IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-TS-01655

EDNA BLANCHARD DAVIDSON, ET AL. APPELLANTS

VS.

TARPON WHITETAIL GAS STORAGE, LLC. APPELLEE

APPEAL FROM THE FIRST JUDICIAL DISTRICT,
CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI,
HONORABLE JAMES S. POUNDS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Nathan E. Bafford
Callie May Whitfield Becks
Billy Blanchard
Bryant Elbert Blanchard
Charles Walker Blanchard
Dorothy Blanchard
Earnest Blanchard
Elizabeth Blanchard
Ferdinand Blanchard
Jesse Blanchard
Mary Alice Blanchard
Michael Blanchard
Robert Blanchard
Sherry Blanchard
Tina Blanchard
Walter Blanchard, Jr.
Yvonne Mitchell Blanchard
Ella Byrd
Ezell Brandon
Leon Brandon
Willie Charles Brandon
Jessica Carouthers Clifton
Richie Lee Cunningham
Edna Blanchard Davidson
Maddie Sue Davis
Mary Ann Blanchard Evans
Shirley Moore Gadson
Shirley Gaskin
Catherine Heard
Lena Hicks
Landra Hodges
Mary Howell
Mary Blanchard Howell
Lois Blanchard Lymon
Joseph C. McNulty
Joseph F.S. McNulty, III
Ben Moore, Sr.
Ben Moore, Jr.
Miller D. Pace
Gracie Harrell Polk
Barbara Stovall
Mark Walker
L.C. Washington
Willie Walker
Robert Whitfield
Margie Whitfield Willis
Any and all heirs of Henry E. Whitfield
Melanie Williams
Tarpon Whitetail Gas Storage, LLC

Attorney of record for Appellants

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STATEMENT OF THE CASE

Since the 1800s, the Blanchard family has owned the Blanchard family tract with four homes and a family cemetery on its twenty-five acres. (Ex. 1: Trial, p. 108).

On December 6, 2007, Tarpon Whitetail Gas Storage, LLC (Condemnor) and twenty three heirs of the Blanchard family negotiated regarding the purchase of the Blanchard estate in Monroe County, Mississippi. These negotiations did not result in a sale.

On June 29, 2009, Tarpon filed Civil Action CV2009-308-GM, a Complaint for Eminent Domain of gas storage rights against all parties with claims to the Blanchard estate.

On August 19, 2009, the Special Court of Eminent Domain, Monroe County, Mississippi held a hearing seeking the Court's approval to condemn the gas storage rights as approved by the Federal Energy Regulatory Comm'n and the Mississippi State Oil and Gas Board, and injunctive relief to immediately begin injecting gas into the storage zone under the Blanchard estate.

On August 30, 2010, the Special Court of Eminent Domain, Monroe County, Mississippi held a jury trial to determine the value of the Blanchard estate. Honorable J. Joshua Stevens, Jr., Appellants' attorney at the time, made a motion to continue the case due to his health issues, including colon cancer that metastasized into his liver and both lungs, his current chemotherapy sessions, his debilitating headaches, and his heavily medicated state. The motion to continue was denied. Mr. Stevens made a motion for the lay witness landowners to testify about the value of their property. The motion for lay witness testimony was denied and could not be admitted into evidence. *Pro se* defendants filed a timely Statement of Values to testify about the value of their property, but the judge also denied their motion and ruled that it could not be admitted into evidence. Mr. Stevens made a motion for an inspection of the premises, which was denied. (Trial 162).

The only testimony regarding the value of the Blanchard estate came from Alan Cook, the manager of land resources for Condemnor, Michael Dean, Petroleum Engineer retained by Condemnor to testify, and Stephen Holcombe, Real Estate Appraiser for Appraisal Services, hired by Condemnor. The result was a verdict for $13,000.00 to be split among 23 people.

