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

REPLY BRIEF OF THE APPELLANT

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

ORAL ARGUMENT REQUESTED

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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.

This issue is about the trial court's failure to correctly apply the law concerning demand, and the fact that the mere **"showing" of property does not prove the probability of "demand".**

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.

All of Higgins' prospects that "rode by" the Howards' property were "heavy industrial" prospects. Rhett testified that he was just showing a prospect property. Not one of the prospects testified at the trial to prove that they had any interest in the Howards' property whatsoever.

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 has been found to be a correct statement of the law, and all the other instructions given to the jury in the case at bar were not sufficient to instruct the jury about expert testimony.

ISSUE NO. 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.

The Mississippi Supreme Court has refused to accept testimony of values of comparables for a highest and best use different from that of the subject 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.

Holcombe's "magical damages calculation" shows how he arrived at his damages in this case, and it proves that he did not follow the Before and After Rule to value the Howards' property in this case.

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.

Holcombe has to use comparable sales that are similar ie. "the same highest and best use" to establish value. Mississippi law is clear, and Holcombe violated it.

Instruction D-13 was not applicable in this case, and the other jury instructions adequately instructed the jury.

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.

This first sentence was designed solely to prejudice and poison the jury 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.

The Mississippi Supreme Court has gone so far as to suggest that, where the jury has viewed the property being taken, any substantial evidence in the record supporting the jury's damage assessment will preclude interference in this Court. There are no sales of property that were admitted into evidence in this case that support this verdict.

A jury view does not make the jury infallible. In this case the jury wandered off into an insupportable verdict.

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 court's failure to correctly apply the law was clearly stated in MTC's Summary of the Argument and at the very beginning of MTC's Argument of this issue. It is clear that the Howards failed to understand that this issue is not about the trial court's rulings that occurred in front of the jury, but it is about the court's failure to correctly apply the law, which is reviewed using the de novo standard.

MTC objected when Higgins was asked had he "shown" an industrial prospect the Howard property. (V 2 p 183 l 8-19). At that point the trial court misapplied Mississippi law by allowing the "showing" of property to prove demand. MTC filed its Motion in Limine to avoid this error by the trial court. Once the testimony was given and heard by the jury, the trial court could not undo the damage.

Miss. R. Evid. 103, which is titled "Rulings on Evidence", basically says that in jury cases rulings on evidence should be conducted, to the extent practicable, outside the presence of the jury. Examples of why these rulings should be made outside of the jury are stated in Miss. R. Evid. 103(c). MTC did point out that the trial court's rulings were made in front of the jury twice and

once outside the presence of the jury. MTC submits Miss. R. Evid. 103 indicates that it is best if such rulings are made on the record outside the presence of the jury.

Since this issue requires a de novo standard of review, it is vitally important to understand that the Howards' Statement of Values and Holcombe testimony said that the highest and best use of the Howards' property was "light industrial" and "secondary commercial". The Howards consistently failed to use (1) "light industrial" as the highest and best use in their brief, but instead they used "industrial" and the same with using (2) "commercial" rather than "secondary commercial". **Do not be misled by this tactic**.

The testimony at trial showed that Higgins (1) was willing to develop whatever somebody wants (V 2 p 196 l 6-10), (2) is not a licensed appraiser (V 2 p 196 l 11-20), (3) was testifying about "showing" property (V 2 p 196 l 21-23) and all the prospects were "heavy industrial" prospects (V 2 p 191 l 1-22), (4) really did not know where the Howard property was (V 2 p 198 l 6-15), and (5) believes that as far as "demand" for "heavy industrial" sites the Lowndes County industrial project was his "universe" (V 2 p 194 l 13-19) and that if someone wants a "heavy industrial" site there are thousands of acres available and ready to use (V 2 p 194 l 20-27). Counsel for the Howards argued at trial that Higgins' universe has an unfair advantage because Higgins' employer will buy the property and give it to the industrial prospect. (V 1 p 23 l 16-28).

