

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-CA-01369 COA**

**VELMA R. BUTLER AND W. C. BUTLER**

**APPELLANTS**

**v.**

**MISSISSIPPI TRANSPORTATION COMMISSION**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	8/30/95
TRIAL JUDGE:	HON. C.E. MORGAN III.
COURT FROM WHICH APPEALED:	WEBSTER COUNTY SPECIAL COURT OF EMINENT DOMAIN
ATTORNEY FOR APPELLANTS:	JAN R. BUTLER
ATTORNEY FOR APPELLEE:	JOHN M. SUMNER
NATURE OF THE CASE:	CIVIL - EMINENT DOMAIN
TRIAL COURT DISPOSITION:	JURY PLACED TOTAL COMPENSATION OF DAMAGES AT \$44,500
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

This case involves private property taken in Eupora, Mississippi for the relocation and reconstruction of a segment of U.S. 82 from Eupora to the Choctaw County line as part of a Federal Aid Project. This relocation and reconstruction necessitated the acquisition of certain property belonging to Velma and W.C. Butler (the Butlers). Being unable to reach an agreement with the parties, the Mississippi Transportation Commission declared the property necessary for public use and ordered it condemned. Trial proceedings took place in the Webster County Special Court of Eminent Domain, and the jury returned a verdict placing compensation at \$44,500. Aggrieved, the Butlers present the following issues on appeal:

I. MAY THE STATE LEGISLATURE CONSTITUTIONALLY AUTHORIZE THE MISSISSIPPI DEPARTMENT OF TRANSPORTATION, AN AGENCY OF STATE GOVERNMENT, TO TAKE OR DAMAGE PRIVATE PROPERTY PRIOR TO DUE COMPENSATION BEING FIRST PAID TO THE OWNER.

II. MUST A LANDOWNER SHOW THAT SHE POSSESSES THE QUALIFICATIONS NECESSARY IN LAW TO BE ACCEPTED AS AN APPRAISAL EXPERT, EVEN THOUGH SHE HAS BOUGHT AND SOLD PROPERTY IN THE STATE AND COUNTY AND WAS FAMILIAR WITH THE SUBJECT PROPERTY SINCE 1955, BEFORE BEING ALLOWED TO PRESENT TO THE JURY HER OPINION AS TO THE VALUE OF HER LAND BEFORE AND AFTER THE TAKING?

III. WERE THE BUTLERS NOT ENTITLED TO THE BENEFIT OF THE CONSTITUTIONAL PRESUMPTION THAT THE CONSTRUCTION PROJECT WILL BE OF SUCH CHARACTER AS TO DO THE MOST INJURY TO THE REMAINDER AS ANNOUNCED IN *King v. Miss. State Highway Dept.*?

IV. WERE THE BUTLERS NOT ENTITLED TO CROSS-EXAMINE THE APPELLEE'S EXPERT ABOUT DIFFERENCES BETWEEN THE SURVEY INTRODUCED BY APPELLEE AND A PREVIOUS HIGHWAY SURVEY MAP?

V. WERE THE BUTLERS NOT ENTITLED TO TESTIFY TO THEIR OBSERVATIONS OF DAMAGES TO THE HOME AND THE FLOODING HISTORY AND LIKELY FUTURE FLOODING AS IT AFFECTS THE AFTER VALUE OF THE PROPERTY?

Finding no error, we affirm the jury's verdict of \$44,500.

## FACTS

In December 1992, the Mississippi Transportation Commission (Commission) filed the original action to obtain part of the Butlers' property. However, the land description in the original complaint was incorrect, and on June 6, 1994, the Commission filed an amended complaint with a corrected and amended description of the land. The complaint sought condemnation of 1.01 acres, leaving approximately 6.5 acres upon which the Butlers have their residence. Keith Swain, a project engineer with the Mississippi Department of Transportation (MDOT), testified that the Butlers' property is approximately one mile south of Eupora on Highway 9. The 1.01 acres taken from the Butlers was for the U.S. 82 bypass project. After the bypass construction is complete, the new right of way will be approximately fifteen feet from the Butlers' residence.