SUMMARY OF THE ARGUMENT

The trial judge erred in requiring Condemnor's pre-trial compliance as required by Miss. Code Ann. 11-27-83, most notably, by failing to appoint an independent appraiser. During the trial, the trial judge erred in allowing Condemnor to seek greater condemnation rights than were set out in the pleadings (Ex. 3: Condemnor's Complaint, p. 3, n. 5). The trial judge erred in allowing Condemnor's expert to testify, and in allowing their deficient Statement of Values. The trial judge erred in denying Appellant landowners' Statement of Values, and in denying *pro se* landowners' Statement of Values. The trial judge erred in denying Appellant landowners in an eminent domain case from testifying about the value of their property. The trial judge erred in denying Appellant landowners' counsel from continuing the case due to health issues. The trial judge erred in denying Appellant's motion for a jury view. The trial judge erred in denying testimony regarding compensation and fair market value. The trial judge erred in overturning the jury verdict.

These errors resulted in the judge's abuse of discretion, and as such, this Honorable Court should dismiss the proceedings. In the alternative, this Court should remand the proceedings to allow Appellant landowners to present landowner testimony and expert appraisal testimony regarding compensation and fair market value, thus allowing Appellants tor receive just compensation for the condemnation of the Blanchard family tract.

ARGUMENT

The purpose of an eminent domain proceeding is to determine the fair market value of the property at issue.

The standard of review of eminent domain proceedings is de novo for questions of law, and findings of fact will be overturned where they are supported by substantial evidence in the record unless there was abuse of discretion by the trial judge or the findings were manifestly wrong or clearly erroneous. Morley v. Jackson Redevelopment Auth., 874 So.2d 973, 975(¶ 11) (Miss.2004).

I. The trial judge violated the procedural safeguards of Miss. Code Ann. 11-27-83 by failing to require the filing of a *lis pendens* notice, failing to appoint an independent appraiser, and failing to allow the landowner to withdraw 85 percent of the independent appraiser's valuation.

The Mississippi Code states as follows:

> The court, or the judge thereof in vacation, as soon as practicable after being satisfied that service of process has been obtained, shall appoint a disinterested, knowledgeable person qualified to make an appraisal of the property described in the complaint to act as appraiser. Miss. Code Ann. § 11-27-83 (2011).

The trial judge erred in the following respects with regard to the requirements of this statute. The trial judge allowed the Condemnor to proceed without a *lis pendens* notice. The Mississippi Code states that immediately after filing the complaint, the Plaintiff shall also file a *lis pendens* notice with the chancery clerk. Miss. Code Ann. §§ 11-27-7, 11-47-1 et seq.

Appellant landowners' counsel stated, "Let's talk about some deficiencies. This complaint, under 11-27-33, it says that – the statute says that the Plaintiff shall file a *lis pendens*. Where is it? I mean, we haven't seen it if it's been filed." (Ex. 1: Trial, p. 66, lines 20-26).

The trial judge failed to appoint an independent appraiser. As soon as process of the Complaint has been served, the Court should appoint an independent appraiser who shall appraise the property proposed for taking and return a report on valuation within ten days. Miss. Code Ann. 11-21-87.

Appellant landowners' counsel stated, "If you are going to take property, like was done here, under the quick take, or under the statute that permits it, 11-27-7 or 11-27-83, [there] has to be an independent appraiser appointed by the court. Here they just came in and said we want it, and we want you -- if you remember the discussion, I asked for a hundred thousand dollar bond, they asked for a $25,000 bond, and the Court set a $25,000 bond." (Ex. 1: Trial, p. 67, lines 1-6).

Appellant landowners' counsel stated further, "We don't have the money to hire experts, when somebody has a one two-hundredths interested. I mean, how are we going to get an expert on a practical basis here? We can't testify ourself (sic). We don't have the money. It doesn't make sense to, perhaps for any one of these people to put up the money for an expert. The Court was supposed to appoint one. Read the statute. ... It would give everybody an idea of what we were dealing with here and help us, and that was taxed as court cost, which the Plaintiff would end up paying. An independent. Not Mr. Holcombe. As fine a qualified appraiser as he is, he is not independent. The Court was supposed to do that, is the way we see it." (Ex. 1: Trial, p. 67, lines 7-25).

The trial judge failed to allow the landowner to withdraw 85 percent of the independent appraiser's valuation, which would have provided the funds to prepare a more aggressive defense. Upon entry of an order of immediate possession, the condemning authority shall pay 85 percent of the independent appraiser's valuation into the registry of the court, which the landowner is entitled to withdraw. Miss. Code Ann. § 11-27-89. The condemning authority is required to pay interest at

the rate of 8 percent per annum from the date of filing of an eminent domain complaint until payment on any excess a landowner may be awarded over the quick-take deposit. Miss. Code Ann. § 11-27-87. If the landowner receives less than the 85 percent deposit, the condemning authority is entitled to a personal judgment against the landowner for the difference. Id.