This issue is solely about a failure to correctly apply the law. Clark et al v. Mississippi Transp. Comm'n, 767 So.2d 173, 175(Par10) (Miss.2000) states: "There must be some **probability** that the land would be used within a reasonable time for the particular use to which it is adapted." Higgins and Rhett simply testified that they each "showed" the Howards' property to prospects. Higgins and Rhett are both basically "salesmen" and "showing" property is what they do. Not one of the prospects testified at the trial.

There was absolutely no testimony about any follow up or expressed interest by any of the prospects concerning the Howards' property. There was no testimony that an interested prospect entered into negotiations with or asked for the Howards to quote a price for their property. There was no testimony that any prospect made an offer to purchase the Howards' property. There was no testimony that a contract was executed by an interested prospect to purchase the Howards' property. There was no testimony that any part of the Howards' property was sold. The Howards' property did not even get to "first base" with any of the prospects. MTC submits Higgins and Rhett's testimony about "showing" the Howards' property proves absolutely nothing, and it certainly does not prove a "**probability**" of demand for the highest and best use of "light industrial" and "secondary commercial" that they claimed for their property at trial.

The Howards attempted to use Burkhalter and Squincher to show demand. Both those properties were shown at trial to have been

used for industrial purposes since 1976. The law in Clark at 175-176 requires that there must be a **present demand**, and they do not show a present demand. Those two (2) properties are not a recent sale nor are they anything that has been built new.

The Howards make much ado about their property having (1) highway frontage, (2) access to natural gas, (3) access to rail service and (4) access to a 161 high voltage TVA power line. Their problem is that Holcombe's fifteen (15) comparable sales do not show that those are important for property that has a highest and best use of "secondary commercial" and/or "light industrial".

The following is to illustrate this disconnect in the Howards' argument. Holcombe could not define what "secondary commercial" was, but he said it was like the John Deere place that sells tractors. (V 3 p 318 l 21-28). The first comparable sale Holcombe testified to was the John Deere dealership property. (V 2 p 225 l 20-26). On Voir Dire Examination of that sale, Holcombe was asked if the John Deere property had a railroad by it, a high voltage electrical line by it, was it on a 4 lane road or did it have natural gas. And, the answer was "no" to all of those questions. (V 2 p 226 l 28 to p 227 l 8). Then, Holcombe was asked does the John Deere need any of that, and he answered "no" that's why I used it. (V 2 p 227 l 9-10). Howards' attorney asked Holcombe why he chose the John Deere sale, and Holcombe said it has the characteristics of "secondary commercial" property. (V 2 p 226 l 2-5). Holcombe testified that only two (2) of his comparable sales were on a highway. (V 3 p 322 l 16-17). By this testimony, Holcombe

confirmed that a railroad, natural gas, a 4 lane road, highway frontage and a high voltage electrical line are not needed for "secondary commercial" property. The same argument applies to the "light industrial" use because Holcombe could not define it and used the same 15 sales to claim that use as well.

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.

After Higgins stated his name for the record, MTC immediately objected to his testimony and stated its reasons for the objection. Among the reasons given, MTC stated "his testimony previously is not relevant or material as to the highest and best use of the defendants' property in this case". (V 2 p 175 l 1-13). The word "previously" is in reference to the fact that Higgins' deposition had been taken (V 2 p 175 l 21) and videod (V 2 p 190 l 3-7). Counsel for the Howards replied "how can he object to it until we hear his testimony". (V 2 p 175 l 18-19).

MTC told the trial court after Higgins stated his name that his testimony previously is not relevant or material as to the highest and best use of the defendants' property in this case. But, the trial court would not listen, and counsel for the Howards acted like he did not know what Higgins would say even though he

had taken Higgins' deposition. All of Higgins' prospects that "rode by" (V 2 p 197 l 1) the Howards' property were "heavy industrial" prospects. (V 2 p 191 l 1-22). A "heavy industrial" use was not and is not relevant to prove a demand of "light industrial" use for the Howards' property. You call that a "strike out" in baseball.

