendant may be sued in the wrong district, but said case or cause shall, upon motion, be transferred for disposition to the proper district and court thereof.

Sources: Codes, 1942, § 2910-14; Laws, 1962, ch. 257, § 14; Laws, 1991, ch. 573, § 13, eff from and after July 1, 1991.

11-5-1
TITLE 11 CIVIL PRACTICE AND PROCEDURE
CHAPTER 5 PRACTICE AND PROCEDURE IN CHANCERY COURTS

11-5-1. Venue of suits.

Suits to confirm title to real estate, and suits to cancel clouds or remove doubts therefrom, shall be brought in the county where the land, or some part thereof, is situated; suits against executors, administrators, and guardians, touching the performance of their official duties, and suits for an account and settlement by them, and suits for the distribution of personalty of decedents among the heirs and distributees, and suits for the payment of legacies, shall be brought in the chancery court in which the will was admitted to probate, or letters of administration were granted, or the guardian was appointed; other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be; and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found; and in all cases process may issue to any county to bring in defendants and to enforce all orders and decrees of the court.

Sources: Codes, 1857, ch. 62, art. 6; 1871, § 977; 1880, § 1847; 1892, § 510; Laws, 1906, § 561; Hemingway's 1917, § 321; Laws, 1930, § 363; Laws, 1942, § 1274.

11-11-3
TITLE 11 CIVIL PRACTICE AND PROCEDURE
CHAPTER 11 VENUE OF ACTIONS

11-11-3. County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.

(1) (a) (i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.

(ii) Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product.

(b) If venue in a civil action against a nonresident defendant cannot be asserted under paragraph (a) of this subsection (1), a civil action against a nonresident may be commenced in the county where the plaintiff resides or is domiciled.

(2) In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.

(3) Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.

(4) (a) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. As to a claim or action that would be more properly heard in a forum outside this state, the court shall dismiss the claim or action. As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:

(i) Relative ease of access to sources of proof;

(ii) Availability and cost of compulsory process for attendance of unwilling witnesses;

(iii) Possibility of viewing of the premises, if viewing would be appropriate to the action;

(iv) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;

(v) Administrative difficulties for the forum courts;

(vi) Existence of local interests in deciding the case at home; and

(vii) The traditional deference given to a plaintiff's choice of forum.

(b) A court may not dismiss a claim under this subsection until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the

claim is dismissed.

Sources: Codes, Hutchinson's 1848, ch. 58, art. 1 (19); 1857, ch. 61, art. 32; 1871, § 522; 1880, § 1498; 1892, § 650; Laws, 1906, § 707; Hemingway's 1917, § 486; Laws, 1930, § 495; Laws, 1942, § 1433; Laws, 1908, ch. 166; Laws, 1940, ch. 248; Laws, 1984, ch. 429; Laws, 2002, 3rd Ex Sess, ch. 2, § 1; Laws, 2002, 3rd Ex Sess, ch. 4, § 1; Laws, 2004, 1st Ex Sess, ch. 1, § 1, eff from and after Sept. 1, 2004, and applicable to all causes of action filed on or after Sept. 1, 2004.

11-11-51
TITLE 11 CIVIL PRACTICE AND PROCEDURE
CHAPTER 11 VENUE OF ACTIONS

11-11-51. Grounds for change of venue, generally.

When either party to any civil action in the circuit court shall desire to change the venue, he shall present to the court, or the judge of the district, a petition setting forth under oath that he has good reason to believe, and does believe that, from the undue influence of the adverse party, prejudice existing in the public mind, or for some other sufficient cause to be stated in the petition, he cannot obtain a fair and impartial trial in the county where the action is pending, and that the application is made as soon as convenient after being advised of such undue influence, prejudice, or other cause, and not to delay the trial or to vex or harass the adverse party. On reasonable notice in writing to the adverse party of the time and place of making the application, if made in vacation, the court, if in term time, or the judge in vacation, shall hear the parties and examine the evidence which either may adduce, and may award a change of venue to some convenient county where an impartial trial may be had, and, if practicable, in which the circuit court may next be held. If made in vacation, the order shall be indorsed on the petition and directed to the clerk, who shall file the same with the papers in the suit.

Sources: Codes, Hutchinson's 1848, ch. 59, art. 2 (1); 1857, ch. 61, art. 122; 1871, § 719; 1880, § 1502; 1892, § 655; Laws, 1906, § 712; Hemingway's 1917, § 491; Laws, 1930, § 500; Laws, 1942, § 1443.

11-27-1
TITLE 11 CIVIL PRACTICE AND PROCEDURE
CHAPTER 27 EMINENT DOMAIN

11-27-1. Who may exercise right of eminent domain.

Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, except as elsewhere specifically provided under the laws of the state of Mississippi.

Sources: Codes, 1942, § 2749-01; Laws, 1971, ch. 520, § 1, eff from and after January 1, 1972.

11-27-5
TITLE 11 CIVIL PRACTICE AND PROCEDURE
CHAPTER 27 EMINENT DOMAIN

11-27-5. Complaint to condemn; parties; preference.

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. The complaint shall be considered a matter of public interest and shall be a preference case over other cases except other preference causes. The complaint shall describe in detail the property sought to be condemned, shall state with certainty the right to condemn, and shall identify the interest or claim of each defendant.

Sources: Codes, 1942, § 2749-03; Laws, 1971, ch. 520, § 3; Laws, 1991, ch. 573, § 61, eff from and after July 1, 1991.

11-27-19
TITLE 11 CIVIL PRACTICE AND PROCEDURE
CHAPTER 27 EMINENT DOMAIN

11-27-19. Evidence of value; award and interest.

Evidence may be introduced by either party, and the jury may, in the sound discretion of the judge, go to the premises, under the charge of the court as to conduct, conversation and actions as may be proper in the premises. Evidence of fair market value shall be established as of the date of the filing of the complaint. Any judgment finally entered in payment for property to be taken shall provide legal interest on the award of the jury from the date of the filing of the complaint until payment is actually made; provided, however, that interest need not be paid on any funds deposited by the plaintiff and withdrawn by the defendants prior to judgment. At the conclusion of the trial, the court shall instruct the jury in accordance with the Mississippi Rules of Civil Procedure.

Sources: Codes, 1942, § 2749-10; Laws, 1971, ch. 520, § 10; Laws, 1991, ch. 573, § 65, eff from and after July 1, 1991.

19-5-151
TITLE 19 COUNTIES AND COUNTY OFFICERS
CHAPTER 5 HEALTH, SAFETY AND PUBLIC WELFARE

19-5-151. Incorporation of districts authorized.

(1) Any contiguous area situated within any county of the state, and not being situated within the corporate boundaries of any existing municipality, and having no adequate water system, sewer system, garbage and waste collection and disposal system, or fire protection facilities serving such area, may become incorporated as a water district, as a sewer district, as a garbage and waste collection and disposal district, as a fire protection district, as a combined water and sewer district, as a combined water and garbage and waste collection and disposal district, as a combined water and fire protection district, or as a combined water, sewer, garbage and waste collection and disposal and fire protection district, in the manner set forth in the following sections.