Bob Malone, a staff appraiser with the MDOT, opined that the Butlers' original 7.31 acres of land with their residence and other improvements had a before the taking value of \$118,670. Malone

testified about recent comparable sales of property in the area as required by law. *See Howell v. State Highway Comm'n of Mississippi*, 573 So. 2d 754, 757 (Miss. 1990)(requiring state highway commission to determine value of property based on comparable, although not identical sales). He looked at three sales of acreage: a 3 acre plot that sold at \$8,000 an acre in 1991; a 2.92 acre plot that sold for \$5,137 an acre in 1989; and a 13.27 acre plot that sold for \$2,539 an acre in 1989. Additionally, Malone looked at three similar residences: a new 1,266 square foot residence that sold for \$37,000 in 1991; a house similar in size to the Butlers' and built in 1967 that sold for \$45,000 in 1989; and another house similar in size and built about the same time as the Butlers' that sold for \$55,000 in 1990. Based on these comparable sales, Malone appraised the Butlers' land at \$8,000 an acre, and the residence at \$58,500, and a utility shed at \$3,000. He estimated the after value at \$79,920. Malone testified that because of the damage to the residence as a result of its proximity to the highway, the resulting restrictive access to the driveway, plus a new fence and a new driveway, the Butlers were due \$38,750 total compensation. The highest and best use of the land according to Malone was residential.

W.C. Butler testified that he had owned the land upon which his residence sits since 1956. He built his residence in 1969. His opinion of the residence's before value without the land was \$130,000. His opinion of the value of his land was that each acre was worth \$30,000, making his total acreage worth \$195,000. However, when pressed about his \$30,000 an acre estimate, Butler admitted that he did not know of any comparable sales of nearby acreage that had sold for \$30,000, \$20,000 or even \$10,000 an acre. Additionally, he knew of no houses that had sold for as much as \$100,000. His before value of his property estimated at \$325,000, and his after value estimated at \$129,300, Butler contended that he was due \$197,700 in compensation.

**I. MAY THE STATE LEGISLATURE CONSTITUTIONALLY AUTHORIZE THE MISSISSIPPI DEPARTMENT OF TRANSPORTATION, AN AGENCY OF STATE GOVERNMENT, TO TAKE OR DAMAGE PRIVATE PROPERTY PRIOR TO DUE COMPENSATION BEING FIRST PAID TO THE OWNER.**

The Butlers argue that the "quick-take" statutory provisions, Sections 11-27-83 and 11-27-85 of the Mississippi Code, are unconstitutional. Section 17 of the Mississippi Constitution states in pertinent part:

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law. . . .

Miss. Const. art. 3, § 17. As prescribed by our state constitution, the so-called "quick take" statute states that "[u]pon entry of said order [granting right to immediate title and immediate entry], the plaintiff may deposit not less than eighty-five percent (85%) of the amount of the compensation and damages as determined by the appraiser with the clerk of the court, and upon so doing, the plaintiff shall be granted title to the property. . . ." Miss. Code Ann. § 11-27-85(2) (Supp. 1996). However, the Butlers contend that the statute is unconstitutional because it does not require the plaintiff to deposit the full amount of compensation. We are not persuaded by their argument. The constitution clearly states that compensation must be paid to the owner "in a manner prescribed by law." The

Mississippi Supreme Court has spoken to the policy behind the "quick take" statute in *Hudspeth v. State Highway Commission of Mississippi*:

The "quick take" statute is a major public policy pronouncement appropriately emanating from the legislative branch of our government. It was designed to enhance the State's highway program by providing the highway department access to the needed right-of-way as quickly as practicable consistent with the legitimate interests of the landowner.

534 So. 2d 210, 213 Miss (1988). This issue is meritless.

II. MUST A LANDOWNER SHOW THAT SHE POSSESSES THE QUALIFICATIONS NECESSARY IN LAW TO BE ACCEPTED AS AN APPRAISAL EXPERT, EVEN THOUGH SHE HAS BOUGHT AND SOLD PROPERTY IN THE STATE AND COUNTY AND WAS FAMILIAR WITH THE SUBJECT PROPERTY SINCE 1955, BEFORE BEING ALLOWED TO PRESENT TO THE JURY HER OPINION AS TO THE VALUE OF HER LAND BEFORE AND AFTER THE TAKING?

