IN THE COURT OF APPEALS 02/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00450 COA

MISSISSIPPI TRANSPORTATION COMMISSION

APPELLANT

v.

DANNY W. YELVERTON AND WIFE, KATHY J. YELVERTON, OWNERS; HOME SAVINGS ASSOCIATION OF KANSAS CITY, MISSOURI, ASSIGNEE AND BENEFICIARY; GEORGE V. KINNEY, CO-TRUSTEE; JOHN C. WOOLLEY, CO-TRUSTEE

APPELLEES

TRIAL JUDGE: HON. MILLS E. BARBEE

COURT FROM WHICH APPEALED: DESOTO COUNTY SPECIAL COURT OF EMINENT DOMAIN

ATTORNEYS FOR APPELLANT:

MICHAEL T. LEWIS AND PAULINE S. LEWIS

ATTORNEY FOR APPELLEES:

PAUL R. SCOTT

NATURE OF THE CASE: EMINENT DOMAIN

TRIAL COURT DISPOSITION: JUDGMENT FOR LANDOWNERS ON JURY VERDICT FOR $47,500

BEFORE BRIDGES, C.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

The Mississippi Transportation Commission (Commission) appeals from the judgment of the DeSoto County Court of Eminent Domain which that court entered on a jury verdict for $47,500 in favor of Danny W. and Kathy J. Yelverton, husband and wife, owners of a parcel of land containing 0.35 acres of land which the Commission acquired through its powers of eminent domain to relocate and to widen Mississippi State Highway No. 302 (Highway 302), also known as Goodman Road. This Court finds no error in the Commission's issues and thus affirms the judgment of the special court of eminent domain.

I. Facts

In August, 1988 Danny W. Yelverton and his wife Kathy bought their home located on a 1.63 acre parcel of land described as Lot 26 in the Country Oaks Subdivision in northern De Soto County. They paid $132,000 for their home and lot. Their lot is located at west of Timber Trail and north of Highway 302, or Goodman Road. Timber Trail runs in a north-south direction along the 175-foot eastern border of the Yelvertons' lot; and Highway 302 runs in an east-west direction along the 409.3-foot southern border of the parcel.

The Yelvertons' house faces east toward Timber Trail and it is located near the western end and north side of the lot. The garage, which is located on the south side of their home, has doors on its south side. The paved area directly south of the garage is part of a driveway that runs in an eastern direction, parallel to Highway 302, near the southern boundary of Lot 26 to the western right-of-way of Timber Trail. Between the driveway and the southern boundary of the lot is a wooded area composed of some twenty or more oak trees, some of which have circumferences of five feet. These trees form a "buffer zone" for the Yelvertons' house, which reduces the impact of the sights and sounds of the traffic on Highway 302 on the residents of and visitors to the Yelvertons' home.

The Commission decided to widen Highway 302 from two to five lanes and to relocate its center line ever so slightly in the process of widening and reconstructing this highway. Consequently, it condemned a 0.35 acre strip along the south side of the Yelvertons' Lot 26. This 0.35 acre strip measured 37.7 feet along the western boundary and 35.5 feet along the eastern boundary of the Yelvertons' lot, and it extended along the entire south end of their lot. The strip to be taken by the Commission included all of the wooded area and most of the Yelvertons' driveway. The Commission's taking of this 0.35 acre strip of the Yelvertons' Lot 26 totally eliminated the wooded "buffer zone" and necessitated that the Yelvertons construct a new driveway immediately north of their existing driveway from Timber Trail on the east to their garage on the west.

II. Litigation

Because the Commission and the Yelvertons failed to agree about the amount of compensation that the Commission owed the Yelvertons as a result of its taking this 0.35 acre strip, the Commission filed a petition for a special court of eminent domain on April 27, 1993. The Commission asserted in its statement of values which it filed on October 19, 1993, that the sum of $19,950 adequately compensated the Yelvertons' for the taking of their land to widen Highway 302; but as they indicated

in their statement of values which they filed on March 18, 1994, the Yelvertons evaluated their compensation for Commission's taking their land in the total amount of $68,000. Of this amount, the Yelvertons valued the property at $21,118.00 and the damage to the remainder at $46,882.00.

This matter was tried on March 29-30, 1994. The staff appraiser for the Commission testified that the value of the Yelverton's property before the taking was $140,000, that the value after the taking was $120,050, and that total amount of compensation which Commission owed the Yelvertons was $19, 950. William Sexton, the Yelvertons' appraiser, testified that the value of the property was $185,000 before the taking and that the total amount of compensation to which the Yelvertons were entitled was $36,118. When the Yelvertons' counsel asked Sexton what the after-the-take value of the land and home would be, Sexton muffed the answer, but he ultimately replied that the after-the-take value would be the difference between $185,000 and $36,118. Sexton protested that he had not brought his calculator to court that day; thus he was unable to determine the difference between $185,000 and $36,118. After Sexton testified, Danny Yelverton testified that the difference in the value of his property before and after the taking was $70,000 to $75,000. The jury also viewed the property.

