

**THE CONDEMNEE’S PERSPECTIVE OF DIRECTED VERDICT, MOTIONS FOR MISTRIAL,
AND JUDGMENT NOTWITHSTANDING THE VERDICT IN ACTIONS FOR CONDEMNATION**

by

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A. DIRECTED VERDICT

In condemnation cases, as in other cases, “[a] directed verdict is proper only where there is no conflict in the evidence as to any material issue and the evidence introduced together with all reasonable deductions and inferences therefrom demands a particular verdict.” McDaniel v. Department of Transportation, 200 Ga.App. 674, 678, 409 S.E.2d 552, 555 (1991)(quoting Turner, etc., Advertising v. Fidelity Eastern, etc., 185 Ga.App. 815, 817, 366 S.E.2d 201 (1988)). In these cases, just and adequate compensation is the material issue which must be established by evidence.

While the condemnor is burdened with proving just and adequate compensation,

[i]f the condemnee contends that the value or the amount of the damage is greater than is shown by the condemnor's proof and seeks a verdict for some greater amount he must introduce evidence that will itself or together with other evidence in the case support the verdict, else if a verdict is returned for an amount greater than is authorized under the condemnor's evidence it will fall because unsupported.

Dawson v. Department of Transportation, 203 Ga.App. 157, 158, 416 S.E.2d 163, 165 (1992) (quoting Lewis v. State Hwy. Dept., 110 Ga.App. 845(1a), 140 S.E.2d 109 (1964)).

In Dawson, condemnees’ land was landscaped with trees and shrubs, and condemnees attempted to recover separately for those trees and shrubs by introducing evidence regarding the cost of replacement. However, as the Georgia Court of Appeals found, “[t]rees and shrubs are not

an improvement on the land such that their loss may be the subject of a separate award of compensation.” 203 Ga.App. 157 (1992). Additionally, the cost of replacing the trees and shrubs is not admissible to establish consequential damages to the remainder of condemnee’s property. Id. at 158. The condemnees did not introduce any independent evidence which would authorize a finding that the value of their condemned property or the consequential damages to their remainder was greater than that presented by condemnor’s expert. Id. Moreover, as to value, condemnees stipulated that “if they could not recover for the lost trees and shrubs separately, the testimony given by condemnor's expert as to the value of the property taken was otherwise dispositive.” Id. The court found that directed verdict was proper and further stated: “Where[, as here,] the only evidence introduced in a condemnation case, together with all proper inferences to be drawn therefrom, shows that only one verdict would be authorized, it is not error for the trial judge to direct a verdict for the owner in the amount shown by the evidence.” Id. (quoting Fulton County v. Bailey, 107 Ga.App. 512, 130 S.E.2d 800 (1963)).

Not only does Dawson illustrate that trees and shrubs do not amount to improvements warranting separate awards of compensation, but also that independent evidence is vital to condemnees in a condemnation action.

The importance of such evidence is further emphasized in Department of Transportation v. 2.953 Acres of Land. In this case, condemnors took 2.953 acres from a 32.2-acre tract of land occupied by a wholesale grocery facility, and the area condemned was located on the facility’s expansion site for additional warehouse space. Department of Transportation v. 2.953 Acres of Land, 219 Ga.App. 45 (1995). Condemnees introduced evidence of consequential damages and cost to cure to the trial court, including having to purchase an additional plot in order to build an adequate and necessary warehouse space. Id. at 46. Further, “condemnees claimed that the land

was no longer saleable as a wholesale grocery distribution facility, the use for which it is presently used” and presented evidence as to the probable use of the land in the future. Id. at 48.

Condemnors contend that the condemnees' evidence as to the “probable future use of the land was improper because only the present diminution in value is relevant.” Id. However, the Georgia Court of Appeals states that because condemnees claim their land could not be sold for the same use for which it is currently being used, “the evidence presented as to the future sale price of the land after the taking was not ‘wholly speculative or conjectural’ as suggested by the [condemnor].” Id. Condemnors further opposed condemnees’ claim for consequential damages and cost to cure. However, “this court has approved the use of evidence that condemnees were precluded from expanding and had to buy additional land in order not to lose future growth. See *Old National Inn*, supra at 161, 345 S.E.2d 853.” Id. The evidence, therefore, was sufficient to be considered by a jury and the trial court properly denied condemnor’s motion for directed verdict.

In McDaniel v. Department of Transportation, the condemnation proceedings of three separate, non-adjacent pieces of property, with varying improvements and condemned portions, were consolidated into one action. 200 Ga.App. 674, 674, 409 S.E.2d 552, 553 (1991). The condemnor’s expert testified that he separately appraised each parcel, but only provided the combined value of the condemned property at \$7,270. Id. at 676. By contrast, the condemnee’s expert testified as to the individual value of each parcel and its improvements, which amounted to a total of \$15,742. Id. Thus, condemnee asserts condemnor failed to shoulder its burden of proof “by establishing the damages to each of the three separate pieces of property condemned and the different improvements to each,” and the trial court erred in denying a partial directed verdict. Id. Certainly, condemnation proceedings may be consolidated, and there are even cases when the

condemnor's burden of proof is satisfied by producing the value of combined properties, such as when the values of land and improvements are equal. Id. at 677. In this case, however, the Georgia Court of Appeals found that the condemnor failed to shoulder its burden.