Appellant landowners' counsel stated, "[w]e take exception and realize the Court doesn't have the full information from expert testimony about the value." (Ex1: Quick Take hearing, p. 8, lines 22-25). The judge ordered that a $25,000 bond would be sufficient, and failed to appoint an appraiser. (Ex1: Quick Take hearing, p. 10, lines 23-5). The $25,000 bond amount was selected with no reference to an appraiser, or with the amount being 85% of the appraiser's amount.

II. The trial judge erred in allowing the appellee corporation to use a Statement of Values that fails to meet the statutory requirements of Miss. Code Ann. 11-27-7 and 11-27-83.

The Mississippi Code further states as follows:

> The appraiser, after viewing the property, shall return to the clerk of court within ten (10) days after his appointment, his report in triplicate, under oath, which report shall state: (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint; (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the appraiser; and (3) his opinion as to the highest and best use of the property, and a narrative of the facts pertaining to his appraisal. Miss. Code Ann. § 11-27-83 (2011).

In reference to Condemnor's failure to meet these requirements, Appellant landowners' counsel stated, "[Condemnor] can file a Statement of Values, but it's supposed to be the before and after test. Mr. Holcomb's – the Statement of Values, read it. It doesn't do it. It doesn't do what they are required. ... It doesn't talk about what the surfaces, high and best use. That's supposed to be there, too. It doesn't talk about the fair market value of the property to be condemned, determined as of the date of the filing, or the damages, or the before and after [test], which is what it's supposed to

do. ... The damages to the remainder. Ignore it. (Ex. 1: Trial, p. 67, lines 28-9; p. 68, lines 1-17, 28-29). (See Ex. 2: Condemnor's Statement of Values)

In addition, the judge denied the landowner's motion for a more definite statement under Mississippi Rule of Civil Procedure 12(e) of what Plaintiff seeks to condemn. *See, e.g.,* Mississippi Power Co. v. Leggett, See e.g., Mississippi Power Co. v. Leggett, 197 So. 2d 475, 479 (Miss. 1967) (plaintiff must fully define the number, kind and location of trees to be condemned, referenced in petition only as danger trees).

Appellant landowners' counsel stated, "[the Statement of Values] is supposed to be exactly what we are taking. They are still standing up here and telling all they are taking is rights underground. Read the pleading. Read the complaint. Their motion to do it. Here is what we are taking, this underground strata, which they certainly do say, and told the jury, and the *incidental right of surface and subsurface ingress, use and egress as reasonably necessary to construct, operate and maintain the property.* Now, what does that mean? To me, it's nebulous. Does it give them the right to go drill a test well on there...? Even though they had no intention of building any compressor station on them at this time, they have the right to go on these properties and take it, and yet they put nothing on there. You can't take something away – and even in voir dire he's telling them that all we are taking is something way down three hundred feet under the ground. Read what the pleadings say. Read Mr. Holcombe's report of what he is saying they are taking. Whether he puts any value on it or not, they are certainly taking it." (Ex. 1: Trial, p. 69, lines 1-27) (Statement refers to Ex. 4: Condemnor's Complaint, p. 3, n. 5).

The Court stated, "I find the Statement of Values filed by the Plaintiff in this case to be proper." (Ex. 1: Trial, p. 88, lines 1-4). The trial judge erred by admitted this Statement of Values, which fails to meet the statutory requirements of Miss. Code Ann. 11-27-7 and 11-27-83.

III. The trial judge erred in denying Appellant landowners' counsel from continuing the case due to health issues.

Appellant landowner's counsel renewed his motion for a request for a continuance. (Ex. 1: Trial, p. 59, lines 7-19). As grounds for such, counsel stated that he had recently undergone a PET scan (Ex. 1: Trial, p. 60, lines 16-25), suffered from colon cancer, which had metastasized into his liver and both lungs (Ex. 1: Trial, p. 60, lines 25-29), was undergoing intensive chemotherapy (Ex. 1: Trial, p. 61, lines 4-20), and had an MRI showing debilitating headaches (Ex. 1: Trial, p. 61, lines 21-29; p. 62, lines 1-9; Trial, p. 63, lines 9-29; Exhibit 1, motion for continuance, Exhibit 2, MRI results of Appellant Landowner's counsel.)

