IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60674

BAY POINT PROPERTIES, INCORPORATED,

Plaintiff - Appellant

v.

MISSISSIPPI TRANSPORTATION COMMISSION; MISSISSIPPI DEPARTMENT OF TRANSPORTATION; DICK HALL, in his capacity as Mississippi Transportation Commissioner; MIKE TAGERT, in his capacity as Mississippi Transportation Commissioner; TOM KING, in his capacity as Mississippi Transportation Commissioner; WAYNE H. BROWN, in his capacity as former Mississippi Transportation Commissioner; MELINDA MCGRATH, in her capacity as Executive Director of the Mississippi Department of Transportation; LARRY BROWN, in his capacity as former Executive Director of Mississippi Department of Transportation, also known as Butch; DANIEL B. SMITH, in his capacity as Administrator of the Right-of-Way Division of Mississippi Department of Transportation,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Aug. 27, 2019)

Before DAVIS, HO, and ENGELHARDT, Circuit Judges.

JAMES C. HO, Circuit Judge:

A state court jury found that Mississippi state officials violated the Takings Clause by exceeding the scope of a state easement on private property. But the jury granted a monetary award considerably lower than the amount of "just compensation" sought by the property owner. So the property owner, after losing on appeal in state court and unsuccessfully seeking certiorari in the U.S. Supreme Court, brought this suit in federal court. The State moved to dismiss on sovereign immunity grounds, and the district court granted the motion in an exhaustive opinion. We agree and accordingly affirm.

While this case was pending on appeal, the Supreme Court issued its decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). In its supplemental briefing, the property owner contends, in effect, that *Knick* overturns prior sovereign immunity law in cases arising under the Takings Clause. But we find nothing in *Knick* to support that claim.[1]

---

[1] In its original brief, the property owner asked us to "address the tension" between state sovereign immunity and the right to just compensation under the Fifth and Fourteenth Amendments. That determination, however, is one for the Supreme Court—not this panel. *See*, *e.g.*, *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993) (holding that takings claims under the Fifth Amendment are "barred because under the Eleventh Amendment, a citizen may not sue his own state in federal court")

It is well established under the Supreme Court's sovereign immunity precedents that there are "only two circumstances in which an individual may sue a State": (1) Congressional abrogation of state sovereign immunity consistent with the Enforcement Clause of the Fourteenth Amendment; or (2) State waiver of immunity. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). As the district court correctly concluded, neither of these circumstances are present in this case.

Nothing in *Knick* alters these bedrock principles of sovereign immunity law. To begin with, the Court did not even have occasion to re-consider sovereign immunity law in *Knick*, because that case involved a suit against a locality, and it is well established that local governments are not entitled to the sovereign immunity enjoyed by states. *See*, *e.g.*, *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193 (2006) ("[T]his Court has repeatedly refused to extend sovereign immunity to counties."); *Jinks v. Richland County*, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.").

Nor does anything in *Knick* even suggest, let alone require, reconsideration of longstanding sovereign immunity principles protecting states from suit in federal court. Rather, *Knick* held only that "a property owner has a claim for a violation of the Takings Clause" cognizable in federal court "as soon as a government takes

---

(citing U.S. CONST. amend. XI; *Pennhurst State Sch. & Hosp. v. Haldeman*, 465 U.S. 89, 98 (1984)).

his property for public use without paying for it." 139 S. Ct. at 2170. Accordingly, *Knick* did away with the previous rule requiring "a property owner [to] pursue state procedures for obtaining compensation before bringing a federal suit." *Id.* at 2173.

In other words, to the extent that *Knick* has any effect on suits against state governments, the Court simply put takings claims against state governments on equal footing with claims against the federal government. *See id.* at 2170 ("We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken."). And nobody disputes that takings claims against the federal government require the waiver of sovereign immunity contained in the Tucker Act. *See id.* (citing 28 U.S.C. § 1491(a)(1)); *id.* at 2186 (Kagan, J., dissenting) ("The Tucker Act waives the Federal Government's sovereign immunity.").

Not surprisingly, then, the Tenth Circuit has already held that *Knick* does not alter traditional principles of state sovereign immunity. *See*, *e.g.*, *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) ("*Knick* did not involve Eleventh Amendment immunity, which is the basis of our holding in this case. Therefore, we hold that the takings claim against the [Utah Department of Corrections] must be dismissed based on Eleventh Amendment immunity."). We therefore affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

BAY POINT PROPERTIES, INC. PLAINTIFF

v. Civil No. 1:17cv207-HSO-RHW

MISSISSIPPI TRANSPORTATION COMMISSION, et al. DEFENDANTS

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION 161 TO DISMISS

(Filed Aug. 20, 2018)

BEFORE THE COURT is the Motion [6] to Dismiss filed by Defendants Mississippi Transportation Commission ("MTC"), Mississippi Department of Transportation ("MDOT"), Dick Hall, Mike Tagert, Wayne H. Brown, Melinda McGrath, Larry "Butch" Brown, and Daniel B. Smith. Plaintiff Bay Point Properties, Inc. ("Bay Point") owns fourteen acres of land sitting on the eastern shore of the Bay of Saint Louis in Mississippi. However, the Mississippi State Highway Commission held a permanent easement over the land for highway purposes to facilitate the construction and maintenance of the eastern foot of the bridge spanning the bay. In 2005, Hurricane Katrina struck the Mississippi Gulf Coast, destroying the bridge. MTC and MDOT rebuilt the bridge, after which they decided to also construct a public park on the remainder of the property that fell within the geographic limits of the easement.

Bay Point sued MTC and MDOT in state court, arguing that construction of the park constituted a taking of Bay Point's land. A jury awarded Bay Point as just compensation $500.00 in damages, and the Mississippi Supreme Court affirmed the judgment. Bay Point now brings this suit in federal court, seeking over $16 million in just compensation and a declaratory judgment that Defendants' actions and two Mississippi statutes are unconstitutional. Because Bay Point's claims are barred by the Eleventh Amendment to the United States Constitution, Defendants' Motion [6] to Dismiss should be granted. This case will be dismissed without prejudice for lack of jurisdiction.

I. BACKGROUND

A. Factual Background

Bay Point is a Mississippi corporation that owns a 14.34 acre parcel of land in Pass Christian Isles, Mississippi. Compl. [1] ¶¶ 10, 20. This property sits at the eastern foot of the U.S. Highway 90 bridge that crosses the Bay of St. Louis in Mississippi. *Id.* Bay Point purchased the property from Wallace Walker on August 1, 1994. *Id.* ¶ 21. During Walker's ownership of the property, on May 27, 1952, he granted the Mississippi State Highway Commission, which was the predecessor to MTC, an easement over the property for highway purposes. *Id.* 24. The easement was obtained for the specific purpose constructing "Toll Project No. 1," the bridge crossing the Bay of St. Louis between the cities of Pass Christian and Bay St. Louis. *Id.*

After the easement was granted, MTC and MDOT operated Toll Project No. 1 for more than fifty years until Hurricane Katrina destroyed the bridge on August 29, 2005. *Id.* ¶ 26. MTC and MDOT chose not to rebuild Toll Project No. 1, but rather demolished and removed it. *Id.* ¶ 27. MTC and MDOT decided to relocate the bridge and selected a different roadbed for the new U.S. Highway 90, and thus the bridge, which required the establishment of a new right-of-way and the acquisition of additional property. *Id.* ¶ 28. Ultimately, MTC and MDOT used 4.6 acres of Bay Point's tract of land to build the new highway, bridge, and its necessary right-of-way. *Id.* ¶ 30.

After completion of the new bridge, MTC and MDOT elected to construct a recreational park on the remainder of the property that was not used for the new bridge but was still subject to the easement. *Id.* ¶ 31. The park was built on the abandoned roadbed of the discontinued Toll Project No. 1. *Id.* ¶ 32. In its minutes dated November 10, 2009, MTC authorized MDOT to enter into a Memorandum of Agreement on behalf of MTC with Harrison County regarding the financing, construction, and operation of the park on Bay Point's property. *Id.* ¶ 36. Under the Memorandum, MTC would construct the park and Harrison County would operate and maintain it. *Id.* ¶ 38.