(2) If the certificated area of a nonprofit, nonshare corporation chartered under the Mississippi Nonprofit Corporation Act for the purpose of owning and operating rural waterworks lies in one county, the corporation may become incorporated as a water district in the manner set forth in Section 19-5-153(3). If the nonprofit, nonshare corporation's certificated area lies in more than one (1) county, the procedure in Section 19-5-164 shall be used.

Sources: Codes, 1942, § 2998.7-21; Laws, 1972, ch. 536, § 1; Laws, 1973, ch. 493, § 1; Laws, 1999, ch. 304, § 1; Laws, 2008, ch. 306, § 1, eff from and after passage (approved Mar. 17, 2008.)

75-17-7
TITLE 75 REGULATION OF TRADE, COMMERCE AND INVESTMENTS
CHAPTER 17 INTEREST, FINANCE CHARGES, AND OTHER CHARGES

75-17-7. Interest on judgments and decrees.

All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

Sources: Codes, Hutchinson's 1848, ch. 47, art. 2 (3), ch. 54, art. 2 (38); 1857, ch. 50, arts. 1, 3, ch. 62, art. 100; 1871, §§ 1269, 2279, 2281; 1880, §§ 1141, 1143, 1958; 1892, § 2350; Laws, 1906, § 2680; Hemingway's 1917, § 2078; Laws, 1930, § 1949; Laws, 1942, § 39; Laws, 1975, ch. 336, § 1; Laws, 1989, ch. 311, § 5, eff from and after July 1, 1989.

77-3-1
TITLE 77 PUBLIC UTILITIES AND CARRIERS
CHAPTER 3 REGULATION OF PUBLIC UTILITIES

77-3-1. Application of article to municipal public utilities.

Except as otherwise provided in Section 77-3-6, any public utility as defined in paragraph (d) of Section 77-3-3, owned or operated by a municipality shall not be subject to the provisions of this article, except as to extension of utilities greater than one (1) mile outside corporate boundaries after March 29, 1956.

Sources: Codes, 1942, § 7716-01; Laws, 1956, ch. 372, § 1; Laws, 1968, ch 502, § 1; Laws, 1990, ch. 455, § 2, eff from and after July 1, 1990.

77-3-5
TITLE 77 PUBLIC UTILITIES AND CARRIERS
CHAPTER 3 REGULATION OF PUBLIC UTILITIES

77-3-5. Jurisdiction and powers of commission.

Subject to the limitations imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities. However, the commission shall not have jurisdiction over the production and gathering of natural gas or the sale of natural gas in or within the vicinity of the field where produced, or over the facilities and equipment utilized in any such operations including but not limited to such facilities as separators, scrubbers and gasoline plants of all types. Moreover, the commission shall not have jurisdiction to regulate the rates for the sales:

(a) of gas, water, electricity or sewage disposal services by municipalities to such persons as said municipalities are authorized by law to serve;

(b) of gas or electricity by cooperative gas or electric power associations to the members thereof as consumers, except as provided by Sections 77-3-15 and 77-3-17, where service is rendered in a municipality;

(c) of water or sewage disposal service by nonprofit corporations or associations where the governing body of such corporation or association is elected by the consumers thereof or appointed by the county board of supervisors; or

(d) of water by districts organized under the provisions of Chapter 45, Laws of 1966-1967, Extraordinary Session.

Sources: Codes, 1942, § 7716-04; Laws, 1956, ch. 372, § 4; Laws, 1966, ch. 542, § 1; Laws, 1968, ch. 503, § 1; ch. 502, § 2, eff from and after passage (approved August 8, 1968).

77-3-43
TITLE 77 PUBLIC UTILITIES AND CARRIERS
CHAPTER 3 REGULATION OF PUBLIC UTILITIES

77-3-43. Determination of rate base.

(1) In regulating the rates of any public utility subject to the provisions of this chapter, the commission shall, on hearing after reasonable notice, ascertain and fix the rate base of the property of the public utility in such manner as to be fair both to the public utility and to the consumer when the same is relevant or material to the exercise of the jurisdiction of the commission. The commission shall make readjustments from time to time, and ascertain the cost of all new construction, extensions and additions to the property of every public utility. In arriving at such rate base, the commission shall give due consideration to: (a) the reasonable original costs of the property used and useful, or to be used and useful within a reasonable time after the test period; (b) the portion of the cost which has been consumed by previous use recovered by depreciation expense; (c) the allowance for funds used during construction, not to exceed on borrowed funds the true net interest cost of such funds, computed according to the actuarial method, and, on the equity component thereof, a rate of return granted on common equity in the last rate proceedings before the commission, or if such rate has not been established within the preceding three (3) years, then the average rate of return actually earned on equity during the preceding three (3) years; (d) any other elements deemed by the commission to be material in determining the rate base for rate-making purposes.

(2) Valuations of property of such a public utility for rate-making purposes shall not include property purchased, labor supplied or services rendered by any firm or corporation owned or controlled in whole or in part, directly or indirectly, by such public utility, or which owns or controls in whole or in part, directly or indirectly, such public utility, unless such firm or corporation permits the commission to have access to such of the books and records of such firm or corporation as may be necessary in the opinion of the commission to enable the commission to determine whether such labor, materials, property or services rendered were supplied at reasonable prices. The rate base shall not include property donated to such utility without any consideration nor shall operating expenses include depreciation of such donated property.

(3) Whenever the commission is required in administering this chapter to find the value of gas in the field where produced, such value shall be determined as the amount paid therefor by the public utility in the field pursuant to arm's length contract; and in the absence of such arm's length contract, the fair market value of such gas as a commodity in the field.

(4) The commission, in its discretion, when requested by petition of a rate-jurisdictional public utility providing water service as defined in Section 77-3-3(d) (iv), may allow to be recovered in rates the reasonable costs of used and useful facilities deemed necessary for fire protection. Such facilities include fire hydrants, transmission and distribution mains, storage facilities, pumping equipment or other facilities associated with the provision of adequate water production, storage and distribution for fire protection.

Sources: Codes, 1942, § 7716-12; Laws, 1956, ch. 372, § 12; Laws, 1983; ch. 467, § 20; Laws, 2002, ch. 455, § 1, eff from and after July 1, 2002.

