IN THE COURT OF APPEALS OF TENNESSEE

CITY OF GATLINBURG, TENNESSEE, CITY OF PIGEON FORGE, TENNESSEE, CITY OF SEVIERVILLE, TENNESSEE, COUNTY OF SEVIER, TENNESSEE, and SEVIER SOLID WASTE, INC., Petitioners-Appellees, v. GRADY BASCOM FOX, JR. and wife, IRENE DIXON FOX, and CARROLL L. FOX and wife, MILDRED PERRYMAN FOX, Respondents-Appellants.	C/A NO. 03A01-9606-CV-00199 SEVIER COUNTY CIRCUIT COURT HONORABLE WILLIAM R. HOLT, JR. JUDGE

For Appellants

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For Appellees

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OPINION

VACATED AND REMANDED

Susano, J.

This is a condemnation case. Petitioners acquired by

eminent domain a tract of real property in Sevier County for use as a landfill. The petitioners' authority to take the land is not in question; this appeal only involves the amount of compensation to which the landowners are entitled. Following the first jury verdict, the trial judge suggested a remittitur, which was accepted by the landowners. The petitioners, however, refused to accept the remittitur, and the trial judge, believing he was required to do so, granted them a new trial. A second jury trial was conducted, yielding a much smaller verdict. The landowners appealed, contending that the trial court erred in granting the petitioners a new trial. They seek to have the first verdict, less the remittitur, reinstated. The following question is presented for our review:

> Does acceptance of a remittitur lie exclusively with the party in whose favor the jury verdict has been rendered?

The petitioners also raise issues, which in substance allege error in the method of valuation utilized by the landowners and their expert witness. They claim that the first jury heard improper testimony and that its verdict is tainted by that evidence.

I

The subject property consists of 155.57 acres of pasture land and woodland located near the heavily-traveled parkway in Pigeon Forge. It was not being farmed at the time of the taking in 1991, but it had been previously used for this purpose, going back to 1915. Following an extensive study of the area, the petitioners chose this tract as the best available site for a new landfill, due to its size, soil content, accessibility, and proximity to an older landfill. The petitioners then filed a joint petition for condemnation and were subsequently awarded title to and possession of the land.

The landowners retained an expert witness, Jeff Fletcher, to make an appraisal of the condemned property. The petitioners filed a motion in limine seeking to exclude Fletcher's testimony, due to his alleged use of improper comparable sales and because he allegedly based his opinion of the property's value solely upon its highest and best use. The trial court excluded one "comparable" sale from Fletcher's analysis, found that the weight and credibility to be given the other comparable sales were matters for the jury to decide, and ruled that Fletcher would not be allowed to limit his appraisal to the land's highest and best use.

At trial, Fletcher testified that the property was worth, on average, approximately $10,000 an acre. He arrived at a total value of $1,578,000. Landowners Grady and Carroll Fox each testified that the land was worth $3,000,000. The

petitioners' two expert witnesses testified that the value of the land was $525,000 and $567,000, respectively. The jury returned a verdict for $1,710,500. The trial judge then suggested a remittitur of $315,000, which was accepted by the landowners, thus reducing the verdict to $1,395,500. The petitioners, however, refused to accept the verdict after the remittitur, and moved for a new trial. Petitioners cited the case of ***Pitts v. Exxon***, 596 S.W.2d 830 (Tenn. 1980), as authority for the proposition that the party in whose favor a remittitur is made has the choice of either accepting the remitted verdict or demanding a new trial. Based solely upon language in the ***Pitts*** opinion, the trial court granted a new trial to the petitioners, as they were the parties in whose favor the verdict adjustment was made. Following the second trial, a new jury returned a verdict of $915,000. The landowners appealed, arguing that the grant of a new trial was improper. They urge us to reinstate the remitted verdict of $1,395,500.

II

We must first determine whether the trial court properly granted a new trial based upon its interpretation of the Supreme Court's decision in ***Pitts v. Exxon***, *supra*. While a new trial grant pursuant to a trial judge's function as the thirteenth juror is not reviewable, it is not every grant of a new trial that involves the thirteenth juror role. *See, e.g.*, ***Huskey v. Crisp***, 865 S.W.2d 451, 454 (Tenn. 1993). In this case,

the trial judge did not act in his capacity as the thirteenth juror, as would have been the case had he granted a new trial upon finding the jury's verdict to be contrary to the evidence and not correctable by remittitur or additur. On the contrary, he suggested a remittitur, which presumably corrected the verdict in his estimation. Only because the petitioners refused to accept the remitted verdict did the trial judge conclude that, as a matter of law, ***Pitts*** required that he grant a new trial.

