

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01301 COA

MISSISSIPPI TRANSPORTATION COMMISSION

APPELLANT

v.

**WALLY DON SWINDLE, TOMMY BROOKS, DEPOSIT GUARANTY NATIONAL BANK,
FORMERLY MERCHANTS & FARMERS, BENEFICIARY, W. B. MEEK, TRUSTEE,
DEPOSIT GUARANTY NATIONAL BANK, BENEFICIARY, ROBERT G. BARNETT,
TRUSTEE**

APPELLEES

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

TRIAL JUDGE: HON. JOSEPH LOPER

COURT FROM WHICH APPEALED: WEBSTER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN MORELL SUMNER

ATTORNEY FOR APPELLEES:

CAROLINE R. MOORE

NATURE OF THE CASE: EMINENT DOMAIN-CONDEMNATION

TRIAL COURT DISPOSITION: OWNER OF CONDEMNED PROPERTY AWARDED \$250,
000.00

BEFORE FRAISER, C.J., BARBER, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This is an appeal by the Mississippi Transportation Commission of an award of just compensation made to Wally Don Swindle for the acquisition by the Commission of a .33 acre tract of commercial real estate in Webster County. The Commission assigns as error the trial court's refusal to order a remittitur or new trial on the ground that the jury's award was against the overwhelming weight of the evidence. Both sides presented one qualified expert real estate appraiser to establish value. The Commission's appraiser established the value at \$109,350. Swindle's appraiser testified that, in his opinion, the property had a fair value of \$270,000. The jury returned a verdict of \$250,000.

The property being acquired was located in Webster County at the intersection of Highways 82 and 403. It contained a number of improvements thereon used in the operation of a convenience store operated by Swindle and his parents.

On considering a new trial motion after a jury verdict in an eminent domain proceeding, the trial court is charged to determine if there is substantial evidence to support the judgment. If so, then the motion must be denied. Conversely, should the trial court determine that the verdict is not based upon competent facts, but rather upon conjecture, supposition, or mere possibilities, then the new trial motion should be granted. *State Highway Comm'n of Miss. v. Havard*, 508 So. 2d 1099, 1104 (Miss. 1987). The duty of an appellate court is to determine whether the trial court committed an abuse of discretion in denying the new trial motion. *State Highway Comm'n v. Viverette*, 529 So. 2d 896, 900 (Miss. 1988).

In this case, the State put on competent proof by a qualified appraiser using customary real estate appraisal methods to establish the market value of the property at \$109,350. This proof made a prima facie case in favor of the Commission. *State Highway Comm'n v. Crooks*, 282 So. 2d 232, 235 (Miss. 1973). "After a prima facie case has been made out by the condemnor, then, if the landowner expects to receive more compensation than that shown, he must go forward with the evidence showing such damage." *Id.* at 235. Since the jury award of \$250,000 was substantially in excess of the value established by the State's proof, we must examine the proof on value presented by Swindle to determine whether there is substantial evidence in the record to support an award of that magnitude.

Swindle's first witness to give an opinion on value was Bobby Smith, accepted without objection as a qualified real estate appraiser. Smith briefly outlined the three traditional methods used by real estate appraisers to arrive at an opinion of value of property. Those methods have been historically designated as the comparable sales or market data approach, the income approach, and the cost approach. Mr. Smith then testified on direct as to his findings using two of these three methods: the income approach and the market data approach. His analysis under the cost approach was developed only during his cross-examination by the Commission's attorney.

The income approach involves nothing much more than a brief mathematical exercise taking as its foundation the rental income that the property can reasonably be expected to produce. This projected annual gross income is reduced by factors to account for taxes, insurance, maintenance, and a vacancy factor to arrive at an estimated net annual income figure. That figure is then capitalized at a rate selected by the appraiser as being that rate of return likely to be demanded by those willing to invest in property of that nature. In this case, Mr. Smith assigned a projected fair rent to the property

of \$3,500. When that figure was subjected to Mr. Smith's formula, it yielded a hypothetical net annual income of \$27,930, which he proceeded to capitalize at the rate of ten and a half percent to arrive at a valuation of \$266,000.