RULE 24 INTERVENTION
RULES OF CIVIL PROCEDURE
CHAPTER IV. PARTIES

RULE 24. INTERVENTION

(a) Intervention of Right. Upon timely application, anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:

(1) when a statute confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency, or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

(d) Intervention by the State. In any action (1) to restrain or enjoin the enforcement, operation, or execution of any statute of the State of Mississippi by restraining or enjoining the action of any officer of the State or any political subdivision thereof, or the action of any agency, board, or commission acting under state law, in which a claim is asserted that the statute under which the action sought to be restrained or enjoined is to be taken is unconstitutional, or (2) for declaratory relief brought pursuant to Rule 57 in which a declaration or adjudication of the unconstitutionality of any statute of the State of Mississippi is among the relief requested, the party asserting the unconstitutionality of the statute shall notify the Attorney General of the State of Mississippi within such time as to afford him an opportunity to intervene and argue the question of constitutionality.

Comment

Rule 24, Intervention, concludes these rules' treatment of parties to civil actions: Rule 19 details who must be joined; Rule 20 details who may be joined; Rule 24 governs the rights of a stranger to the action who desires to be joined.

It has long been the law in Mississippi that a total stranger cannot interfere with the objects and purposes of a civil suit as between the original parties. Nevertheless, when it has happened that an owner or part owner has a claim or interest in property which is the subject of a pending action and which may be materially affected by the outcome of the litigation, he has been allowed to intervene to protect his interests; this is referred to as equitable intervention. See V. Griffith, Mississippi Chancery Practice, §§ 410, 411 (2d ed. 1950), quoted in Edwards v. Harper, 321 So.2d 301 (Miss.1975).

Additionally, intervention has been allowed when specifically permitted by statute; statutory intervention appears to have been the only form of intervention available in courts of law. See, e. g., Miss. Code Ann. § 11-33-101 (other creditors may intervene in attachment action instituted against a debtor); §§ 31-5-1 and -9 (in action on bond of

contractor for Public Works Contracts materialmen and laborers may intervene); § 53-3-19 (in forfeiture and sale of oil and gas products seized as contraband, persons adversely affected thereby may intervene); § 71-3-71 (workmen's compensation employer or insurer entitled to intervene in action by employee against third party); and § 75-31-335 (1972) (any person damaged may intervene in injunction action pertaining to violation of Mississippi Milk Products Sale Law); City of Biloxi v. Gully, 187 Miss. 664, 193 So. 786 (1940).

M.R.C.P. 24 undertakes to continue to distinguish between two kinds of intervention: 24(a) pertains to Intervention of Right and provides that an applicant "shall be permitted to intervene" if he satisfies the tests of that portion of the rule; 24(b), however, is labeled Permissive Intervention and prescribes conditions under which an applicant "may be permitted to intervene" in an action.

If a statute of Mississippi grants a right to intervene, intervention is absolute or permissive depending on whether the statute creates an unconditional or conditional right. Other than this, intervention is said to be of right under 24(a)(2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and he is so situated that the disposition of the action as a practical matter may impair or impede his ability to protect that interest, unless his interest is adequately represented by existing parties. An applicant who does not meet the test of 24(a) may be permitted to intervene under 24(b)(2) if his claim or defense and the main action have a question of law or fact in common. 7A Wright & Miller, Federal Practice and Procedure, Civil § 1902 (1972).

So viewed, it is apparent that Rule 24 is, in practical effect, substantially the equivalent of traditional Mississippi practice in the area of intervention: 24(a)(1) and (b)(1) conform generally to traditional statutory intervention, and 24(a)(2) and (b)(2) follow equitable intervention practices. However, the rule gives law courts intervention powers formerly accorded only to courts of equity.

Whether a particular application to intervene falls under 24(a) or 24(b) makes at least one important difference: An application for permissive intervention is addressed to the discretion of the court, whereas an application for intervention of right poses only a question of law. 7A Wright & Miller, supra.

Intervention pursuant to 24(a) and (b) both require that the application be "timely." The requirement of timeliness is not of fixed meaning and provides an opportunity (even under 24(a)) for the court to take some account of the practical situation and the effect on those already parties and on the economical disposition of judicial business by allowing intervention. Rule 24(a) represents a judgment that in the situation there described justice demands that the interest of the absentee should predominate over the interests of the original parties and of trial convenience, but if the absentee has failed to move promptly to protect his interest he may find himself denied relief. 7A Wright & Miller, supra. Rule 24(d) allows the State of Mississippi to intervene in any civil action wherein a major element of controversy pertains to the constitutionality of a state statute. The purpose of this provision is to protect the public's interest in the result of an action that may have far-reaching statewide implications. Notice to the Attorney General is mandatory even if the court thinks the constitutional question frivolous, but failure to give the notice does not deprive the court of jurisdiction to decide the case. Rule 24(d) was patterned after the following similar rules from other jurisdictions: Alabama Rules of Civil Procedure, R. 24(b); Maine Rules of Civil Procedure, R. 24(d); Minnesota Rules of Civil Procedure, R. 24.04; Tennessee Rules of Civil Procedure, R. 24.04; Federal Rules of Civil Procedure, R. 24(c).

Rule 24(d) allows the State of Mississippi to intervene in any civil action wherein a major element of controversy pertains to the constitutionality of a state statute. The purpose of this provision is to protect the public's interest in the result of an action that may have far-reaching statewide implications. Notice to the Attorney General is mandatory even if the court thinks the constitutional question frivolous, but failure to give the notice does not deprive the court of jurisdiction to decide the case. Rule 24(d) was patterned after the following similar rules from other jurisdictions: Alabama Rules of Civil Procedure, R. 24(b); Maine Rules of Civil Procedure, R. 24(d); Minnesota Rules of Civil Procedure, R. 24.04; Tennessee Rules of Civil Procedure, R. 24.04; Federal Rules of Civil Procedure, R. 24(c). See State v. Watkins, 676 So. 2d 247 (Miss. 1996).

[Amended March 22,2001.]

RULE 60 RELIEF FROM JUDGMENT OR ORDER
RULES OF CIVIL PROCEDURE
CHAPTER VII. JUDGMENT

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

(c) Reconsideration of transfer order. An order transferring a case to another court will become effective ten (10) days following the date of entry of the order. Any motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, for which no extensions may be granted. If a motion for reconsideration is filed, all proceedings will be stayed until such time as the motion is ruled upon; however, if the transferor court fails to rule on the motion for reconsideration within thirty (30) days of the date of filing, the motion shall be deemed denied.

[Amended effective July 1, 2008.]

Comment

Rule 60 (a) prescribes an efficient method for correcting clerical errors appearing in judgments, orders, or other parts of a trial record; errors of a more substantial nature must be corrected in accordance with MRCP 59(e) or 60(b). Thus, the Rule 60(a) procedure can be utilized only to make the judgment or other document speak the truth; it cannot be used to make it say something other than was originally pronounced. See, e. g., West Va. Oil & Gas Co. v. Breece Lumber Co., 213 F.2d 704 (5th Cir. 1964). This procedure accords with prior Mississippi practice. See Miss. Code Ann. § 11-1-19 (1972); Ralph v. Prester, 28 Miss. 744 (1855) (this statute applies solely to the correction of judgments and

decrees and cannot be extended so as to supply a judgment never rendered); Rawson v. Blanton, 204 Miss. 851, 35 So.2d 65 (1948) (judgment which is erroneous as to plaintiff's name involves merely a clerical error which may be corrected in the supreme court without reversal); Healy v. Just, 53 Miss. 547 (1876) (there is no time limit within which a correction to a judgment may be made); Wilson v. Town of Handsboro, 99 Miss. 252, 54 So. 845 (1911) (all courts have inherent power to correct clerical errors at any time and to make the judgment entered correspond to that rendered).