Further stating, "My clients didn't do anything wrong. They're not – they shouldn't be sanctioned, and the most draconian sanction you can put on anybody is just to throw out the proof. ... I take the responsibility for my failures of my office staff to respond to this. I have given the best reasons I can in the Motion for a Continuance, but if the case is tried today, and the Court goes forward, then I think the Court is making a serious error, with all due respect, if it doesn't permit all of these landowners that want to get up there and express an opinion of what it's worth." (Ex. 1: Trial, p. 74, lines 18-29; p. 75, lines 1-2). This motion was denied by the court (Ex. 1: Trial, p. 87, line 3). The trial judge erred when he denied Appellant landowners' counsel's motion for a continuance, thus denying their right to enjoy a fair trial.

IV. The trial judge erred in allowing Condemnor to proceed with condemnation rights in the trial that differed from stated rights in the party's pleadings.

Mississippi Rule of Civil Procedure 12(e) states that a defendant may move for a more definite statement under of what the plaintiff seeks to condemn. See e.g., Mississippi Power Co. v.

Leggett, 197 So. 2d 475, 479 (Miss. 1967) (plaintiff must fully define the number, kind and location of trees to be condemned, referenced in petition only as danger trees).

Appellants objected to the ingress and egress rights as stated in the pleadings, which differed from the testimony of Tarpon's witnesses at trial. Counsel for Condemnor stated,"[w]hat we're talking about, again, is not their surface, not where they may live, but a strata of sand, which we call a gas storage interval or a reservoir, that is from 3400 to 3600 feet below ground and is under these individuals' properties. ... [Condemnor] will not be taking the surface." (Ex1: Quick Take hearing, p. 5, lines 19-28).

Appellant landowners' stated, "I object to that. The taking specifically says they are not taking all the surface. They are taking the right to ingress and egress, to go into the property on the surface and the subsurface under our property. ... They can't get up here on the witness stand and say it's something else from what they are saying the pleadings they are taking." (Ex. 1: Trial, p. 186, lines 14-24). The Court stated that the objection was overruled. (Ex. 1: Trial, p. 186, line 25).

IV. The trial judge erred in allowing Condemnor's expert to testify.

The Supreme Court recognizes three different appraisal methods which may be used to value property in the context of an eminent domain proceeding: the cost approach, the market data or sales comparison approach, and the income approach. Potters II v. State Highway Comm'n of Miss., 608 So.2d 1227, 1231 (Miss.1992).

Mr. Holcombe relied on the income approach in this case. (Ex. 1: Trial, p. 202, lines 1-7). Using this approach, he determined that just compensation for the subsurface gas storage rights and for the taking of the Blanchard family tract was $6,250.00. (Ex. 1: Trial, p. 208, line 28-9; p. 209,

line 1-2). Appellant landowner's counsel objected to the basis of the expert upon Ohio law, which was overruled by the court. (Ex. 1: Trial, p. 110, lines 22-29; p. 111, lines 1-7).

Mr. Holcombe also provided comparable sales evidence. While comparable sales are an accepted and established appraisal practice to rely on, they provide little assistance for the jury to rely on when comparing a unique structure such as a reservoir.

Mr. Holcombe further agreed in his testimony that the highway frontage was suitable for home use, and that the highest and best use for this particular property would be greater for home use than it would be for agricultural use. (Ex. 1: Trial, p. 214, lines 25-9; p. 215, lines 1-15).

Mr. Holcombe testified that he relied on Ohio procedure and Ohio case law that had been provided to him by Condemnor's attorney. (Ex. 1: Trial, p. 221, lines 20-23).

Based on Condemnor's use of Ohio law, his failure to inspect the surface, his use of improper comparable sales, the trial judge erred in admitting this testimony.

VI. The trial judge erred in denying Appellant landowners' Statement of Values for being untimely filed and *pro se* landowners' Statement of Values, which was timely filed.