It is our determination, after a review of the record, that Mr. Smith's testimony concerning this method of valuation will not support a verdict of \$250,000. Mr. Smith's selection of \$3,500 as a projected income was not adequately supported by testimony that would show it to be based upon anything more than his unsubstantiated opinion. He vaguely testified as to a range of rental income for such properties being between \$2,000 and \$4,000, but did not offer one concrete example upon which some reasonable comparison could be made. Even assuming the accuracy of his determination of rent ranges (which we cannot base upon the present state of the record) there is nothing that would suggest his placement of this property near the high end of the range was anything other than an arbitrary act. One need only apply the rather rigid formula of the income approach to a range of figures to see what wide swings in results can be obtained. For example, applying Mr. Smith's formula to a \$2,000 monthly rental income yields a projected value of \$152,000. Absent more substantial evidence that the \$3,500 assumed rent is, in fact, a reasonably accurate projection of what the property would command in the open market, Mr. Smith's opinion as to value using this method is entirely too speculative to support a jury award of the magnitude involved in this case.

The only other appraisal method testified to by Mr. Smith during his direct testimony concerned the comparable sales or market data approach. Under this procedure, an appraiser attempts to locate other similarly constituted and situated properties that have actually sold in arms-length transactions, and determine the sales price of those transactions. Traditionally, the appraiser attempts to obtain some minimum number of comparable sales to protect against the contingency that factors not readily apparent may have distorted the sale price in any one particular transaction. Once this raw data is obtained, the appraiser then applies his skill to make necessary adjustments in the prices obtained in the other sales for such factors as differences in location, lot size, variances in age and condition of improvements, time of sale, and related factors as compared to the property under consideration. Using the raw price that similar property has actually commanded in the marketplace as adjusted to account for those inevitable differences that may reasonably be expected to affect the price of the property under consideration in a mythical arms-length sale, the appraiser arrives at an opinion as to what that price would be. Using this method, Mr. Smith testified to the sale of three convenience stores: two in Eupora and one at the same intersection where the Swindle property was located. However, in his testimony to the jury, Mr. Smith did not even give the price of the sale of the two Eupora properties. He testified that the sale of the convenience store at the same intersection as the Swindle property was \$450,000, but offered only the sketchiest testimony as to how he adjusted that price to the \$275,000 he assigned to the Swindle property under the comparable sales approach. Absent substantially more testimony as to the underlying facts surrounding the alleged comparable sales relied upon by Mr. Smith, there is simply insufficient information to give any credible weight to his opinion. The burden of producing such evidence was upon Swindle. An unsubstantiated opinion, even from a professed expert, cannot support a verdict. *Stubblefield v. Jesco, Inc.*, 464 So. 2d 47, 56 (Miss. 1984). Other than to accept the opinion on blind faith, there is nothing that the jury at trial, or this Court on appellate review, can use to test the reasonableness of Mr. Smith's opinion. A verdict must be based upon credible evidence, not upon blind faith in the opinion of a professed expert.

There are further problems associated with Mr. Smith's testimony in regard to the comparable sales

approach. It is readily evident from the testimony that the gross sales prices for the three convenience stores used by him for comparable sales were the sales of on-going businesses and that a portion of the sales price for these properties included some reasonable amount properly attributable to the "going concern" value of the business being conducted on the properties. ("Going concern value" has been defined as follows: "[T]he value of a business considered as an operating enterprise rather than as merely a collection of assets and liabilities. The term may be used to refer to the total value of a going concern or that portion of the total value that exceeds the value of the other identifiable assets of the business." Julius L. Sackman and Patrick J. Rohan, *Nichols' The Law of Eminent Domain* § 13.13[3] (Rev. 3d ed. 1994) (quoting R. Miles, *Basic Business Appraisal* 19 (John Wiley & Sons 1984)). It is the clear law of this State that, in the course of acquiring property for public purposes through eminent domain, the State does not acquire, nor is the defendant entitled to compensation for, the value of a business being conducted on the property acquired.