Under Rule 60 (a), evidence dehors the record may be considered in making the correction; this also accords with prior Mississippi practice. See Wilson v. Town of Handsboro, supra (In making a determination as to whether the correction should be permitted, any evidence of parol or other kind is competent which throws material light on the truth of the matter. "The object of every litigation is to obtain . . . a final determination of the rights of the parties. That determination is invariably what the judges direct, and not invariably what the clerks record. The power of the court to make the record express the judgment of the court with the utmost accuracy ought not to be restricted."). See also 6A Moore's Federal Practice ¶¶ 60.01-.08 (1971); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2851-2856 (1973).

Rule 60(b) specifies certain limited grounds upon which final judgments may be attacked, even after the normal procedures of motion for new trial and appeal are no longer available. The rule simplifies and amalgamates the procedural devices available in prior practice. Prior to MRCP 60(b), Mississippi recognized the following procedural devices for relief from judgments, other than by appeal:

Statute for Correction of Misrecitals, Miss. Code Ann. § 11-1-19 (1972). This statute, referred to in the preceding discussion of MRCP 60(a), supra, applied solely to corrections of judgments and decrees and could not be extended to supply a decree or judgment never rendered. See Ralph v. Prester, supra; Rawson v. Blanton, supra; V. Griffith, Mississippi Chancery Practice, § 634 (2d ed. 1950).

Writ of Error Coram Nobis. Generally, this device was for review of errors of fact, not of law, which substantially affected the validity of the judgment but which were not discovered until after rendition of the judgment. See Petition of Broom, 251 Miss. 25, 168 So.2d 44 (1964). It was instituted as an independent action.

Bill of Review for Error Apparent. This device was an original bill, and was filed and docketed as such. It cured a material error of law apparent on the face of the decree and the pleadings and proceedings on which it is based, exclusive of the evidence. However, Miss. Code Ann. § 11-5-121 (1972) placed a two-year limitation upon the period of time after the judgment was entered for filing the bill. See Brown v. Wesson, 114 Miss. 216, 74 So. 831 (1917); V. Griffith, supra § 635.

Bill of Review Based on Newly Discovered Evidence. Leave of court was required for the filing of a bill of review based on newly discovered evidence, but after leave was obtained the bill was considered as part of the action it sought to challenge. See V. Griffith, supra §§ 636, 441. The two-year limitations of Miss. Code Ann. § 11-5-121 (1972) applied.

Bill in the Nature of a Bill of Review. This bill was available as an original action for vacating judgments tainted by fraud, surprise, accident, or mistake as to facts, not to law. See Corinth State Bank v. Nixon, 144 Miss. 674 110 So. 430 (1926); City of Starkville v. Thompson, 243 So.2d 54 (Miss. 1971); V. Griffith, supra § 642. This device did not require leave of court for filing, nor was it limited to two years' availability. Cf. Bill of Review for Error Apparent and Bill of Review Based on Newly Discovered Evidence, supra.

Motions for relief under MRCP 60(b) are filed in the original action, rather than as independent actions themselves. Further, motions seeking relief from judgments tainted by fraud, misrepresentation, or other misconduct of an adverse party, MRCP 60(b)(1), accident or mistake, 60(b)(2), or newly discovered evidence, 60(b)(3), must be made within six months after the judgment or order was entered. Aside from these two features, Rule 60(b) does not depart significantly from traditional Mississippi practice with respect to relief from judgments, but it dispenses with the arcane writs and technical requirements of prior practice. Importantly, a Rule 60(b) motion does not operate as a stay or supersedeas; further, in the courts governed by these rules, Rule 60 supersedes the devices discussed above for relief from judgments and orders.

RULE 103 RULINGS ON EVIDENCE
RULES OF EVIDENCE
ARTICLE I. GENERAL PROVISIONS

RULE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, 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; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Continuing objections to evidence of the same or a similar nature or subject to the same or similar objections may in the discretion of the trial judge be allowed.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Comment

Rule 103 concerns the making of an evidentiary record for purposes of appeal.

(a) Subsection (a) reflects existing Mississippi practice. (1) The objection must state the specific ground of objection unless the specific ground is apparent from the context. This adopts and carries forward the approach taken in Murphy v. State, 453 So.2d 1290, 1293-1294 (Miss. 1984). (2) By the same token, when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded. See Brown v. State, 338 So.2d 1008 (Miss. 1976); King v. State, 374 So.2d 808 (Miss.1979). Federal Rule of Evidence 103, which is identical, has been interpreted to have no effect on the harmless error principle.

Subsection (a) also retains the existing practice of recognizing continuing objections, where allowed by the trial judge, as a viable means of preserving a point for appeal. See Hughes v. State, 470 So.2d 1046, 1048 n. 1 (Miss. 1985).

Harris v. Buxton T.V., Inc., 460 So.2d 828 (Miss. 1984) held that no offer of proof was necessary where a party was improperly prohibited from cross-examining a witness. Rule 103 (a)(2) does not affect this holding.

(b) Rule 103 (b) is consistent with pre-rule Mississippi case law which provided that a trial judge was entitled to explain his rulings. Ratliff v. State, 313 So.2d 386 (Miss. 1975); Ladnier v. State, 273 So.2d 169 (Miss. 1973).

The court may also permit the aggrieved party to preserve the record by dictating into the record a statement of the evidence offered but excluded. This accords with the rule announced in such cases as Murray v. Payne, 437 So.2d 47, 55 (Miss. 1983).

(c) Subsection (c) is an attempt to protect the jury from exposure to inadmissible evidence. It conforms to

Mississippi practice. See Cutchens v. State, 310 So.2d 273 (Miss. 1975).

(d) Subsection (d), regarding plain error, is a restatement of that doctrine as it existed in pre-rule practice. It reflects a policy to administer the law fairly and justly. A party is protected by the plain error rule when (1) he has failed to perfect his appeal and (2) when a substantial right is affected. Miss.Sup.Ct.R. 6(b) and 11 permit a plain error rule: "The Court may, at its own option, notice a plain error not assigned or distinctly specified." See also Boyd v. State, 204 So.2d 165 (Miss. 1967). If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975). The plain error rule may be applied in either criminal cases or civil cases. See House v. State, 445 So.2d 815 (Miss. 1984).

RULE 702 TESTIMONY BY EXPERTS
RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 702. TESTIMONY BY EXPERTS

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

[Amended effective May 29, 2003 to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony.]