When Bay Point learned of MTC and MDOT's intention to construct the park, it sent a letter to MTC and MDOT on November 20, 2009, objecting to the park's construction and demanding that construction cease. *Id.* ¶ 40. On December 2, 2009, Defendant

Daniel Smith, Administrator of the Right-of-Way Division of MDOT, emailed Bay Point requesting to discuss the issue. *Id.* ¶ 41. Ultimately, MTC took the position that the original easement had not been abandoned and that Mississippi Code section 65-1-51 authorized it to construct the park on the property in question under the existing easement. *Id.* ¶ 48. Section 65-1-51 states, in relevant part, that the MTC "may acquire and have the Transportation Department develop publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public." Miss. Code. Ann. § 65-1-51. MTC informed Bay Point that it intended to build the park and would not purchase the property from Bay Point. Compl. [1] ¶ 48. The park has been completed and is currently being operated by Harrison County. *Id.* ¶ 51.

B. Procedural History

1. Bay Point's state-court jury trial and appeal

On April 1, 2011, Bay Point filed an inverse condemnation suit against MTC and MDOT in the Circuit Court of Harrison County, Mississippi. *Id.* ¶ 53. A jury trial took place from August 5 to August 13, 2013. *Id.* ¶ 54. The jury returned a verdict in favor of Bay Point on its inverse condemnation claim, finding that the use of the property was not for highway purposes and that there was a taking of Bay Point's property for public use. *Id.* ¶ 57. The trial court instructed the jury that

unless it found that MTC had released the easement on its minutes, MTC retained the easement and the jury could award Bay Point a sum of money not to exceed a nominal sum supported by the evidence in the case. *Id.* ¶¶ 55, 58. The jury determined that the easement continued to encumber the property, Miss. Sup. Ct. Op. [1-1] at 1-2, and awarded Bay Point $500.00 in damages, Compl. [1] ¶ 59. The trial court denied Bay Point's motion for attorneys' fees and costs, and entered a Final Judgment on January 8, 2014. *Id.* ¶ 60.

Bay Point appealed the trial court's Final Judgment to the Supreme Court of Mississippi, *id.* ¶ 61, which affirmed the merits[1] of the Final Judgment on July 21, 2016, *id.* ¶ 62. After the Supreme Court of Mississippi resolved Bay Point's appeal, on March 3, 2017, Bay Point filed a petition for a writ of certiorari with the United States Supreme Court, which denied Bay Point's petition on June 26, 2017. Compl. [1] ¶ 63-64.

2. Bay Point's Complaint in federal court

On July 21, 2017, Bay Point filed a Complaint [1] in this Court pursuant to 42 U.S.C. § 1983, advancing several claims for constitutional violations. The Complaint names as Defendants MTC, MDOT, Mike Tagert and Tom King, in their capacities as Mississippi Transportation Commissioners, Wayne Brown and William Minor, in their capacities as former Mississippi

[1] The Mississippi Supreme Court reversed that portion of the judgment which denied Bay Point's motion for attorneys' fees and costs, and remanded that single issue to the circuit court. *Id*. ¶ 62.

Transportation Commissioners, Melinda McGrath, in her capacity as Executive Director of the MDOT, Larry "Butch" Brown, in his capacity as former Executive Director of MDOT, and Daniel Smith, in his capacity as Administrator of the Right-of-Way Division of MDOT. Compl. [1].

Counts I, II, and VI of the Complaint bring takings, substantive due process, and unreasonable seizure claims, respectively. Compl. [1] at 19. These claims rest upon similar grounds, specifically, that Defendants physically invaded Bay Point's property and destroyed Bay Point's property rights without just compensation. Bay Point alleges that when MTC and MDOT discontinued Toll Project No. 1, the purpose of the easement was terminated and the property was no longer burdened by the easement under common law. *Id.* at 79. MTC was then mandated to release the easement on its minutes under Mississippi Code section 65-1-123. Alternatively, Bay Point claims that section 65-1-123 cannot be applied retroactively to the easement created in 1952. Bay Point contends that Defendants' enforcement of Mississippi Code sections 65-1-123 and 65-1-51 to take Bay Point's land without just compensation is unconstitutional.

In [sic] Count III advances a procedural due process claim, Compl. [1] at 34, and Count IV alleges a violation of equal protection, *id.* at 35. Bay Point claims that Defendants violated the Contracts Clause of the Fourteenth Amendment in Count V on grounds that Mississippi Code section 65-1-123(5)-(7) was not added

to the statute until 1988, and Defendants cannot retroactively apply that statute to impair Bay Point's rights under the easement since it was executed in 1952. Compl. [1] at 37-38.

Count VII asserts a violation of 42 U.S.C. § 1983 and claims that Defendants violated Bay Point's constitutional rights by taking its property without just compensation, Compl. [1] at 39, while Count VIII advances a claim for unjust enrichment/constructive trust. Bay Point asserts that it is the owner of the underlying fee interest in the property and that Defendants will be unjustly enriched if they continue to possess Bay Point's property for a purpose different from that for which the easement was granted. Compl. [1] at 43.

Finally, Count IX seeks declaratory relief and asks the Court to declare Mississippi Code sections 65-1-123 and 65-1-51 unconstitutional facially and as applied to Bay Point. Compl. [1] at 44, 46. Bay Point's prayer for relief asks the Court to declare that Defendants' enforcement of Mississippi Code sections 65-1-123 and 65-1-51 violates the Takings Clause, Due Process Clause, the Equal Protection Clause, and the Contracts Clause of the Constitution. Compl. [1] at 47. Bay Point seeks actual damages and just compensation in the amount of $16,214,926.00. *Id.* at 47-48.

3. Defendants' Motion [6] to Dismiss

On September 1, 2017, Defendants filed a Motion [6] to Dismiss, seeking dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and asserting that Bay Point's claims are barred by the Eleventh Amendment because all Defendants are state agencies or officials named in their official capacities and no consent has been given for this suit. Defs.' Mem. [7] at 5. Defendants also raise several arguments under Federal Rule of Civil Procedure 12(b)(6) that the Complaint fails to state a claim upon which relief can be granted. Defendants assert that Bay Point cannot pursue a § 1983 claim against them because, as state agencies and officials acting in their official capacities, they are not suable "persons" under 42 U.S.C. § 1983. *Id.* at 8. Defendants further contend that Bay Point's claims are barred by the doctrine of res judicata because both the state court suit and this case involve the construction of the park and Bay Point's claim for damages for the alleged taking of its property. *Id.* at 4-5. Defendants next argue that the applicable statutes of limitations bar Bay Point's claims, except for the unjust enrichment claim. *Id.* at 6.

Defendants posit that all of Bay Point's constitutional, declaratory relief, and § 1983 claims are governed by a three-year statute of limitations and note that Bay Point filed its Complaint in this Court on July 21, 2017, *id.* at 6-7, while the limitations period commenced on April 15, 2010, when MDOT notified Bay Point that it planned to continue public use of the

easement, *id.* at 7. Lastly, Defendants contend that Bay Point has not stated a claim for unjust enrichment because Defendants paid for their property interests by purchasing a permanent easement and paying the judgment awarded by the jury. *Id.* at 9.

Bay Point counters that the Eleventh Amendment does not bar suits against state officials in their official capacities for an ongoing violation of federal law that seek prospective declaratory relief. Pl.'s Resp. [28] at 25. Bay Point contends that all Defendants are proper "persons" under 42 U.S.C. § 1983 on grounds that it sued the individual Defendants in their personal capacities and all Defendants are proper persons when declaratory relief is sought, *id.* at 29-30, and that its Complaint is not precluded by res judicata, *id.* at 7-10. Bay Point agrees with Defendants that all of its claims with the exception of the unjust enrichment claim are governed by a three-year statute of limitations, but takes the position that its claims did not accrue until the United States Supreme Court denied the petition for writ of certiorari on June 26, 2017. *Id.* at 26. Lastly, Bay Point contends that it is entitled to relief on its unjust enrichment claim because it still owns title to the underlying fee interest in the property and Defendants have been unjustly enriched by using the property. *Id.* at 33-34.