We reserve further discussion of the testimony and evidence for our analysis and resolution of the three issues which Commission presents for our determination. At the conclusion of trial, the jury returned a verdict of $47,500 for the Yelvertons. After the eminent domain court entered its judgment for the amount of the jury's verdict against Commission, it filed its petitioner's motion for judgment notwithstanding the verdict and alternative relief, including a remittitur of the judgment to $19,950. The court of eminent domain overruled Commission's post-judgment motion in its entirety; and Commission appealed.

III. Issues

Quoted verbatim from its brief, Commission's three issues are:

> I. Whether the trial court erred in denying the Commission's motion for a new trial or remittitur.
>
> II. Whether the trial court erred in disallowing the Commission a full and fair opportunity to cross-examine the landowners' expert witness Sexton concerning his persistent and consistent use of the same $15,000.00 severance/proximity figure in numerous other dissimilar eminent domain cases.
>
> III. Whether the trial court erred in refusing jury instructions P-3, P-9 and in granting jury instruction D-1.

IV. Analysis and resolution of the issues

A. First Issue Whether the trial court erred in denying the Commission's motion for a new trial or remittitur.

1. Standard of review

With respect to a motion for a new trial, the Mississippi Supreme Court has stated:

> The grant or denial of a motion for a new trial is and always has been a matter largely within the sound discretion of the trial judge. The credible evidence must be viewed in the light most favorable to the non-moving party. The credible claims evidence must be viewed in the light most favorable to the non-moving party. The credible evidence supporting the claims or defenses of the non-moving party should generally be taken as true. When the evidence is so viewed, the motion should be granted only when upon a review of the entire record the trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice. Our authority to reverse is limited to those cases wherein the trial judge has abused his discretion.

Anchor Coatings, Inc. v. Marine Indus. Residential Insulation, Inc., 490 So. 2d 1210, 1215 (Miss. 1986). Moreover, "[c]ourts should be particularly loathe to disturb a jury's eminent domain award where . . . the jury has personally viewed the premises," *Mississippi State Highway Comm'n v. Viverette*, 529 So. 2d 896, 900 (Miss. 1988).

> **2. Did the Yelvertons' appraiser, William Sexton, violate the "before and after" rule**?

Commission quotes in its rebuttal brief the following portion of Sexton's testimony which, it claims, demonstrates that Sexton violated the "before and after" rule when he opined that the Yelvertons' just compensation was $36,118.00 for Commission's taking their 0.35 acre portion of their lot to widen Highway 302:

> Q So your before value on the property was a Hundred and Eighty Five Thousand Dollars ($185,000.00). Correct?

A That is right.

> Q And the total damages and taking of the property was Thirty Six, One Eighteen. So do you have calculated there what you determined the value of this property after the take would be?
>
> A A Hundred and Thirty Three Thousand, Eight Hundred and Eighty Two Dollars ($133, 882.00).
>
> THE COURT: I am sorry, what was that?
>
> A One, Thirty Three, Eight, Eight Two.
>
> THE COURT: Thank you.
>
> Q Do you want to check that because that doesn't jive with mine, unless I have added it wrong.

A I don't have a calculator with me but it easiest way to do it would be to take a Hundred and Eighty Five Thousand and minus out Thirty Six Thousand, One Eighteen.

Q I come up with One, Forty Eight, Eight, Eighty Two. That is what it calculated out to.

A You are possibly right on that, because I just had some footnotes here. I determined the value of the property as it sits right now, and then the value of what is being taken. I didn't determine the market data, I didn't note here in my notes the value, what the remainder would be. But it is a simple procedure of taking One, Eighty Five minuses Thirty Six Thousand, One Hundred and Eighteen, whatever that is that is what --

Q That includes not only just the damages to the remainder but the actual taking of the property, the driveway, and everything?

A That includes everything.

The absence of the Commission's objection to any of the foregoing direct examination of Sexton by the Yelvertons' counsel is conspicuous. Indeed, the record further reflects that the Commission's counsel did not object one time to any of the Yelvertons' direct examination of their expert witness, William Sexton. The Commission and the Yelvertons rested after the Commission re-called in rebuttal its appraiser, Dorman Buford, to rebut Sexton's use of the sum of $15,000 as severance damages, which he had included in his estimate of $36,118.00 as just compensation for the taking of the Yelvertons' 0.35 acre portion of their lot. After both parties had rested, the following proceedings occurred outside the presence of the jury:

MR. LEWIS: The next point is, Your Honor, the Commission believes that the Court ought to reject Mr. Sexton's testimony for the reasons that he did not follow the before and after rule. . . . My recall is and my notes are that he didn't have his calculator with him, and he gave a number first that didn't fit, and he just later said he didn't do an after, what he did was to compute the value of the property taken. And as the Court knows, and there is ample case law, that says the before and after rule must be followed by an expert, and that the mere computation of the value of the land taken is an inappropriate method for appraisal.