We review *de novo* the trial court's award of a new trial, with no presumption of correctness. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26 (Tenn. 1996).

The relevant portion of the ***Pitts*** decision, upon which the trial judge relied, provides as follows:

> Where either remittitur or additur is used, the choice of a new trial and new jury or appellate review is available to the party *in whose favor the adjustment is made*, and appellate review is available to the other party where the appellate courts may either adjust the verdict to conform to the evidence if statutorily and judicially authorized to do so, and, where not, a new trial may be granted.

Pitts, 596 S.W.2d at 836 (emphasis added).

We acknowledge that the quoted sentence seems to indicate that the petitioners - the parties in whose favor the

remittitur was made - had the right to demand a new trial. However, we cannot escape the conclusion that the italicized language quoted above represents a "slip of the pen" by the Supreme Court. The overwhelming weight of authority in Tennessee, including authority cited in other parts of ***Pitts***, indicates that it is not the party in whose favor the remittitur is made, but rather it is the party in whose favor *the verdict was rendered* who has the option of choosing a new trial rather than appealing or accepting a remittitur. For instance, the relevant portion of the remittitur statute provides:

> In all jury trials had in civil actions, after the verdict has been rendered, and on motion for a new trial, when the trial judge is of the opinion that the verdict in favor of a party should be reduced, and a remittitur is suggested by the trial judge on that account, with the proviso that in case the party *in whose favor the verdict has been rendered* refuses to make the remittitur a new trial will be awarded, the *party in whose favor such verdict has been rendered* may make such remittitur under protest, and appeal from the action of the trial judge to the court of appeals.

T.C.A. § 20-10-102(a) (emphasis added). As construed by the trial court, the language in ***Pitts*** directly contradicts that of the statute.

Tennessee cases are in line with the language of the statute and, consequently, inconsistent with the trial court's interpretation of ***Pitts***. For example, the Supreme Court has

stated that

> the remittitur and additur statutes were enacted for the purpose of giving the *plaintiff*, in the case of remittiturs, and the defendant, in the case of additurs, the right to accept, under protest, and appeal .... The subject statutes make no reference whatever to the right of a defendant, in case of remittitur, to appeal and contest the inadequacy of the remittitur or the right of a plaintiff to appeal and contest the inadequacy of an additur, both of which rights unquestionably exist ....

Smith v. Shelton, 569 S.W.2d 421, 426 (Tenn. 1978) (emphasis added). As the ***Smith*** case indicates, in the typical case the choice lies with the plaintiff[1] - the party in whose favor the verdict is rendered - and therefore not the party in whose favor the remittitur is made (i.e., the defendant). The plaintiff may accept the remittitur and appeal, or, as provided in T.C.A. § 20-10-102(a), may refuse to make the remittitur and demand a new trial. The only right of the defendant (in this case, the petitioners) that is acknowledged is the right to appeal the inadequacy of the remittitur[2] -- not to demand a new trial. ***Id.*** In addition, our court has recently explained that

> [r]emittiturs of jury verdicts for

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[1]We refer to the "plaintiff" in this opinion rather than using the "longer" label of the "party in whose favor the verdict has been rendered" because in the typical case, the plaintiff is the party seeking compensation and hence the one in whose favor the verdict is rendered. In the instant case, "the part[ies] in whose favor the verdict has been rendered" are the respondents -- the landowners.

[2]Of course, the party in whose favor the remittitur is made can raise other issues, as the petitioners have in this case.

> excessiveness are not made by courts, but by the successful party. The court has the discretionary power to offer *the prevailing party* the opportunity to waive or "remit" the excessive portion of the verdict as an alternative to setting the verdict aside for excessiveness and ordering a new trial. It is therefore said that the court "suggests" a remittitur and *the successful party, if willing* "makes" the remittitur.

Long v. Mattingly, 817 S.W.2d 325, 329 (Tenn. App. 1991) (emphasis added).

