IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI TRANSPORTATION COMMISSION — PLAINTIFF

VS. — CAUSE NO. 2010-CC-01395

JAMES B. HOWARD, BRYANT HOWARD, DORIS HOWARD, GARY GAINES, TRUSTEE, FEDERAL LAND BANK ASSOCIATION OF NORTH MISSISSIPPI, FLCA AND 4-COUNTY ELECTRIC COMPANY — DEFENDANTS

AMENDED BRIEF OF THE APPELLANT

APPEAL FROM THE SPECIAL COURT OF EMINENT DOMAIN
LOWNDES COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

STEVEN R. MCEWEN
MCEWEN LAW FIRM
ATTORNEY FOR APPELLANT
P. O. BOX 709
COLUMBUS, MS 39703
662-243-1111
MS BAR NO. [redacted]

IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI TRANSPORTATION COMMISSION PLAINTIFF

VERSUS CIVIL ACTION NO. 2010-CC-01395

JAMES B. HOWARD ET AL DEFENDANTS

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.

APPELLANT:
Mississippi Transportation Commission
P. O. Box 1850, Jackson, MS 39215-1850

APPELLEES:
James B. Howard, Doris Howard and Bryant Howard
125 Subdivision Road, Columbus, MS 39701

4-County Electric Association
5265 S. Frontage Rd., Columbus, MS 39701

Federal Land Bank Association of North Mississippi, FLCA
P. O. Box 667, Senatobia, MS 38668-0667
and
P. O. Box 2470, Starkville, MS 39759-2470

Gary Gaines, Trustee
Senatobia, MS

ATTORNEY:
Steven R. McEwen of McEwen Law Firm
P. O. Drawer 709, Columbus, MS 39703
Attorney of record for Appellant

Robert Marshall of Edwards, Storey, Marshall, Helveston & Easterling LLP
P. O. Box 835, West Point, MS 39773
Attorney of record for Appellees

STEVEN R. MCEWEN

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STATEMENT OF ISSUES

MTC submits that reversible errors in the trial of this case occurred regarding these matters:

1. The trial court committed reversible error when it ruled in the presence of the jury that the testimony of Joe Max Higgins and Robert Rhett was allowed to prove "demand" for the Defendants' property or a portion of the property.

2. The testimony of Joe Max Higgins and Robert Rhett was timely objected to on the basis that it was irrelevant and immaterial, and the trial court committed reversible error by allowing their testimony.

3. Where the sole issue was to determine the value of the Howards' property, the trial court committed reversible error in denying the only jury instruction, Jury Instruction P-14, that correctly stated the law about how to assess the two appraiser's testimony, which was the only testimony about the value of the property.

4. The admission by the trial court of the SCARBROUGH sale by the Defendants as a comparable sale was error because it allowed the jury to consider testimony about the highest and best use of "heavy industrial" when the Defendants' property had a highest and best of "light industrial" and "secondary commercial" use according to their appraiser and their statement of values.

5. The trial court erred in allowing Steve Holcombe's testimony as to value and in not granting a new trial because his value was not based on reliable principles and methods, violated the Before and After rule and was not based upon facts.

6. The trial court erred by allowing Steve Holcombe to testify about sales that were not comparable to the Defendants' property and then compounded the error by granting Instruction D-13.

7. The first sentence of Instruction D-12 is not a statement of the law and was a prejudicial statement to create sympathy for the Defendants creating a reversible error when Instruction D-12 was granted by the trial court.

8. The denial of Plaintiff's Motion for a new trial was an error because the verdict is not supported by any evidence in this case and it evidences bias.

STATEMENT OF THE CASE

1. NATURE OF THE CASE.

This case is an eminent domain lawsuit filed by the Mississippi Transportation Commission ("MTC") to acquire property to construct 4 new lanes for U. S. Highway 45.

2. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

MTC's **original complaint filed September 8, 2005** in this case. An **amended complaint filed on October 16, 2008, which is the date of taking**. A **trial** was **held April 13-15, 2010**. On May 5, 2010, the Final Judgment in the amount of $604,760 was signed by the Judge and received by the Circuit Clerk. MTC's Motion for a New Trial or other Relief and Motion for Judgment Notwithstanding the Verdict were filed on May 14, 2010. The trial judge heard argument on June 30, 2010. The trial judge entered an Order Overruling Post Trial Motions on August 13, 2010. MTC appealed from the Final Judgment and the Order Overruling Post Trial Motions to the Mississippi Supreme Court by filing its Notice of Appeal on August 23, 2010. There were numerous problems with the record of the case. It took over one year to get the record prepared, reviewed and corrected.

3. STATEMENT OF FACTS.

The Defendants, Bryant Howard ("BH"), James B. Howard ("JBH") and Doris Howard ("DH")(collectively "Howards"), owned a **111.16 acre** tract of land ("cattle farm") (V 1 p 66 l 13-16) that has **always been used by Howards as a cattle farm**. It has **never** been used for **secondary commercial/light industrial**. The **Howards**

stipulated at trial that it was used as **farmland**. (V 1 p 37 l 9-10)

Marvin Vanderford, who is the Project Engineer for MTC in constructing these new 4 lanes on the Howards' property, testified about the location of the Howards' property and the acreage involved in this case. Before this condemnation case was filed, the cattle farm's east boundary was basically U.S. Highway 45, which was a two lane highway. The north boundary of the cattle farm was the Kansas City Southern Railroad. The two lane Highway 45 crossed over this railroad track with a bridge above the track. The south and west boundary of the cattle farm was McIntyre road, which was a gravel county road.

As a result of this condemnation case, **MTC acquired 46.31 acres to build a new 4 lane highway**. Two new bridges were built over the railroad track. Defendants' **cattle farm has 64.85 acres remaining**. 61.33 acres is west of the new 4 lane highway, and 3.52 acres join the east side of Highway 45.

The **cattle farm** was **purchased** by BH and Tony Sharp **in 1994** (V 1 p 66 l 5-12). In November 2004 ownership of the cattle farm was vested in the Howards by deed, which is MTC's Exhibit 19. The Howards executed a deed of trust, which is MTC's Exhibit 17, on the cattle farm to the Federal Land Bank and on page 7 of that **deed of trust dated April 27, 2005**, the **Howards covenanted and warranted that their property would be used principally for agricultural or farming purposes** (V 1 p 74 l 16- p 75 l 14). On **November 26, 2007 the Howards repeated that same covenant** (V 1 p 75 l 16- p 76 l 24) on page 6 in a deed of trust, which is MTC's Exhibit 18, to the

Federal Land Bank.