Comment

The use of the hypothetical question has been justly criticized. Rule 702 permits an expert to testify by giving an opinion or any other form of testimony, such as an exposition. Rule 702 seeks to encourage the use of expert testimony in non-opinion form when counsel believes the trier can draw the requisite inference. The rule, however, does not abolish the use of opinions. As the Federal Rules Advisory Committee's Note pointed out, it will still be possible for an expert to take the next step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. Boggs v. Eaton, 379 So.2d 520 (1980); Early-Gary, Inc. v. Walters, 294 So.2d 181 (Miss. 1974); Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co., 317 So.2d 47 (Miss. 1975). Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. See Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid., 702 adopted in response to Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in Daubert do not constitute an exclusive list of those to be considered in making the determination; Daubert's "list of factors was meant to be helpful, not definitive." Kuhmo, 526 U.S. at 151. See also Pepitone v. Biomatrix, Inc. 288 F. 3d 239 (5th Cir. 2002).

[Comment amended May 29, 2003.]

RULE 44 QUESTIONS CONCERNING VALIDITY OF STATUTES AND ORDERS
RULES OF APPELLATE PROCEDURE
GENERAL PROVISIONS

RULE 44. QUESTIONS CONCERNING VALIDITY OF STATUTES AND ORDERS

(a) Service. If the validity of any statute, executive order or regulation, municipal ordinance, franchise or written directive of any governmental officer, agent, or body is raised in the Supreme Court or the Court of Appeals, and the state, municipal corporation, or governmental body which enacted or promulgated it is not a party to the proceeding, the party raising such question shall serve a copy of its brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or other chief legal officer of the governmental body involved.

(b) Right to Respond. The state, municipal corporation, or governmental body shall, within the time allowed for the filing of a response to the brief, be entitled to file a response and may subsequently be heard orally in the discretion of the court.

(c) Necessity. Except by special order of the court to which the case is assigned, in the absence of such notice neither the Supreme Court nor the Court of Appeals will decide the question until the notice and right to respond contemplated by this rule has been given to the appropriate governmental body.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 44 replaced Miss.Sup.Ct.R. 44, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXXIII-LXXXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Comment

Rule 44 is based on Fed.R.App.P. 44 and Ala.R.App.P. 44. Failure to give notice is an omission which may be cured. Subsection (c) permits action to proceed in the case without notice by special order if the court determines that urgent action is necessary or that the challenged statute, order, or directive is so patently invalid that no response need be required from the affected body. Also, the governmental body may waive its right to respond.

The appearance of the governmental body will ordinarily be in accord with the provisions of Rule 29 concerning an amicus curiae. Pursuant to Rule 25, the certificate of service of the party raising the question of validity should reflect compliance with this rule.

The term "validity" is intended to be broad enough to encompass the method of enactment as well as the constitutionality and authority for any statute, ordinance or regulation. It does not include mere questions of construction and interpretation. This rule applies not only to appeals, but also to any extraordinary proceeding before the court. A provision for notice to the Attorney General in trial proceedings is found in M.R.C.P. 24(d).

Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets

Second Edition

by
Machinery and Technical Specialties Committee
of the American Society of Appraisers

American Society of Appraisers
ASA
The International Society of Professional Valuers

3

Cost Approach

Objectives:

1. Introduce the cost approach and principle of substitution.
2. Distinguish between replacement and reproduction cost.
3. Describe methods of determining cost new.
4. Discuss concepts of depreciation, including obsolescence.
5. Illustrate the cost approach methodology with examples.

Using the cost approach, the appraiser starts with the current replacement cost new of the property being appraised and then deducts for the loss in value caused by physical deterioration, functional obsolescence, and economic obsolescence. The logic behind the cost approach is the principle of substitution: a prudent buyer will not pay more for a property than the cost of acquiring a substitute property of equivalent utility.[1] The principle can be applied either to an individual asset or to an entire facility.

In its simplest form, the cost approach is the current cost (as if new) less all forms of depreciation. The appraiser identifies the property being appraised ("subject"), develops its current replacement cost new, and subtracts all depreciation that makes it less desirable to own than if it were new.

Determination of Current Cost New

Replacement and Reproduction Cost

The replacement cost new is generally the proper starting point for developing an opinion of value using the cost approach.[2] It is essential that the appraiser understand the difference between *replacement cost new* and *reproduction cost new*. Replacement cost is the current cost of a similar new property having the nearest equivalent utility as the property being appraised, whereas reproduction cost is the current cost of reproducing a new replica of the property being appraised using the same, or closely similar, materials. In using the cost approach, the appraiser is comparing to the subject property the property that could actually replace it. The replacement property would be the most economical new property that could replace the service provided by the subject.[3] As Professor James Bonbright states in *The Valuation of Property*:

> Most physical properties are not replaced by properties of the same size, design, and materials. They are replaced by materially different properties of a more modern type, better designed to meet the owner's present needs.... [T]he replacement would be one of substitution [i.e., replacement cost] rather than identical reproduction.... In such cases, the hypothesis that the value of the existing property is derivable from the current cost of constructing or buying a substantially identical property [reproduction cost] is always invalid. The appraiser may still adhere to it [reproduction cost] if he believes that there is no material difference between the cost and efficiency of the different substitute [replacement cost] and the cost and efficiency of the replica [reproduction cost]. But he cannot ignore the discrepancy if it is serious—otherwise he will be guilty of gross overvaluation.[4]

Professor Eugene Grant makes the same point: "[I]f replacement with a different substitute asset would be more economical, the cost of reproducing identically an existing old asset has no bearing on value."[5]

Whether the subject asset is an individual item of equipment or an entire plant, improvements in design, product flow, processing

The Appraisal of Real Estate

Twelfth Edition

he Appraisal Institute:

Appraisal Institute

Professionals Providing Real Estate Solutions

875 North Michigan Avenue • Chicago, Illinois 60611-1980
www.appraisalinstitute.org

CHAPTER

14 The Cost Approach

Like the sales comparison and income capitalization approaches, the cost approach to value is based on comparison. In the cost approach, the appraiser compares the cost to develop a new property or a substitute property with the same utility as the subject property. The estimate of development cost is adjusted for differences in the age, condition, and utility of the subject property to generate a value indication by the cost approach. The cost approach reflects market thinking because market participants relate value to cost. Buyers tend to judge the value of an existing structure not only by considering the prices and rents of similar buildings but also by comparing the cost to create a new building with optimal physical condition and functional utility. Moreover, buyers adjust the prices they are willing to pay by estimating the costs to bring an existing structure up to the physical condition and functional utility they desire.