Even though they agreed with the condemnee's assertion that the condemnor's burden was not met, the court still found that a partial directed verdict would be improper, as it states:

[While the condemnor's] evidence was insufficient to enable the jury to arrive at the value of the three properties taken in the condemnation action, [the condemnor's expert] testimony that the combined value of all the interests in those properties equaled only \$7,270 did constitute some evidence that all the interests therein did not amount to the \$15,742 value given by appellants' expert.

Id. at 678.

Here, the condemnor's failure to satisfy its burden was still not enough to warrant a directed verdict on behalf of condemnee. Condemnor's evidence must be wholly invalidated as this case illustrates that even incomplete evidence may defeat a condemnee's motion for directed verdict.

B. MOTIONS FOR MISTRIAL

As recognized by the Georgia Court of Appeals in Wilkes v. Department of Transportation, trial judges “[have] a broad discretion, dependent on the circumstances of each case, which will not be disturbed unless manifestly abused. [Cits.] Unless it is apparent that a mistrial is essential to preservation of the right of fair trial, the discretion of the trial judge will not be interfered with. [Cit.]” Wilkes v. Dep't of Transp., 176 Ga.App. 739, 740 (1985) (quoting Firestone Tire Co. v. King, 145 Ga.App. 840, 843 (1978)).

In Wilkes, condemnors stated in their closing remarks that the jury had to “‘think about all the interests at play here’ and that they had to ‘consider not only the property owner, but the public that needs the project, the public that pays for the property.’” 176 Ga.App. at 740. Initially, condemnees objected to the statement, and the trial court cautioned the condemnors to refrain from stating anything more. Id. With trial court's permission, condemnees reserved their objections

until after the court charged the jury, and thereafter, the condemnees requested that either a motion for mistrial be granted or the trial court recharge the jury. Id. “The trial court thereupon recharged the jury, ‘[i]n reaching your decision in this case, you are not to be concerned with the effect of your verdict, either upon [appellants] on the one hand, the State of Georgia or [appellee] on the other.’” Id. The motion for mistrial was denied thereafter. Id.

Condemnees asserted that the recharge “failed to offset the prejudicial effect of appellee's counsel's remarks on the jury and thus their motion for a mistrial should have been granted... because the trial court did not specify the verdict's effect on the jurors themselves.” Id. However, in consideration of the court's discretion and an absence of any manifest abuse of the court's discretion, the Georgia Court of Appeals found that the “requested corrective action” was adequate as the improper remarks did not imply the jurors would bear the financial costs of the taking. Id.

Department of Transportation v. .590 Acres of Land & Bryan further recognizes the court's broad discretion in ruling on motions for mistrial. In .590 Acres, the condemnee stated during testimony that he did not agree with the condemnor's assessed valuation, stating: “they had already offered me more for it and I turned that down.” 174 Ga.App. 589, 591 (1985). Condemnor immediately objected and moved for a mistrial. Id. The trial court denied the motion for mistrial and, instead, took curative action and instructed the jury to disregard the condemnee's statement. Id. Ultimately, the Court of Appeals found the trial court properly exercised their discretion as the testimony, though arguably improper, was harmless, largely because no actual amount was ever mentioned. Id.

In some instances, the court may even decide not to take any curative actions after a potentially prejudicial comment. In Stephens v. Department of Transportation, counsel for condemnor made an allegedly prejudicial comment during an objection, and while that comment

was not included in the Court of Appeal's opinion, the condemnor characterized it as an "inadvertent statement." 170 Ga.App. 784, 789 (1984). The trial court decided to deny the condemnee's motion for mistrial as the court believed it would be best not to call the jury's attention to it. Id. In evaluating the trial court's decision making, the Georgia Court of Appeals found no error in "[the trial court's] unchallenged determination that, under the circumstances, curative instructions would have a more prejudicial effect...than ameliorative value." Id.

Much like Stephens, Department of Transportation v. Knight is a case in which both a motion for mistrial was denied and curative action was not taken. In this case, before trial had commenced, a juror was overheard saying that he "did not think the government should take private land." 143 Ga.App. 748, 751 (1977). The condemnor moved for mistrial, but the trial court denied. Id. The Georgia Court of Appeals found that the trial court was within its discretion to deny as:

[t]here was no indication that anyone had said or done anything whatsoever that might have influenced this juror, a fact which distinguishes this case from those cited by the Department. Nor did the comment indicate that the juror held any prejudice or predisposition with respect to any issue involved in the case, since the government's right to take the land was not in dispute.

Id. at 752.