Some time after the condemnation case was filed, the **Howards built a new fence on their remaining property** so that they **could continue to use it for a cattle farm.** (V 1 p 66 l 17 to p 67 l 17) Between October 2009 and April 2010, **MTC was requested** by BH **to place riprap** in ditch (V 1 p 46 l 1 to p 46 l 13) **to keep young calves inside the fence** (V 1 p 70 8 to p 71 l 1). **During the trial in April 2010** the **Howards** were **still using** their **remaining property as a cattle farm.** (V 1 p 66 l 13-16)

Steve Holcombe (**"Holcombe"**), who was the Howard's appraiser, testified that as of the date of taking the cattle farm's highest and best uses were light industrial and secondary commercial (V 2 p 314 l 10-15) and **of an interim use "for pasture"** (V 2 p 377 l 10 to p 378 l 9). In applying this interim use "for pasture" to the damages due the Howards, **Holcombe determined** that the **Howards suffered "water loss" in the amount of $3,000 and used seven years as the time for the cost to cure to get water in a pasture on an interim basis.** (V 2 p 278 l 5-29) In addition **Holcombe determined that new fencing was due the Howards in the amount of $16,850.** (V 2 p 276 l 29 to p 277 l 26) Later in the trial, **Holcombe lamented it was a shame that MTC should have to pay for fencing, but if the property could not be used for pasture, then MTC would owe the Howards' damages for the lack of use of the property.** (V 3 p 377 l 19-29)

Alex Smith testified on behalf of MTC as an appraiser. He has an MAI designation and has testified in other condemnation cases.

He testified that after searching the land records and contacting realtors, he located all the sales in the area of the Howards' property. Using the sales that he found, he concluded that the highest and best use of the Howards' property was rural residential and agricultural. He testified that his Before Value was $409,000.00, his After Value was $219,000.00 and his Just Compensation was $189,000.00.

Holcombe testified that has an MAI designation and has testified in other condemnation cases. He testified that the highest and best use of the Howards' property was light industrial and secondary commercial. He testified that his Before Value was $3,200,000.00, his After Value was $1,745,469.68 and his Just Compensation was $1,454,530.32.

MTC and the Howards agreed in testimony that there was no damage to the 61.33 acres west of the new highway **Holcombe testified** that the **3.52 acres remaining east of Highway 45** after the taking by MTC **was worth a negative 40 cents**. Holcombe's damages of $101,331.80 which applied solely to the 3.52 acres works out to make the 3.52 acres worth a negative 40 cents after the taking. **In contrast to Holcombe's negative 40 cents value testimony**, BH, **one of the owners** of the remaining 3.52 acres testified that he **wanted MTC to build a ramp to this same 3.52 acres** (V 1 p 77 l 13-28) to property worth a negative 40 cents. About this 40 cent problem, Holcombe testified "I knew this was off, because I spent hours on it." (V 2 p 294 l 11-12). Holcombe never got it right during the trial.

The trial court allowed Holcombe to testify to sales of property that MTC objected to as non-comparable to the Howards' property. MTC also objected to Holcombe's After Value on the basis that he did not follow the Before and After Rule. Holcombe's values that he testified to at trial do not support his After Value that he testified to at trial. Holcombe never was able to mathematically support his After Value at the trial using his numbers.

Joe Max Higgins and Robert Rhett testified on behalf of the Howards. Joe Max Higgins testified to showing heavy industrial prospects property that included the Howards' property. Robert Rhett testified that he showed the Howards' property. MTC objected to allowing these 2 witnesses to testify, but the trial court allowed their testimony to prove "demand" for the Howards' property.

The trial court denied MTC's Instruction P-14 and over the objection of MTC, the court granted Instruction D-12 and D-13.

SUMMARY OF THE ARGUMENT

ISSUE NO. 1

The trial court committed reversible error when it ruled in the presence of the jury that the testimony of Joe Max Higgins and Robert Rhett was allowed to prove "demand" for the Defendants' property or a portion of the property.

The trial court did not correctly apply the law when it allowed this testimony to prove "demand", and the trial court's legal rationale proves there was an error of law, which requires a de novo standard of review. The trial court provided the reasoning and the law used in overruling MTC's objections to Higgins and Rhett's testimony.

Showing the property does not prove demand. Showing property without any concrete things done to show that the property is being prepared to be used for either a "light industrial use" or a "secondary commercial use" does not meet the requirement of probability. Holcombe only talked about sales of property or what had been built new for his demand study. Nothing Higgins said proved any demand for a "light industrial use".

The trial court incorrectly applied the law concerning demand. The testimony of Higgins and Rhett did not prove the probability of demand. This case should be reversed, and a new trial granted.

ISSUE NO. 2

The testimony of Joe Max Higgins and Robert Rhett was timely objected to on the basis that it was irrelevant and immaterial, and the trial court committed reversible error by allowing their

testimony.

The testimony of Higgins and Rhett was irrelevant and immaterial and should not have been allowed. Both Higgins and Rhett's testimony proved nothing regarding the issues in this case. The Howards' Statement of Values claim "light industrial" and "secondary commercial" as highest and best use, and therefore, Higgins' testimony about "heavy industrial use" is irrelevant and immaterial. Testimony about showing property by both Higgins and Rhett proves nothing in this case. A new trial should be granted.

ISSUE NO. 3

Where the sole issue was to determine the value of the Howards' property, the trial court committed reversible error in denying the only jury instruction, Jury Instruction P-14, that correctly stated the law about how to assess the two appraiser's testimony, which was the only testimony about the value of the property.

There was no other instruction about appraisers and how they arrive at their opinions as to value. Value is the issue in this case. The law stated in Instruction P-14 was not given in any other jury instruction. A party has a right to have jury instructions on all material issues presented in the pleadings or evidence.

Instruction P-14 has been found to be a correct statement of the law by the Mississippi Court of Appeals. Instruction P-14 was warranted, and since it was denied, a new trial must be granted in this case.

ISSUE NO. 4

The SCARBROUGH sale, which has a highest and best use of "heavy industrial", was not a comparable sale to the Howards' property, which according to Holcombe and the Howards' Statement of Values has a highest and best of "light industrial" and "secondary commercial" use, and the trial court knowing that it had a different highest and best use committed reversible error when it ruled the sale admissible as a comparable sale.

Holcombe should know that you do not compare sales of property that have a different highest and best use. Later, he had to admit that he also used sales of rural residential to compare to the Howards' property. Mississippi law holds that it is error to allow the jury, through witness testimony, to consider as evidence the sale of non-comparable property.