In *Mississippi State Highway Comm'n v. Ladner*, 243 Miss. 139, 137 So. 2d 791, 793 (1962), the Mississippi Supreme Court reversed a case upon a conclusion that the jury had impermissibly inflated damages based upon testimony that the proposed taking would destroy the defendant's cattle business conducted on the property. The Court said that "[t]he jury was told by this evidence that a profitable business was being ruined and we are convinced they considered that as an element of damage, *when the Commission was not condemning the business . . .*" *Id.* at 792 (emphasis supplied). The Court quoted from an *American Jurisprudence* article on Eminent Domain to the effect that "[i]t generally has been assumed that injury to a business is not an appropriation of property for which compensation must be made." *Id.* at 793 (quoting 18 Am. Jur. *Eminent Domain* § 259).

In a companion case also involving a cattle operation handed down the same day as *Ladner*, the Supreme Court reversed a jury verdict due to the improper admission of testimony that the taking would end the defendant's cattle operation. *Mississippi State Highway Comm'n v. McCardle*, 243 Miss. 111, 137 So. 2d 793, 796 (1962). In *McCardle*, the Court quoted with approval from a treatise on eminent domain law to the effect that:

[it] is well settled that when land occupied for business purposes is taken by eminent domain, the owner or occupant is not entitled to recover compensation for the destruction of his business or the injury thereto by its necessary removal from its established location.

Id. at 796 (quoting Julius L. Sackman and Patrick J. Rohan, *Nichols' The Law of Eminent Domain* § 13.13[3] (Rev. 3d ed. 1994)).

In *Potters II v. State Highway Commission*, the Supreme Court considered a case where a Burger King franchise owner attempted by several ingenious methods to interject the value of its on-going hamburger business into the jury's deliberations. *Potters II v. State Highway Comm'n*, 608 So. 2d 1227, 1232 (Miss. 1992). The Court rejected such attempts, saying that "[c]ondemnation cases are not vehicles through which a landowner may seek and recover the value of a business, however thriving, nor the loss of profits he might have made had he retained the property." *Id.* at 1232 (citations omitted). In language that certainly has direct application to the testimony of Mr. Smith in this case, the *Potters II* Court said:

Davis' market data or sales comparison study suffered the same vice. Rather than seeking comparable sales of commercial properties or even of fast food restaurants, Davis sought sales of Burger King restaurants in the Southeastern United States. He focused upon three involving a total of six properties, five in or near Columbia, South Carolina, and a sixth in Orangeburg. *In each of his comparable sales, a successful going concern, together with the franchise itself, was sold along with the land, improvements, fixtures and equipment. Such sales are simply not comparable to today's taking.*

Id. at 1234 (emphasis supplied).

One of the primary reasons the Burger King sales were not comparable, was not the fact that they were located in South Carolina, but that they included in their sales price items not being acquired in the eminent domain proceeding, including specifically any value attributable to the "successful going concern" operated on the property.

Without some reasonable analysis of the three sales used by Mr. Smith to remove from the gross sales price that portion properly attributable to the going-concern value of the businesses, the testimony of Mr. Smith as to this method of valuation was not probative on the issue before the jury and was calculated to substantially mislead the jury in its deliberations.

Mr. Smith did not, in his direct testimony, even offer any evidence concerning his analysis of the third appraisal method, *i.e.* the cost approach. Nevertheless, during cross-examination he was called upon to defend his cost approach valuation, and we have reviewed that testimony to see if, through cross-examination, any evidence was developed that would support the jury's award. We conclude that it was not. In using the cost approach, Mr. Smith admitted that his valuation of the improvements being acquired was substantially the same as that assigned by the Commission's appraiser, and that the primary difference involved a substantial variance in the value assigned to the land itself. The Commission's appraiser, using this approach, had assigned a value of \$22,300 to the land itself. Mr. Smith, on the other hand, assigned a value of \$174,900.