While no support for the trial court's interpretation of the statement in ***Pitts*** can be found in the law of this state, many other Tennessee cases illustrate the concept that it is the prevailing party's sole prerogative to request a new trial when the court suggests a remittitur. *See, e.g.*, ***Magness v. B. Hitt Electric Co.***, 604 S.W.2d 44 (Tenn. 1980); ***Dixie Feed & Seed Co. v. Byrd***, 376 S.W.2d 745 (Tenn. App. 1963); ***Westmoreland v. Tolbert***, 1990 WL 48464 (Tenn. App., M.S., filed April 11, 1990, Koch, J.). Furthermore, cases dealing with additur set forth a logical corollary of the idea that only the plaintiff is entitled to accept or reject a remittitur, by holding that it is the *defendant* who has the choice of whether to accept an additur. *See, e.g.*, ***Evans v. Wilson***, 776 S.W.2d 939, 941 (Tenn. 1989) and ***Smith v. Shelton***, 569 S.W.2d at 426.

We also note that no authority is cited in ***Pitts*** to support the disputed proposition; to the contrary, each case

cited within the opinion speaks only in terms of the plaintiff's acceptance or refusal of a suggested remittitur. In light of the foregoing, we can only conclude that the Supreme Court's statement in ***Pitts v. Exxon*** was simply a "slip of the pen." We believe the Supreme Court *intended* to state the following in ***Pitts***:

> Where either remittitur or additur is used, the choice of a new trial and new jury or appellate review is available to the party *against whom* the adjustment is made, and appellate review is available to the other party where the appellate courts may either adjust the verdict to conform to the evidence if statutorily and judicially authorized to do so, and, where not, a new trial may be granted.

(Emphasis added). This expression of remittitur and additur procedures would be consistent with the provisions of T.C.A. §§ 20-10-101 and -102, as well as the case law of Tennessee. Consequently, in a remittitur situation, the choice of a new trial or acceptance of the remittitur would fall only to the plaintiff, who would be the party against whom the adjustment was made, since the plaintiff's verdict would have been reduced by the remittitur. Conversely, in the case of additur, the choice of a new trial or acceptance would lie with the defendant, since the adjustment would increase the verdict and thus operate against the defendant.

We point out this perceived oversight in the ***Pitts*** case with all due respect to the Supreme Court. In so doing, we are

not unmindful of our obligation to follow the directives of that superior court. *See* ***Holder v. Tennessee Judicial Selection Commission***, ___ S.W.2d ___ , No. 01S01-9610-CH-00211 (Tenn., filed October 23, 1996)(for publication). We offer our opinion in the hope that the Supreme Court will revisit the questioned statement in ***Pitts*** to correct the court's apparent "slip of the pen."

We therefore conclude that the trial court erred in granting a new trial to the petitioners based solely upon its interpretation of ***Pitts***.

Our inquiry does not end here, however, since the petitioners have raised eleven issues of their own challenging the first jury verdict. We must now address these issues to determine whether, in light of the improper award of a new trial, we may restore the first verdict, as remitted.

III

Petitioners raise several issues regarding testimony as to the value of the subject property. The most substantial of these issues assigns error in the mode of valuation utilized by the landowners' expert, Jeff Fletcher. Specifically, the petitioners assert that Fletcher's testimony was improperly based solely upon the highest and best use of the land.

We first note that the trial court has wide discretion with regard to the admissibility of expert testimony in condemnation cases. ***State ex rel Com'r, D.O.T. v. Veglio***, 786 S.W.2d 944, 948 (Tenn. App. 1989). The objective in such a proceeding is to award just compensation to the landowner. ***Love v. Smith***, 566 S.W.2d 876, 878 (Tenn. 1978). "Just compensation" is measured by the fair market value of the land at the time of the taking. ***Id.***; ***Layne v. Speight***, 529 S.W.2d 209, 214 (Tenn. 1975). In making that determination, the jury must consider all reasonable, available uses to which the property is adapted. ***Love***, 566 S.W.2d at 878; ***Layne***, 529 S.W.2d at 214; and ***Davidson County Bd. of Educ. v. First Am. Nat'l Bank***, 301 S.W.2d 905, 907 (Tenn. 1957). Therefore, the value of the property may not be based only upon its "highest and best" use. ***Love***, 566 S.W.2d at 878; ***Layne***, 529 S.W.2d at 214; and ***Davidson County Bd. of Educ.***, 301 S.W.2d at 907. As stated in the ***Love*** case,

> the highest and best use may be considered in determining value but it may not be the *sole* measure thereof. (citations omitted). A corollary of this principle is that expert witnesses in expressing their opinions of value should not be allowed "to give their opinions as to the value of property for a particular purpose." (citations omitted).

Love, 566 S.W.2d at 878 (emphasis added).