ISSUE NO. 5

The trial court erred in allowing Steve Holcombe's testimony as to value and in not granting a new trial because his value was not based on reliable principles and methods, violated the Before and After rule and was not based upon facts.

One of the problems that both sides knew Holcombe had even before he took the witness stand was his value for damages to the remainder. His testimony concerning those damages were summed up by this statement ". . . I knew this was off, because I spent hours on it." (V 2 p 294 l 11-12). Holcombe never got that right during the trial.

Another valuable insight into Holcombe's testimony is that he

has 6 values of real property down to the penny. Anyone that knows about land appraisals should seriously question anyone ability to value real property down to the penny.

Mississippi recognizes and follows the before and after rule in determining the measure of damages when a part of a tract of land is taken for public use. Holcombe's values that he testified to at trial do not support his After Value that he testified to at trial. And, the method and reasoning Holcombe gave to justify the amount he used for damages to the remainder are unbelievable. Holcombe never was able to mathematically support his After Value at the trial using his numbers.

Holcombe did not follow the Before and After Rule and apply its principles and methods to determine the amount that he testified to as Just Compensation in this case. It is a math problem which produces exact numbers. The claim of rounding made by Holcombe at trial is completely and utterly bogus. He testified to the penny. There is no explanation that can prove that he followed this elementary rule. His failure to follow the proper method is FATAL to the verdict, and a new trial should be ordered.

ISSUE NO. 6

The trial court erred by allowing Steve Holcombe to testify about sales that were not comparable to the Defendants' property and then compounded the error by granting Instruction D-13.

Sales that are a different in highest and best use from the Howards' alleged highest and best use and that are much smaller than the Howards' property, these non-comparable sales should not

have been allowed. By allowing non-comparable sales and Instruction D-13, the trial court committed reversible error. A new trial should be granted.

ISSUE NO. 7

The first sentence of Instruction D-12 is not a statement of the law and was a prejudicial statement to create sympathy for the Defendants creating a reversible error when Instruction D-12 was granted by the trial court.

Instruction D-12 states the following in its first sentence: "In the present case, the Howards may not have desired to sell the property taken." That sentence is not a correct statement of the law. In fact, it is irrelevant. The evidence in this case does not warrant the instruction.

ISSUE NO. 8

The denial of Plaintiff's Motion for a new trial was an error because the verdict is not supported by any evidence in this case and it evidences bias.

There was absolutely no evidence admitted in the case at bar to support the verdict. The jury's findings must be based upon competent evidence. There were no comparable sales entered into evidence that support the jury's verdict. Neither appraiser testified to any value remotely close to the verdict.

Much of the Howards' case was designed solely to make the jury prejudiced against MTC. This tactic had no bearing on the issue at trial and was offered for no other purpose than to bias and prejudice the jury. Even MTC is entitled to a fair trial.

ARGUMENT

ISSUE NO. 1

The trial court committed reversible error when it ruled in the presence of the jury that the testimony of Joe Max Higgins and Robert Rhett was allowed to prove "demand" for the Defendants' property or a portion of the property.

The trial court did not correctly apply the law when it allowed this testimony to prove "demand", and the trial court's legal rationale proves there was an error of law, which requires a de novo standard of review. Mississippi Transportation Commission v. Fires et ux, 693 So.2d 917, 920 (Miss.1997).

Before either Joe Max Higgins ("Higgins") or Robert Rhett ("Rhett") testified, MTC filed a Motion in Limine which included an objection to the testimony of both Higgins and Rhett. Ruling on MTC's Motion in Limine as to both Higgins (V 1 p 14 l 21 to p 15 l 21)) and Rhett's testimony (V 1 p 11 l 15 to p 14 l 20) was reserved by the trial court. MTC renewed its objection at the time Higgins (V 2 p 174 l 10-23) (V 2 p 175 l 1-24) (V 2 p 183 l 5 to p 184 l 10) and Rhett (V 2 p 201 l 2-23) were called before their testimony was given. The trial court allowed both men to testify.

With Higgins on the witness stand and the jury present, MTC objected to his testimony as not relevant or material. (V 2 p 183 l 5-29). The trial court overruled MTC's objection. (V 2 p 184 l 3-4). Then, the first ruling concerning "demand" by the trial court was made. The trial court stated in the presence of the jury:

> "The Court is going to overrule the objection. The Court is not allowing any testimony as to value. It is simply for the limited purpose of the demand for -- which is an issue between both parties -- what is the demand for this property or a portion of the property. For that limited purpose the Court will allow the witness. But it has nothing to do with values of any kind as far as figures."(V 2 p 184 l 4-10).

The trial court did basically the same thing when MTC objected to Rhett's testimony was beginning. The second ruling about "demand" occurred immediately after MTC made its objection, the following was said in the presence of the jury:

> Mr. Marshall: Your Honor, that's the same objection he made to Mr. Higgins' testimony. We're not introducing prices or anything else except demand.
>
> The Court: And it's limited simply for the purpose of showing that there was --
>
> Mr. Marshall: Demand.
>
> The Court: -- a demand, or at least a probability of demand.
>
> Mr. Marshall: That's correct, Your Honor.
>
> The Court: The Court's going to overrule the objection on that limited basis and will allow the testimony on that limited basis, again confined to on or before October the 16th, 2008. (V 2 p 201 l 11-23).

All of the trial court's rulings should have been made outside the presence of the jury. It should be noted that the court did not make its third ruling on this matter before the jury. But, the first two rulings were made in front of the jury. The jury is instructed to follow the trial court's instructions.

After Rhett's testimony was completed and the jury had left the courtroom, the trial court stated that it felt that this case would be appealed. (V 2 p 208 l 10-12). Then, the trial court

provided the reasoning and the law used in overruling MTC's objections to Higgins and Rhett's testimony. (V 2 p 208 l 10 to p 209 l 13). The trial court cited Clark et al v. Mississippi Transportation Commission, 767 So.2d 173, 175(Par10) (Miss.2000) quoting "There must be some probability that the land would be used within a reasonable time for the particular use to which it is adapted". Then, the trial court quoted "Prevailing authority holds that the owners mere plans or hopes for the future are completely irrelevant. However, where the plans of the landowner have moved from the realm of purely hypothetical and have obtained some degree of concrete realization, we think future development is relevant and admissible to show a basis for one's opinion as to the highest and best use of the land." Clark at 176(Par14).