MR. SCOTT: Your Honor, my first response to that is this here again is not a timely motion. We rested and they put on rebuttal, I mean, we are beyond that now . . . . Secondly, Mr. Sexton appraised the property just exactly the same way as the State's appraiser. I mean he followed through step by step; and whether he said the magic words, whether he said before and after, but on his step by step, he appraised the property as it is; he appraised the land being taken; he assigned values to the driveway; fences; and all those things, exactly the same way as the State's appraiser did. But

first of all, you know, I think when you don't timely make such a motion as that you waive it. It is basically . . . a directed verdict motion. And that should have been made at the close of defendants' case.

THE COURT: Make your record; if [the court reporter] has it?

MR. LEWIS: This is for your benefit, Judge, if you have a recall and have clear notes there is no need to have that read back. If you would like to have it done, we can do it.

THE COURT: I don't need it. I am not sure how good my recall is, but I know what you are talking about. I recall Mr. Sexton's testimony that as to the amount of damages then his substraction was wrong, and then he said whatever the difference is that is the after value, and then you just subtract that again from the before value to get what the damages are.

MR. LEWIS: My recall is that he said he didn't compute the after value.

THE COURT: Is that what her notes show?

MR. LEWIS: Maybe it would be helpful to have that read?

THE COURT: Well, it is in the record. I am going to overrule your motion anyway, but it is in the record. But I think--

MR. SCOTT: I think he made a comment that he didn't have his notes, just have some of his notes or something.

THE COURT: He didn't have his calculator, and he didn't have his notes where he did that, but he could have very well said that, but I thought I recall somewhere earlier where he did, and I can be wrong, but the record will bear us out, if it needs to be, or at a subsequent time. And I am not summarily overruling your motion, but I think all the facts and figures are before the jury. And as to the manner in which they came to the jury, it may not be one, two, three, four, five; it may have been one, four, two, three, five, or however it got to them. But I think it is sufficiently before the jury and can be received by them as his before and after with the damages--

Finally, this Court finds that while the Commission did not object to any of Sexton's testimony as an expert witness for the Yelvertons, the Commission did include in its motion for JNOV and alternative relief its objection to Sexton's alleged failure to abide by the before and after rule, which it composed

as follows:

> This Honorable Court erred in allowing the jury to consider the testimony of expert Bill Sexton because Mr. Sexton did not testify according to the before and after rule. Although the witness did testify concerning his opinion on the before value, he plainly stated under oath that he had not computed the after value of the remaining tract.

As we noted, the trial judge overruled this motion.

Because the Commission did not object contemporaneously to any of the testimony of the Yelvertons' appraiser, William Sexton, but instead waited until both it and the Yelvertons had finally rested before it proceeded further with the matter, this Court determines that this "sub-issue" is procedurally barred. In *Anderson v. Jaeger*, 317 So. 2d 902, 906-07 (Miss. 1975), the Mississippi Supreme Court advised the bar that if a litigant did not object to the introduction of evidence when an adversary offered it, it was too late to raise the potential error for the first time in the litigant's motion for new trial when it wrote:

> When, in the course of a trial before a jury, it is conceived that something has occurred of a prejudicial nature, an objection must be interposed at the time and the trial court thus be given an opportunity to rule. If the sustaining of the objection should then be considered incapable of removing from the minds of the jury the supposed prejudicial effect of the matter objected to, the court then must be requested to instruct the jury that it be disregarded. If, the trial court having responded by so instructing the jury, the objector should still consider that the interests of his client have been irremediably prejudiced and that the actions of the trial court, although favorable, have not been effective in removing from the minds of the jury the prejudicial effect of the objectionable matter, then a motion must be made at the time for a mistrial. It is not permissible to wait until after a verdict has been returned to raise questions such as this after it has turned out that the verdict is unfavorable. It is too late to raise the point for the first time in a motion for a new trial.

The Commission's inclusion of this issue in its motion for new trial comes too late.

However, had the Commission objected timely to Sexton's method of appraisal of the Yelvertons' damages, its reliance on *Daniels v. Board of Supervisors*, 323 So. 2d 748 (Miss. 1975), to support its objection would have been misplaced. In its brief, the Commission offers the following quotation from *Daniels* to support its position that Sexton's appraisal did not comport with the before and after rule:

> Petitioner [the Clarke County Board of Supervisors] attempted to follow the before and after rule by first appraising the whole property before the taking, then arriving at the damages, and deducting the damages from the before-value to arrive at the after-taking value. This is not a proper method of appraisal under the before and after rule.