II. DISCUSSION

A. Legal standard

Defendants' argument that Bay Point's claims should be dismissed on Eleventh Amendment immunity grounds is a challenge to the Court's subject-matter jurisdiction that is evaluated under Federal Rule of Civil Procedure 12(b)(1).

Under Rule 12(b)(1), "[a] case is properly dismissed for lack of subject[-]matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quotation omitted). When the Court's subject-matter jurisdiction is challenged, the party asserting jurisdiction bears the burden of establishing it. *King v. U.S. Dep't of Veterans Affairs*, 728 F.3d 410, 413 (5th Cir. 2013). The Court has the power to dismiss a complaint for lack of subject-matter jurisdiction on any one of three bases: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* (quoting *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)).

When presented with a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court "must assess whether the complaint contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face[.]" *Spitzberg v. Houston Am. Energy Corp.*, 758 F.3d 676, 683 (5th Cir. 2014)

(citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A court must accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff. *Varela v. Gonzales*, 773 F.3d 704, 707 (5th Cir. 2014) (citation omitted). This tenet, however, is inapplicable to legal conclusions. *Id.* (citation omitted).

B. Analysis

1. Immunity under the Eleventh Amendment

a. MTC and MDOT, as state agencies, are immune from Bay Point's claims.

Defendants assert that this Court lacks subject-matter jurisdiction over Bay Point's claims on grounds that they are immune from suit under the Eleventh Amendment to the United States Constitution. Defs.' Mem. [7] at 5-6. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

"Eleventh Amendment immunity operates like a jurisdictional bar, depriving federal courts of the power to adjudicate suits against a state." *Union Pac. R. Co. v. La. Pub. Serv. Comm'n*, 662 F.3d 336, 340 (5th Cir. 2011). A nonconsenting state is immune from suits

brought in federal court by the state's own citizens as well as by citizens of another state. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Eleventh Amendment immunity extends to any state agency or other political entity that is deemed an "arm" of the state. *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997).

Bay Point alleges that both MTC and MDOT are agencies of the State of Mississippi. Compl. [1] at ¶ 11-12; *see also* Miss. Code Ann. § 65-1-2 (designating MDOT as a "state agency" under statute creating the department); *Stuckey v. Mississippi Transp. Comm'n*, No. 3:07CV639TLS-JCS, 2009 WL 230032, at *1-2 (S.D. Miss. Jan. 29, 2009) (finding that MTC is an arm of the State). MTC and MDOT are state agencies, and there is nothing in the record to indicate that MTC or MDOT have consented to this suit in federal court. Therefore, the Eleventh Amendment bars all of Bay Point's claims against MTC and MDOT, and these Defendants will be dismissed from this civil action.

b. The Eleventh Amendment bars Bay Point's claims against the individual Defendants because Bay Point seeks monetary and retrospective relief.

The remaining Defendants are all state officials of MTC or MDOT who are being sued in their official capacities. *See* Compl. [1] at 1. While Bay Point argues in its Response that it has sued the individual Defendants in their individual capacities, looking to the Complaint, the case caption clearly identifies all of the

individual Defendants as sued in their "capacit[ies] as Mississippi Transportation Commissioner, . . . Executive Director of the Mississippi Department of Transportation," or "Administrator of the Right-of-Way Division" of the MDOT. Compl. [1] at 1. The Complaint does not mention "individual capacity" or "personal capacity" with respect to these named Defendants. Bay Point is represented by counsel such that it is not entitled to the liberal construction of its pleadings normally accorded to a pro se litigant. *Cf. Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981).

Even construing Bay Point's pleading as ambiguous as to whether the individual Defendants are being sued in their official or individual capacities, when a complaint does not clearly specify such capacity, "'[t]he course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). "In assessing the 'course of proceedings,' courts consider several factors including the contentions made in the parties' briefs, the substance of the complaint, and the nature of the relief a plaintiff seeks." *McPhail v. City of Jackson*, No. 3:13CV146-HSO-RHW, 2014 WL 2819026, at *5 (S.D. Miss. June 23, 2014).

Bay Point does contend in its brief that it has sued the individual Defendants in their personal capacities. But the procedural history of this case, the substance of the Complaint, and relief sought by Bay Point demonstrate otherwise. In state court, Bay Point only sued the MTC and MDOT, and did not sue any of the individual Defendants. Looking to the substance of the

Complaint, the Complaint alleges that the easement over the property was granted to the Mississippi State Highway Commission, which was the predecessor to MTC, that MTC constructed the park on Bay Point's property, and that the jury found that MTC took Bay Point's property but that MTC had not abandoned the easement. "Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Graham*, 473 U.S. at 165 (citation, quotation marks, and ellipses omitted). Bay Point has claimed that it has been injured by MTC's retention of the easement, and the substance of the Complaint does not allege personal liability on the part of the individual Defendants.

"Personal-capacity suits seek to impose personal liability," and "an award of damages against an official in his personal capacity can be executed only against the official's personal assets." *Graham*, 473 U.S. at 165, 166. Here, however, Bay Point seeks an award of damages for just compensation for the taking, an award that would not come from the individual Defendants' personal assets, but rather from the State's purse. Moreover, Bay Point does not plead for punitive damages in its Complaint, which are only "available in a suit against an official personally." *Graham*, 473 U.S. at 167 n.13. Bay Point has not pleaded that it is seeking to impose personal liability on the individual Defendants.

c. The *Ex parte Young* exception does not apply to this case.

Bay Point contends that it can nevertheless proceed on its claims for declaratory relief against the state officials in their official capacities. Pl.'s Resp. [28] at 24. Under the Supreme Court's exception to the Eleventh Amendment created in *Ex parte Young*, a suit challenging the constitutionality of a state official's action in enforcing state law is not a suit against the state. 209 U.S. 123, 159-60 (1908). *Ex parte Young* held that Eleventh Amendment immunity does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law in claims against state officials sued in their official capacities. *Id.* at 155-56. Permissible suits under *Ex parte Young* are confined to cases where "the relief sought" is "declaratory or injunctive in nature and prospective in effect." *Saltz v. Tenn. Dep't of Emp't Sec.*, 976 F.2d 966, 968 (5th Cir. 1992).

The Supreme Court has "refused to extend the reasoning of *Young*, however, to claims for retrospective relief." *Green v. Mansour*, 474 U.S. 64, 68 (1985). *Ex parte Young* cannot be used, for instance, to obtain an injunction requiring the payment of funds from the state's treasury or an order for specific performance of a state's contract. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 256-57 (2011). Nor does *Ex parte Young* apply to cases where "federal law has been violated at one time or over a period of time in the past," or to "cases in which that relief is intended indirectly to encourage compliance with federal law through

deterrence or directly to meet third-party interests such as compensation." *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986). The *Ex parte Young* exception is also not available "if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else." *Id.* at 278.

Stated more broadly, the *Ex parte Young* exception does not apply when the state is the real, substantial party in interest. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). The "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." *Id.* at 107 (emphasis in original). In determining whether the *Ex parte Young* exception applies to a suit, "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation and quotation marks omitted). Here, Bay Point advances claims seeking actual damages and a monetary award for just compensation. Because an award of such damages would come from the State's treasury, these claims are barred.

Bay Point also seeks declaratory relief, requesting the Court enter a declaratory judgment adjudicating Mississippi Code sections 65-1-51 and 65-1-123 unconstitutional. Compl. [1] ¶ 205. A review of Bay Point's Complaint reveals that it is seeking relief that is not prospective in nature. The substance of Bay Point's allegations with respect to the claim for declaratory

relief are that Defendants have applied Mississippi Code sections 65-1-51 and 65-1-123 "to preclude Plaintiff from recovering just compensation," and "to award Bay Point only a nominal sum of $500 in damages, rather than the just compensation due of $16,214,926." Compl. [1] ¶¶ 198-202. These allegations indicate that Bay Point seeks declaratory relief in order to receive greater compensation and money damages than it did in state court based upon a past violation of federal law. *Ex parte Young* does not apply in such a situation.