The testimony by Holcombe and the filed Statement of Values said that the highest and best use of the Howards' property was "light industrial" and "secondary commercial". Section 11-27-7 of the Mississippi Code (1972) states in part that ". . . the statements required by this section shall constitute the pleadings . . .". It is evident that the Howards do not want to be restricted by the law which limits their evidence to prove only "light industrial" and "secondary commercial". In fact, the Howards argue in their Conclusion that "heavy industrial" was justified. But, any testimony about a highest and best use of "heavy industrial" should not be considered because it is not relevant or material.

"It is well settled law according to Mississippi case law that statements of value in an eminent domain proceeding are to be treated as pleadings are treated in civil causes in circuit court." Hudspeth v. State Highway Comm'n of Mississippi, 534 So.2d 210, 215 (Miss.1988). The Mississippi Supreme Court stated in Tunica County v. Matthews, 926 So.2d 209, 214 (Miss.2006): "This Court has refused to accept testimony of values of comparables for a highest and best use different from that of the subject property".

Therefore, a "showing" of the Howards' property for a highest and best use of "heavy industrial" should not be relevant or material.

MTC timely objected to Higgins' testimony and to Rhett's testimony stating that "I renew my motion in limine" which included that Rhett's testimony was not "relevant or material". (V 1 p 12 l 6). Higgins' testimony was all about "heavy industrial" prospects and clearly is not relevant or material. Rhett testified: ". . . I was just showing them property." (V 2 p 205 l 4-5). That is what a real estate salesman does.

The trial court was clearly told what Rhett would say and that it proved nothing about "demand" for the Howards' property. (V 1 p 11 l 15 to p 13 l 29). Rhett testified that at the time of trial he was an owner of a company that had an ongoing eminent domain case with MTC and that company's property was just south of the Howards' property. (V 2 p 206 l 16 to p 207 l 1). Not only was Rhett's testimony irrelevant and immaterial, it was clearly shown that he might have something to gain by his testimony.

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 has been found to be a correct statement of the law by the Mississippi Court of Appeals in North Biloxi Dev. v. Miss. Transp. Comm'n. In that case 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, were found to be a correct statement of the law. The trial court ruled that this instruction was duplicitous. But, MTC submits that all the other instructions given to the jury in the case at bar were not sufficient to instruct the jury about expert testimony and for the following reasons, it was a fatal error in this case to not give Instruction P-14.

The Howards claimed in their brief that MTC objected to P-14 (See p.13 last paragraph first sentence). Obviously, MTC would not and did not object to its own jury instruction. The Howards objected claiming that it may send a message to the jury that if they find something wrong with the appraiser's testimony that they will disregard it in total. The Howards argue in their brief that Holcombe's pedigree and the fact that there were no Daubert issues at trial made this instruction unnecessary.

But, the Howards have revealed that Holcombe did not and does not know how to follow the Before and After Rule (see the "magical damages calculation" discussed in Issue No. 5 hereafter). Holcombe's inability to follow the Before and After Rule was first revealed at trial when he could not mathematically support his After Value. (V 2 p 294 l 13-21). Then, it was revealed that

Holcombe did not follow the Before and After rule in Gentry eminent domain case. He remembered the case, but he could not remember his problem with the Before and After Rule. (V 2 p 295 l 22 to p 296 l 23). These items certainly show Holcombe's pedigree is tainted and show that there is a significant Daubert issue. At trial, it was shown his testimony changed about his sales used, his adjustments that he made and the value of damages to the 3.52 acres remaining east of the new highway. This jury instruction was warranted and needed to properly instruct the jury.

The Howards make reference about a jury note at bottom of page 14 in their brief. That jury note is not in the record.

The Howards' claim that this case was "a battle of the appraisers", but they did not want Instruction P-14. Obviously, they did not want the jury to use this instruction and compare Holcombe's testimony with Mississippi law.

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 Mississippi Supreme Court stated in Tunica County v.

Matthews, 926 So.2d 209, 214 (Miss.2006): "This Court has refused to accept testimony of values of comparables for a highest and best use different from that of the subject property". Holcombe testified as to the two (2) highest and best uses of the Howards' property, and neither of them were "heavy industrial".

