Case Update - Georgia Eminent Domain Seminar
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1. **City of East Point v. Young, 340 Ga. App. 223 (February 15, 2017)**

Issue: Sovereign Immunity from Inverse Condemnation Claims

Young brought an action for inverse condemnation, negligence, negligence per se, and trespass, claiming that the City had damaged the driveway of an apartment complex she owned by repeatedly driving a garbage truck over the concrete entrance, and the damage made the driveway unusable, which caused the tenants to not renew their leases, and ultimately led to Young losing the complex to foreclosure. The trial court granted the City's motion for summary judgment on Young's claims for negligence, negligence per se, and trespass on the basis of sovereign immunity. However, the trial court denied both parties' motions for summary judgment on the inverse condemnation claim, holding that there were issues of fact for a jury to determine. Both parties appealed, and the Court of Appeals affirmed the trial court.

The City argued that it was entitled to summary judgment since Young presented no evidence of damages. However, because the trial court never addressed this issue in its order, the Court of Appeals concluded it was not appropriate for the Court to address it either and instead stated that the trial court should address whether the City is entitled to summary judgment on this ground. The Court of Appeals did note that as held in Stroud v. Hall County, the failure to produce probative evidence of damages of a specific amount is not a viable basis for summary judgment. 339 Ga. App. 37, 41 (2016).

2. Curry v. DOT, 341 Ga. App. 482 (May 18, 2017)

Issue: Jury Instructions Regarding Access Rights

GDOT filed a Petition and Declaration of Taking against property owned by Curry, condemning all access rights from the property to Firetower Road, as Firetower Road would cease to exist after completion of the project. During the trial, GDOT presented evidence that Curry owned another tract of property on Highway 257, which adjoined the subject property, and that she had access to Highway 257 via both tracts. The jury awarded Curry $86,000 as just and adequate compensation, and the trial court entered a judgment accordingly. Curry appealed contending that the trial court erred by instructing the jury on a means of determining consequential damages for loss of right of access that was both inaccurate as a matter of law and inapplicable to the facts of the case.

Both during the charge conference and after the court instructed the jury, Curry objected to the italicized language of the charge below as to consequential damages:

> "If the construction of a limited-access highway interferes with the owner's access right, the owner's right of access to an existing road would have to be taken into account, condemned, and included in the owner's compensation.
> Now, a property owner of land contiguous to a public road has "right to access or easement of access" of the road and he cannot be deprived of this right without just and adequate compensation being paid. This right of access consists of the right of egress and ingress to the abutting public road. However, *a property owner is not entitled to access at all points on the boundary between his property and the public right of way, but is entitled to convenient access. If the means of access are not substantially interfered with[,] the property owner is not entitled to consequential damages for loss of access. The measure of damages is any diminution to market value of the remaining property by reason of such interference. Whether there has been a substantial interference and any reduction in fair market value by reason of such interference is for you to determine."*

Curry argued that in McDonald v. DOT, 247 Ga. App. 763 (2001), a similar charge was given with nearly identical facts to the present case, and said charge had constituted reversible error. However, the Court of Appeals found no reversible error in the jury charge, stating that the charge given also included much of the same language employed by the Supreme Court in DOT v. Whitehead, 253 Ga. 150 (1984), to explain that a condemnee must be compensated for loss of right of access but that in determining damages, consideration can also be given as to whether the condemnee has alternative access. Furthermore, since the jury awarded Curry more than the DOT argued was just and adequate compensation, the jury clearly did not construe the

instructions to mean that Curry was not entitled to any consequential damages as Curry contended.

3. <u>DeKalb County v. Speir</u>, 341 Ga. App. 774 (June 15, 2017)

Issue: Business Loss; Post-Taking Lease Obligations

DeKalb County condemned property at the intersection of Lavista Road and Oak Grove Road, which resulted in closing two of the three driveways serving the property, reducing the overall property size, restricting parking, and significantly impacting access. Following a jury trial, the jury awarded $313,000 to the property owner, and $671,000 to the tenant on the property, who owned and operated a dry cleaning business.

At trial, the tenant's business appraiser testified to the business value, as well as the fact that the tenant was required to continue making payments under its lease on the property through 2017, resulting in further losses. The County filed a motion in limine to exclude evidence of the tenant's post-taking lease obligations. The trial court denied the motion and admitted the evidence.