The retrospective nature of Bay Point's requested relief is made clear by its Response in Opposition to Defendants' Motion to Dismiss, in which Bay Point asserts that it seeks declaratory relief because Defendants have applied the Mississippi statutes "to preclude Plaintiff from recovering just compensation" for the taking. PL's Mem. [28] at 25. Moreover, Bay Point asserts that "the Eleventh Amendment should not immunize Defendants from the obligation to pay just compensation." *Id.* at 26. In other words, Bay Point has acknowledged that with regard to its requested injunctive relief, the only effect it seeks is to require the State to pay over $16 million in compensation.

Furthermore, with regard to the request for declaratory relief, Bay Point posits that "[t]here is a justiciable controversy in this case as to whether Defendants can retroactively apply Miss. Code Ann. § 65-1-123 to expand the right of MTC to use property beyond the scope of highway easements limited to specific purposes" and as to whether Defendants have

applied the Mississippi statutes "so that private property can be used by the public for entirely different purposes than the one use permitted under an existing specific highway easement without the payment of just compensation." Compl. [1] ¶¶ 203-04.

These assertions do not allege an ongoing violation of federal law, rather, they speak in terms of actions that have occurred in the past. Defendants' application of these statutes to Bay Point occurred in the past, when Defendants constructed the park on Bay Point's property and when the jury determined during the state court proceedings that the easement continued to encumber the property. The controversy regarding MTC's use of the property beyond a highway purpose has already occurred and has been adjudicated by both a state trial court and the State's highest court.

Bay Point does also maintain that Defendants' "ongoing, physical invasion" of Bay Point's property violates the Constitution. Pl.'s Resp. [28] at 25. Even if the Court were to construe Defendants' continued operation of the park as an ongoing violation of federal law, Bay Point still has not shown enough to avoid the Eleventh Amendment bar to its suit. Bay Point must allege an ongoing violation of federal law *and* seek relief that is prospective in nature. *Verizon*, 535 U.S. at 645. In other words, Bay Point must seek relief that will govern the future conduct of Defendants. *See Pennhurst*, 465 U.S. at 102-03. Bay Point's request for declaratory relief does not seek to enjoin Defendants from taking any action in the future, and Bay Point

does not allege that it faces a threatened future injury from Defendants' application of these statutes.

If Bay Point's request is construed as seeking to enjoin Defendants from operating the park and from relying on the MTC minutes to maintain that the easement has not been terminated, and requiring Defendants to look to common law at the time of the grant of the easement, under the particular circumstances of this case such relief remains nonetheless retrospective. A Mississippi trial court applied the statutes Bay Point now challenges and a jury accordingly found that the easement had not been terminated, thus the property was still encumbered. The Supreme Court of Mississippi affirmed that verdict. Declaring the Mississippi statutes unconstitutional would have the effect of nulling the state court judgment. Bay Point's chief complaint is that it believes that it has been injured by receiving only $500.00 in just compensation. But to the extent Bay Point claims that it has been harmed by the jury's award, that injury has already occurred, and undoing that verdict would in effect afford Bay Point retrospective, not prospective, relief.

Bay Point's claims in this regard cannot avoid Defendants' Eleventh Amendment immunity, and this Court must dismiss them because it lacks jurisdiction to adjudicate them. Because the basis for the dismissal is this Court's lack of subject-matter jurisdiction due to the Eleventh Amendment, the dismissal will be without prejudice. *Campos v. United States*, 888 F.3d 724, 738 (5th Cir. 2018).

III. CONCLUSION

IT IS, THEREFORE, ORDERED AND ADJUDGED that Defendants Mississippi Transportation Commission, Mississippi Department of Transportation, Dick Hall, Mike Tagert, Wayne H. Brown, Melinda McGrath, Larry "Butch" Brown, and Daniel B. Smith's Motion [6] to Dismiss is **GRANTED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that this civil action is **DISMISSED WITHOUT PREJUDICE** on grounds of Eleventh Amendment immunity.

SO ORDERED AND ADJUDGED, this the 20th day of August, 2018.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

201 So. 3d 1046

Bay Point Props. v. Miss. Transp. Comm'n

Supreme Court of Mississippi

July 21, 2016, Decided

NO. 2014-CA-01684-SCT

Counsel: ATTORNEYS FOR APPELLANT: WILLIAM ALEX BRADY, II, CHARLES STERLING LAMBERT, JR.

ATTORNEYS FOR APPELLEES: CHRISTOPHER M. HOWDESHELL, JACK HOMER PITTMAN.

Judges: RANDOLPH, PRESIDING JUSTICE, WALLER, C.J., DICKINSON, P.J., LAMAR, COLEMAN, MAXWELL AND BEAM, JJ., CONCUR. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J.

Opinion by: RANDOLPH

Opinion

NATURE OF THE CASE: CIVIL - EMINENT DOMAIN

EN BANC.

RANDOLPH, PRESIDING JUSTICE, FOR THE COURT:

P1. Bay Point Properties Inc. filed inverse condemnation proceedings against the Mississippi Transportation

Commission,[1] claiming the easement MTC had across Bay Point's property had terminated and that MTC was required to pay Bay Point the unencumbered value of the property. The issue was put to the jury, which determined the easement—for which the Commission had paid $50,000—continued to encumber the property, but that the use by MTC was not a highway purpose. The jury awarded Bay Point the encumbered value of $500, as testified to by two witnesses.[2] Bay Point appealed. We affirm in part the judgment of the Circuit Court for the First Judicial District of Harrison County. However, the trial court failed to follow Section 43-37-9's mandate to "determine and award or allow . . . such sum as will, in the opinion of the court[,] . . . reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding." Thus, we reverse the judgment of the Harrison County Circuit Court in part and remand the case with instructions to the trial court to hold a hearing in compliance with Section 43-37-9.

FACTS AND PROCEDURAL HISTORY

P2. In 1952, the Mississippi State Highway Commission, MTC's predecessor, acquired an easement over

---

[1] For purposes of this opinion, we refer collectively to the Transportation Commission and the Department of Transportation as MTC.

[2] Bay Point's expert refused to give an encumbered value. As a result, the only encumbered-value testimony before the jury was between $100 and $500.

certain property of Wallace Walker for "all highway purposes" by an agreed judgment.[3] The property was used to reconstruct a bridge spanning the Bay of St. Louis, between Pass Christian and Bay St. Louis, after the bridge had burned in 1948.[4] After Hurricane Katrina destroyed the bridge in 2005, MTC constructed a newly designed bridge across the bay.[5] MTC subsequently entered an agreement with Harrison County, which provided that (1) MTC would build a park, (2) Harrison County would maintain the park, (3) Harrison County would provide MTC any additional property required to build the park, and (4) MTC would maintain its property interest (its easement) in the park. MTC then built a park, with a parking lot, on the old road bed, with stairs connecting to the new bridge, which included a walking and biking path for the public.

P3. Bay Point, Walker's successor in interest, filed inverse condemnation proceedings, claiming the easement terminated on the *whole* property when the new bridge was constructed following Katrina. Alternatively, Bay Point argued that the easement terminated

---

[3] Pursuant to an agreed judgment, the Commission paid Walker $50,000 and Walker reserved a five-foot buffer along Bayou Boisdore to prohibit the general public from using bayou frontage.

[4] The bridge suffered substantial damage following Hurricane Camille in 1969, but MTC was able to repair the bridge in place.

[5] The new design required that the eastern foot of the new bridge be moved south and west to flatten out or straighten the curve approaching the now-elevated bridge.

on that *portion* of the easement used to build the park when the park was constructed. Bay Point asserted MTC's subsequent use constituted a taking for which it was entitled to just compensation of the unencumbered value of the property. MTC argued that it was using the property for highway purposes. Alternatively, MTC argued that, even if its use was not a highway purpose, the easement continued to burden the property because it had not been released on MTC's minutes as required by Section 65-1-123. *See* Miss. Code Ann. § 65-1-123 (Rev. 2012). Therefore, any compensation owed to Bay Point would be the value of the property, encumbered by the easement.

P4. The jury viewed the property and heard five days of testimony before returning a verdict for Bay Point. The circuit court denied Bay Point's motion for attorneys' fees, costs, and expenses, as well as its post-trial motions for additur, new trial on the issue of damages, and/or judgment notwithstanding the verdict (JNOV). Bay Point appealed.