Id. at 749. However, in *Daniels*, the Mississippi Supreme Court further found that the Board's appraiser, Robert H. Donald, Jr., made other errors in his appraisal of the property that the Board had condemned for highway purposes. *Id.* In *Daniels*, the board of supervisors had condemned a portion of Daniels' lot which measured 8 feet by 105 feet fronting on the public road. *Id.* The lot was 210 feet deep, and a store building thirty-two feet wide built of concrete blocks was located so that its front would be only "inches within the proposed new right-of-way which would result from the taking of the eight by one-hundred-five foot lot. *Id.* However, an eight-foot deep shed which had been added to the front of original concrete-block store building was located on the lot which the board of supervisors was taking. *Id.* Donald, the board's appraiser, was of the opinion that the taking of the lot and shed would not damage the remainder of Daniels' property at all. *Id.*

The supreme court disagreed with Donald on two issues. *Id.* First, the court noted that "the replacement cost of the shed which Donald estimated at $384 less $126 for depreciation did not necessarily reflect the damages to the concrete-block building. *Id.* Secondly the court opined that "[T]he removal of the shed across the front of the building and extending the right-of-way within inches of the front of the building damaged the remaining property as a matter of law." *Id.* The supreme court then concluded that *Daniels* "was not a proper case for the exception to the before and after rule." We infer that the Commission's quotation from *Daniels* is dicta in terms of the Mississippi Supreme Court's decision in that case. The Commission cites no other case in which the Mississippi Supreme Court has similarly held that it was error for the appraiser to "first apprais[e] the whole property before the taking, then arriv[e] at the damages, and deduct[] the damages from the before-value to arrive at the after-taking value."

Moreover, in *Howell v. State Highway Commission*, 573 So. 2d 754, 757 (Miss. 1990) (citations omitted), the Mississippi Supreme Court expounded the following criterion by which to determine the amount of just compensation to which the landowner is entitled to receive from the appropriating governmental agency for the taking of the land:

> The just compensation in cases involving a partial taking is generally the value of the part taken plus all the damages which the residue of the property suffers, including a dimunition in the value of the remainder . . . . Anything less than the foregoing would encroach upon the constitutional guarantee of just compensation.

This quotation justifies Sexton's ascertainment and appraisal of all the damages which the remainder of the Yelvertons' property would sustain as the result of the Commission's taking 0.35 acre of their lot.

This court agrees with the trial judges' comment about Sexton's expert appraisal of the Yelvertons' just compensation which it previously quoted: "And as to the manner in which [the matter of just compensation] came to the jury, it may not be one, two, three, four, five; it may have been one, four, two, three, five, or however it got to them. But I think it is sufficiently before the jury and can be received by them as his before and after with the damages." After all, the blatant flaw in Sexton's testimony was his error in subtraction, which the Yelvertons' attorney corrected none-too-adroitly. Regardless of Sexton's faux pas in computation, this Court finds that his expert opinion was adequate

to establish an after value of $148,882, the difference between his before value of $185,000 and the total damage to the remainder of $36,118.00. We therefore resolve this "sub-issue" of its first issue adversely to the Commission both because we find it to be procedurally barred and because we find that Sexton's appraisal substantially complied with the purpose of the "before and after rule."

3. Danny Yelverton's opinion about the damages to the remainder of the Yelvertons' home and lot

The Commission adopted the same strategy about objecting to Danny Yelverton's opinion about the damages done to the remainder of his home and lot that it adopted about objecting to William Sexton's testimony, *i. e.*, it waited until both it and the Yelvertons had finally rested before it made its objection. The trial judge relied on *Potters II v. State Highway Comm'n*, 608 So. 2d 1227 (Miss. 1992), to which we will subsequently refer, to overrule the Commission's objection to Yelverton's testimony. He opined:

> Landowners are not generally expert in the field and their modes of articulation differ, and I believe that his testimony was sufficient for the jury to accept in whatever way they wish as to the credibility of his testimony, and what he stated as to just compensation. So that will be overruled as well.

We noted that the Commission did not object one time to William Sexton's testimony; and we now note that the Commission did not object one time to any of Yelverton's testimony about his just compensation for the Commission's taking of a portion of his lot. As with its objection to Sexton's testimony, the Commission included it's objection to Yelverton's testimony in its motion for JNOV and alternative relief. Again this Court finds that the Commission is procedurally barred from arguing this second sub-issue for the same reasons that we held that it was procedurally barred from raising the issue that the Yelvertons' appraiser had violated the before and after rule.