In applying the cost approach, an appraiser estimates the market's perception of the difference between the property improvements being appraised and a newly constructed building with optimal utility. Generally, the cost approach supports two methods for estimating cost and three methods of estimating depreciation. In its classic form, the cost approach produces an opinion of value of the fee simple interest in the real estate at stabilized occupancy, so the total cost must include any costs needed to achieve typical stabilized occupancy. Also, if the purpose of the appraisal is to estimate the value of an interest other than fee simple, an adjustment may be required. For example, a property rights adjustment could be made as a lump-sum adjustment at the end of the cost approach or in the final reconciliation of the approaches to value.

cost approach: A set of procedures through which a value indication is derived for the fee simple interest in a property by estimating the current cost to construct a reproduction of, or replacement for, the existing structure plus any profit or incentive; deducting depreciation from the total cost; and adding the estimated land value. Other adjustments may then be made to the indicated fee simple value of the subject property to reflect the value of the property interest being appraised.

In applying the cost approach, an appraiser must distinguish between two cost bases, which should be used consistently throughout. Typically one of the following cost bases is applied:

In the **cost approach**, a property is valued based on a comparison with the cost to build a new or substitute property. The cost estimate is adjusted for the depreciation evident in the existing property.

- Reproduction cost
- Replacement cost

The market and physical condition of the appraised property usually suggest whether an exact replica of the subject property (reproduction cost) or a substitute property with similar utility (replacement cost) would be a more suitable comparison.

The appraiser estimates the cost to construct the existing structure and site improvements (including direct costs, indirect costs, and an appropriate entrepreneurial profit or incentive) using one of three traditional techniques:

1. Comparative-unit method
2. Unit-in-place method
3. Quantity survey method

The appraiser then deducts all depreciation in the property improvements from the cost of the new structure as of the effective appraisal date. The amount of depreciation present is determined using one or more of the three fundamental methods:

1. Market extraction method
2. Age-life method
3. Breakdown method

When the value of the land is added to the cost of the improvements less depreciation, the result is an indication of the value of the fee simple interest in the real estate component of the property, assuming stabilization.

This chapter provides an outline of the cost approach and explains the fundamental appraisal concepts that support this approach to value. Chapters 15 and 16 discuss the specifics of cost and depreciation estimates—i.e., the essential techniques applied to render a convincing opinion of value using the cost approach.

Relation to Appraisal Principles

Substitution

The principle of substitution is basic to the cost approach. This principle affirms that a prudent buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay. Older properties can be substituted for the property being appraised, and their value is also measured relative to the value of a new, optimal property. In short, the cost of property improvements on the effective date of the appraisal plus the accompanying land value provides a measure against which prices for similar improved properties may be judged.

The Dictionary of Real Estate Appraisal

Fourth Edition

Appraisal Institute™
Professionals Providing Real Estate Solutions

550 W. Van Buren St., Suite 1000 • Chicago, IL 60607
www.appraisalinstitute.org

collected rent equals the equity allowing the property to be foreclosed, and the borrower transfers the property to a third party and files bankruptcy staving off foreclosure and allowing the scheme to continue. The borrower receives rental payments and state and federal tax benefits.

rent subsidy. Supplementary money granted by a government agency or charitable organization to indigent people who cannot meet rental payments.

rent-up period. A period of time during which a rental property is in the process of initial leasing; may begin before or after construction and lasts until stabilized occupancy is achieved.

repairs. Current expenditures for general upkeep to preserve a property's condition and efficiency; may include renewal of small parts of any property component; does not include replacement, i.e., the renewal of any substantial part of the property or a change in the form or material of the building. *See also* **cost of repairs; maintenance.**

replacement allowance. An allowance that provides for the periodic replacement of building components that wear out more rapidly than the building itself and must be replaced during the building's economic life.

replacement cost. The estimated cost to construct, at current prices as of the effective appraisal date, a building with utility equivalent to the building being appraised, using modern materials and current standards, design, and layout.

replacement cost coverage. Type of insurance that guarantees that the insurance company will pay to replace the damaged property with new property (depreciation will not be deducted). (R.S. Means)

replacement cost new (RCN). *See* **replacement cost.**

replacement reserves. *See* **replacement allowance.**

report. Any communication, written or oral, of an appraisal, appraisal review, or appraisal consulting service that is transmitted to the client upon completion of an assignment. (USPAP, 2002 ed.)

repossession. The retaking of possession of a property. A landlord may repossess a property after a tenant fails to meet rental payments or breaks other terms of the lease; a mortgagor repossesses after the mortgagee falls behind on mortgage payments. *See also* **reentry.**

reproduction cost. The estimated cost to construct, at current prices as of the effective date of the appraisal, an exact duplicate or replica of the building being appraised, using the same materials, construction standards, design, layout, and quality of workmanship and embodying all the deficiencies, superadequacies, and obsolescence of the subject building.

repurchase agreements and reverse repurchase agreements. Short-term financing arrangements made by securities dealers, banks, and the Federal Reserve System in which a person who needs funds for a short period uses his or her portfolio of money market investments as collateral and sells an interest in the portfolio with the obligation to repurchase it, with

UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE and ADVISORY OPINIONS 2005 EDITION

APPRAISAL STANDARDS BOARD
THE APPRAISAL FOUNDATION
Authorized by Congress as the Source of Appraisal Standards and Appraiser Qualifications

Published in the United States of America.

EFFECTIVE:
January 1, 2005

- use of the extraordinary assumption results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for extraordinary assumptions.

(h) **identify any hypothetical conditions necessary in the assignment.**

Comment: A hypothetical condition may be used in an assignment only if:

- use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison;
- use of the hypothetical condition results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for hypothetical conditions.

Standards Rule 1-3 **(This Standards Rule contains specific requirements from which departure is permitted. See the DEPARTURE RULE.)**

When the value opinion to be developed is market value, and given the scope of work identified in accordance with Standards Rule 1-2(f), an appraiser must:

(a) **identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends; and**

Comment: An appraiser must avoid making an unsupported assumption or premise about market area trends, effective age, and remaining life.

(b) **develop an opinion of the highest and best use of the real estate.**

Comment: An appraiser must analyze the relevant legal, physical, and economic factors to the extent necessary to support the appraiser's highest and best use conclusion(s).

Standards Rule 1-4 **(This Standards Rule contains specific requirements from which departure is permitted. See the DEPARTURE RULE.)**

In developing a real property appraisal, an appraiser must collect, verify, and analyze all information applicable to the appraisal problem, given the scope of work identified in accordance with Standards Rule 1-2(f).

(a) **When a sales comparison approach is applicable, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.**

(b) **When a cost approach is applicable, an appraiser must:**

(i) **develop an opinion of site value by an appropriate appraisal method or technique;**

(ii) **analyze such comparable cost data as are available to estimate the cost new of the improvements (if any); and**

(iii) **analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation).**

(c) **When an income approach is applicable, an appraiser must:**

- it is required to properly develop credible opinions and conclusions;
- the appraiser has a reasonable basis for the extraordinary assumption;
- use of the extraordinary assumption results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for extraordinary assumptions.

(h) identify any hypothetical conditions necessary in the assignment.

