

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

by

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BURDEN

Except in the case of an inverse condemnation and a claim for business losses and other claimed peculiar damages, the burden of proof is on the condemnor. Specifically, the condemnor has the burden to prove the value of the property being taken and any damages to the property not taken, and the burden of proof in a condemnation case never shifts from the condemnor. Pendarvis Construction Corp. v. Cobb County-Marietta Water Authority, 239 Ga. App. 14 (1999); West v. Dept. of Transportation, 176 Ga. App. 806 (1985). However, the condemnor may present evidence that is favorable to its contentions as to the just and adequate compensation due to the condemnee. Georgia Power Co. v. Brooks, 207 Ga. 406, 62 S.E. 2d 183 (1950); City of Atlanta v. Brookins, 147 Ga. App. 869, 250 S. E. 2d 577 (1978); Venable v. State Hwy. Dept. 138 Ga. App. 788, 227 S. E. 2d 509 (1976).

If the Condemnee disagrees with the amount of compensation or contends that other elements of value should be awarded, the Condemnee does have the burden of presenting evidence to establish its contentions. Dept. of Transp. V. Bird, 158 Ga. App. 369, 280 S. E. 2d 394 (1981), rev'd in part on other grounds, Pendarvis Constr. Corp. v. Cobb County-Marietta Water Auth., 239 Ga. App. 14, 520 S. E. 2d 530 (1999); Lewis v. State Hwy. Dept., 110 Ga. App. 845, 140 S. E. 2d 109 (1964); Georgia Power Co. v. Smith, 94 Ga. App. 166, 94 S.E. 2d 48 (1956).

The burden of proof never shifts, but the burden of going forward with the evidence shifts to the Condemnee who seeks to recover a higher amount of compensation. Pendarvis Constr. Corp. v. Cobb County-Marietta Water Auth., 239 Ga. App. 14, 520 S. E. 2d 530 (1999); Glover. v. Dept.of Transp., 166 Ga. App. 512, 304 S.E. 2d 567 (1983).

The failure of the Condemnor to place a value on a particular element of damage does not result in a failure to meet the burden of proof. White v. Georgia Power Co., 237 Ga. 341, 227 S.E. 2d 385 (1976).

The verdict of the jury must be supported either by direct evidence or opinion evidence relating to the value of the property and consequential damages. Dept. of Transp. V. Bird, 158 Ga. App. 369, 280 S.E. 2d 394 (1981); Pendarvis Constr. Corp. v. Cobb County-Marietta Water Auth., 239 Ga. App. 14, 520 S.E. 2d 530 (1999).

SUFFICIENCY OF EVIDENCE

Despite the holdings cited above concerning the burden of proof and the burden of going forward, the Georgia courts have held that a jury, in its determination of just and adequate compensation, is not bound by the opinions of value presented to it by the parties and may consider the sufficiency of all of the evidence presented to it in arriving at its verdict of just and adequate compensation. Under these cases, jurors are not required to accept as correct the opinions of witnesses as to the value of property, even though such opinions are uncontradicted by other opinion testimony. Jurors may consider the nature of the property involved together with any other facts or circumstances properly within the knowledge of the jury that may throw light upon the question of value. The jury may fix either a lower or a higher value upon the property than that stated in the opinions and estimates of the witnesses, provided the verdict is not clearly

unreasonable in light of all of the evidence. See generally Department of Transp. V. Driggers, 150 Ga. App. 270 (1979).

A sufficiency of evidence issue arose from the use of aggregate value testimony in McDaniel. v. Department of Transportation, 200 Ga. App. 644 at 676 (2) (1991). The condemnor's expert testified to the combined value of three separate parcels of land situated in the same general vicinity. The condemnees, whose expert testified about the value of each parcel separately and arrived at a sum twice the amount of the condemnor's expert, moved for partial directed verdict based on the condemnor's failure to carry its burden of proof. The two-judge opinion found that in the absence of any evidence that the values of properties and improvements thereon were equal, the evidence was insufficient to enable the jury to arrive at the amount of just and adequate compensation due condemnees, although the evidence was sufficient to avoid entry of a partial directed verdict to condemnees based upon their expert's testimony.

Motions for Directed Verdict, Mistrial and Judgment Notwithstanding The Verdict will generally arise due to questions dealing with the admissibility or sufficiency of the evidence that arise during the trial, the appropriateness or inappropriateness of the charges to the jury and arguments of counsel.

The court may, if the evidentiary and procedural requirements have otherwise been satisfied, grant a motion for judgment n. o. v. for condemnor or condemnee. Barron v. Dept of Transp., 188 Ga. App. 306, 372 S.E. 2d 684 (1988).

For a good discussion on Condemnor's and Condemnee's perspective to Motions in Limine to exclude evidence and other matters, please refer to discussions of the use of Motions in Limine presented by Melissa J. Perignat, Esq., Elizabeth R. Story and Thomas J. Fitzgerald at the February 25, 2016 Eminent Domain Seminar, Institute of Continuing Legal Education in Georgia.

DIRECTED VERDICT

A directed verdict is authorized only where there is no conflict in the evidence as to any material issue and the evidence, with all reasonable deductions therefrom demands a particular verdict. Georgia Cas. & Surety Co. v. Valley Wood, Inc. 2016, 336 Ga. App. 795, 783 S.E. 2d 441 (2016).

The standard of appellate review of the denial of a motion for directed verdict is the any new evidence test; the question on appeal is not whether the verdict and judgment of the trial court was merely authorized, but whether a contrary judgment was demanded. Rolleston v. Estate of Sims. 253 Ga. App. 182, 558 S. E. 2d 411 (2001).