To an extent, it is misleading to say that the market data approach and the cost approach are separate appraisal exercises, especially in the instance where the raw land remains a significant part of the value, since unimproved land is not susceptible to appraisal based upon cost of construction. Appraisers must, therefore, once the improvements are accounted for, resort to some other appraisal method to supply a figure for the land. In this instance, both appraisers resorted to the comparable sales or market data approach to determine the raw land value. Mr. Smith, however, simply assigned a figure of \$750 per front foot to the lot. He produced no comparable sales that would support such a valuation, and, in fact admitted that he could not find a comparable sale that would support such a valuation. His only support for that figure was his testimony that in Greenwood, Mississippi, it was not unusual for "fringe area" commercial property to command \$1,000 per front foot. He offered no concrete example of such a transaction, nor did he conduct any analysis as to the variances in the market from Greenwood to that prevailing in the area of Swindle's property. Such an unsupported opinion does not provide the substantial evidence necessary to support an opinion of value.

The only other opinion testimony concerning value offered by Swindle was his own. While an owner is competent to give his opinion as to value, that opinion, as any other, must have some reasonable basis to support it. *See, e.g., Potters II*, 608 So. 2d at 1235; *Miss. State Highway Comm'n v. Magee*, 186 So. 2d 238, 239 (Miss. 1966). Mr. Swindle offered no such testimony, and it is obvious from reviewing his testimony as a whole that his opinion as to value improperly includes a "going-concern" factor for the business he and his family operated on the premises.

The only other evidence offered that might affect value was testimony concerning sales revenues from Swindle's operation and from the convenience store at the same intersection. Without some testimony to assist the jury in interpreting how such raw figures affected the value of the land and improvements and not the going-concern value of the businesses operated on the premises, this evidence certainly was not probative on the issue before the jury and, in fact, had the substantial likelihood of being misleading.

Despite the deference due to the jury's verdict in a case of this nature, we are compelled to conclude that the verdict is not supported by substantial credible evidence, and must, therefore, be seen as based upon conjecture and speculation, or upon consideration of the impermissible element of the value of the convenience store business itself. We determine that the trial court committed an abuse of discretion when it failed to order a new trial on the Commission's timely motion. There is no evidence that would, in our opinion, support a verdict in excess of that testified to by the Commission's appraiser. Therefore, pursuant to the requirements of section 11-1-55 of the Mississippi Code of 1972, this Court does hereby order that, if the appellee will enter a remittitur of \$140,650 in the records of the Webster County Court of Eminent Domain within fifteen days of the date this decision becomes final, thereby reducing the judgment to \$109,350, the judgment shall be affirmed. Upon the failure of the appellee to enter a remittitur as indicated, then this case shall be reversed and remanded for a new trial on the issue of just compensation.

THE JUDGMENT OF THE SPECIAL COURT OF EMINENT DOMAIN OF WEBSTER COUNTY IS AFFIRMED ON CONDITION THAT APPELLEE ENTER A REMITTITUR OF \$140,650, THEREBY REDUCING THE JUDGMENT TO \$109,350, SAID REMITTITUR TO BE FILED WITH THE CLERK OF THE WEBSTER COUNTY COURT OF EMINENT DOMAIN WITHIN FIFTEEN DAYS OF FEBRUARY 27, 1996; HOWEVER, UPON THE FAILURE OF THE APPELLEE TO SO ENTER A REMITTITUR, THEN THIS CAUSE IS REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF JUST COMPENSATION. COSTS OF THIS PROCEEDING ARE ASSESSED TO THE APPELLEE.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., AND BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.