Comment: A hypothetical condition may be used in an assignment only if:

- use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison;
- use of the hypothetical condition results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for hypothetical conditions.

Standards Rule 7-3 **(This Standards Rule contains specific requirements from which departure is permitted. See DEPARTURE RULE.)**

In developing a personal property appraisal, an appraiser must collect, verify, analyze, and reconcile all information pertinent to the appraisal problem, given the scope of work identified in accordance with Standards Rule 7-2(f).

(a) Where applicable, identify the effect of highest and best use by measuring and analyzing the current use and alternative uses to encompass what is profitable, legal, and physically possible, as relevant to the type and definition of value and intended use of the appraisal;

(b) Personal property has several measurable marketplaces; therefore, the appraiser must define and analyze the appropriate market consistent with the type and definition of value; and

Comment: The appraiser must recognize that there are distinct levels of trade and each may generate its own data. For example, a property may have a different value at a wholesale level of trade, a retail level of trade, or under various auction conditions. Therefore, the appraiser must analyze the subject property within the correct market context.

(c) Analyze the relevant economic conditions at the time of the valuation, including market acceptability of the property and supply, demand, scarcity, or rarity.

Standards Rule 7-4 **(This Standards Rule contains specific requirements from which departure is permitted. See DEPARTURE RULE.)**

In developing a personal property appraisal, an appraiser must collect, verify, and analyze all information applicable to the appraisal problem and the type of property, given the scope of work identified in accordance with Standards Rule 7-2(f).

(a) When a sales comparison approach is applicable, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.

(b) When a cost approach is applicable, an appraiser must:

(i) analyze such comparable cost data as are available to estimate the cost new of the property; and

Julius L. Sackman

NICHOLS ON EMINENT DOMAIN

§ 15.08 The Franchise of a Utility

It is well settled that the franchise of a public service corporation is property that must be paid for,[1] unless it is expressly provided in the statute by which the franchise is granted that compensation need not be made.[2] One court has stated that in addition to considering the franchise of a company in the condemnation of a plant, other factors to be considered are:

(a) Items for which a city was required to pay in expropriating the electrical power distribution system of a company within

---

[1] *Federal:* Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893); City of Thibodeaux v. Louisiana Power & Light Co., 225 F. Supp. 657 (E.D. La. 1963).

Arizona: City of Phoenix v. Consolidated Water Co., 101 Ariz. 43, 415 P.2d 866 (1966); City of Tucson v. El Rio Water Co., 101 Ariz. 49, 415 P.2d 872 (1966).

California: In re Marin Municipal Water Dist., P.U.R. 1915 C. 433; *In re* Marin Municipal Water Dist., P.U.R. 1915 C. 474; *In re* Palo Alto, P.U.R. 1917 A. 163; *In re* Redding, P.U.R. 1919 F. 415; *In re* Redding, P.U.R. 1921 C. 1.

Kansas: Galena Water Co. v. Galena, 74 Kan. 644, 87 P. 735 (1906).

Kentucky: Richmond Tpke. Co. v. Madison County Fiscal Ct., 114 Ky. 351, 24 Ky. L. Rptr. 1260, 70 S.W. 1044 (Ky. Ct. App. 1902).

Maine: Kennebec Water Dist. v. Waterville, 96 Me. 234, 52 A. 774 (1902); Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903); Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537 (1904).

Mississippi: Mississippi Power & Light Co. v. City of Clarksdale, 288 So. 2d 9 (1973); Bear Creek Water Ass'n v. Town of Madison, 416 So. 2d 399 (1982).

See also In re Fifth Avenue Coach Lines, Inc., 22 N.Y. 2d 613, 294 N.Y.S.2d 502, 241 N.E.2d 717 (1968).

Pennsylvania: West Chester, etc., Plank Rd. Co. v. Chester County, 182 Pa. 40, 37 A. 905 (1897); Hanover v. Hanover Sewer Co., 251 Pa. 95, 96 A. 132 (1916); Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54, 20 A. 407 (1885).

Rhode Island: Bristol v.Bristol Water Works, 23 R.I. 274, 49 A. 974 (1900).

See Madole, *Legal Problems of Utilities in Condemnation Proceedings,* 4 Institute on Eminent Domain 127 (1962).

[2] *Federal:* Omaha Water Co. v. Omaha, 218 U.S. 180, 30 S. Ct. 615, 54 L. Ed. 991 (1910).

Massachusetts: Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N.E. 533 (1897); Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N.E. 977 (1901).

Wisconsin: Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 N.W. 555 (1909).

corporate limits of the city where physical properties of the company within the city, franchise of the company, usefulness of extra-urban properties, and the right of passage through the city to serve other areas.

(b) General rule to be applied in awarding damages for the expropriation of electrical power distribution system of a company within corporate limits of the city is valuation as between a willing buyer and a willing seller of the business.

(c) When electrical distribution business of a company within a city is seized, it must be valued according to its ability to produce income, and to this must be added value of the property plus all damages sustained in consequences of the expropriation.

(d) A power company, upon expropriation of its electrical distribution business within corporate limits of a city was entitled to damages based on future growth where proved to a reasonable certainty, although mere guesses as to anticipated future earnings had to be excluded.

(e) Upon condemnation of electrical distribution utility as an electric utility to be operated as such, facts of future growth must be taken into consideration in fixing present value of the whole system to a willing buyer.

(f) Upon condemnation of an electrical distribution company by a city for operation thereof by the city, future growth, as an element of damages, should be evaluated by using capitalization method for determining present value and its interest rate, together with incremental net income attributable to future growth.[3]

Even if the utility is not a "going concern" that is, it has no physical plant, the franchise has been held to be compensable where the only property taken was a certificate of public convenience since that certificate created a monopoly and protected the utility from all competition.[4] The reasonable value of the franchise taken or the extent to which it has been damaged is ordinarily

[3] City of Thibodeaux v. Louisiana Power & Light Co., 225 F. Supp. 657 (E.D. La. 1963).

[4] Flecha Caida Water Co. v. City of Tuscon, 4 Ariz. App. 331, 420 P.2d 198 (1966).

the measure of damages.[5] Such loss has been measured, not merely by the intrinsic value of the physical plant (such as pipes and conduits in the soil), but by actual loss to the company of the right to unobstructed passage through the street.[6]

[1]—Income as a Criterion of Value

The value of the franchise may be reached by capitalizing income that would probably be earned during its existence over and above a fair return upon the tangible property in the plant.[7]

---

[5] *Federal:* United States v. 25.4 Acres of Land, 71 F. Supp. 248 (1947), *rev'd on other grounds,* 168 F.2d 391 (1948).

Indiana: Indiana Power Co. v. St. Joseph, etc., Power Co., 159 Ind. 42, 63 N.E. 304 (1902), *reh'g denied,* 64 N.E. 468 (1902).