Regardless of the procedural bar, we resolve this issue against the Commission. The Commission "does not object to Yelverton's taking the stand and testifying." It further concedes that "[t]he landowner Yelverton ha[d] a substantial basis for testifying as to his opinion of the value before the acquisition." Instead, the Commission complains "that Yelverton failed to give any reasonable basis for his opinion" that the value of his property after the Commission had taken the 0.35 acre portion of his lot would be reduced by $70,000 or $75,000. It concludes by contending that within the two-and-one-half pages of the record during which Yelverton discussed the after-value of his home and lot, there is "not a single reference to any non-speculative or non-imaginary element of damage which would affect his property after the acquisition." Therefore, according to the Commission, "[T]he jury had no credible evidence to support its verdict."

As the Commission concedes, the landowner may testify about the nature and extent of the damages to the remainder of his property which the taking of a portion of it will cause. *See Potters II v. State Highway Comm'n*, 608 So. 2d 1227, 1235 (Miss. 1992) (landowner is exempted from showing that he possesses the qualifications necessary in law to be accepted as an expert witness because he has acquired a unique view of his property which he can and ought be allowed to share with the jury).

The Commission did not cross-examine Danny Yelverton at all. After both litigants had finally rested, the Yelvertons' counsel announced to the trial judge that the Yelvertons were bound by their statement of values in the total amount of $68,000, which they had earlier had filed in this case, to which announcement, the Commission's counsel replied, "There is no issue on that." Pursuant to *Potter II*, this Court holds that the trial judge did not err by overruling the Commission's motion to strike Danny Yelverton's opinion about the after value of his property, especially in the absence of the Commission's contemporaneous objection to Yelverton's testimony on that subject and the Commission's not cross-examining Yelverton on his opinion. In *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1166 (Miss. 1992), the Mississippi Supreme Court explained:

> Expert opinions, of course, are not obligatory or binding on triers of fact but are advisory in nature. The jury may credit them or not as they appear entitled, weighing and judging the expert's opinion in the context of all of the evidence in the case and "the jury's own general knowledge of affairs . . . ."

This Court opines that the same principle applies to the jury's evaluation of a landowner's opinion of the value of his or her damages in an eminent domain case.

4. Summary of the Commission's First Issue

The Yelvertons' appraiser, William Sexton, opined that the before fair market value of the Yelvertons' home and lot was $185,000. Danny Yelverton's opinion of the before value was between $175.000 and $180,000. The Commission's appraiser, Dorman Buford, opined that the after value of the Yelvertons' home and lot was $130,050. The difference between Sexton's before value of $185, 000 and Buford's after value of $130,050 is $54,950. The jury's verdict was for $47,500, which was $7,450 less than the maximum difference of $54,950. Thus, this Court concludes that the verdict fell within the maximum parameters of the Yelvertons' due compensation which the evidence established, and it therefore declines to disturb it. Our conclusion is supported by the earlier quotation from *Mississippi State Highway Commission v. Viverette*, 529 So. 2d 896, 900 (Miss. 1988) "[c]ourts should be particularly loathe to disturb a jury's eminent domain award where . . . the jury has personally viewed the premises." We affirm the trial judge's denial of the Yelvertons' motion for a new trial.

As for the Commission's request that this Court enter a remittitur "to the amount of $19,950," which was the amount of the Yelvertons' just compensation in the opinion of the Commission's appraiser, we decline to do so. The Mississippi Supreme Court explained in *Ross-King-Walker, Inc. v. Henson*, 672 So. 2d 1188, 1193-94 (Miss. 1996):

> Motions challenging the quantum of damages and seeking a remittitur are by their very nature committed to the sound discretion of the trial judge. Where the trial judge acts upon these matters, we reverse only if he has abused or exceeded his discretion. This Court will not vacate or reduce an award of damages, "unless it is so out of line as to shock the conscience of the Court."

The Commission's motion for JNOV and alternative relief included its motion that the trial judge enter a "remittitur of the judgment to $19,950." When the trial judge overruled the Commission's motion, he necessarily denied its motion for the remittitur. We affirm the trial judge's denial of the Commission's motion for remittitur for the same reason that we affirmed his denial of the Commission's motion for a new trial, and that is that the amount of the jury's verdict fell within the parameters of the amount of due compensation to which the Yelvertons were entitled as established by the evidence. We affirm the trial judge's denial of a remittitur for which the Commission moved.

> **B. Second Issue** Whether the trial court erred in disallowing the Commission a full and fair opportunity to cross-examine the landowners' expert witness Sexton concerning his persistent and consistent use of the same $15,000.00 severance/proximity figure in numerous other dissimilar eminent domain cases.