ISSUES

P5. Bay Point raises the following issues, which we restate and reorder for clarity:

> I. Whether the trial court erred in granting MTC's motion in limine regarding release of the easement.
>
> II. Whether the trial court erred in denying Bay Point's supplemental motion in limine regarding testimony of a nominal sum.

III. Whether the trial court erred in excluding testimony of an appraisal of the five-foot buffer.

IV. Whether the trial court erred in giving jury instructions D-2A, D-3A, and D-7A.

V. Whether the trial court erred in refusing jury instruction P-4.

VI. Whether the trial court erred in not instructing the jury that MTC must acquire property in fee to use as rest and recreation areas under Section 65-1-51.

VII. Whether the jury verdict was supported by substantial evidence.

VIII. Whether the trial court erred in denying Bay Point's motion for attorneys' fees and costs.

IX. Whether the trial court erred in denying Bay Point's post-trial motions.

ANALYSIS

I. Whether the trial court erred in granting MTC's motion in limine regarding release of the easement.

P6. Bay Point argues the trial court erred in granting MTC's motion in limine, limiting evidence of abandonment of the easement to the minutes of the Commission. We review evidentiary matters for an abuse of discretion. ***Ware v. Entergy Miss., Inc.***, 887 So. 2d 763, 766 (Miss. 2004). There is no abuse of discretion in granting a motion in limine "if the court determines that (1) the material or evidence in question will be

inadmissible at trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury." ***Id.***

P7. The Legislature has provided by statute the process by which an easement for highway purposes terminates: "All easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes[.]" Miss. Code Ann. § 65-1-123(5). The section further provides that "[i]n no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse[.]" Miss. Code Ann. § 65-1-123(6). Per the statute, the easement could not have been abandoned *by nonuse.* Release (*i.e.*, termination or abandonment) requires a determination on the minutes.

P8. Therefore, any evidence of abandonment other than minute entries is irrelevant and inadmissible. *See* M.R.E. 401 (" 'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); M.R.E. 402 ("Evidence which is not relevant is not admissible."). As the statute itself provides the sole process by which an easement for highway purposes terminates, the trial court did not err in limiting evidence of abandonment to what the statute requires—Commission minute entries.

P9. The dissent's separation-of-powers argument is misplaced. *See* Dis. Op. at ¶¶ 42-43. The Legislature has decreed that it is the Transportation Department's prerogative whether to release a highway easement. MTC is the entity charged with transportation-related policy decisions, not this Court.[6]

II. Whether the trial court erred in denying Bay Point's supplemental motion in limine regarding testimony of a nominal sum.

P10. Bay Point argues on appeal that it filed a supplemental motion in limine to strike any testimony that its property was worth a nominal sum. However, Bay Point mischaracterizes its own motion. Bay Point's supplemental motion in limine requested only that the trial court "bar the expert testimony of John 'Jeb' Stewart[.]" The motion asserted that "Mr. Stewart should not be allowed to offer his opinion. . . . Mr. Stewart should not be allowed to offer any testimony. . . . Mr. Stewart should not be allowed to sit in front of the jury. . . ." Finally, Bay Point requested the court "bar the expert testimony of John 'Jeb' Stewart."

P11. While the trial court denied the motion, Stewart did not testify. We fail to see how Bay Point was

---

[6] The dissent contends this Court's "interpretation of the law permits the MTC unilaterally to determine when an easement has terminated." Dis. Op. at ¶ 43. To be clear, whether the easement had been abandoned was a determination to be made by the appropriate factfinder—in this case, the jury. *See* Jury Instruction D-7A, ¶ 16, *infra.* As in all cases, a jury's decision is subject to judicial review.

prejudiced by the trial court's refusal to bar Stewart from testifying when Stewart in fact did not testify.[7] *See* M.R.E. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]").

III. Whether the trial court erred in excluding testimony of an appraisal of the five-foot buffer.

P12. At some point, MTC appraised the value of the five-foot buffer around Bayou Boisdore reserved to Walker in the agreed judgment. Bay Point argues the trial court erred in excluding evidence of that appraisal. In ***Coleman v. Mississippi Transportation Commission***, 159 So. 3d 546, 548 (Miss. 2015), this

---

[7] Bay Point argues in its supplemental motion in limine that Brian Moore and Tommy Madison should not have been allowed to testify regarding a nominal value for the same reasons it asserted Stewart should not have been allowed to testify to a nominal value. However, the motion sought only to exclude Stewart's testimony. At trial, Bay Point failed to object that Moore's or Madison's opinions were improper expert testimony. If no contemporaneous objection is made, an error is waived. ***InTown Lessee Assocs., LLC v. Howard***, 67 So. 3d 711, 719 (Miss. 2011). *See also* M.R.E. 103(a)(1). Nevertheless, Madison testified that, according to "the appraisal methodology and treatises," an underlying fee encumbered by an easement for all highway purposes has a nominal value of around $100-$500. Moore testified that "the appraisal industry" places a nominal value of around $500 on property encumbered by an easement for all highway purposes. Opinions supported by methodologies recognized in the appraisal industry are admissible. *See* ***Miss. Gulf Props., LLC v. Eagle Mech., Inc.***, 98 So. 3d 1097, 1103-04 (Miss. Ct. App. 2012) (*citing* ***Gulf S. Pipeline Co. v. Pitre***, 35 So. 3d 494 (Miss. 2010)).

Court held a trial court in error for excluding a second appraisal of the same property. As the appraisal was of the same property, it was "relevant and admissible" as to the value of that property. *Id.* at 551-52. However, the appraisals here are of two different parcels of property. The five-foot buffer was reserved to Walker, and thus he retained rights in that property that he did not retain in the property subject to MTC's easement. The trial court found the evidence would be irrelevant and would serve only to confuse the jury, as the value of the buffer was not related to the value of the property, whether encumbered or not. Moreover, neither the park nor the highway sits on the buffer. The trial court did not abuse its discretion in excluding this evidence.

IV. Whether the trial court erred in giving jury instructions D-2A, D-3A, and D-7A.

P13. "The main query we make when reviewing jury instructions is whether (1) the jury instruction contains a correct statement of the law and (2) whether the instruction is warranted by the evidence." ***N. Biloxi Dev. Co., LLC v. Miss. Transp. Comm'n***, 912 So. 2d 1118, 1123 (Miss. Ct. App. 2005). In reviewing jury instructions, the instructions must be read as a whole. ***Id.***

P14. Instruction D-2A instructed the jury "that an easement encumbers, or is still over and upon the land unless it has been abandoned by [MTC]." Instruction D-3A instructed the jury that, in order to prevail on the

issue of abandonment, Bay Point had to prove by full and clear evidence that MTC had abandoned the easement. The instruction then quoted Section 65-1-123, which provides that abandonment of an easement requires a release on the minutes of the Commission, rather than mere nonuse.

P15. Bay Point argues the full and clear evidence standard was erroneous. However, "[e]vidence of abandonment must be 'full and clear.' " ***Stone v. Lea Brent Family Invs. L.P.***, 998 So. 2d 448, 456 (Miss. Ct. App. 2008) (quoting ***Columbus & Greenville Ry. Co. v. Dunn***, 184 Miss. 706, 185 So. 583, 586 (1939)). Bay Point further argues the easement could have terminated in ways other than a minute entry of release by MTC, but D-3A quoted the statute directly. As discussed in Issue I *supra*, this issue is without merit.

P16. Finally, D-7A presented the jury with three alternative findings:

> If you find (1) that [MTC]'s easement has not been abandoned, and (2) that the use being made of the property in this case is a highway purpose, then your verdict shall be in favor of [MTC], and no sum of money shall be awarded to [Bay Point]. Or,
>
> Alternatively, if you find (1) that [MTC]'s easement has not been abandoned, but (2) that the use being made of the property in this case is not a highway purpose, then your verdict shall be in favor of [Bay Point], and you may award it a sum of money, but said sum may not

> exceed a nominal sum that has been evidenced by the proof in the case. Or,
>
> Alternatively, if, and only if, you find by full and clear evidence that [MTC]'s easement has been abandoned, and that the property of [Bay Point] has been taken by [MTC], you may award [Bay Point] just compensation for any such taking, just compensation being what you determine to be the difference between the fair market value of the property taken after proper application of the before and after rule.