Our review of the transcript of Fletcher's testimony persuades us that, contrary to the trial court's directive, he

did in fact base his opinion of the property's value only on its highest and best use. Fletcher testified in pertinent part as follows:

> Q. What is it that makes the Fox property unique?
>
> A. From what I understand, now I'm not an engineer, the location. The location is one of the contributing factors to any real-estate value. The soil of the property lends itself to a specific type of use, and that's what makes it unique.
>
> Q. A landfill?
>
> A. A landfill.
>
> * * *
>
> Q. The landfill. Is the landfill what makes the Fox property unique and valuable, in your opinion?
>
> A. That's right.
>
> Q. And is that why you place this high value on it, is because of its potential use as a landfill?
>
> A. Saying that the highest and best use of this piece of property out of the alternative uses available, the highest and best use would be for a landfill.
>
> Q. And my question was, is that the reason you place the high value on the Fox property?
>
> A. That's correct.
>
> Q. In doing your analysis of the values you specifically did not include any farm sales being used for farm purposes; is that correct?
>
> A. Didn't think that was the highest and best use of the property.
>
> Q. But to answer my question, you did not use any sales of farm property for farm purposes?
>
> A. That's correct. And the reason I didn't is, because I did not consider farm use the highest

> and best use of the property. I considered it. I didn't think that was the best use.
>
> Q. So in other words, you value the property based on its highest and best use, the Fox property based on its highest and best use?
>
> A. That's what you end up doing after you consider the alternative uses that are available for a piece of property....

We find that this testimony clearly indicates that Fletcher calculated the value of the land based only upon its use as a landfill. It appears that he "considered" other uses for the land, such as residential or farming, but discarded them and did not factor the land's value for those purposes into his calculations. We believe that the principles of valuation expressed in the cases contemplate more than the computation of a piece of property's overall value based solely upon its highest and best use, preceded by a mere acknowledgement that other possible uses exist. Land values based upon these other uses must be taken into account in calculating the property's value.

Therefore, we conclude that Fletcher's testimony improperly used the property's highest and best use, as a landfill, as its sole measure of valuation. We agree with the petitioners that the jury's verdict was substantially influenced by his testimony, and thus we cannot find this error to be harmless. Rule 36(b), T.R.A.P. *Cf.* ***Love***, 566 S.W.2d at 878-79. The influence of Fletcher's testimony upon the jury is evidenced by the fact that the initial verdict was closer to Fletcher's

value than that of any other witness.[3] As a result of this prejudicial error, a new trial is warranted. We are aware that a second trial was conducted in this matter, but we cannot affirm the verdict that it produced, since we are not privy to a transcript or record of those proceedings. Furthermore, to accept its result would be to ignore the trial court's error in granting it in the first place. Fairness dictates that we remand this case to the trial court for a new trial.

IV

Due to the fact that a new trial is necessary, we deem it appropriate to address some of the numerous additional errors assigned by the petitioners, and to thereby offer some guidance to the trial court.

Another significant issue raised by the petitioners is whether the testimony of Fletcher and the landowners as to the value of the property was based upon improper comparable sales. Petitioners argue that the two property sales principally relied upon by Fletcher and the landowners were not comparable to the subject property, in that one tract was purchased by the Dollywood theme park for use as a parking lot, while the other included valuable frontage on the Pigeon Forge parkway. The

[3]The jury verdict was $1,710,500, a little higher than Fletcher's value of $1,578,000. The landowners testified that the property was worth $3,000,000, while the two expert witnesses called by the petitioners arrived at values of $525,000 and $567,000.

trial judge allowed the use of these sales, over the objection of the petitioners.

It is well-settled that the admission of comparable sales in a condemnation action falls largely within the sound discretion of the trial court. ***Layne***, 529 S.W.2d at 211; ***Memphis Housing Auth. v. Peabody Garage Co.***, 505 S.W.2d 719, 722 (Tenn. 1974); ***Veglio***, 786 S.W.2d at 946; and ***Shelby County v. Stallcup***, 594 S.W.2d 392, 396 (Tenn. App. 1979). As a preliminary matter, the trial judge considers all factors which bear upon that issue; once a comparable sale is admitted into evidence, the weight to be given that transaction becomes a question for the jury. ***Stallcup***, 594 S.W.2d at 396; ***Memphis Housing Auth. v. Newton***, 484 S.W.2d 896, 898 (Tenn. App. 1972).