Counsel for the Howards argued in support of their Motion in Limine (1) that property such as the SCARBROUGH property was not in the immediate vicinity of the Howards' property (V 1 p 23 l 22-23). and (2) said that "We're talking apples and oranges when we try to relate that to the Howard property" (V 1 p 23 l 29 to p 24 l 1).

It is abundantly clear that Holcombe does not understand that first you determine the highest and best use of the Howards' property. Then, you use comparable sales that are similar ie. "the same highest and best use" to establish value. Similarity means the same highest and best use. Holcombe admitted under cross examination that he also used residential sales to compare with the Howards' property. Mississippi law is clear, and Holcombe violated it. The trial court failed to follow settled Mississippi law.

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.

In their response to this issue, the Howards introduced the

"magical damages calculation" to find out what damages are. The Howards argue that by using this calculation Holcombe determines what the damages to the remainder are. They even say that MTC should accept their explanation and give in to the fact that Holcombe knows exactly how to calculate damages in an eminent domain proceeding.

The Howards represent in their brief in the first paragraph third sentence under Issue No. 5 on page 19 that Holcombe calculated damages by "taking the before value and then subtracting the value of the part taken and the value of the part remaining". There is no such formula in the Before and After Rule. Holcombe has simply made it up. Damages are determined **solely** by establishing a Before Value and an After Value, which is then subtracted from the Before Value to arrive at Just Compensation. "The Before and After Rule swallows and absorbs all the damages of every kind and character." Mississippi State Highway Comm'n v. Hall, 252 Miss. 863, 874, 174 So.2d 488, 492 (1965)

This is a clear admission that Holcombe did not follow the Before and After Rule, and it explains (1) why Holcombe's numbers do not add up (the "40 cent argument") and (2) why when Holcombe realized he made a mathematical mistake in arriving at his value of the property taken, his damages were increased in the amount of $1,921.87 as the value of the property taken was decreased by $1,921.87 (see page 30 of MTC's brief). MTC now understands why it was no coincidence that both changed exactly $1,921.87. It explains now why on February 24, 2010, which was the date of

Holcombe's deposition, his damage to the 3.52 acres was $99,409.93 and that the damage to the 3.52 acres changed on March 2, 2010 to $101,331.80. **It also explains why Holcombe could not give a reason or an explanation as to why the 3.52 acres was worth $1,921.47 when he gave his deposition and at the trial it was worth a negative 40 cents. It is absolutely clear that Holcombe never was valuing the 3.52 acres to arrive at his After Value as required in the Before and After Rule. No, Holcombe was just using his magical formula to determine the value of the 3.52 acres after the taking.** For the record MTC still does not accept that Holcombe knows how the Before and After Rule works nor does he know how to calculate damages in an eminent domain proceeding.

The Howards attempt to cover up their real reason for telling the Judge that they could put Holcombe on and probably get through on the second day of trial. They blame MTC for its cross examination as to why they could not finish on the second day of trial. The Howards had Holcombe on direct examination until 5:15 PM on the second day, and for a substantial time with basically no interruptions at the beginning of the third day. Then, after the trial court allowed a recess for the jury, cross examination of Holcombe began. The Howards really did not want MTC to cross-exam Holcombe.

The third paragraph of the Howards' argument to Issue No. 5 is just made up and has no basis in fact. In Holcombe's deposition, he testified as to how he arrived at his Before Value. He decided that the Howards' property was worth between $28,000 per acre and

$30,000 per acre. When he multiplied 111.16 acres times each of those per acre prices, he had a range of value between $3,112,480 and $3,334,800. He picked the Before Value to be $3,200,000. He then divided $3,200,000 by 111.16 acres and arrived at the per acre value of $28,787.33 for the Howards' property. Holcombe never multiplied 111.16 acres by $28,787.33 to get his Before Value. He determined the Before Value, and then he divided it by the acreage to find out the per acre value.