The Court of Appeals found there was no error, as the tenant offered testimony that the property, with its particular location and access points was unique, raising a jury question on uniqueness. As such, the presentation of business loss evidence was appropriate. The Court of Appeals further held that this evidence is not limited to the market value of the business before the taking and immediate after. Instead, evidence of *any* business loss which results in a diminution of value of the business is admissible. The tenant's business appraiser testified that the taking not only depleted the value of the business, but it also "saddled" the tenant with a lease obligation it was contractually obligated to pay for several more years. The future rent payments were connected to the market value of the business just after the taking, bringing the evidence within the ambit of business loss, as these obligations existed at the time of the taking.

4. Fox v. Norfolk S. Corp., 342 Ga. App. 38 (June 23, 2017)

Issue: Inverse Condemnation

Fox filed an action for inverse condemnation and trespass against Norfolk Southern after Norfolk Southern constructed a passing side track parallel to its existing track within its existing right-of-way, which bisected Fox's property. The passing track was built on the west side of the existing 100 foot right of way. After negotiations with Fox for the purchase of additional right-of-way failed, Norfolk Southern reconfigured its plans for the side track to fit entirely within the existing right-of-way through Fox's property. Once the side track was operational, trains would sit on the side track and block Fox's private railroad crossing, preventing Fox from continuing to use the property for cattle grazing. In the action, Fox alleged that based on both the language of the 1868 right of way deed and the historical use of the right of way, Norfolk Southern's right of way was only 45 feet wide. Therefore, Fox argued, anything outside of that 45 foot strip should be considered trespass on the property.

Norfolk Southern removed the case to federal court, asserting the trespass claim was preempted by federal law and asking the court to exercise supplemental jurisdiction over the inverse condemnation claim. The federal court remanded the case back to state court, finding that Fox's claims were not preempted since it did not relate to the regulation of the railroad or affect the operation and use of the railroad, but only compensation for a wrongful taking. After extensive discovery, Norfolk Southern filed a motion for summary judgment. The trial court granted Norfolk Southern's motion for summary judgment, finding that Norfolk Southern's new side track was within the existing right of way. Fox filed a motion for reconsideration, asserting for the first time that the interference with his access across the tracks resulted in inverse condemnation of the portion of his property located to the east of the tracks. The trial court denied the motion, finding that the claim for inverse condemnation of the eastern portion of the property was preempted by the ICCTA (Interstate Commerce Commission Termination Act).

Fox appealed, contending that the trial court erred in finding that Norfolk Southern constructed the side track within its own right of way, that Fox had not acquired any part of that right of way through adverse possession, and that Fox's claim of inverse condemnation of the property on the east side of the tracks was preempted by federal law.

The Court of Appeals first considered jurisdiction of the appeal based on the trial court's finding that the inverse condemnation claim was preempted by federal law. After a discussion on

the history of the Court's jurisdiction, the Court determined it would hear the merits of the appeal, since it routinely exercises appellate jurisdiction in those cases that do not involve an affirmative claim of preemption (i.e. where it has been raised as a defense and where the defense does not involve a direct constitutional challenge to an entire statute on preemption grounds).

Addressing the merits of the case, the Court found no error in the trial court's finding that the railroad had not trespassed outside its right of way. The Court addresses each of Fox's arguments:

- O.C.G.A. § 46-8-100 supports that the 1913 valuation map showing the 100 foot right-of-way is conclusive evidence of the right-of-way dimensions and Fox failed to present any evidence of ownership interest by virtue of title or adverse possession of the disputed property.
- The surveys incorporated into Fox's deeds show a 100 foot right-of-way and under Georgia law, "a deed incorporating a recorded plat by reference as the legal description [of the property] has the same effect as if written out in the deed." Jones v. Brown, 244 Ga. App. 300, 302 (2000).
- Norfolk Southern is not bound to its admission that it did not own the property on which it constructed the side track, as the admission was based on a plat that is impossible to determine the precise location of the disputed property and both parties admitted that Norfolk Southern has a 100 foot right-of-way.
- Fox was not able to establish adverse possession over the disputed property area. Further, the 1868 deed gave the grantor permission to use the land within the right of way for agricultural purposes up to "the ditch" on either side of the track. Thus, Fox's possession was permissive, not adverse.