P17. The jury essentially had to resolve two issues: whether the easement was abandoned, and whether the use being made was a highway purpose. If the easement remained in existence and MTC was using it for a highway purpose, there was no taking. If the easement remained in existence, but MTC was using the property for a purpose other than a highway purpose, then MTC took Bay Point's property. However, the compensation owed would be the value of the property, subject to the easement, and could not exceed a sum evidenced by the proof offered. The only encumbered value placed before the jury was a nominal one (between $100 and $500).[8] Alternatively, if the easement had been abandoned, and MTC was using the property for a purpose other than a highway purpose, then MTC

---

[8] Had greater values been testified to, the argument that a "nominal sum" was incorrect would have more validity. However, the only encumbered value evidenced by proof *in this case* was a nominal one. Therefore, the instruction correctly instructed the jury as to how the law applied to the facts in this case.

took Bay Point's property, for which Bay Point was owed the value of the property, unencumbered by the easement. This instruction contains a correct statement of the law that was warranted by the evidence, given the testimony offered of the necessity to repair and/or replace the Highway 90 bridge that spans the Bay of St. Louis. *See* ¶ 2 *supra.*

P18. The dissent raises arguments not presented to the trial court. (*See* Dis. Op. at ¶¶ 41-42). However, we do not consider arguments raised for the first time on appeal. *See* ***Anderson v. LaVere***, 136 So. 3d 404, 410 (Miss. 2014). We do not hold trial courts in error on issues not presented to them for consideration. *See* ***Ridgway Lane & Assocs. v. Watson***, 189 So. 3d 626, 630 n.4 (Miss. 2016) (quoting ***InTown Lessee Assocs., LLC v. Howard***, 67 So. 3d 711, 718 (Miss. 2011)); ***Ronk v. State***, 172 So. 3d 1112, 1139 (Miss. 2015) (citing ***Moawad v. State***, 531 So. 2d 632, 634 (Miss. 1988)). Furthermore, Bay Point did not object to the instruction based on the arguments introduced anew by the author of the dissent. If a proper contemporaneous objection is not made, an error is waived. *See* ***InTown***, 67 So. 3d at 719.

V. Whether the trial court erred in refusing jury instruction P-4.

P19. P-4 is a long and convoluted instruction. Among other things, it gives the jury a summary of Bay Point's position along with a summary of MTC's position. It then presents the jury with the following:

> If you find that:
>
> 1. The underlying property burdened by the easement granted by Wallace C. Walker in 1952 is owned in fee by [Bay Point]; and
>
> 2. That [MTC] only possessed an easement for the limited purpose granted in the 1952 Judgment and Verdict; and
>
> 3. [MTC]'s current uses of the Property of Bay Point are outside the limited and specific scope of the Easement granted to [MTC], then you must find in favor of [Bay Point] and award just compensation. If you find that the current uses of [Bay Point]'s property are within the scope of the Easement granted in the 1952 Judgment and Verdict, then you must find in favor of [MTC].

P20. As discussed in Issue IV *supra* regarding instruction D-7A, the jury had to determine whether the easement still burdened the property and whether MTC's use was a highway purpose. Instruction P-4 is premised on Bay Point's position that the easement terminated when MTC used the property for a non-highway purpose, which fails to consider Section 65-1-123's requirement that easements be declared as no longer necessary on Commission minutes before they are released. "An instruction that incorrectly states the law, is covered fairly in another instruction or is without foundation in the evidence need not be given." ***N. Biloxi***, 912 So. 2d at 1123. We find the trial court did not err in refusing to give jury instruction P-4.

VI. Whether the trial court erred in not instructing the jury that MTC must acquire property in fee to use as rest and recreation areas under Section 65-1-51.

P21. Section 65-1-51 reads, in pertinent part, "[t]he commission may acquire and have the Transportation Department develop publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public." Miss. Code Ann. § 65-1-51 (Rev. 2012). Bay Point argues this section requires MTC to buy property used for rest and recreation areas in fee, and that the trial court erred in not instructing the jury to that effect. MTC counters by arguing it can build rest and recreation areas on publicly owned easements for such purposes.

P22. However, we decline to address whether MTC can build rest and recreation areas on easements.

> To warrant reversal, two elements must be shown: error, and injury to the party appealing. Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the final outcome of the case; it is prejudicial, and ground for reversal, only when it affects the final result of the case and works adversely to a substantial right of the party assigning it.

Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216, 221 (Miss. 1969). *See also* ***Gray v. State***, 799 So. 2d 53, 61 (Miss. 2001).

P23. Even if MTC was required to acquire the property used for the park in fee, the value of the property depended on the existence, *vel non*, of the easement. If the easement continued to exist, compensation due to Bay Point would be the value of the property, subject to the easement. If the easement no longer existed, compensation due to Bay Point would be the value of the property, unencumbered by the easement. The jury was presented with only two values: an encumbered value of between $100 and $500, and an unencumbered value of $26 per square foot. The jury determined the easement continued to exist and awarded Bay Point $500. That being the case, instructing the jury that MTC was required to acquire land used for rest and recreation areas in fee would not have affected the final result of the case, and therefore did not prejudice Bay Point. *See* ***Jaquith***, 224 So. 2d at 221. Assuming the trial court erred by not instructing the jury that MTC must acquire land used for rest and recreation areas in fee, that error was harmless.

VII. Whether the jury verdict was supported by substantial evidence.

P24. "This Court has a long-standing history of not disturbing jury verdicts in eminent domain proceedings, especially when the jury has viewed the property being taken and the evidence in the record supports

the jury's findings." ***Trowbridge Partners, L.P. v. Miss. Transp. Comm'n***, 954 So. 2d 935, 943 (Miss. 2007) (citing ***Miss. Highway Comm'n v. Havard***, 508 So. 2d 1099, 1105 (Miss. 1987)). Courts are "loathe to disturb a jury's eminent domain award where, as here, the jury has personally viewed the premises." ***Crocker v. Miss. State Highway Comm'n***, 534 So. 2d 549, 554 (Miss. 1988). In fact, "where the jury has viewed the property being taken, any substantial evidence in the record supporting the jury's damage assessment will preclude reversal." *Id.*

P25. The jury's verdict of $500 was supported by substantial evidence. The jury viewed the property. The appraiser-witnesses agreed that the unencumbered value of the property was $26 per square foot. Bay Point's appraiser refused to give an encumbered value. MTC's appraisers testified that, according to appraisal methodology and procedures, along with their personal knowledge of practice, the encumbered value of the property would be a nominal sum of around $100-$500.[9] This was the only encumbered value presented to the jury.

P26. Bay Point consistently argues that the easement terminated on the whole property when MTC built the new bridge, or that it at least terminated on the property used for the park when the park was built. As discussed in Issue I, *supra*, easements for

[9] Though the easement for all highway purposes rendered the land practically worthless, this value was based on the maxim that because land holds the world together, it cannot be devoid of value.

highway purposes can be released only when MTC determines on its minutes that it no longer needs the property for highway purposes.[10] While MTC's agreement with Harrison County was executed on the minutes, the agreement provided that the county would provide, "at no cost to the Commission, any right or interest in any property owned by the [c]ounty which may be necessary to complete construction of the [p]ark." The agreement further provided that MTC retained its interest in the property, and that if the county determined it would no longer operate the park, the county would inform MTC, "which will have the option of closing the [p]ark and removing all improvements." The jury heard this evidence but determined it insufficient to constitute a release.

---

[10] Bay Point relies on ***Hattiesburg Realty*** for its contention that highway easements can terminate other than by a declaration on commission minutes. This reliance is misplaced. ***Hattiesburg Realty*** provides "If and when the Commission decides to abandon its right-of-way easement over all or any portion of the Tuttle lots, or declares all or any portion of the Tuttle lots surplus under applicable law, the disposition . . . would be governed and controlled by applicable Mississippi law." ***Hattiesburg Realty Co. v. Miss. State Highway Comm'n***, 406 So. 2d 329, 332 (Miss. 1981). *See also* ***Miss. State Highway Comm'n v. McClure***, 536 So. 2d 895, 896 (Miss. 1988) ("When the MSHC determined that a portion of that easement was no longer needed by the public, the easement ceased to exist."). These cases are consistent with the statutory provision, as the Commission makes decisions or declarations only through its minutes.