Not less than ten days prior to trial, the defendants shall file and serve on plaintiff their Statement of Values setting forth the same information. "The statements required by this section shall constitute the pleadings of the parties with respect to the issue of value, and shall be treated as pleadings are treated in civil actions in the circuit court. Miss. Code Ann. § 11-27-7; Hudspeth v. State Highway Comm'n of Mississippi, 534 So. 2d 210, 215 (Miss. 1988). The judge may increase or decrease the time for filing statements of value for good cause shown. Mississippi State Highway Comm'n v. Blackwell, 350 So. 2d 1325, 1329 (Miss. 1977); Mississippi State Highway Comm'n v. Amos, 319 So. 2d 231, 233 (Miss. 1975); Mississippi State Highway Comm'n v. Arndt, 304 So. 2d

281, 282 (Miss. 1974).

The failure of the landowner to file a Statement of Values does not entitle the plaintiff to have judgment based on its Statement of Values. The condemning authority still must present evidence to the jury "by way of a writ of inquiry" to allow determination of "due compensation" consistent with the requirements of section 17 of the Mississippi Constitution. Coleman v. Mississippi State Highway Comm'n, 289 So. 2d 918, 920 (Miss. 1974).

Appellant landowners' counsel stated, "The Statement of Values is considered a pleading. It can be amended, changed, added to at any time. That's the only pleadings required here." (Ex. 1: Trial, p. 65, lines 3-8) (Statement refers to Ex. 5: Defendant's Statement of Values). The court noted that the Statement of Values for Appellants was filed eight days before trial. (Ex. 1: Trial, p. 65, lines 9-19). However, the *pro se* landowners filed their Statement of Values more than ten days prior to the trial. (Ex. 1: Trial, p. 65, lines 20-21) (Ex. 6: The Walkers Statement of Values).

The trial judge erred when he denied Appellant landowners and *pro se* landowners from submitted their Statement of Values. The Court stated, "I find the Statement of Values filed by the Plaintiff in this case to be proper and yours to be untimely, filed on Friday, three days ago." (Ex. 1: Trial, p. 88, lines 1-4). Appellant landowners' counsel stated, "Does that apply to the other defendants, too, who did file one timely?" The Court responded, "That's correct." (Ex. 1: Trial, p. 88, line 18).

VII. The trial judge erred in denying Appellant landowners in an eminent domain case from testifying about the value of their property.

It is settled in eminent domain practice that a landowner may give his or her opinion of the fair market value of the property. This does not, however, mean the landowner can get on the witness stand and say anything he or she wants. Properly understood, the rule exempts the

landowner from showing that he or she possesses the qualifications necessary in law to be accepted as an expert witness. See M.R.E. Rule 702.

It proceeds on the premise that the landowner through his or her ownership has acquired a unique view of the property and that the landowner can and ought to be allowed to share this view with the jury. Because landowners ordinarily are not experts and trained in the field of property valuation, they are not held to precise modes of articulation of the way in which they arrived at the values they give. Testimony by landowner's principal as to the valuation and damage to his land was allowed as long as he did not hold himself out as an expert in eminent domain case. Mississippi Transp. Comm'n v. Highland Development, L.L.C., 836 So. 2d 731 (Miss. 2002).

In Clark v. Mississippi Transportation Commission, this Honorable Court noted that the price the landowner paid for the property being taken was an important piece of evidence regarding determination of present value and that the landowner's residence in the vicinity for 31 years and familiarity with industrial property in the area was a sufficient basis to allow the landowner's testimony as to comparable sales, highest and best use of the property and his opinion as to its fair market value. Clark v. Mississippi Transp. Comm'n, 767 So. 2d 173, 178 (Miss. 2000).

If, after Condemnor in an eminent domain proceeding establishes a prima facie case as to the value of the property taken, the party whose property is being condemned desires to receive greater compensation, then it must present evidence of a higher valuation. Martin v. Mississippi Transp. Comm'n, 953 So. 2d 1163 (Miss. Ct. App. 2007).

Regarding the fact that the *pro se* landowners filed their Statement of Values more than ten days prior to the trial. (Ex. 1: Trial, p. 65, lines 20-21). Appellant landowners' counsel stated, "Now, the other defendants, landowners, filed their [Statement of Values] more than ten days [prior to trial] ... a landowner doesn't have to have any certain method or technique, like an expert would have to come, and [provide an] evaluation. He can just give his gut feeling from whatever source he has got,

and it affects the – the weight of it, but not the admissibility, and … what this plan seeks to do is bring his expert in here and testify as to value, and we are left absolutely defenseless. (Ex. 1: Trial, p. 65, lines 20-9; p. 66, lines 1-4).