What the trial court left out that was stated in Clark was "There must be a present demand for the land for such purpose or a reasonable expectation of such demand in the near future." Clark at 175-176. In Clark the owner and his appraiser testified to concrete things that the owner had to done to show that he was preparing to use the property for industrial purposes. Showing property without any concrete things done to show that the property is being prepared to be used for either a "light industrial use" or a "secondary commercial use" does not meet the requirement of probability. It might show a possibility of demand but not the probability of demand that is required.

Even the Howards' appraiser, Holcombe, got it right on what you look for to prove demand. He was asked on cross-examination

about his demand study as follows:

> Q. Now, I wrote down that you told the jury this morning as well that when you were doing a demand study that you look at what's most recently been built in the area, correct?
>
> A. That's correct.
>
> Q. Now, tell the jury on Highway 45 South from the 82 interchange to the Howard property, what has been built that's new?
>
> A. You've got the Glenn, and that's it.
>
> Q. And that's your demand?
>
> A. Well, The Glenn's didn't -- and then the sale that I can't talk about, but no not only that, you've got other sales in the general area that shows the demand in the general area. Of what had been built on, had only been the Glenn's and the sale I can't talk about. (V 3 p 313 l 19 to p 313 l 5).

Holcombe was allowed to sit and watch the trial from start to finish. He knew about Higgins and Rhett's testimony. But, he did not say is that I knew that Higgins and Rhett had shown the Howards property, and I used that in my demand study. And, Holcombe did not say that I contacted realtors to see how many times that they had shown the Howards' property. No, Holcombe only talked about sales of property or what had been built new. Showing someone property does not prove the probability of demand!

An analogy that shows no demand v. demand is a car salesmen

gets on the TV and says you better hurry on down to buy our newest model car. We only have 20 in stock. We have had over 1,000 people come and look at them in the last month. No that would be foolish. Instead, he says that these cars are "selling like hot cakes". Looking at the car does not show demand. It is when a car is bought that demand for the car is shown. Appraisers do not cite how many people have looked at a property to show demand. They look at sales of property to establish demand.

Mississippi State Highway Commission v. Robertson, 350 So.2d 1348, 1350 (Miss.1977) holds that "[O]ffers or options to purchase property are not competent evidence to establish the fair market value of property." MTC's objection to Higgins (V 1 p 15 l 6-8) (V 2 p 175 l 11-13) (V 2 p 183 l 8-19) and Rhett's (V 1 p 11 l 22 to p 12 l 8) (V 2 p 201 l 4-10) testimony included an analogy of "showing property" does not prove demand just like "offers or options to purchase property" are not competent evidence to establish value. The Clark case talks about concrete things done to the property to show demand. And, Holcombe clearly stated that demand is shown by sales and what new has been built. Showing the property does not prove demand.

Higgins' testimony was all about "heavy industrial use" and showing the property for a "heavy industrial use". Holcombe obviously considered a "heavy industrial use" for the Howards property, but in his testimony he says that he settled on a "light industrial use". Nothing Higgins said proved any demand for a "light industrial use". Additionally, just like Rhett, showing the

property does not prove demand.

Unlike the owner in the Clark case, the Howards made no effort to develop their property for a "secondary commercial use" or a "light industrial use" before this condemnation case was filed. Instead they continuously used it solely for an " agricultural use".

The trial court incorrectly applied the law concerning demand. The testimony of Higgins and Rhett did not prove the probability of demand. This case should be reversed, and a new trial granted.

ISSUE NO. 2

The testimony of Joe Max Higgins and Robert Rhett was timely objected to on the basis that it was irrelevant and immaterial, and the trial court committed reversible error by allowing their testimony.

The standard of review for admission of testimony is abuse of discretion. Mississippi Transp. Comm'n v. Fires, 693 So.2d 917, 920 (Miss.1997).

This is a companion issue with Issue No. 1 because it also challenges the trial court allowing Higgins and Rhett to testify. But, this issue is decided under a different standard of review.

The testimony of Higgins was irrelevant and immaterial because it was solely about a highest and best use of "heavy industrial" and not about a "light industrial use" or a "secondary commercial use". The Howards' statement of values claimed that the highest and best use of their property was a "light industrial use" and a

"secondary commercial use". Nothing that Higgins said should have been allowed. Higgins said that he was not talking about property such as a John Deere dealership or a Glenn Machine Works which Holcombe said would be analogous to what the Howards' property would be used. Further, by allowing Higgins' testimony, the jury was completely confused as to what use they should consider in determining Just Compensation due to the Howards.

The testimony of Rhett was irrelevant and immaterial and should not have been admitted by the trial court because there was no sale of the property. Showing the Howards' property does not prove the value or the use of the Howards' property. As Robertson was quoted above, offers or options to purchase property are not competent evidence to establish the fair market value of property. An offer and an option to purchase property are considerably further down the path to selling property than having someone merely look at the property. So if offers and options are not allowed to prove value, then surely showing someone property is not either.

Therefore, the testimony of Higgins and Rhett was irrelevant and immaterial and should not have been allowed. Both Higgins and Rhett's testimony proved nothing regarding the issues in this case. The Howards' Statement of Values claim "light industrial" and "secondary commercial" as highest and best use, and therefore, Higgins' testimony about "heavy industrial use" is irrelevant and immaterial. Testimony about showing property by both Higgins and Rhett proves nothing in this case. A new trial should be granted.

ISSUE NO. 3

Where the sole issue was to determine the value of the Howards' property, the trial court committed reversible error in denying the only jury instruction, Jury Instruction P-14, that correctly stated the law about how to assess the two appraiser's testimony, which was the only testimony about the value of the property.

Instruction P-14 states:

> "The Court instructs the Jury that an appraiser's testimony as it relates to damages and fair market value of the subject property must be based upon sufficient facts or data, be the product of reliable principles and methods, and not based on speculation or guesswork of the appraiser. If it is your opinion that any part of an appraiser's testimony in this case was not supported by sufficient facts or data, or was not the product of reliable principles or methods, you should disregard any such testimony of that appraiser."

The Howards objected to MTC's P-14. (V3 p 417 l 7&8). MTC's argument in support of Instruction P-14 was that it came out of a case on appeal. An appellate court found that it was a valid instruction and that it was not reversible error to give it. (V3 p 417 l 14-25). Then, the Howards stated that the danger of Instruction P-14 was that it may send a message to the jury that if the jury finds something wrong with the appraiser's testimony that the jury will disregard it in total, which the Howards thought was different from the credibility issue. (V 3 p 418 l 3-9). The trial court sustained the Howards' objection and added that the speculation, guess work, etc. as to how the jury is to evaluate the evidence is covered in all the other instructions. P-14 was denied by the trial court. (V 3 p 418 l 10-15).