VIII. Whether the trial court erred in denying Bay Point's motion for attorneys' fees and costs.

P27. "[A] trial court's decision regarding attorneys' fees will not be disturbed by an appellate court unless it is manifestly wrong." ***Tupelo Redevelopment Agency v. Gray Corp., Inc.***, 972 So. 2d 495, 521 (Miss. 2007) (citing ***Mabus v. Mabus***, 910 So. 2d 486, 488 (Miss. 2005)).

P28. Pursuant to Mississippi Code Section 43-37-9,

> [w]here an inverse condemnation proceeding is instituted by the owner of any right, title or interest in real property because of use of his property in any program or project in which federal and/or federal-aid funds are used, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property, or the state's attorney effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or the state's attorney, reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding.

P29. MTC used federal funds to finance construction of the park. Bay Point was the plaintiff in this inverse-condemnation proceeding. The jury rendered a verdict for the plaintiff in the amount of $500. Based on the

jury verdict, the trial court rendered a judgment for the plaintiff in the amount of $500. Accordingly, all the requirements of the statute were met for an award of "reasonable costs, disbursements and expenses, including reasonable attorney,[11] appraisal and engineering fees, actually incurred because of such proceeding." Section 43-37-9's mandatory language—*shall* determine and award—leaves no room for judicial discretion, except as to a reimbursement amount that was "reasonable." We conclude it was within the trial court's discretion not to grant Bay Point's request for $680,000 in full. Yet we reject the trial court's failure to award *any* reimbursement at all. Such a result is in direct violation of the statute and therefore manifestly wrong.

---

[11] Rule 1.5 of the Mississippi Rules of Professional Conduct sets out several factors which the trial court should consider in determining the reasonableness of the amount of attorneys' fees:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Miss. R. Prof'l Conduct 1.5(a).

IX. Whether the trial court erred in denying Bay Point's post-trial motions.

P30. Bay Point's entire argument is that "the jury award of $500 was in error and the lower [c]ourt's refusal to grant Plaintiff's Motion for Additur was a clear error of law, an abuse of discretion, manifestly wrong and contrary to the substantial weight of the evidence, and reversal is proper."

P31. An additur can be granted where (1) the damages are inadequate because the jury was influenced by bias, prejudice, or passion; or (2) the damages awarded were contrary to the overwhelming weight of the evidence. Miss. Code Ann. § 11-1-55 (Rev. 2014). The evidence must be viewed in the light most favorable to the party in whose favor the jury decided. ***Lewis v. Hiatt***, 683 So. 2d 937, 941 (Miss. 1996). As discussed in Issue VII *supra*, the jury award of $500 was supported by substantial evidence. Ergo, the trial court's refusal to grant additur was not in error.

CONCLUSION

P32. For the reasons stated, the judgment of the Circuit Court for the First Judicial District of Harrison County is affirmed in part. Because the trial court rendered judgment in Bay Point's favor and awarded it compensation, all of the requirements of the statute were met for an award of reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of such proceeding. The trial court's failure to

follow the statute's clear mandate is reversible error. We therefore affirm the judgment in part, reverse the judgment in part, and remand the case to the Harrison County Circuit Court with instructions to the trial court to hold a hearing in compliance with Section 43-37-9.

P33. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

WALLER, C.J., DICKINSON, P.J., LAMAR, COLEMAN, MAXWELL AND BEAM, JJ., CONCUR. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J.

Dissent by: KITCHENS

Dissent

KITCHENS, Justice, dissenting:

P34. The majority affirms the trial court's grant of a jury instruction that allowed the jury to find that a taking had occurred because the Mississippi Transportation Commission (MTC) no longer was using the easement for highway purposes, but that just compensation could not be awarded because the MTC had not released the easement on its minutes. Indeed, Mississippi Code Section 65-1-123(5) provides that "[a]ll easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes. . . ."

Miss. Code Ann. § 65-1-123(5) (Rev. 2012). But a state statute cannot be applied in a manner that thwarts a landowner's state and federal constitutional rights to just compensation for a governmental taking of private property. U.S. Const. amend. V; U.S. Const. amend. XIV; Miss. Const. art. 3, § 17; ***Preseault v. U.S.***, 100 F.3d 1525, 1551-52 (Fed. Cir. 1996). Therefore, I respectfully dissent. I would reverse and remand for a determination of just compensation owed to Bay Point for the taking of its property unburdened by the easement.

P35. The facts of this case may be stated succinctly. In 1952, the MTC[12] acquired an easement over the property of Wallace Walker for highway purposes. Walker's successor, Bay Point Properties Inc., sued for inverse condemnation after the MTC commenced construction of a public park on the easement and asserted that the use of the land for a public park was within the scope of the easement. The jury found that, because the MTC's use of the land was not for highway purposes, and thus outside the scope of the easement, a taking had occurred. But because the MTC had not released the easement on its minutes by entering a determination that the easement was no longer needed for highway purposes, the jury did not award just compensation for the taking. Instead, the jury awarded nominal damages of $500, an amount representing the value of the Bay Point's property encumbered by the easement.

---

[12] Then the Mississippi State Highway Commission.

P36. On appeal, Bay Point renews its argument from the trial that, because the jury found that the MTC's use of the easement exceeded its scope, the easement was terminated, and the MTC owes just compensation for the property unencumbered by the easement. The MTC argues that the easement did not terminate because Section 65-1-123(6) states that the MTC's easements cannot be construed as abandoned by nonuse, and Section 65-1-123(5) states that easements for highway purposes "shall be released when they are determined on the minutes of the commission as no longer needed for such purposes." Miss. Code Ann. §§ 65-1-123(5); 65-1-123(6) (Rev. 2012).

P37. Under the Fifth Amendment to the United States Constitution, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Article 3, Section 17, of the Mississippi Constitution provides,

> 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; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

Miss. Const. art 3, § 17. This Court has held that the state constitutional right "provides broader protection of private property rights by the guarantee that

'[p]rivate property shall not be taken or damaged for public use, except on due compensation. . . .'" ***Gilich v. Miss. State Highway Comm'n,*** 574 So. 2d 8, 11 (Miss. 1990) (quoting Miss. Const. art. 3, § 17). These provisions establish absolute federal and state constitutional rights to just compensation when private property is taken for public use.

P38. The MTC is authorized by statute to take by eminent domain any rights, title, and interests in property that are necessary for its authorized purposes. ***Roberts v. State Highway Comm'n***, 309 So. 2d 156, 161 (Miss. 1975); Miss. Code Ann. § 65-1-47 (Rev. 2012). Here, the MTC took an easement for highway purposes. An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land . . . for a specific limited purpose." *Easement*, Black's Law Dictionary 527 (7th ed. 1999). The dominant tenement holds the easement, and the obligation is imposed upon the servient tenement. ***Browder v. Graham***, 204 Miss. 773, 38 So. 2d 188 (1948). Easements may be created by express grant, implication, or prescription. ***Miss. State Highway Comm'n v. Wood***, 487 So. 2d 798, 804 (Miss. 1986). When an easement is created by express grant for a particular purpose, the terms of the grant govern the extent of the permissible usage. ***Preseault***, 100 F.3d at 1542 (quoting Jon. W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* ¶ 8.02[1], at 8-3 (Rev. ed. 1995)). If the holder of the dominant estate uses the land in a way inconsistent with the purpose for which the easement was granted, the easement reverts to the holder of the

servient estate free of the easement. ***Preseault***, 100 F.3d at 1542 (quoting ***Lawson v. State***, 107 Wn.2d 444, 730 P.2d 1308, 1312 (Wash. 1986)).

P39. Bay Point argued that the easement had reverted to Bay Point when the MTC used the easement to build a park, a use which Bay Point argued exceeded the grant of the easement for highway purposes. The jury agreed and found that the MTC no longer was using the easement for highway purposes; thus, a taking had occurred. However, the trial court instructed the jury that, unless it also found that the MTC had released the easement on its minutes, the MTC retained the easement and the jury could not award just compensation. The trial court granted this jury instruction after finding that Section 65-1-123(5) does not permit the termination of an easement for highway purposes in any manner other than by a release on the minutes.