As for Fox's Motion for Reconsideration, the Court of Appeals found that the trial court erred in finding that the inverse condemnation of property on the east side of the tracks was preempted by federal law. Because Fox asserted a traditional state law claim for inverse condemnation, the Court analyzed the preemption defense under the "as-applied" standard, which is used to assess whether, as applied to the facts of this case, Georgia inverse condemnation law would have the effect of unreasonably burdening or interfering with rail transportation. Norfolk Southern, who bears the burden of proving the doctrine applies, did not offer argument or evidence to show the action for inverse condemnation would interfere or

burden rail transportation. Therefore, the Court determined that the inverse condemnation claim would not unreasonably interfere with or burden the rail transportation, and therefore would not be preempted by federal law. Since the trial court never considered the merits of Fox's claim for the inverse condemnation of the property east of the tracks, and the record indicated a question of fact regarding interference with access to the east side of the tracks which can support an inverse condemnation claim, summary judgment was not proper.

5. City of Marietta v. Summerour, 807 S.E.2d 324 (October 30, 2017)

Issue: Compliance with O.C.G.A. § 22-1-9 – Policies and practices guiding exercise of eminent domain.

This case involves a small grocery store on Allgood Road in Marietta and, more particularly, the parcel of land on which the store sits. Ray Summerour owned the land for nearly three decades. On June 1, 2010, the City of Marietta sent a letter to Summerour, informing him that the City had an interest in his property for the purpose of building a public park, that it had hired an appraiser to determine the value of the land, and that an offer to purchase the property was forthcoming. Three weeks later, the City sent a written offer to Summerour, which said:

> The City of Marietta has employed a Certified Appraiser to appraise your property. The Certified Appraiser has valued your property at $85,000.00. The purpose of this letter is to offer you the appraised value of your property. Please review this offer and let me know if you are willing to sell your property to the City of Marietta for the certified appraised value.

Summerour did not respond to this offer. On October 6, 2010, the City sent another offer letter to Summerour, identical to its earlier written offer. Again, Summerour did not respond.

The City did not correspond with Summerour again until May 23, 2013, when the City sent a letter to Summerour in which it expressed continued interest in the property and suggested that, if Summerour had any interest in selling the property, he ought to contact the City. That letter, however, did not offer to purchase the property for any particular amount. Again, Summerour did not respond.

The City hired a real estate appraiser to reappraise the property and engaged a business appraiser to assess the value of the grocery store. On July 26, 2013, a lawyer for the City sent another written offer to Summerour, which said:

> This firm represents the City of Marietta which has an interest in purchasing your property located at the above referenced address. The city has engaged a professional certified real estate appraiser to conduct a current appraisal on your property and the current appraised value is $95,000.00. In addition, the certified business appraiser has placed a value of $46,700.00 on the business located on the property. Therefore, the total value of the property is believed to be $141,700.00. Please accept this letter as an official request by the City of Marietta to purchase your property at the above address for the above stated value. At your convenience, please contact the undersigned regarding this matter.

On August 13, 2013, Summerour sent a letter to the City explaining that he had cooperated with the City's appraisers, meeting with them and giving them the information they had requested. Summerour asked for a summary of the appraisals done for the City or "some form of documentation to show me how [the appraisers] came up with the numbers," noting that the offer was less than he expected. Summerour said he intended to obtain his own appraisal and expressed a willingness to discuss the matter with the City.

On December 4, 2013, Summerour sent another letter to the City, in which he made a counteroffer to sell the property for $375,000. After a meeting between Summerour and the lawyer for the City concerning this counteroffer, the City rejected the counteroffer on December 10, 2013. Two days later, the City offered $152,000 for the property and warned that, unless Summerour obtained his own appraisal and shared it with the City, "this is likely to be the [C]ity's highest offer." Summerour rejected the City's latest offer.

Following the December negotiations, Summerour hired an attorney and obtained his own appraisal of the property. In April 2014, the lawyers for the City and Summerour corresponded about the property on several occasions, although the City refused to schedule a meeting with Summerour until he had his own "written signed appraisal" in hand. On May 8, 2014, Summerour's lawyer sent a letter to the City, reminding the City that it had never provided Summerour with a summary of its appraisal, notwithstanding its repeated demands that Summerour produce his own appraisal report. At that point, the City finally provided a summary of its appraisal to Summerour and on May 16, 2014, the City produced a copy of an appraisal report. The report was dated July 17, 2103, almost ten months prior to its production.