In North Biloxi Dev. v. Mississippi Transp. Comm'n , 912 So.2d 1118, 1123(Par 11) (Miss.Ct.App.2005), the court stated that:

> The standard of review which we employ when reviewing jury instructions on appeal is that we must read the instructions as a whole. Entergy Mississippi, Inc. v. Bolden, 854 So.2d 1051, 1056(Par 6) (Miss.2003). An instruction that incorrectly states the law, is covered fairly in another instruction or is without foundation in the evidence need not be given. Heidel v. State, 587 So.2d 835, 842 (Miss.1991) The main query that we make when reviewing jury instructions is whether (1) the jury instruction contains a correct statement of the law and (2) whether the instruction is warranted by the evidence. Seigfried v. State, 869 So.2d 1040, 1044(Par 11) (Miss.Ct.App.2003).

In reviewing the jury instructions given, there was no other instruction about appraisers and how they arrive at their opinions as to value. Value is the issue in this case. The law stated in Instruction P-14 was not given in any other jury instruction. "A party has a right to have jury instructions on all material issues presented in the pleadings or evidence. Glorioso v. YMCA, 556 So.2d 293, 295 (Miss.1989).

Instruction P-14 has been found to be a correct statement of the law. The Mississippi Court of Appeals stated in North Biloxi Dev. at 1126 stated that Instruction P-5, which is basically the same as Instruction P-14 in the case at bar, when read together with Instruction P-6, which is basically the same as Instruction P-15 in the case at bar, contains a correct statement of the law.

Holcombe told the jury several things that were not true. In his testimony he told the jury that you cannot buy 100 acre tracts in the prairie and that he knew of just one 85 acre sale. It was the largest that he knew had sold in the prairie (V 2 p 267 l 4-9).

Then on cross examination, he was asked to look at his own comparable sales chart. He then had to admit to the jury that he had a sale of 220 acres in his own sales chart. (V 3 p 310 to p 311 l 4) He told the jury that the Howards' remaining property did not have highway frontage at the time of the trial. (V 2 p 275 l 24-26). Yet another statement that is not true.

It was clearly shown by MTC that Holcombe's testimony was not based upon sufficient facts or data and that he did not follow reliable principles and methods in his appraisal. First, Holcombe never was able during the trial to show the jury how his After Value was determined mathematically. At the trial he was never able to show the jury a computation that supported his After Value. It was off by 40 cents. (V2 p 285 l 25 to p 294 l 21). Second, Holcombe claimed that his damage to remainder figure of $101,331.80 meant that the 3.52 acres was worth $0.00. The truth is that simple math using his per acre price of $28,787.33 per acre times 3.52 acres equals $101,331.40. His damage to the remainder figure of $101,331.80 computes to a negative 40 cents. His explanation for being off 40 cents was a rounding problem. (V2 p 290 l 7 to p 294 l 12). However, he never proved that at the trial, and he confessed that he knew this was off because he spent hours on it. (V 2 p 294 l 11-12). Third, Holcombe used a sale of residential property as a comparable sale in his appraisal to compare with property that was suppose to have a highest and best use of light industrial and secondary commercial. (V3 p 308 l 6-13). Fourth, Holcombe used a comparable sale to compare with the Howards'

property that had 7/10th's of an acre. (V3 p 311 l 5-22). This 7/10th's of an acre has a doctor's office on it. (V3 p 320 l 2-5). Fifth, Holcombe could not provide a written definition of "light industrial" or "secondary commercial" as a highest and best use. (V3 p 312 l 1-18). Fifth, Holcombe testified that when doing a demand study that you look at what's most recently been built in the area and that the only thing built new between the Highway 45 South and 82 interchange to the Howard property was on the Glenn property, his comparable sale 6. (V3 p 312 l 19-27).

The jury heard about changes in his appraisal. At his deposition he testified that he used sales 2, 4, 5, 8, 11 and 13 to come up with the value of the Howards' property. (V 3 p 335 l 24 to p 336 l 8). Then at trial, Holcombe deleted sales 2 and 5 and added sales 6 and 14. (V 3 p 336 l 9-18). Then during the trial sale 13 was objected to by MTC as inadmissible (V2 p 245 l 9-15), and the objection was sustained. (V2 p 246 l 15). Holcombe was asked how the loss of sale 13 affected his appraisal, and he said none. (V3 p 337 l 22-24). On cross-examination at the trial, Holcombe was asked how he used his comparable sales and compared them to the Howards' property. At his deposition Holcombe told me that all his adjustments in the comparison process were done mentally and were not written down. (V3 p344 l 11-25). At the trial he had written down his adjustments and was suppose to have provided them to MTC. But, he did not provide them. (V3 p 344 l 26 to p 345 l 9). Then, at that point in the trial, it was shown that some of his adjustments had changed from what he said at the

deposition and what he had written down at the trial. He was never able to explain how he determined the amount of damages of the Howard's property east of Highway 45.

Instruction P-14 was indeed warranted by the evidence in this case. Some of the points raised are about small amounts of money. But, if you cannot be trusted with the small things, then how can you be trusted with the larger things. Holcombe chose the small things when his Just Compensation figure was to the penny. Hopefully, a reasonable person knows that land values are not discernable down to the penny. Yes, Instruction P-14 was warranted, and since it was denied, a new trial must be granted in this case.

ISSUE NO. 4

The SCARBROUGH sale, which has a highest and best use of "heavy industrial", was not a comparable sale to the Howards' property, which according to Holcombe and the Howards' Statement of Values has a highest and best of "light industrial" and "secondary commercial" use, and the trial court knowing that it had a different highest and best use committed reversible error when it ruled the sale admissible as a comparable sale.

The standard of review for admission of testimony is abuse of discretion. Fires at 920.

In introducing the Howards' comparable sale number 8, the following questions and answers between Mr. Marshall and Holcombe occurred and then MTC objected:

Q. PACCAR, what do they do?

A. Build motors.

Q. Okay. And you testified that your highest and best use was light industrial?

A. Yes.

Q. PACCAR is not a light industrial facility, is it?

A. No.

Q. It's heavy industrial manufacturing?

A. Yes.

Mr. McEwen: Your Honor, we object to this sale. . . . He was trying to use the highest and best use of heavy industrial to prove the value of light industrial, and that's not allowed because it's not the same highest and best use. So, we object to that sale on that basis. (V 2 p 236 l 28 to p 237 l 15).