As part of his calculation of the total damages which the Yelvertons would sustain because of the Commission's taking of their 0.35 acre portion of their lot, Sexton included an amount of $15,000 which he characterized as "severance" or "proximity" damages. According to Sexton, these damages represented the diminution of the value of the Yelvertons' property caused by the loss of the existing wooded "buffer" zone that insulated the Yelvertons' home from the traffic on Highway 302. According to Sexton, after the Commission's taking of the 0.35 acre portion of the Yelvertons' lot and the subsequent expansion of Highway 302, the distance between edge of the highway right-of-way and the Yelvertons' house would be decreased to thirty seven feet. The ultimate effect would be to intensify the sights and sounds of the newly widened Highway 302, and this increased intensity of sight and sound would unavoidably interfere with the solitude and the privacy of the Yelvertons' residence.

In all of his appraisals of other properties which the Commission proposed to take for the widening and relocation of Highway 302, including a lot referred to as the "Reeves property," Sexton had used the same amount of $15,000 to establish the severance/proximity damages that the other owners of the other parcels of land had suffered. Thus, the Commission sought to cross-examine Sexton about his habitual use of the amount of $15,000 for severance/proximity damages on his other appraisals. The Commission intended to discredit Sexton's appraisal methods by showing that the sum of $15,000 was Sexton's routine and invariable estimate of the landowners' severance/proximity damages. The Yelvertons anticipated the Commission's tactic by moving for an order *in limine* which would prevent the Commission from cross-examining their appraiser on his regular use of $15,000 for his appraisal of the landowners' severance/proximity damages. In ruling on the Yelvertons' motion *in limine*, the trial judge advised the Commission:

> You will be able to cross examine [Sexton] with regard to handling appraisals for other landowners on the Highway 302 project that he has been in Court and testified before in cases. I again will not allow anything about the Reeves' appraisal, and I think that if you want to question him on the Fifteen Thousand Dollars ($15,000.00) it should be in this case only with regard to how he came upon it, the basis for it, and if he can establish a firm basis for that in this case only.

The Commission complains of this ruling by the trial judge in this its second issue.

In considering this issue we are mindful of the Mississippi Supreme Court's statement that "the latitude allowed counsel in cross-examination in this state is quite wide" and that "[a]ny matter relevant may be probed." *Mississippi State Highway Comm'n v. Havard*, 508 So. 2d 1099, 1102 (Miss. 1987). Regardless of the materiality of this particular cross-examination to the matter of Sexton's credibility, we are also aware of Mississippi Rule of Evidence 103, to which we earlier referred, which provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." M.R.E. 103. In the present case, after the trial judge sustained the Yelvertons' motion in limine, the Commission was able to engage in the following cross-examination of Sexton:

> Q. I am going to focus on that Fifteen Thousand Dollars ($15,000).
>
> A. Okay.
>
> Q. As I understood your testimony on direct the fifteen thousand dollars figure does not come from any hard data in the market place?
>
> A. That is correct
>
> Q. So that means that there are no comparables that you went out and found and said this house was a hundred (100) feet form the right-of-way before the take, and it is now eighty (80) feet, and it dropped Fifteen Thousand . . . and based on that I believe Fifteen Thousand Dollars . . . is appropriate in this case?
>
> A. There is no exact black and white to it. That is correct.
>
> Q. No hard data
>
> A. That is correct
>
> Q. That is your opinion?
>
> A. That is correct.
>
> Q. What does the American Institute of Appraisers have to say about the data which should support an appraiser's opinion? Do you know?
>
> A. Well, I think I know where we are going here with this, and you are asking me is the opinion supported through hard evidence? And my response to you is that the numbers up to the fifteen thousand dollars . . . were reached in my opinion, professional opinion, hard evidence. The fifteen thousand dollars . . . was an estimate based on my professional opinion of what this home would suffer in the market place after the take; after the trees were removed; after the driveway was relocated; after this five . . . lane Highway 302 is now thirty-seven feet from the structure as opposed to fifty some odd feet with no sound barrier, or no safety barrier with the trees there Unfortunately, this identical situation has not been tested on the market with enough evidence to support a

> black and white issue. No, it has not. So consequently because of that it was my opinion, my professional opinion as a real estate appraiser that this property reflect a fifteen thousand dollar . . . detriment in the market value after the taking
>
> Q. That is your unsupported opinion
>
> A. That is correct.

As the quoted portion of the record demonstrates, in spite of the trial judge's ruling, the Commission was still afforded a substantial opportunity to cross-examine Sexton about his routine use of the $15,000 figure. One consequence of the Commission's cross-examination of Sexton was to establish by his own admission that his value of fifteen thousand dollars for severance/proximity damages was unsupported by market data. Moreover, the trial judge allowed the Commission to recall its appraiser, Dorman Buford, to rebut Sexton's estimate of $15,000 by testifying about one "true sale" of one of the properties affected by the widening of Highway 302. Buford testified that the property had been appraised as having a before value of $98,000, that he had appraised the value of the land taken and resulting damages to the remainder at $8,000, which left an after value of $90,000. Buford then testified that after the Commission had paid the landowner the sum of $8,000, the landowner sold the remainder of his property for $90,000. The record then contains this snippet of Buford's rebuttal testimony:

> Q. And what does this tell you about Mr. Sexton's claim of $15,000 [for] severance damages?
>
> A. That it is like he says, it is strictly unsupported. There is market indication that there is no proximity damage based on this data here.