Procedural deficiencies may also prevent a court from granting a motion for mistrial. In Department of Transportation v. Foster, the condemnor argued that the trial court erred in denying its motion for mistrial on two occasions, but in both cases, the Georgia Court of Appeals upheld the trial court's decision. 262 Ga.App. 524, 527, 586 S.E.2d 64, 67 (2003). First, after agreeing not to present testimony regarding the sentimental value of the property, the condemnee testified that she had lived there for 46 years, that her children enjoyed living there, and that she had worked hard to cultivate a garden on the property. Id. The condemnor objected to this testimony during trial, but failed to request a mistrial. Id. The Georgia Court of Appeals found that "[b]ecause the

[condemnor] did not request a mistrial at the time that it made its objections, it may not now claim that the trial court should have declared a mistrial.” Id. Second, though evidence regarding settlement negotiations or the condemnor’s bad faith was prohibited, the condemnee testified that the condemnor “had refused to buy [her] house.” Id. This time, the condemnor objected to the testimony and moved for a mistrial. Id. However, the trial court denied the motion for mistrial and instead gave unspecified, curative instructions. Id. The condemnor did not renew its motion for mistrial, and because of this, the Court of Appeals found that the condemnor’s “contention that the trial court erred in denying its motion for mistrial is without merit.” Id.

Motions for mistrial are highly fact specific, and as evidenced in the foregoing cases, the court has broad discretion in deciding whether to grant or deny such motions. While courts may opt for curative action instead of granting a mistrial, such curative action or instruction is not always taken. Further, while the initial decision regarding a motion for mistrial is up to the discretion of the court, once a trial court has made a decision regarding a motion for mistrial, only manifest abuse will allow that decision to be overturned.

C. JUDGMENT NOTWITHSTANDING THE VERDICT

As an initial matter, the procedural requirements of judgment notwithstanding the verdict are of importance. Barron v. Department of Transportation, 188 Ga.App. 306 (1988) involves a declaration of taking condemnation in which the condemnee was dissatisfied with the amount of estimated compensation. At the associated appeal, a jury awarded the condemnee a special verdict, which included consequential damages. Id. Thereafter, condemnor moved the court for a judgment notwithstanding the verdict as to those consequential damages, which was granted. Id. The condemnee believed this to be in error because, while the condemnor did make a motion at the close of evidence, he failed to specifically denominate the motion as one for directed verdict,

which is required for a JNOV motion pursuant to 9-11-50(b). Id. Ultimately, the court found that the trial court considered the undenominated motion as one for directed verdict and ruled upon it as such so that the procedural requirements for JNOV were satisfied. Id. “Accordingly, if the evidentiary and procedural requirements have otherwise been satisfied, the superior court’s disposition of such an appeal by the grant of a motion for judgment n.o.v. would be authorized by the provisions of OCGA § 9-11-50.” Id. Procedural requirements, therefore, must be satisfied in order for JNOV to proceed, and as illustrated by Barron, the content of those procedural requirements, namely motions seeking directed verdict, are much more important than their title.

In Department of Transportation v. Arnold, 154 Ga.App. 502 (1980), the condemnees sought to prove at trial that the condemnor’s valuation of the 7.107 acres of condemned land did not represent just and adequate compensation. In support of their contention, condemnees presented testimony that the land at issue is not only a part of the 25-acre tract originally identified, but also a 69-acre tract “comprised of the 25-acre tract and a contiguous 44-acre tract; that the 44-acre tract is owned by two of the three owners of the 25-acre tract; that the three owners of the 25-acre tract are business partners; and that the three men have treated the two tracts as a single parcel of land.” Id. The per-acre value of the land increases when it is considered part of the 69-acre tract of land, and the jury returned an award much higher than that set by the condemnor. Id. The condemnor made a motion for judgment notwithstanding the verdict, which was denied. Id. In their appeal of that denial, the condemnor argued that “the opinion evidence (introduced) by the condemnee on the trial of the case was not proper evidence for consideration by a jury and was void of probative value.” Id. The Georgia Court of Appeals disagreed.

In its analysis, the Georgia Court of Appeals states,

[t]he courts of this state have traditionally granted condemnees of land considerable leeway in presenting evidence bearing upon the market value of their condemned land. “Anything that actually enhances the value (of the land)

must be considered in order to meet the demands of the Constitution that the owner be paid before the taking, adequate and just compensation.”

Department of Transportation v. Arnold, 154 Ga.App. 502 (1980)(quoting Hard v. Housing Authority of Atlanta, 219 Ga. 74, 80, 132 S.E.2d 25, 29 (1963)). Further, the court found that the condemnees’ uncontroverted evidence established “unity of use and substantial, though not perfect, unity of ownership with respect to the 25 and 44-acre tracts,” which demonstrated the condemned tract was an integral part of the 69-acre tract of land. Id. Therefore, condemnees laid an appropriate foundation for opinion evidence as to the per-acre value of the 69-acre parcel, and there was no error in denying condemnor’s judgment notwithstanding the verdict. Id.

As Arnold illustrates, the historical treatment of evidence as to the market value of condemned land is certainly favorable to condemnees. Still, it is imperative for condemnees to lay a proper foundation for that valuation evidence.