The Butlers argue that the trial court committed reversible error in disallowing Mrs. Butler to testify as to the value of their property. Mrs. Butler was questioned about her previous work history as well as the knowledge she had gleaned from her attorney husband. Mrs. Butler testified that she had only discussed area property values with her husband, and that she knew only what she had learned from him. The trial judge would not allow her to give her opinion of the property's value because she did not have any knowledge other than that which she had gleaned from her husband. Mr. Butler had already given his opinion as to the value of their property. While the law does state that a landowner need not possess the expert qualifications of an appraiser in order to give her opinion of the value of her land, there is the requirement that the landowner give an opinion based on her own unique view of the property. *Potters II v. State Highway Comm'n of Mississippi*, 608 So. 2d 1227, 1235 (Miss. 1992). Mrs. Butler's opinion was not her own, but that of her husband's. She did not have any familiarity with the fair market values. Mr. Butler had testified to his opinion of the fair market values but was exposed on cross-examination as having an exaggerated and unrealistic opinion of property values in his area. *Potters II* states that "[n]othing in this rule, however, empowers a landowner to present an opinion based on legally irrelevant factors." *Id.* The Butlers have failed to prove reversible error.

III. WERE THE BUTLERS NOT ENTITLED TO THE BENEFIT OF THE CONSTITUTIONAL PRESUMPTION THAT THE CONSTRUCTION PROJECT WILL BE OF SUCH CHARACTER AS TO DO THE MOST INJURY TO THE REMAINDER AS ANNOUNCED IN *King v. Miss. State Highway Department*?

V. WERE THE BUTLERS NOT ENTITLED TO TESTIFY TO THEIR OBSERVATIONS OF DAMAGES TO THE HOME AND THE FLOODING HISTORY AND LIKELY FUTURE FLOODING AS IT AFFECTS THE AFTER VALUE OF THE PROPERTY?

Because issues III and V are so intertwined, we will address them together. When a piece of a larger tract is taken, "the property owner is due compensation equal to the difference between the fair market value of the whole tract immediately prior to the taking and the fair market value of the remaining tract immediately after the taking." *State Highway Comm'n of Mississippi v. Havard*, 508 So. 2d 1099, 1101 (Miss. 1987). Special instances and specific elements of damages are swallowed by this before-and-after rule. *Id.* "[W]itnesses may testify concerning any specific quality, item or change in the property or its attributes, so long as this is ultimately related to the value of the property remaining after the taking." *Id.* at 1101-02.

During the trial, the Butlers tried to testify to certain structural defects in their house as well as potential flooding of their property that they claimed resulted from or would result from the highway construction. The trial court denied their testimony because neither Mr. or Mrs. Butler was qualified to testify about the cause of structural or foundational problems in their residence. While Rule 701 of the Mississippi Rules of Evidence allows lay opinion testimony, the Butlers' proposed testimony did not fall under that category. The Butlers wanted to testify that cracks in their walls were as a matter of fact caused by the highway construction. "Rule 701 opinions are by definition lay opinions and thus require no specialized knowledge, however obtained." *Mississippi State Highway Comm'n v. Gilich*, 609 So. 2d 367, 377 (Miss. 1992). "[W]here, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Miss.R.Evid. 702 opinion and not a Rule 701 opinion." *Sample v. State*, 643 So. 2d 524, 529-30 (Miss. 1994). The trial judge stated that he would allow a structural engineer or like expert to testify that certain cracks in their house may have been caused by the construction, but that the Butlers' testimony was insufficient. *See Couch v. City of D'Iberville*, 656 So. 2d 146, 152 (Miss. 1995) ("The adjudication of whether a witness is legitimately qualified as an expert is left to the sound discretion of the trial judge."). The trial court did not commit error in holding that the Butlers did not possess the knowledge necessary to explain structural deficiencies in their house.