For a sale to be admitted as a comparable sale, a piece of property must be similar to the condemned land in type and location, and it must have been sold near the time of the taking. ***Maryville Housing Auth. v. Ramsey***; 484 S.W.2d 73, 75 (Tenn. App. 1972); ***Memphis Housing Auth. v. Ryan***, 393 S.W.2d 3, 11 (Tenn. App. 1964). It need not be identical to the condemned property. ***Ryan***, 393 S.W.2d at 11. No bright-line rules exist as to the requisite degree of physical similarity, distance, or proximity in time; again, these matters rest within the discretion of the trial judge. ***Newton***, 484 S.W.2d at 897; ***Ramsey***, 484 S.W.2d at 76.

In view of the foregoing authority, we cannot conclude that the trial judge abused his discretion in allowing testimony based upon the disputed comparable sales. The transcript indicates that both sides were allowed sufficient opportunity to demonstrate the similarities and dissimilarities of each sale. *See* ***Stallcup***, 594 S.W.2d at 396. The weight to be assigned to each sale's comparability was properly left to the jury, once the trial judge determined those sales to be admissible.

Petitioners further argue that the testimony of Fletcher and the landowners was impermissibly based upon the value of the property as a landfill, the purpose for which it was condemned. It is true that a property owner generally is not entitled to an increase in the land's value due to the public improvement for which it is taken. ***Layne***, 529 S.W.2d at 212. Furthermore, the value of property taken by eminent domain is to be determined without regard to "any enhancement or depreciation which occurred before the taking in anticipation of the [public] improvement." ***Veglio***, 786 S.W.2d at 946. Nevertheless, in the instant case, the property's potentially enhanced value as a landfill exists independent of the project for which it was taken. In other words, the land is not potentially valuable as a landfill *because* the petitioners plan to use it for that purpose; the land is potentially valuable because it is - and has been - uniquely suited for use as a landfill. This is supported by the testimony as to its soil content, accessibilty, location, proximity to another landfill, and other features, all of which

existed prior to the property's condemnation.

> It is clear that a landowner
>
> has the right to have the jury to consider any special uses and adaptabilities to which the land is shown to be susceptible. If the land is adapted to a special use which enhances its value this value belongs to the owner, and he has the right to demand consideration thereof in estimating the market value.

Stroud v. State, 279 S.W.2d 82, 88 (Tenn. App. 1955) (citing ***Alloway v. Nashville***, 88 Tenn. 510, 13 S.W. 123, and ***McKinney v. Memphis, etc., Hotel Co.***, 59 Tenn. 104, 131). *Accord* ***Davidson County Bd. of Educ. v. First Am. Nat'l Bank***, 301 S.W.2d 905, 909 (Tenn. 1957). In addition, it has been explained that

> [i]n determining the market cash value, you cannot single out from the elements of general value the value for an especial [sic] purpose; but you are to consider all the constituent elements that make up the market value,--its availability, adaptability, and capability for different uses and purposes.

Davidson County Bd. of Educ., 301 S.W.2d at 909 (quoting ***Alloway***, 88 Tenn. 510, 13 S.W. 124). Therefore, we conclude that the property's potential value as a landfill may properly be considered in the overall determination of its value. As explained earlier, the use of the property as a landfill may not be the *sole* measure of its value in this case, but it may be one

of the considerations factored into that calculation.

As an additional matter, the petitioners assert that the testimony of Fletcher and the landowners was based in part upon values taken from the oaths on the deeds of conveyance for the comparable sales. They allege this to be in violation of T.C.A. § 67-4-409(c), which states as follows:

> Any oath required in subsections (a) and (b) [transfers of realty, mortgages, deeds of trust and other instruments] shall not be introduced as evidence in any proceeding had in connection with any condemnation action for the purpose of indicating the value of such real property.

We disagree with the petitioners' contention. This statute precludes using the sworn-to amount on the deed of conveyance of the *condemned* property as proof of its value; it does not, however, forbid using amounts from deeds of conveyance of *comparable* property to calculate the value of land that has been condemned. *See* ***Love v. Smith***, 566 S.W.2d 876 (Tenn. 1978); ***State, ex rel D.O.T. v. Harvey***, 680 S.W.2d 792 (Tenn. App. 1984). Thus, we find this issue as framed by the petitioners to be without merit.

Petitioners' remaining issues raise questions of the reasonableness of the verdict, the influence of passion, prejudice, or caprice upon the jury, and the duty of the trial judge to grant a new trial when dissatisfied with the verdict.

In view of our disposition of the other issues, we find it unnecessary to address these matters.

The judgment of the trial court is vacated. Costs on appeal are assessed against the appellees. This case is remanded to the trial court for a new trial, consistent with this opinion.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.