As for the reason for the Corrected Statement of Values, Holcombe admitted at trial that his numbers changed after his deposition. The initial Statement of Values reflected Holcombe's numbers per his deposition. The Corrected Statement of Values were numbers that Holcombe changed after his deposition and testified to at trial. Even though Howards' counsel tries to take the blame, I do not think that counsel will claim that they appraised the Howard property. Holcombe alone is responsible for his numbers.

The admission by the Howards that Holcombe did not follow the Before and After Rule should warrant a new trial in this case. Holcombe was the only value witness for the Howards.

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 Howards claim that no legal authority was cited to support

this issue. Apparently, they failed to read page 35 of MTC's brief.

MTC adopts its argument in Issue No. 4 as part of its reply to the Howards in this issue.

MTC disagrees that Alex Smith used (1) possible use, (2) permissible use, (3) feasible use and (4) highest and best use to determine the highest and best use of the Howards' property. In a specific order, Alex Smith used the following questions to arrive at the highest and best use of the Howards' property. They are: (1) Is the use feasibly possible?, (2) Is the use legally permissible?, (3) Is the use financially feasible? and (4) Is the use maximally productive?. (V 1 p 98 l 25 to p 100 l 7).

The Howards and Holcombe fail to grasp what an "after sale" is. They think it has to do with the date of taking and the date of the comparable sale. But, an "after sale" is one is which the comparable sale has frontage on the new highway that is the subject of the ongoing eminent domain case. In this case, the Glenn sale was property that had frontage on the new Highway 45 that was under construction at the time of the trial. It is not uncommon for the new highway to make property more valuable. Therefore, it should not be compared to the landowner's property as it existed before the taking. The Glenn comparable sale fits this exactly. The new Highway 45 right of way had been purchased for a new 4 lanes, and Glenn was very close to the Highway 82 interchange with Highway 45.

In the case at bar, there were sales of property available that were comparable in size to the Howard property as proven by

Holcombe's own list of sales, and Alex Smith's sales. Holcombe testified that he did not know of sales of property over 85 acres in the prairie. That statement was not true. (V 3 p 310 l 21 to p 311 l 4).

The Howards complain about MTC asking Holcombe questions about his 15 sales, but they put them all into evidence in Defendants' exhibits 1 through 16. Exhibit 16 showing all these sales is titled "Combined Comparable Sales & Howard Property". Holcombe testified to using two (2) different sales than he put on Defendants' exhibit 25. Certainly, MTC has a right to cross examine Holcombe on these sales.

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.

The Howards, not MTC, raised a straw man (the Howards did not want to sell), and then got the trial court to put it in an Instruction D-12. The Howards incorrectly stated that MTC's counsel asked Bryant Howard about selling their property. It was Bob Marshall that asked that question. (V 1 p 81 l 15-17). In Rhett's answer he added something that was not asked by MTC. (V 2 p 203 l 12-17). Whether or not the Howards wanted to sell or not is irrelevant. This "first sentence" in Instruction D-12 was

designed solely to prejudice and poison the jury 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.

The Mississippi Supreme stated in Mississippi State Highway Comm'n v. Franklin County Timber Company Inc. et al, 488 So.2d 782, 787 (Miss.1986) : "We have gone so far as to suggest that, where the jury has viewed the property being taken, any substantial evidence in the record supporting the jury's damage assessment will preclude interference in this Court." There are no sales of property that were admitted into evidence in this case that support this verdict. Holcombe testified that somebody is right, and somebody is wrong. There is no in between. A jury view does not make the jury infallible.

Allowing the jury to pick a number in between the highest valuation allowed into evidence and the lowest valuation allowed into evidence might be understandable where the same highest and best use is claimed by all parties and all the comparable sales have that highest and best use. But, in this case with different highest and best uses at issue, the middle ground is a vast wasteland that has no sales or testimony to support it.

CONCLUSION

It is an absolute fact that Holcombe failed to use the Before and After Rule in this case. **$1,921.47** absolutely proves it. That number represents his value of the remaining 3.52 acres east of the new highway 45 on the date of his deposition. He cannot explain why that amount changed to a negative 40 cents at trial except by his "magical damages calculation", which clearly violates the Before and After Rule.