Additionally, the trial court refused testimony about future flooding of their property based on flooding caused by a neighbor in 1980. We agree with the trial court's decision to disallow the testimony about the flooding because flooding that was caused fifteen years ago by a neighbor is irrelevant. Moreover, testimony about flooding that may be caused in the future without some basis is too speculative. *See Ellis v. Mississippi State Highway Comm'n*, 487 So. 2d 1339, 1341 (Miss. 1986) (holding trial judge within his discretion in disallowing speculative testimony without foundation or personal knowledge). The Butlers were certainly entitled to prove specific instances of damage, such as any structural damage or potential flooding. However, they should have presented experts to testify to those things about which they had no special knowledge.

Nonetheless, the Butlers sought to give the following instruction, which the trial court refused:

You are instructed that because our Constitution requires that "due compensation" be paid to the landowners, it is presumed that the construction of the highway project will be of such character as to do the most injury to the remaining property of the landowners, Velma R. Butler and W. C. Butler.

You may, then, consider this presumption in making your determination of the "after value" of the remaining property belonging to Velma R. Butler and W. C. Butler.

It was through this instruction that the Butlers sought damages for supposed structural damage to their house and potential flooding of their property. The trial court refused this instruction because there was no evidence in the record to support such an instruction. The Butlers argued at trial that they were entitled to such an instruction based on the Mississippi Supreme Court's language in *King v. Mississippi State Highway Comm'n.*, 609 So. 2d 1251, 1254-55 (Miss. 1992). *King* was an inverse condemnation case in which the supreme court spoke of a presumption "that the construction will be of such character as to do the most injury to the remaining property of the landowner." *Id.* at 1254. The court continued, stating:

This view is a function of the policy imperative that compensation and damages be payable once and for all and not piecemeal. One policy imperative of the before-and-after rule for more than half a century has been that the landowner's entire right and the Commission's entire liability will be resolved in a single action. *That rule gives the landowner substantial incentive to discover and show all special damages.*"

*Id.* at 1254-55 (emphasis added). As we stated above, the Butlers could have put on competent witnesses to testify about specific damages affecting the after value of their property. They did not. Even if the Butlers had put on such competent evidence, the case law states:

It should be repeatedly emphasized that subjects which are relevant as testimony are not thereby appropriate for instructions. Although every factor affecting a depreciated market value may be put in evidence, the ultimate issue is the extent of their cumulative impact upon such total valuation . . . . The several items of damage should be left to the fields of testimony and argument.

*Mississippi State Highway Commission v. Hall*, 174 So. 2d 488, 493 (Miss. 1965). The Butlers failed to put on proof of special damages, and even if they had, the refused instruction was not proper.

#### IV. WERE THE BUTLERS NOT ENTITLED TO CROSS-EXAMINE THE APPELLEE'S EXPERT ABOUT DIFFERENCES BETWEEN THE SURVEY INTRODUCED BY APPELLEE AND A PREVIOUS HIGHWAY SURVEY MAP?

In addition to the amended and corrected survey map submitted with the amended complaint, the Butlers sought to introduce into evidence the incorrect survey map submitted with the original complaint in the case. The trial court ruled that the original survey map was irrelevant. At trial and on appeal the Butlers fail to demonstrate how the original, incorrect survey map was in any way relevant to the issues of damage and compensation. "[T]he admission or exclusion of testimony based on relevancy is within the discretion of the trial judge, and this Court will reverse only if it finds that an abuse of discretion has occurred." *Mississippi Transp. Comm'n v. Fires*, 693 So. 2d 917, 920 (Miss. 1997). This issue is meritless.

**THE JUDGMENT OF THE WEBSTER COUNTY SPECIAL COURT OF EMINENT DOMAIN OF COMPENSATION IN THE AMOUNT OF \$44,500 IS AFFIRMED. COSTS OF THIS APPEAL ASSESSED TO APPELLANTS.**

**THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND  
SOUTHWICK, JJ., CONCUR. MCMILLIN, P.J., NOT PARTICIPATING.**