The trial court reserved ruling on the objection. (V 2 p 237 l 23-24). Then, Holcombe is asked if there is a significant difference in value between the 2 uses, and MTC objects to that question. (V 2 p 237 l 27 to p 238 l 9). The court allows Holcombe to answer the question over MTC's objection. (V 2 p 238 l 20-21). From page 238 to the middle of page 239 much of what is recorded in the transcript does not make sense. This is just another example of the many problems with the record of this trial, and if you read the complete transcript you will see more problems. But ultimately, the trial court overruled MTC's objection. (V 2 p 241 l 3-4).

Holcombe should know that you do not compare sales of property that have a different highest and best use. Later, he had to admit that he also used sales of rural residential to compare to the Howards' property. In Mississippi State Highway Commission v. Central Land & Rental Corp., 239 So.2d 335, 338 (Miss.1970) , the Court held that it is error to allow the jury, through witness testimony, to consider as evidence the sale of non-comparable property.

ISSUE NO. 5

The trial court erred in allowing Steve Holcombe's testimony as to value and in not granting a new trial because his value was not based on reliable principles and methods, violated the Before and After rule and was not based upon facts.

This is reviewed under an abuse of discretion standard. Adcock et al v. Mississippi Transportation Commission, 981 So.2d 942, 946(Par12) (Miss.2008). The admission of expert testimony is committed to the sound discretion of the trial judge, and the trial judge must act as the gatekeeper in an effort to avoid error. Under the modified Daubert standard, which has been adopted by the Mississippi Supreme Court, "the trial court must first determine whether expert testimony is relevant and, second, whether the proffered testimony is reliable ". Adcock, 981 So.2d at 946-947. Miss. R. Evid. Rule 702 was amended to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony. Such testimony must be both relevant and

reliable. This rule states that an expert opinion is admissible if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

MTC submits that the court should gain insight concerning Holcombe's testimony with the Howards' attorney by considering that on the 2nd day of trial at 4PM (V 2 p 207 l 28 to p 208 l 4), the trial court infers that we have another hour for testimony (V 2 p 208 l 5). The Howards' tell the trial court that if she will stretch the recess from 10 minutes to 15 minutes that they can put Holcombe on and probably get through today. (V 2 p 209 l 16-19). After reading all the problems with Holcombe's appraisal and testimony, is it reasonable to conclude that a whole 45 minutes was sufficient for the jury to determine if Holcombe's just compensation amount of $1,454,530.32 was accurate?

The following helps to focus in and gain insight as to why it would be suggested that only 45 minutes was needed for his testimony. One of the problems that both sides knew Holcombe had even before he took the witness stand was his value for damages to the remainder. His testimony concerning those damages were summed up by this statement ". . . I knew this was off, because I spent hours on it." (V 2 p 294 l 11-12). Holcombe never got that right during the trial.

Another valuable insight into Holcombe's testimony is that he has 6 values of real property down to the penny. The per acre

price of the Howards' property is $28,787.33. His After Value is $1,745,469.68. His Just Compensation is $1,454,530.32. His Value of the land acquired is $1,333,141.25. His temporary easement value is $207.27. His damages to the remainder is $101,331.80. He does have 3 rounded figures. His Before Value of $3,200,000.00. His fencing figure of $16,850.00. And, his temporary water replacement of $3,000.00. These values down to the penny should be like a flashing red light at an intersection warning motorists to stop. Anyone that knows about land appraisals should seriously question anyone ability to value real property down to the penny.

With these two insights, the focus becomes clearer regarding the use of Holcombe's appraisal using reliable principles and methods. A warning is now given to watch out for Holcombe's diversion tactics. One diversion tactic was the blame game. If there was a problem with his appraisal, then it was MTC's fault. For example, Holcombe complained that MTC changed the acreage on the Howards' property remaining east of the new 4 lanes. It went from 3.51 acres to 3.52 acres. That change threw Holcombe for a loop. The plain fact is that 1/100th of an acre times $28,787.33 equals $287.73. Another diversion tactic was that there were too many numbers, and he could not remember them. They were his numbers. He provided most of them before the trial in discovery. But, when he asked about them, he could not remember. Could the failure to remember have been feigned? Why would someone want to forget all these numbers? Just continue to read for the answer.

Holcombe did not base his After Value on reliable principles

and methods. MTC moved to strike his After Value because Holcombe's calculation did not support it, and the trial court overruled the objection. (V 2 p 294 l 13-22). At the hearing on the post trial motions, MTC provided the court with uncontested factual proof that Steve Holcombe did not use the before and after rule to arrive at Just Compensation in the case at bar. State Highway Commission of Mississippi v. Smith, 511 So.2d 881, 882 (Miss.1987), states "that Mississippi recognizes and follows the before and after rule in determining the measure of damages when a part of a tract of land is taken for public use".

During cross-examination Holcombe was asked to write down his numbers as to how he arrived at just compensation for the jury on a large pad for them to see. Unfortunately, the record is lacking at this point, but the record shows that they did not add up to his After Value. The point to be made is that the Howards' Just Compensation figures added up perfectly. (V 2 p 297 l 29 to p 298 l 19). But Howards' After Value does not. (V 2 p 294 l 13-22). Do you think that Holcombe might have used the formula of subtracting his Just Compensation amount from his Before Value to get his After Value? If you add up all the pennies, then the Just Compensation amount adds up, but the After Value amount does not. Is that not strange or what? And if you use the Before and After Rule to determine Just Compensation, then Holcombe's numbers do not work. But, if you subtract Just Compensation from the Before Value, then his numbers work perfectly. Hmmmmm? Surely that is just a coincidence. Just like the coincidental change in his damages to

the remainder value shown next.

As shown on Defendants' Statement of Value dated March 1, 2010 (V 1 p 77 of the Clerk's Transcript), Holcombe's damages to the remaining property was $99,409.93 and his fair market value of the property condemned was $1,335,063.12. On Defendants' Corrected Statement of Value dated March 2, 2010 (V 1 p 82 of the Clerk's Transcript), Holcombe's damages to the remaining property changed to $101,331.80 and his fair market value of the property condemned changed to $1,333,141.25.

If you subtract $99,409.93 from $101,331.80, the difference is $1,921.87 in the values Holcombe changed regarding his damages to the remaining property. If you subtract $1,333,141.25 from $1,335,063.12, the difference is $1,921.87 in the values Holcombe changed regarding his fair market value of the property condemned. What a coincidence, the changes of both were exactly $1,921.87.