On May 21, 2014, the City notified Summerour that the Mayor and City Council soon would meet to consider whether to acquire the property by eminent domain. The City again offered to purchase the property based on its 2013 appraisal. A flurry of negotiations followed, in

the course of which the City eventually offered $160,000 for the land, but Summerour rejected the City's final offer.

On October 2, 2014, the City filed a petition to condemn the property. A special master was appointed and heard evidence from both parties regarding their respective valuations. In addition, Summerour argued that the petition should be dismissed because the City failed to comply with O.C.G.A. § 22-1-9. The special master found that the City had complied with its statutory obligations and awarded Summerour $225,000. The findings of the special master were returned to the trial court, and the parties filed exceptions to the award. After a hearing, the trial court adopted the special master's award as its own judgment.

Summerour appealed, and the Georgia Court of Appeals set aside the trial court's judgment. See Summerour v. City of Marietta, 338 Ga. App. 259 (2016). In its opinion, the Court of Appeals pointed to O.C.G.A. § 22-1-9(3), which it said required the City to provide Summerour with a written summary basis for its valuation of the property before or at least around the time that negotiations commenced. Upon its review of the record, the Court of Appeals concluded that the City did not provide Summerour with any such summary in a timely manner, and indeed, the City only provided a summary in May 2014, long after the initiation of negotiations. Noting the failure of the City to fulfill its obligations under O.C.G.A. § 22-1-9(3) might be indicative of bad faith, the Court of Appeals directed the trial court on remand to reconsider the question of bad faith. The Court of Appeals declined to decide whether noncompliance with O.C.G.A. § 22-1-9(3) is remediable, irrespective of bad faith.

The Supreme Court of Georgia granted the City's petition for writ of certiorari, directing the parties to address three questions:

> (1) To what extent are the provisions of O.C.G.A. § 22-1-9 mandatory requirement?
>
> (2) Did the Court of Appeals err in determining that [the City] failed to comply with O.C.G.A. § 22-1-9(3)?
>
> (3)If the provisions of O.C.G.A. § 22-1-9 are mandatory and the Court of Appeals correctly determined that [the City] failed to comply, what is the proper remedy.

Adopted in response to perceived abuses of eminent domain, O.C.G.A. § 22-1-9, entitled "Policies and practices guiding eminent domain," is part of the Landowner's Bill of Rights and Private Property Protection Act of 2006, and provides:

> In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for property owners, and to promote confident in land acquisition practices, all condemnations and potential condemnations shall, to the greatest extent practicable, be guided by the following policies and procedures[.] O.C.G.A. § 22-1-9.

Because the statute provides that a condemning authority is to be "guided" only "to the greatest extent practicable" by the provisions of O.C.G.A.§ 22-1-9, the City argued that these provisions are effectively nothing more than suggested guidelines for condemnations, which are not mandatory or, at least, judicially enforceable. Summerour, on the other hand, argued that the provisions are mandatory except to the extent that compliance with those provisions is impracticable, and that they statute imposes meaningful and judicially enforceable limits upon condemnations, even if it leaves some matters to the discretion of the condemning authority. The Supreme Court determined that Summerour had the better argument, concluding that O.C.G.A. § 22-1-9 "is understood most reasonably as mandatory, not optional. We hold the compliance with the provisions of Section 22-1-9 is required to the extent that compliance is practicable." 807 S.E.2d 324, 332.

The Supreme Court next turned to the question as to whether the City complied with O.C.G.A. § 22-1-9(3), which provides:

> *Before the initiation of negotiations for fee simple interest for real property*, the condemning authority shall establish an amount which it believes to be just compensation and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the condemning authority's independent appraisal of the fair market value of such property. *The condemning authority shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation.* Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. The condemning authority shall consider alternative sites suggested by the owner of the property as of the compensation offered[.]

807 S.E.2d at 332 (quoting O.C.G.A. § 22-1-9(3)) (emphasis supplied in the opinion).The Supreme Court agreed with the Court of Appeals that the City violated this provision because it failed to disclose the appraisal summary to Summerour in a timely manner. The Supreme Court rejected the City's main argument that the clause "[b]efore the initiation of negotiations for fee simple interest for real property" applies only to the first sentence of O.C.G.A. § 22-1-9(3), concerning a "prompt offer," and that the sentence requiring an appraisal summary – appearing

in the middle of the subjection – does not contain an express timing requirement." In doing so, the Supreme Court concluded:

> If we interpret the provision at issue to contain no timing requirement whatsoever, the city could wait even until after formally condemning the property before providing the summary — an absurd result that would defeat the purpose of this provision. See Roberts v. Deal, 290 Ga. 705, 709 (2) (723 SE2d 901) (2012) (statutes generally should be construed to "avoid absurd results"). Thus, we give this provision its most sensible and reasonable meaning: a condemning authority must provide the appraisal summary prior to the initiation of negotiations or as soon thereafter as "practicable."