On February 24, 2010 in his deposition, Holcombe testified that the damages to the 3.52 acres remaining east of the new Highway 45 was $99,409.93. Holcombe testified on that day that in the Before Value the 3.52 acres was worth $28,787.33 per acre or $101,331.40. $101,331.40 minus damages of $99,409.93 equals **$1,921.47**, which would have to be the value of the remaining 3.52 acres at his deposition.

According to the Howards' brief on page 21, Holcombe discovered a math error in the "value of the land acquired" after he gave his deposition. That error was in the amount of $1,921.87. Upon discovering that error, Holcombe increased the "damages to the remaining 3.52 acres" in the same amount that the "value of the land acquired" decreased.

To understand why Holcombe increased the "damages to the remaining 3.52 acres" simply because the "value of the land acquired" decreased, one has to understand that he determines the value of damages by his "magical damages calculation" as explained in the Howards' brief. There is absolutely no reason for "damages

to the remaining 3.52 acres" to increase when the "value of the land acquired" decreased except for this "magical damages calculation".

This revelation clearly and absolutely proves that Holcombe did not use the Before and After Rule to value the Howards' property for this case. The Howards represent in their brief that Holcombe calculated damages by "taking the before value and then subtracting the value of the part taken and the value of the part remaining". There is no such formula in the Before and After Rule. Holcombe has simply made it up.

This appeal is about Holcombe's failure to use the Before and After rule, the trial court's failure to correctly apply the law by allowing Higgins and Rhett to testify, allowing comparable sales that were not comparable, the denial of an appellate court approved jury instruction, and more.

The Howards claim it is a "battle of the appraisers". If their assertion is true, then why were they so afraid of instruction P-14. Could it be that Holcombe's appraisal has more "holes" in it than a slice of swiss cheese? Obviously, the Howards did not want the jury to use this instruction and compare Holcombe's testimony with Mississippi law.

One thing that both appraisers were quite clear at trial about is that the "demand" for property was proven by two things: (1) sales of property and (2) what had been built new close to the Howards' property. By allowing Higgins and Rhett to testify at the trial about "showing property" to prove "demand" and talk about

"heavy industrial" prospects to prove "light industrial/secondary commercial" use, this jury wandered off into an "insupportable verdict". Merely showing property proves absolutely nothing about the demand for property. In these hard times when every dollar counts for MTC to build and maintain Mississippi's highways, it will be a travesty of justice to allow this verdict to stand on the insupportable foundation of testimony about "showing property" to prove "demand".

A jury verdict is not infallible just because there was a jury view. This jury heard evidence that should not have been allowed. The jury relies upon the trial court judge to be the gatekeeper properly restrict and allow evidence that is lawfully admissible. The landowner should not to be given the freedom to use inadmissible evidence. This only serves to confuse the jury and hides the material facts about a case.

Another problem that the Howards have is that they clearly fail to understand that light industrial or secondary commercial properties obviously do not require (1) access to a 161 TVA transmission line, (2) access to a train track, (3) access to natural gas, (4) a mile of highway frontage or (5) the use of 111 acres. Their own appraiser's comparable sales prove that these characteristics are not important for light industrial or secondary commercial properties. It is plain to see that the market does not recognize them as being important. Holcombe testified that direct access to a highway was not even important.

It is readily apparent that the Howards are delighted to

receive less than forty-two percent (42%) of what Holcombe stated was Just Compensation. The Howards did not cross appeal. They want to take the money and run.

The Howards had no rebuttal to the economic catastrophe occurring on October 16, 2008. The Dow's plunge began in early October 2007 and not in 2008 as MTC incorrectly stated in its Conclusion of its initial brief. This economic catastrophe is still affecting the value of real estate.

MTC submits that the truth must be ignored and justice must be denied if a new trial is not granted in this case.

Respectfully submitted on the 23rd day of May, A. D. 2012.

MISSISSIPPI TRANSPORTATION COMMISSION, Appellant

BY: _____

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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 23rd day of May, A. D. 2012.

STEVEN R. MCEWEN

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