Could Holcombe explain the changes at trial? Truthfully, he admitted that the change regarding the fair market value of the property condemned was a mathematical error. (V 3 p 357 l 11-22). It is easy to confirm the error that he made. If you multiply 46.31 acres times $28,787.33, the answer comes out to be $1,333,141.25 every time. But, Holcombe never did explain to us at the trial how he originally came up with $1,335,063.12. It is plain to see that math with him is an adventure.

Holcombe admits that on February 24, 2010, which was the date of his deposition (V 3 p 352 l 3-5), his damages to the remainder property was $99,409.93 (V 3 p 355 l 4-24) for 3.52 acres (V 3 p

363 l 8 to p 364 l 17). Holcombe could not come up with an explanation for this change. (V 3 p 357 l 26 to p 360 l 6). He tried the blame game by blaming MTC (V 3 p 358 l 11-14), but he realized that would not work. So, his final statement on the subject at that time by saying ". . . I'm no quantitive physicist or anything else, but thank goodness. This figure and this figure is the same (indicating)." (V 3 p 360 l 3-6). The blame game picked up again on redirect testimony accusing MTC and MTC's attorney for Holcombe's troubles (V 3 p 368 l 26 to p 373 l 12). In a last gasp effort, Holcombe claims that 3.52 acres is absolutely worthless. (V 3 p 373 l 13-25). The real truth is that his damage figure of $101,331.80 results in the 3.52 acres having a negative 40 cents value.

Interestingly, when Holcombe admitted at his deposition that the damages to the remainder property was $99,409.93 for 3.52 acres, the result of that testimony would mean that the remaining 3.52 acres would be worth $1,921.47 after subtracting the damages. According to the Howards' statement of values the math error was discovered between March 1, 2010 and March 2, 2010. For some unexplained reason, Holcombe decided that the remaining 3.52 acres was worth a negative 40 cents when he discovered his math error regarding the fair market value of the property condemned.

The focus is now much clearer as to the material defects in Holcombe's testimony about values and how he arrived at them. MTC submits that as a gatekeeper the trial judge should not allow expert testimony that does not meet the standard stated in the

modified Daubert standard and in Miss. R. Evid. Rule 702. It has clearly been shown to the court that Holcombe's testimony was not based upon the product of reliable principles and methods and that he did not apply the principles and methods reliably to the facts of the case. Therefore, his testimony as to Just Compensation should be disregarded completely.

Mississippi recognizes and follows the before and after rule in determining the measure of damages when a part of a tract of land is taken for public use. Holcombe's values that he testified to at trial do not support his After Value that he testified to at trial. And, the method and reasoning Holcombe gave to justify the amount he used for damages to the remainder are unbelievable. Holcombe never was able to mathematically support his After Value at the trial using his numbers.

Without Holcombe's testimony, the Howards do not have any testimony as to the amount of Just Compensation that should be paid for the taking of the Howards' property. Holcombe did not follow the Before and After Rule and apply its principles and methods to determine the amount that he testified to as Just Compensation in this case. It is a math problem which produces exact numbers. The claim of rounding made by Holcombe at trial is completely and utterly bogus. He testified to the penny. There is no explanation that can prove that he followed this elementary rule. His failure to follow the proper method is FATAL to the verdict, and a new trial should be ordered.

ISSUE NO. 6

The trial court erred by allowing Steve Holcombe to testify about sales that were not comparable to the Defendants' property and then compounded the error by granting Instruction D-13.

The standard of review for admission of testimony is abuse of discretion. Fires at 920. In North Biloxi Dev. v. Mississippi Transp. Comm'n at 1123(Par 11) the standard of review for reviewing jury instructions is provided. It is that we must read the instructions as a whole. If an instruction incorrectly states the law, is covered fairly in another instruction or is without foundation in the evidence, then it need not be given. Mainly the court checks to see that (1) the jury instruction contains a correct statement of the law and (2) whether the instruction is warranted by the evidence.

Holcombe testified that he used rural residential sales as comparable sales to the Howards' property to show the good, the bad and the ugly. (V 3 p 373 l 26 through p 374 l 13). The record shows that he used different types of highest and best use properties as comparable sales to compare with the Howards' property.

None of the 5 sales that the trial court allowed into evidence based upon Holcombe's testimony were comparable to the Howards' property. 4 sales were so much smaller than the Howards' property that they cannot be compared. Holcombe testified that 85 acres is the largest sale he knew about in the prairie. On cross examination, it was shown that his own appraisal listed a sale of

220 acres in the prairie. In his testimony at trial Holcombe did not request that his 220 acre comparable sale be used to value the Howards' property.

The court allowed the GLENN sale to be used by Steve Holcombe to value Defendants' property for the "before value" even though it was clearly shown to be an "after sale". An "after sale" is one that occurred after the right of way for the new 4 lane had been acquired. The "before value" is to be determined based upon the value of the property immediately before the taking which means when the highway is a 2 lane road and not a 4 lane road.

The trial court erred in allowing the GLENN sale to be used by Steve Holcombe to value Defendants' property for the "before value" even though it was clearly shown to be an "after sale".

Instruction D-13 states: "the land with which the subject property is being compared does not have to be of the same size or acreage, or approximately so, if the other criteria essential to a fair comparison are present, for to hold otherwise would make it impossible to find a comparable tract of land or a sale which would be used as a means of evaluating the fair market value of due compensation."

Although the language is a correct statement of the law, it is not applicable based on the evidence in this case. There were sales of property of similar size to subject property, but Holcombe chose to ignore them.

Jury Instruction D-13 was not needed either. It improperly emphasized that the size of the properties chosen by Holcombe to be

compared with the Howards' property could be much smaller than 111 acres. Thereby, this jury instruction was used to affirm Holcombe's faulty testimony.

Just like Smith's comparable sales, most of Holcombe's 15 comparable sales did not have a railroad, a high voltage line or was located on a highway. But, the Howards' spent considerable time at trial trying to prove that Smith's sales were not comparable to the Howard property because they did not have a railroad, a high voltage line or was located on a highway.

Sales that are a different in highest and best use from the Howards' alleged highest and best use and that are much smaller than the Howards' property, these non-comparable sales should not have been allowed. Mississippi State Highway Commission v. Central Land & Rental Corp. at 338. By allowing non-comparable sales and Instruction D-13, the trial court committed reversible error. A new trial should be granted.