We again refer to our earlier quotation from *Flight Line, Inc.* that "expert opinions . . . are not obligatory or binding on triers of fact but are advisory in nature." *See Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1166 (Miss. 1992). This Court therefore concludes that the Commission's opportunity to cross-examine Sexton was not so substantially impaired as to constitute error on the part of the trial judge; and we resolve this second issue adversely to the Commission.

> **C. Third Issue** Whether the trial court erred in refusing jury instructions P-3, P-9 and in granting jury instruction D-1.

1. Instruction D-1

Over the Commission's objection, the trial judge granted Instruction D-1, which the Yelvertons had requested. This instruction read:

> The Court instructs the jury that a landowner may give his opinion of the fair market value of his property without showing that he possesses the qualification necessary to be

> accepted as an expert witness. This is allowed since he has acquired a unique view of the property through his ownership and the law recognizes that he ought to be allowed to share this view with the jury.

The record contains the following objection by the Commission's counsel to this instruction:

> Your Honor, D-1 appears to be a correct rule of evidence, but it is not a rule of substantive law that would help this jury decide this case. This is a rule that would go to the admissibility of the landowners' opinion, not a rule that would help the jury in determining whether that testimony should be accepted or rejected. It implies in fact that the jury should accept it as credible, and it further implies that this testimony is supported by sound basis, and it gives undue emphasis to Mr. Yelverton's testimony.

The trial judge responded to the Commission's objection as follows:

> I am going to grant that instruction. The reason is that the Court's instruction tells the jury that they are to determine credibility and weight of all the evidence, of all the witnesses, and this instruction allows them to understand that this landowner can testify and give his own opinion, and his opinion, of course, can be given whatever weight and credibility the jury wishes to do so, and that is the jury is instructed to that.

The Commission's counsel then inquired if there was any guidance in the Court's instruction to the jury that "they may accept or reject any witness' testimony according to their . . . ." The trial judge responded by reading the following portion of the "Court's Instruction": "Your exclusive domain is to determine what weight and what credibility would be assigned the testimony and the supporting evidence of each witness in a case." The Commission's counsel responded, "Okay. That is fine."

Nevertheless, the Commission has assigned as error the trial judge's granting of Instruction D-1.

The Commission argues that while Instruction D-1 "contains a correct statement of a rule of evidence, its reference to a landowner's "unique view of the property" is an improper comment upon the evidence and served to give Mr. Yelverton's testimony an indicia of reliability which it otherwise lacked." The Commission next argues that Instruction D-1 "highlighted and enhanced Mr. Yelverton's words." In summary, the Commission's position is that Instruction D-1 "comments upon the weight of the evidence."

The Commission's arguments do not persuade this Court that the trial judge erred when he granted the Yelvertons' requested Instruction D-1. Instead, we accept the trial judge's explanation for his granting this instruction. As the judge explained, the instruction does no more than explain the policy rationale as to why a landowner is qualified to testify as to the value of his property. *See, e.g., Potters II v. State Highway Comm'n,* 608 So. 2d 1227, 1235 (Miss. 1992) (the rule allowing a landowner to testify as to the value of his property "proceeds on the premise that the landowner

through his ownership has acquired a unique view of the property and that he can and ought be allowed to share this view with the jury").

Moreover, jury instructions are not reviewed in isolation but must be read as a whole for the purpose of determining whether the jury was fairly instructed. *Burton ex rel. Bradford v. Barnett*, 615 So. 2d 580, 583 (Miss. 1993). If the instructions, taken together, properly instruct the jury, no reversible error exists due to an error in one instruction. *Detroit Marine Eng'g v. McRee*, 510 So. 2d 462, 467 (Miss. 1987). Thus, even if we were to find that the language to which the Commission objected involved an improper comment on the evidence or invited the jury to place undue weight upon Yelverton's testimony, we think that any such error is more than cured by the general instruction that the trial judge also gave to the jury that its "exclusive domain . . . [was] to determine what weight and what credibility would be assigned the testimony and the supporting evidence of each witness in a case." Even the Commission's counsel replied, "Okay. That is fine," when the trial court directed his attention to this portion of the Court's Instruction. We affirm the trial judge's granting Instruction D-1.