On appeal of denial of a motion for a directed verdict, the plaintiff must establish that there was no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demanded the verdict sought. Driggers v. Campbell. 247 Ga. App. 300, 543 S. E. 2d 787 (2000).

Grant of directed verdict can be upheld only where reviewing court determines that all evidence demands that verdict; this requires de novo review. (Hulsey v. Department of Transp., 230 Ga. App. 763, 498 S. E. 2d 122 (1998).

In Hulsey, which was an inverse case, the trial court granted DOT's motion for a directed verdict based upon DOT's assertion that Hulsey failed to establish a date of taking. In this case, the Court of Appeals established the date of stabilization of the impact as the date of taking and since Hulsey presented some evidence showing a date of taking and the valuation of damages on that date, the trial court erred in granting a directed verdict in favor of DOT. 230 Ga. App @ 266.

Conversely, in Dawson v. Department of Transportation, 203 Ga. App. 157, 158, 416 S.E.2d 163, 165 (1992), the Dawson's attempted to recover separately for trees and shrubs located

on the land taken by introducing evidence regarding the cost of replacement of the trees and shrubs. 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)).

In McDaniel v. Department of Transportation, 200 Ga. App. 674, 674, 409 S.E.2d 552, 553 (1991), cited hereunder, the condemnation proceedings of three separate, non-adjacent pieces of property, with varying improvements and condemned portions, were consolidated into one action. The Condemnor’s expert testified that he separately appraised each parcel, but only provided the combined value of the condemned property at \$7,270. The Condemnee’s expert testified as to the individual value of each parcel and its improvements, which amounted to a total of \$15,742. Condemnee contended that 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 its motion for a partial directed verdict. Condemnation proceedings may be consolidated, and there are cases where condemnor is able to satisfy its burden of proof by producing evidence of the value of the combined properties, such as when the values of land and improvements may be equal, but in *McDaniel*, the Georgia Court of Appeals found that the condemnor failed in carrying its burden of proof.

However, 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.

Directed verdict and judgment notwithstanding the verdict (JNOV) is not proper unless there is no conflict in evidence as to any material issue and evidence introduced, with all reasonable deductions therefrom demands certain verdict. *Department of Transp. V. Blair*, 220 Ga. App. 342, 469 S. E. 2d 446 (1996)

MOTIONS FOR MISTRIAL

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. *Wilkes v. Department of Transp.*, 176 Ga. App. 739, 740 (1985); *Firestone Tire Co. v. King*, 145 Ga. App. 840, 843 (1978)).

In *Wilkes*, Condemnor’s counsel stated in his closing 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.’” Initially, Condemnee’s counsel objected to the statement, and the trial court admonished the Condemnor’s counsel to so proceed. Counsel for the Condemnee received the trial court’s permission, to reserve 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. “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.” The trial court denied the Condemnee’s motion for mistrial.

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. 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. See also Stephens v. Department of Transportation, Condemnor’s counsel made an allegedly prejudicial comment during an objection which the Condemnor’s counsel characterized it as an "inadvertent statement." The trial court denied the condemnee’s motion for mistrial and refrained from giving any curative instructions believing it would be best not to call the jury’s attention to the comment. The 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.”

See also Stephens, Department of Transportation v. Knight , 143 Ga. App. 748, 751 (1977) the Condemnor moved for mistrial, that was denied by the trial court. Where a man was overheard saying that he “did not think the government should take private land.” The Georgia Court of Appeals found that the trial court was within its discretion to deny the motion.

JUDGMENT NOTWITHSTANDING THE VERDICT

In Barron v. Department of Transportation, 188 Ga. App. 306 (1988) the jury awarded condemnee a special verdict, which included consequential damages. Condemnor moved the court for a judgment notwithstanding the verdict as to those consequential damages, which was granted by the trial court. Condemnee contended the action of the trial court to be erroneous because, while the condemnor did make a motion at the close of evidence, the Condemnor failed to specifically denominate the motion as one for directed verdict, which is required for a JNOV motion pursuant to 9-11-50(b). The court found that the trial court considered the motion as one for directed verdict and ruled upon it as such so that the procedural requirements for JNOV were satisfied. “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.”

In Department of Transp. V. Blair, 220 Ga. App. 342, 469 S. E. 2d 446 (1996) there was conflicting testimony as to whether or not a stop sign, shown to be placed at a lower level than proscribed obstructed his view before pulling into oncoming traffic. DOT moved for a directed verdict and subsequently a judgment notwithstanding the verdict because there was insufficient evidence that the law stop sign proximately caused the collision.

The Court held that in determining whether the trial court erred by denying defendant's motions for a directed verdict and motion for judgment n.o.v., this court must view and resolve the evidence any doubt or ambiguity in favor of the verdict and judgment n.o.v. A directed verdict and judgment n.o.v. is not proper unless there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom demands a certain verdict.

**450 (citation, punctuation, and emphasis omitted.) Stone v. Allen, 201 Ga. App. 842, 843 (1), 412 S. E. 2d 605 (1991). Here, because the evidence as to the proximate cause of the collision is in conflict and does not demand a certain verdict, and because some of that evidence supports the verdict that the DOT's negligence in maintaining the low stop sign proximately caused the accident, the trial court did not err in denying the DOT's motions for a directed verdict and judgment n.o.v. See Taylor v. McClendon, 205 Ga. App. 390, 391 (2), 422 S.E. 2d 440 (1992).