Appellant landowners' counsel continued, "I think the Court needs to be real careful taking away what we consider a sacred right of a landowner to get up here and express to that jury what he feels it's worth. He may be out in left field, but he has got a right to say it. And you're just got to trust a jury to apply what weight, or give what weight is should have." (Ex. 1: Trial, p. 66, lines 12-18). Further stating, "the Plaintiff want[s] to muzzle these landowners and not give them the right to stand up here as laymen and tell this jury what they think their property is worth." (Ex. 1: Trial, p. 68, lines 22-26).

The court asked, "What is the gist of what [appellant landowners] are going to testify the value of loss is on this property by having this gas stored 3000 feet underground?" (Ex. 1: Trial, p. 71, lines 12-17). As an offer of proof, appellant landowner's counsel stated, "The before and after test. What think very valuable property rights – sometimes it's not what appears above the ground. You could have gold laying down there. You could have an oil down there. You can have a valuable subsurface structure that's worth money. … We have discussed – in our Statement of Values, we put the value before the taking at $650,000, the value after the taking is $150,000. … [I]t's worth something to other companies. Other companies – this is not the only company doing [gas storage]. Trial, p. 71, lines 18-29; p. 72, lines 1-29) One of the things is what [Condemnor] is offering, but that may – that may affect what they feel about it, without saying to the jury that it was an attempt to compromise, why did [Condemnor] offer them that huge amount of money if it wasn't worth it to them? … They offered the family $230,000. (Ex. 1: Trial, p. 73, p. 1-23). Further stating, "[t]he jury shouldn't hear what they were offered by the Plaintiff, but it was one of the bases of what they thought they had." (Ex. 1: Trial, p. 74, lines 3-6).

The court abused its discretion by ruling against the landowners' right to testify. (Ex. 1: Trial, p. 87, line 27-9).

IX. The trial judge erred in denying Appellants' motion for a jury view.

The Mississippi Code provides that in the court's discretion the jury may view the property taken "under the charge of the court as to conduct, conversations and actions as may be proper in the premises." Miss. Code Ann. s. 11-27-19. The trial court may determine that a jury view would not be useful. See e.g., Evans v. Mississippi State Highway Comm'n, 197 So. 2d 805, 807 (Miss. 1967) (where trial was 5½ years after taking and the physical characteristics of the property had changed). However, the better practice is to allow the jury view. Redevelopment Auth. of City of Meridian v. Holsomback, 291 So. 2d 712, 715 (Miss. 1974).

Appellant landowners' counsel requested an inspection of the premises. (Ex. 1: Trial, p. 162, lines 9-13). Because counsel did not make the request during discovery due to his illness, his request was denied by the court. (Ex. 1: Trial, p. 162, lines 6-23). The trial judge erred in this ruling, as it would have been the better practice as stated in case law, and would have provided additional information for the jury to consider.

X. The trial judge erred in denying testimony regarding compensation and fair market value.

Compensation is to be based on the property itself and the damages to its fair market value. Trustees of Wade Baptist Church v. Mississippi State Highway Comm'n, 469 So. 2d 1241, 1244 (Miss. 1985); Evans v. Miss. Power Co., 206 So. 2d 321, 322 (Miss. 1968).

In Mississippi State Highway Comm'n v. Hillman, the court elaborated upon compensation by stating:

> Due compensation is made the owner of a tract of land when a part thereof is taken for public use when he is paid the value of the land taken and the damages, if any, which result to him as a consequence of the taking ... without considering either general benefits or injuries resulting from the use to which the land taken is to be put, shared by the general public., 198 So. 565, 569 (Miss. 1940).

Items such as noise attributable to additional traffic or increased proximity of a highway are typically noncompensable injuries resulting from use of land taken and shared by the general public. Mississippi State Highway Comm'n v. Hurst, 349 So. 2d 545, 546 (Miss. 1977); New v. State Highway Comm'n, 297 So. 2d 821, 824 (Miss. 1974). However, to the extent that such items affect the fair market value of property remaining after a taking, evidence with respect to how they affect value is admissible. State Highway Comm'n of Mississippi v. Havard, 508 So. 2d 1099, 1101 to 1102 (Miss. 1987); Smith v. Mississippi State Highway Comm'n, 423 So. 2d 808, 812 (Miss. 1982).