2. Instructions P-3 and P-9

The Commission also asserts that the trial judge erred in refusing to give jury instructions P-3 and P-9. Instruction P-3 read:

> In determining fair market value of the property sought to be acquired in this case, you, the jury, should not take into consideration what you think the land might be worth at some future date or speculate on some future use of the property that is not supported by the evidence; neither should you consider any elements of inconvenience or other elements of damage which are speculative, imaginary or remote which may or may not occur in the future.

The trial judge explained his denial of Instruction P-3 which the Commission requested as follows:

> I am going to refuse it for this reason, Mr. Lewis . . . . [T]he jury has not heard any testimony or evidence in my opinion on anything other than what they have in the before and after posture in this case. If there is any element of inconvenience it was included in the damages and arrived at by the witnesses. There is nothing in addition to the after value that would be tacked on, as a matter of fact in one of the instructions, we said no special damages should be added to it, is the way I interpreted that instruction. So we have told them over and over in these instructions the before and after and the differences is what the damages are, and they are pretty much before the jury in that capacity.

The record reflects that the Commission's counsel had not prepared Instruction P-9 beforehand, but, instead, dictated it into the record after the trial judge had denied Instruction P-3. Instruction P-9 as dictated into the record read:

> The Court instructs the jury that you should not consider sympathy nor the emotional

> impact which the acquisition may have on the defendants. Your sole focus in determining just compensation should be the fair market value of the acquired property.

The Yelvertons' counsel opposed granting this Instruction P-9 because the trial judge had instructed the jury in the Court's Instruction that "[y]ou should not be influenced by bias, sympathy or prejudice." The Commission's counsel responded:

> What about the emotional impact of the taking? Recall Mr. Yelverton's testimony, it was emotional at times, he did say this was their dream home. I think the jury needs to be told that they ought not to consider that.

The trial judge explained his denial of Instruction P-9 as follows:

> Well, I think that it is covered here with bias, sympathy, prejudice, not to speculate, do any guesswork or conjecture on their verdict. I am going to leave that in these Court's instruction. Your submitted instruction is now quoted in the record, and I have refused it. P-9 refused.

The paragraph in the Court's Instruction to which the trial judge referred read as follows:

> It is your duty to determine the facts from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. You should not be influenced by bias, sympathy or prejudice. Your verdict should be based on evidence and not upon speculation, guesswork or conjecture.

In *Bradford ex rel. Burton v. Barnett*, 615 So. 2d 580, 583 (Miss. 1993) (citations omitted), an opinion from which we previously quoted, the Mississippi Supreme Court opined:

> Defects in specific instructions do not require reversal "where all instructions taken as a whole fairly -- although not perfectly -- announce the applicable primary rules of law."

This court concludes that the portions of the Court's Instruction which we quoted adequately and effectively instructed the jury on the matters which the Commission sought to address in its Instructions P-3 and P-9. Thus, the trial judge did not err when he denied both of these instructions. We affirm his denial of both of these instructions and resolve this portion of Issue three against the Commission.

V. Summary

The Yelvertons' appraiser, William Sexton, complied substantially, if clumsily, with the before and

after rule when he offered his opinion about the amount of damage which his clients' property would sustain by the Commission's taking of this portion of their lot for the widening and relocation of Highway 302. Although he was admittedly not an expert in the matter of land appraisals, the landowner, Danny Yelverton, was entitled to express his opinion about the amount of just compensation to which his wife and he were entitled to receive for the Commission's taking the southernmost 0.35 acre portion of their lot. Regardless of the trial court's ruling on the Yelvertons' motion *in limine*, which was perhaps less restrictive than the Commission contends, counsel for the Commission was allowed adequate opportunity to cross-examine the Yelvertons' appraiser about his evaluation of their severance/proximity damages at $15,000. Moreover, the Commission offered rebuttal testimony of their appraiser to show that there was no basis for such an estimate of severance/proximity damages by the Yelvertons' appraiser, a fact which he admitted himself under the Commission's cross-examination.

The maximum difference between the Yelvertons' appraiser's before value of $185,000 for their property and the Commissions' appraiser's after value of $130,050 for the Yelvertons' property was $54,950. The jury's verdict for $47,500 was $7,450 less than this maximum difference of $54,950. Thus we have concluded that the trial court did not err when it overruled the Commission's motion for JNOV and alternative relief, included in which was the Commission's request for a remittitur of the judgment "to $19,950." The trial court did not err because it did not abuse its discretion in denying that motion. Moreover, our perusal of all the instructions persuades us that the all the instructions taken as a whole fairly informed the jury about the applicable primary rules of law in this eminent domain proceeding. Therefore, we affirm the judgment of the special court of eminent domain.

THE JUDGMENT OF THE DESOTO COUNTY SPECIAL COURT OF EMINENT DOMAIN IS AFFIRMED. COSTS ARE ASSESSED TO APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., BARBER, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.