P40. I would hold that the trial court erroneously applied Section 65-1-123(5) and Section 65-1-123(6) in a manner that violated Bay Point's state and federal constitutional rights to just compensation for the taking. I would hold that the jury's finding that the easement was no longer used for highway purposes triggered Bay Point's constitutional rights to just compensation for the value of the property unencumbered by the easement. As stated, the MTC had title to an easement for highway purposes. As found by the jury, when the MTC built the park, it put the property to a new use, outside the grant of an easement for highway purposes. In other words, according to the jury's finding, the MTC's use of the easement exceeded the terms of the grant,

causing the easement to revert to Bay Point and entitling Bay Point to just compensation for the MTC's taking of the easement for use as a park. The MTC presented no evidence or argument that the easement had not terminated due to some need for future highway use. This Court errs by speculating that the easement may be needed for future repair or replacement of the Highway 90 bridge.

P41. Moreover, the MTC acquired the easement in 1952, before the enactment of Section 65-1-123(5) and Section 65-1-123(6). These provisions were added to the statute by amendment in 1988. 1988 Miss. Laws, ch. 597, § 1. Yet the trial court construed Sections 65-1-123(5) and Section 65-1-123(6) to require that Bay Point could show that the easement had terminated only if the MTC had released the easement on its minutes. This interpretation prevented any termination of the easement that otherwise would have occurred under the common law. It has been held that, because interests in land are fixed at the time of their creation, application of a "later statute[] . . . to divest those interests would constitute a separate ground for finding a governmental taking." ***Preseault***, 100 F. 3d at 1540 n. 13 (citing ***Lawson***, 107 Wn.2d 444, 730 P. 2d 1308). When the easement was created in 1952, termination of an easement did not require a determination on the MTC's minutes. Therefore, constitutionally, Section 65-1-123(5) cannot be applied to divest the interests of Bay Point by supplanting the common law and requiring a determination on the minutes before an easement can terminate.

P42. Additionally, the trial court's interpretation of Section 65-1-123(5) implicated the doctrine of separation of powers. Although the majority points out that Bay Point never presented a separation of powers argument to the trial court, this Court may address a separation of powers violation *sua sponte.* ***Wimley v. Reid***, 991 So. 2d 135, 136 (Miss. 2008). Article 1, Section 1 of the Mississippi Constitution provides,

> The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Miss. Const. art. 1, § 1. Article 1, Section 2, addresses encroachment of power and provides, in part, that,

> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.

Miss. Const. art. 1, § 2.

P43. The jury instruction granted by the trial court and approved by the majority in this case plainly allowed the MTC, an executive agency, to exercise power properly belonging to the judiciary. The majority's interpretation of the law permits the MTC unilaterally to determine when an easement has terminated. As shown by this case, even if the facts support the legal conclusion that an easement has terminated by its

own language, under the majority's interpretation, the MTC may hold the easement indefinitely by refusing to release it on the minutes no matter how far the MTC may stray from the public purpose for which the property was taken from its private owner. And under the majority's interpretation, if a lawsuit ensues, the jury's role is limited to deciding whether the MTC has, in fact, released the easement on its minutes. This Court errs by construing Section 65-1-123 to allow the MTC to retain terminated easements until such time, if ever, as it deigns to release them on its minutes.

P44. Finally, I would hold that Section 65-1-123(5) and Section 65-1-123(6) are no bar to Bay Point's recovery of just compensation equal to the value of its property unencumbered by the easement. Section 65-1-123(6) states that no property interest acquired by the MTC "shall . . . be construed as abandoned by nonuse." Under the common law, a presumption of abandonment arises from protracted nonuse of an easement over an extended period of time, and the presumption is strengthened if there is proof of intent to abandon. ***R & S Dev., Inc. v. Wilson***, 534 So. 2d 1008, 1010 (Miss. 1988). Bay Point does not claim abandonment by nonuse, and the jury did not find the easement to have been abandoned. Indeed, the MTC's use of the easement to build a public park hardly can be considered abandonment. Instead, Bay Point argued and the jury found that a taking had occurred because the MTC was using the easement, but not for highway purposes. Thus, Section 65-1-123(6) did not bar Bay Point's

recovery of just compensation for the unencumbered value of the property.

P45. Neither does Section 65-1-123(5) bar Bay Point's recovery of just compensation for the value of the property unencumbered by the easement. Section 65-1-123(5) states that the MTC "shall" release an easement for highway purposes when it is determined on the minutes to no longer be needed for such purposes. Thus, the statute places an affirmative duty upon the MTC to determine if and when an easement is no longer needed for highway purposes, and then to release that easement on the minutes. Here, the MTC did not formally release the easement on its minutes. However, the jury has entered a verdict to the effect that the easement no longer is being used for highway purposes. "Equity regards as done that which ought to be done." ***PMZ Oil Co. v. Lucroy***, 449 So. 2d 201, 208 (Miss. 1984). A jury finding that the easement no longer was being used for highway purposes eliminated the need for a formal entry of that fact on the minutes. Therefore, the jury should have been instructed to award just compensation for the unencumbered value in the event it determined the easement no longer was being used for highway purposes.

P46. The majority affirms a verdict that violated Bay Point's federal and state constitutional rights to just compensation for the taking of its property for public use. This Court errs by interpreting Sections 65-1-123(5) and (6) in a manner that violates Bay Point's right to just compensation. Because the jury found that the MTC's easement no longer was being used for

highway purposes, Bay Point was entitled to just compensation for the value of the property unencumbered by the easement. I would reverse the judgment and remand this case to the trial court for a determination of just compensation for the unencumbered value of the property.

KING, J., JOINS THIS OPINION.

**IN THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BP PROPERTIES, INC.	**PLAINTIFF**
VERSUS	**CAUSE NO. A2401-2011-00115**
MISSISSIPPI DEPARTMENT OF TRANSPORTATION AND MISSISSIPPI TRANSPORTATION COMMISSION	**DEFENDANTS**

FINAL JUDGMENT

(Filed Jan. 7, 2014)

In this cause, the claim by the Plaintiff, BP Properties, Inc. (now known as Bay Point Properties, Inc.), that all of its interest in certain lands described in Exhibit "A" attached hereto and incorporated herein (being the same legal description included in the Judgment and Verdict recorded at Deed Book 358, Pages 202-205 on August 29, 1952, in the Land Records of Harrison County, Mississippi, First Judicial District), was taken by the Defendants, Mississippi Department of Transportation and Mississippi Transportation Commission, and appropriated to the public use without payment of just compensation, was submitted to a jury composed of Kathy Vogel and eleven other qualified persons. On August 13, 2013, said jury returned the following verdict:

> We the jury, find for the Plaintiff, BP Properties, Inc., against the Defendant Mississippi

Department of Transportation and Mississippi Transportation Commission and assess its damages in the amount of $500.00.

It is, therefore, ORDERED AND ADJUDGED that the verdict of the jury, finding for the Plaintiff against the Defendants, and assessing damages in the amount of Five Hundred and no/100 Dollars ($500.00), is hereby entered as the Judgment of this Court.

It is further ORDERED AND ADJUDGED that the Mississippi Transportation Commission shall tender to the Clerk of this Court the sum of Five Hundred and no/100 Dollars ($500.00) on behalf of itself and the Mississippi Department of Transportation; that Plaintiff's Motion for Attorney's Fees, Costs and Expenses under Mississippi Code Annotated Section 43-37-9 is denied, as set forth under separate order of this Court; that said $500.00 payment shall satisfy any and all of the Defendants' obligations to the Plaintiff in this civil action; that the Clerk of this Court, without further order from the Court, shall disburse said $500.00 sum to the Plaintiff upon receipt; and that a copy of this Final Judgment shall be certified and filed in the Land Deed Records of the Chancery Clerk's office of the First Judicial District of Harrison County, Mississippi.

SO ORDERED AND ADJUDGED, this the 3rd day of January, 2014.

/s/ John C. Gargiulo
JOHN C. GARGIULO
CIRCUIT COURT JUDGE