Mississippi State Highway Commission v. Hillman defined fair market value as:

> It will be sufficient now to say that 'the market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it' ... 'All the facts as to the condition of the property (land) and its surroundings its improvements and capabilities, may be shown and considered in estimating its value. Of course circumstances and conditions tending to depreciate the property are as competent as those which are favorable.' Mississippi State Highway Commission v. Hillman, 198 So. 565, 571 (Miss. 1940).

Every factor affecting a property's value should be considered. See, e.g., Wright v. Jackson Mun. Airport Auth., 300 So. 2d 805, 810 (Miss. 1974) (existence of servitude); Mississippi Power Co. v. Walters, 204 So. 2d 471, 476 (Miss. 1967) (presence of "danger trees" which constituted part

of taking; condemner could not require landowner to bear expense of marketing severed trees). Aesthetic damage by taking of trees is not a separately compensable item of damages. That damage must be taken into account in the before and after analysis. Mississippi State Highway Comm'n v. Viverette, 529 So. 2d 896, 900 (Miss. 1988).

Evidentiary objections which concern the appropriate legal standard to apply when determining the value of property in eminent domain proceedings are questions of law. Trowbridge Partners, L.P. v. Mississippi Transp. Comm'n, 954 So. 2d 935 (Miss. 2007).

A property is valued for condemnation purposes at its highest and best use. Its value is not to be estimated simply with reference to its present condition and usage but with reference to any usage to which it is reasonably adapted. Mississippi State Highway Comm'n v. Wagley, 231 So. 2d 507, 508 to 509 (Miss. 1970); Mississippi State Highway Comm'n v. Brooks, 123 So. 2d 423, 427 (Miss. 1960). That use must be one to which it is probable the land can be used for within a reasonable time. Green Acres Mem'l Park, Inc. v. Mississippi State Highway Comm'n, 153 So. 2d 286, 291 to 292

(Miss. 1963); State Highway Comm'n v. Brown, 168 So. 277, 279 (Miss. 1936). A landowner's specific plans for future development are admissible to show highest and best use. Clark v. Mississippi Transp. Comm'n, 767 So. 2d 173, 176 (Miss. 2000). Where property is not zoned for a particular usage, that usage may nonetheless be shown as highest and best use if the proof shows that rezoning is a reasonable probability and the property is not valued as if the rezoning has already been effected. Mississippi Transp. Comm'n v. National Bank of Commerce, 708 So. 2d 1, 3 (Miss. 1997); Dennis v. City Council of Greenville, 646 So. 2d 1290, 1294 (Miss. 1994); Mississippi State Highway Comm'n v. Wagley, 231 So. 2d 507, 509 (Miss. 1970).

The condemning authority has a heavy and non-delegable duty to pay a landowner the full fair market value of the landowner's property. Sarphie v. Mississippi State Highway Comm'n, 275 So. 2d 381, 383 (Miss. 1973). In Times Square Realty, Inc. v. City of Grenada, the court reversed in part because the city's witnesses placed no value on water wells and main meter included in the taking because they were "worth nothing" to the city. 421 So. 2d 1053, 1055 (Miss. 1982). ... "[T]he principle question is what is the worth of that being taken to the person having to sell his property. ... In our opinion both of these items should have been included in the appraised value of the entire systems." Id.

Mississippi State Highway Commission v. Hillman is the seminal Mississippi case on determination of condemnation damages. Mississippi State Highway Commission v. Hillman, 198 So. 565, 569 to 570 (Miss. 1940). The Hillman court set forth a damages formula:

> When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering general benefits or injuries resulting from the use to which the land taken is to be put, that are shared by the general public. Hillman, 198 So. 565, 569 (Miss. 1940).

The court gave further definition in stating that "[t]he before and after rule 'swallows and absorbs' all specific elements of damages. State Highway Comm'n of Mississippi v. Havard, 508 So. 2d 1099, 1101 (Miss. 1987).