Maine: Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903); Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537 (1903); Waukeag Ferry Ass'n v. Arey, 128 Me. 108, 146 A. 10 (1929).

New York: In re White Plains Water Comm'rs, 176 N.Y. 239, 68 N.E. 348 (1903); Waterford El. L. H. & P. Co. v. State, 117 Misc. 480, 191 N.Y.S. 657 (NY. Ct. Cl. 1921); *In re* New York Water Service Corp., 67 N.Y.S.2d 850 (1946), *aff'd,* 271 A.D. 1019, 69 N.Y.S.2d 508 (1947), *aff'd,* 296 N.Y. 1016, 73 N.E.2d 724 (1947).

Ohio: Cincinnati, etc., Tpke. Co. v. Cincinnati, 9 Ohio S.& C.P. 259, 6 Ohio N.P. 233.

Pennsylvania: Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54, 20 A. 407 (1885).

Washington: Washington Boom Co. v. Chehalis Boom Co., 90 Wash. 350, 156 P. 24 (1916).

Wisconsin: Appleton Water Works Co. v. Railroad Comm'n, 154 Wis. 121, 142 N.W. 476 (1913).

[6] *New York: In re* Gillen Place, 304 N.Y. 215, 106 N.E. 897 (1952).

[7] *Federal:* Monongahela Navigation Co. v. United States, 158 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1895); Puget Sound Power & Light Co. v. Puyallup, 51 F.2d 688 (9th Cir. 1931).

But see City of Thibodeaux v. Louisiana Power & Light Co., 373 F.2d 870 (5th Cir. 1967), *cert. denied,* 389 U.S. 975, 88 S. Ct. 476, 19 L. Ed. 2d 468 (1967), in which the Fifth Circuit said: "The power company was entitled to the value of the franchise based on the business it was doing; but not on what it might do in the future. It accepted to franchise on this condition."

Arizona: City of Phoenix v. Consolidated Water Co., 101 Ariz. 43, 415 P.2d 866 (1966); City of Tuscon v. El Rio Water Co., 101 Ariz. 49, 415 P.2d 872 (1966).

Connecticut: State v. Suffield, etc., Bridge Co., 82 Conn. 460, 74 A. 775 (1910).

Maine: Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903); Waukeag Ferry Ass'n v. Arey, 128 Me. 108, 146 A. 10 (1929).

If the franchise is no more than an indeterminate permit that necessarily must come to an end when the proceedings to take over the plant are instituted, it can have no value.[8] If the franchise is not exclusive in terms, the fact that its earning power might be impaired by the grant of a similar franchise must be considered when computing its value.[9] In any event, past earnings are not a conclusive indication of probable future earnings, because physical conditions may change,[10] and the rates may be reduced by public authority.[11]

Pennsylvania: Clarion Tpke., etc., Co. v. Clarion County, 172 Pa. 243, 33 A. 580 (1896); West Chester, etc., Plank Rd. Co. v. Chester County, 182 Pa. 40, 37 A. 905 (1897); Harrisburg, etc., Tpke. Rd. Co. v. Cumberland County, 225 Pa. 467, 74 A. 340 (1909).

Tennessee: Lebanon, etc., Tpke. Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22 (1929).

The value of a franchise depends upon its earning capacity, but whether it "largely" depends upon that element is for the jury. Chestnut Hill Rd. Co. v. Montgomery County, 228 Pa. 1, 76 A. 726 (1910).

To merit consideration the earnings referred to must not be remote in time but should be limited to a reasonable period immediately prior to the taking. Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54, 20 A. 407 (1885).

While the foregoing cases permit consideration of earnings merely as one of the elements bearing upon the value of a franchise, one case, in effect, considered such element in itself determinative of the value of the franchise. United States v. Brooklyn Union Gas Co., 168 F.2d 391 (2d Cir. 1948).

For a more complete discussion, *see* § 19.07[2] *infra.*

[8] *California:* Sears v. Tuolumne County, 132 Cal. 167, 64 P. 270 (1901).

Maine: Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903); Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537 (1904).

Massachusetts: Springfield v. West Springfield Aqueduct Co., 167 Mass. 128, 44 N.E. 1063 (1896).

Wisconsin: Appleton Water Works Co. v. Railroad Comm'n, 154 Wis. 121, 142 N.W. 476 (1913).

[9] *Maine:* Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903); Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537 (1904).

New York: In re Brooklyn, 143 N.Y. 596, 38 N.E. 983 (1894), *aff'd,* 166 U.S. 685 (1897).

Rhode Island: Bristol v. Bristol, etc. Water Works, 23 R.I. 274, 49 A. 974 (1900).

[10] Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903) (in which it was held that the condemnee was entitled to have considered the increase in income caused by the growth and population of the district which it serviced).

[11] *Maine:* Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903).

It has been held that where the evidence in the case indicates that a public utility is doomed to operate at a loss or at a return not commensurate with the value of its physical assets, it is difficult to see why any allowance should be made for the right to operate the business that the franchise represents.[12]

[2]—Use as a Criterion of Value

In determining valuation, it is the existence of the franchise that is the criterion. The question of actual use or nonuse of the rights and privilege granted thereby is not material.[13] The same principle has been applied to the question of the owner's good faith in the exercise of the franchise. So long as the franchise is subsisting and unrevoked, the mere fact that the owner has so conducted himself as to render it possible that the franchise will be forfeited has been held of no material significance.[14]

[3]—Statutory Provisions

There are some jurisdictions in which the element of franchise value as evidence of plant value has been statutorily limited or excluded.[15]

[4]—Unit Rule

Although it has been said that a franchise may exist entirely independent of a physical structure and may even exist when there is, in fact, no structure,[16] and although it has been held that a franchise may have value in itself since it gives the owner the privilege of doing a profitable business,[17] the better rule seems to be that a separate value should not be assigned to franchise value. This element of value should be considered together with

---

[12] Gray Line Bus Co. v. Greater Bridgeport Transit District, 188 Conn. 417, 449 A.2d 1036 (1982), citing Treatise.

[13] Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903).

[14] *Id. But see* West Chester, etc., Plank Rd. Co. v. Chester County, 182 Pa. 40, 37 A. 905 (1897).

[15] *Massachusetts:* Mass. Gen. L. Ann. Ch.164 § 43 (West 1976).

Ohio: Ohio Rev. Code Ann. § 745.03 (1976).

[16] Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537 (1904); Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903).

[17] Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 A. 6 (1903).

other elements, insofar as it enhances the value of the utility's tangible properties.[18]

---

[18] *See* dissenting opinion of Judge Marshall in Appleton Water Works Co. v. Railroad Comm'n, 154 Wis. 121, 142 N.W. 476 (1913).

See also:

California: Cucamonga County Water Dist. v. Southwest Water Co., 22 Cal. App. 3d 245, 99 Cal. Rptr. 557 (1971).

Maine: Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537 (1904).

New York: In re Water Comm'rs, 71 A.D. 544, 76 N.Y.S. 11 (1879).