807 S.E.2d at 333.

In this case, the City sent Summerour three letters in 2010, one of which expressed interest in purchasing the property, and two of which communicated a specific offer - $85,000. Three years later, in July 2013, the City sent Summerour a slightly more detailed letter, breaking down the offer amount into $95,000 for the property and $46,700 for the store business. The City did not send Summerour an appraisal summary until May 2014, 10 months after the July 2013 appraisal and the July 2013 letter. The Supreme Court agreed "with the Court of Appeals that 'the 2010 and 2013offers do not contain a sufficient summary of the basis for the amount the City established as just compensation, and the sufficient summary that was provided in 2014 came far too late." Id. (quoting Summerour, 338 Ga. App. at 265(1)).

The Supreme Court rejected the City's reasons for withholding the appraisal summary. The City explained that it was, at the time, attempting to negotiate the sale not only of the land owned by Summerour, but several neighboring parcels. If the City had provided each of the several owners with information about the basis for their respective appraisals, the owners might have compared information, and those with parcels that had been appraised lower than neighboring parcels might misapprehend that their parcels had been undervalued, which would have driven up the prices at which the owners would voluntarily agree to sell their land. The Supreme Court found this argument unavailing:

> In the first place, the idea on which it is based strikes us as highly implausible. There was nothing to stop the owners of the neighboring parcels from comparing offers, and any such comparison would have revealed any substantial disparities in the valuations. The notion that any misgivings arising from these disparities would be dispelled by withholding information about the basis for the appraisals — information that presumably, of course, would have explained the disparities seems far-fetched.

> More important, "practicable" does not mean convenient. In modern usage, "practicable" is commonly understood to mean "reasonably capable of being accomplished" or "feasible in a particular situation." Black's Law Dictionary (10th ed. 2014). See also 2 New Shorter Oxford English Dictionary, p. 2317 (1993 ed.) ("practicable" means "[a]ble to be put into practice; able to be effected, accomplished, or done; feasible"). To say that something is impracticable is to say that it reasonably cannot be done; it does not mean merely that it is inconvenient. The reasons offered by the City for withholding information about the appraisal for as long as it did go to the convenience of the City, not the feasibility of disclosing that information to Summerour. It was entirely feasible for the City to provide the appraisal summary to Summerour long before it actually did so. Thus, the City failed to comply with the dictates of Section 22-1-9 (3).

807 S.E.2d at 333-334.

The Supreme Court then turned to the issue of what remedy is available to Summerour as a result of the City's violation of O.C.G.A. § 22-1-9(3). The City contended that, even if it violated subsection (3), no remedy is available to Summerour, except upon a showing of bad faith, because O.C.G.A. 22-1-9 itself does not contain a remedial provision. The Supreme Court rejected the City's argument, finding that "dismissing the condemnation petition is an appropriate remedy where a condemning authority has acted outside its authority by violating the law, irrespective of bad faith." Id. at 334. The Supreme Court held that "[b]ecause the City failed to comply with Section 22-1-9(3), and because there is no evidence in the record that Summerour acquiesced in or waived strict compliance with the statute, the City acted outside its authority by condemning Summerour's property, and the City's condemnation petition must be dismissed." Id. at 335.

6. PHH Investments, Inc. v. Department of Transportation, 343 Ga. App. 462 (October 27, 2017)

Issue: Consequential damages for a contiguous tract

Edens and Avant Financing II Limited Partnership ("E&A") owns a parcel of land, identified as Parcel 6, near the intersection of Georgia Highway 400 and Highway 53 in Dawson County. Parcel 6 is a strip mall anchored by a Kroger grocery store. Contiguous to Parcel 6, there is a smaller outparcel within the strip mall, identified as Parcel 5 and owned by PHH Investments, Inc. ("PHH"). PHH leases Parcel 5 to Zenith Investments, Inc. ("Zenith"), which operates a Wendy's restaurant on the site.