Evidence of those specific elements of damages are admissible so long as they are related to the "before and after" value of the property and affect its market value. Mississippi State Highway Commission v. Hillman, 198 So. 565, 570 (Miss. 1940).

Every factor having a legitimate bearing on the before or after value of the land may be put in evidence. This includes specific items affecting the depreciated value, but they may not be shown

as separate items of damage. Mississippi State Highway Comm'n v. Ladner, 137 So. 2d 781, 784 (Miss. 1962).

Items such as noise attributable to additional traffic or increased proximity of a highway are typically non-compensable injuries resulting from use of land taken and shared by the general public. Mississippi State Highway Comm'n v. Hurst, 349 So. 2d 545, 546 (Miss. 1977); New v. State Highway Comm'n, 297 So. 2d 821, 824 (Miss. 1974). However, to the extent that such items affect the fair market value of property remaining after a taking, evidence with respect to how they affect value is admissible. State Highway Comm'n of Mississippi v. Havard, 508 So. 2d 1099, 1101 to 1102 (Miss. 1987); Smith v. Mississippi State Highway Comm'n, 423 So. 2d 808, 812 (Miss. 1982).

Appellant landowners' counsel questioned Condemnor's witness Mr. Cook regarding the noise, odor, and the possibility of explosion (Ex. 1: Trial, p. 132, lines 27-9; p. 133, lines 1-29; p. 134, lines 1-29). The jury should be permitted to consider damages such as noise, odor, and the possibility of explosion as it relates to the fair market value of the property on the surface, and whether the party has received just compensation.

Appellant landowners' counsel questioned Mr. Holcombe regarding noise, odor, and the possibility of explosion, and Mr. Holcombe admitted that potential homeowners do not like to be close to any of these issues. However, Mr. Holcombe further stated that this would result in no decrease in value. (Ex. 1: Trial, p. 223, lines 28-9; p. 224, lines 11-14).

Mr. Holcombe further stated that he never value the before taking. (Ex. 1: Trial, p. 235, lines 10-11). Mr. Holcombe stated that he did not make a personal inspection of the property. (Ex. 1: Trial, p. 237, lines 1-3).

XI. Whether the trial judge erred in overturning the jury verdict.

A jury verdict shall not be set aside on post-trial motion, nor reversed on appeal, except where the verdict reflects bias, passion or prejudice or is contrary to the overwhelming weight of the evidence. Dorrill v. State Highway Comm'n, 525 So. 2d 1333, 1335 (Miss. 1988); Mississippi State Highway Comm'n v. Antioch Baptist Church, Inc., 392 So. 2d 512, 514 (Miss. 1981).

The jury is not bound by the expert testimony, but is to consider all evidence in reaching a verdict. Bishop v. Mississippi Transp. Comm'n, 734 So. 2d 218, 222 (Miss. Ct. App. 1999); Warren County v. Harris, 50 So. 2d 918, 920 to 921 (Miss. 1951).

The jury awarded $13,000 to the Appellant landowners. (Ex. 1: Trial, p. 284, lines 21-9). Condemnor's attorney requested a judgment notwithstanding the verdict. (Ex. 1: Trial, p. 285, line 6-7). The judgment remains at $13,000.00 to be split among 23 people. (Ex. 7: Jury Verdict Form)

CONCLUSION

Appellant landowners respectfully assert that the trial judge made errors beginning during the quick take condemnation process until the completion of the trial. Without a healthy attorney, they were unable to comply with discovery requirements. Their attorney was also unable to fully represent their interests at trial. The court denied their ability to speak during the trial. When the jury found an amount in their favor, the court took it away. For all of these reasons, they assert that these errors resulted in the judge's abuse of discretion, and as such, this Honorable Court should dismiss the proceedings. In the alternative, this Court should remand the proceedings to allow Appellant landowners to present landowner testimony and expert appraisal testimony regarding compensation and fair market value, thus allowing Appellants tor receive just compensation for the condemnation of the Blanchard family tract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above and foregoing pleading to opposing counsel J. Jeffrey Trotter, P.O. Box 24297, Jackson, Mississippi 39225-4297, and to the trial court judge, Honorable James S. Pounds, P.O. Box 843, Aberdeen, Mississippi 39730, on this 29th day of July, 2011.

Counsel on behalf of Appellants