ISSUE NO. 7

The first sentence of Instruction D-12 is not a statement of the law and was a prejudicial statement to create sympathy for the Defendants creating a reversible error when Instruction D-12 was granted by the trial court.

In North Biloxi Dev. v. Mississippi Transp. Comm'n at 1123(Par 11) the standard of review for reviewing jury instructions is provided. It is that we must read the instructions as a whole. If an instruction incorrectly states the law, is covered fairly in

another instruction or is without foundation in the evidence, then it need not be given. Mainly the court checks to see that (1) the jury instruction contains a correct statement of the law and (2) whether the instruction is warranted by the evidence.

Instruction D-12 states the following in its first sentence: "In the present case, the Howards may not have desired to sell the property taken." That sentence is not a correct statement of the law. In fact, it is irrelevant. The evidence in this case does not warrant the instruction.

MTC stated on the record that it objected to only the first sentence and without it no objection to the rest of the instruction. The record shows that a willing seller was covered in several instructions. MTC submits that the sole purpose for that sentence was to create sympathy for the Defendants and emphasized that the Howards did not want to sell their property. Thereby, planting in the jury's mind that the Howards were not being treated fairly and causing the jury to be prejudice and bias against MTC.

ISSUE NO. 8

The denial of Plaintiff's Motion for a new trial was an error because the verdict is not supported by any evidence in this case and it evidences bias.

A motion for a new trial challenges the weight of the evidence as noted in James v. Mabus, 574 So.2d 596, 601 (Miss.1990). It is reviewed under an abuse of discretion standard. Adcock et al v. Mississippi Transportation Commission, 981 So.2d 942, 950

(Miss.2008).

There was absolutely no evidence admitted in the case at bar to support the verdict. State Highway Commission of Mississippi v. Warren, 530 So.2d 704, 707 (Miss.1988) holds that the trial judge may order a new trial if "the verdict was contrary to the overwhelming weight of the credible evidence". This one is easy because there is no evidence whatsoever to support the verdict.

The jury's findings must be based upon competent evidence. There were no comparable sales entered into evidence that support the jury's verdict. The jury must base its decision on facts entered into evidence to arrive at a verdict. Holcombe told the jury that somebody was right and somebody was wrong. Neither appraiser testified to any value remotely close to the verdict.

In Mississippi State Highway Commission v. Valentine, 239 Miss. 890, 124 So.2d 690, 693 (Miss.1960), the Court stated: "It is the duty of this Court to determine whether there is any reasonable, believable evidence which will support the verdict in this case. A proper exercise of the judicial function does not require us to believe the incredible."

Much of the Howards' case was designed solely to make the jury prejudiced against MTC. Mississippi State Highway Commission v. Deavours, 251 Miss. 552, 170 So.2d 639, 640 (Miss.1965). This tactic had no bearing on the issue at trial and was offered for no other purpose than to bias and prejudice the jury. "Everybody, including the Highway Commission, is entitled to a fair trial". Id, 170 So.2d at 645.

Howard's attorney questioned Smith extensively on whether his comparable sales had a railroad, a high voltage line or was located on a highway. For what purpose? Only 1 out of Howards' own appraiser's 15 comparable sales has a railroad next to it. Only 1 out of Holcombe's 15 comparable sales has a high voltage line. Only 2 out of Holcombe's 15 comparable sales was located on a highway. (V 3 p 320 l 28 to p 322 l 17). Just like most of Alex Smith's comparable sales do not have a railroad, a high voltage line or was located on a highway.

CONCLUSION

Eminent Domain cases are considered to be mundane and not "interesting", "mysterious" or "sexy". But, they are important to the parties involved. Justice requires Judges to remain vigilant and not to simply rubber stamp a jury verdict just because its an "eminent domain case". The facts of this case call out for reversal based upon the "mirage" that the Defendants' property was and is more than rural residential and agricultural property.

A key phrase to consider is that "it's the economy, stupid", which President Bill Clinton made famous. He reminded the nation that "it's the economy" when he ran against President Bush and won. In the case at bar, this court needs to consider that "it's the economy" when deciding the issues presented. Several months after the date of taking, October 16, 2008, it was reported that the United States was in the worst economic downturn since the Great Depression. During this economic downturn, large amounts of wealth simply disappeared. It was triggered in late summer 2007 by "the bubble bursting" in the housing market. Subprime loans and liquidity problems caused banks to fail. Banks stopped lending. The Dow plunged from a record high of over 14,000 in early October 2008 to under 6,800 in early 2009 which was slightly over a 50% decline. Unemployment was rising. Drastic measures were taken to avoid a depression. This was and continues to be the backdrop for valuing the Defendants' property on October 16, 2008.

Holcombe has more than proven that he cannot be trusted with 40 cents, how to ascertain damages to the remainder or to do simple

math problems. Why should he be trusted in making adjustments to comparable sales and "speculating" that all the Howards' property would be used as "light industrial" or "secondary commercial" within 7 years from October 16, 2008? He testified that to determine "demand" you look to see what has been built new. The only new construction within a mile of the Howards' property is Glenn Machine Works. The 2 properties, Sqwincher and Burkhalter, that are near the Howards' property that was mentioned numerous times by the Howards at trial had been located in that area since 1976. The fact that they are there does not show a current demand. In Luke 16:10 Jesus said "Whoever can be trusted with very little can also be trusted with much, and whoever is dishonest with very little will also be dishonest with much". The transcript clearly reveals Holcombe's trustworthiness and his failure to use the Before and After rule in valuing the Howards' property in this case.

Please allow justice and truth to be your guide in considering the issues presented for review. MTC requests that a new trial be granted.

Respectfully submitted on the 10th day of February, A. D. 2012.

MISSISSIPPI TRANSPORTATION COMMISSION, Appellant

BY: _____

STEVEN R. MCEWEN, MSB [redacted]
Attorney for Appellant
P. O Box 709
Columbus, MS 39703
Telephone: 662-243-1111

CERTIFICATE OF SERVICE

I, Steven R. McEwen, attorney for Appellant, Mississippi Transportation Commission, certify that I have this day served a true and correct copy of the Amended Brief of the Appellant by United States mail with postage prepaid on Honorable Beverly Franklin, Judge, P. O. Box 1829, Columbus, MS 39703, and Robert B. Marshall, Jr., Esquire, attorney for Appellees, at his address of P. O. Box 835, West Point, MS 38773.

SO CERTIFIED this the 10th day of February, A. D. 2012.

/STEVEN R. MCEWEN

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