As originally configured, Parcel 5 did not have driveways directly accessing Georgia Highway 400 and Highway 53, so when PHH purchased Parcel 5, it also received an easement for access over Parcel 6, so that Parcel 5 could be accessed from both highways. Using these easements, northbound drivers on Highway 400 can cross Highway 53 and turn right directly into Parcel 6 (the strip mall) where they can access Parcel 5 via an internal roadway known as Big Horn Drive, which connects Highways 400 and 53 and runs behind the Wendy's restaurant along the border of Parcels 5 and 6. Southbound drivers on Highway 400 have to turn left onto Highway 53, where they can turn left into Parcel 6 and access Parcel 5 via the southern portion of Big Horn Drive. Drivers on Highway 53 traveling in both directions can turn into the same entrance on Parcel 6 (the strip mall) onto Big Horn Drive to access Parcel 5 (the Wendy's). These methods allowed drivers to visit the Wendy's restaurant on Parcel 5 and return to the highways relatively easily from any direction.

In 2014, DOT endeavored to create a "continuous flow intersection" and filed a petition to condemn certain portions of Parcel 6 (the strip mall), including portions containing the access easements used by PHH and Zenith for access to Parcel 5 (the Wendy's). No portion of Parcel 5 was condemned. After completion of the project, direct access from Highway 400 to Parcel 6 and Big Horn Road (and ultimately to Parcel 5) would be cut off in either direction. Instead, Highway 400 drivers traveling in either direction would be rerouted to Highway 53 to the Parcel 6 access point on Highway 53.[1] Also, drivers would not be able exit the access point on Parcel 6 onto Highway 53.[2]

In response to DOT's petition, PHH and Zenith argued that the reduced access to Highways 400 and 53 would negatively impact the business of the Wendy's restaurant, converting it from a "convenience" location to a "destination" location not suited to a fast-food restaurant. They argued there are entitled to consequential damages for the diminution in the property value for Parcel 5 resulting from the reduced access to the Wendy's restaurant, in addition to the reduction value in the easements themselves. In response to DOT's motion for

[1] Although not mentioned in the opinion, drivers rerouted from Highway 400 to Highway 53 would no longer be able to turn left into the Parcel 6 access point onto Big Horn drive due to the construction of a median.

[2] Although not mentioned in the opinion, the Parcel 6 access point on Highway53, a full turn ingress and egress driveway before the project, would be converted to a right in only after the project.

partial summary, the trial court ruled that PHH and Zenith were not entitled to claim consequential damages for the diminution in the value of Parcel 5 (the Wendy's) resulting from the taking of portions of an adjoining property, Parcel 6 (the strip mall).[3] PHH and Zenith appealed arguing they are entitled to recover diminution in the market value of Parcel 5 resulting from the taking on Parcel 6 in the condemnation action against Parcel 6.

The Court of Appeals affirmed the trial court's ruling, finding the case is controlled by Georgia Power Company v. Bray, 233 Ga. 558 (1974), which addressed a claim by a neighboring landowner seeking consequential damages arising from the condemnation of an easement to install power lines on the condemned property. In that scenario, the Supreme Court of Georgia held:

> Consequential damages to a contiguous tract of land having a different ownership from that in which the taking occurs may be real and may in fact exist, but a separate owner's claim for consequential damages to his land contiguous to the tract where the taking occurs cannot be asserted in a condemnation action. Consequential damages to the "remainder of the tract in which the taking occurs" are the only consequential damages that may be recovered in the condemnation action.

343 Ga. App. 464 (quoting Bray, 233 Ga. App. at 558 – 559).

Based on this rule, the Court of Appeals concluded that PHH and Zenith could not recover consequential damages for Parcel 5 in the action against Parcel 6 because they do not own the condemned parcel, Parcel 6, and no part of Parcel 5 is being condemned. The Court of Appeals recognized, however, that

> [t]his ruling does not foreclose recover in the present action of (a) the market value of the taken portion of the easements, and (b) damages reflecting diminution, if any, of PHH's easements within Parcel 6 as those easements remain after the project. Nevertheless, . . . [PHH and Zenith] cannot obtain damages reflecting the diminished value of Parcel 5, which damages must be recovered, if at all, in an action for inverse condemnation.

343 Ga. App. 464 – 465 (citing Simon v. DOT, 245 Ga. 478, 480 (1980); Dougherty County v. Hornsby, 213 Ga. App. 114 (1957); and Eastside Properties v. DOT, 231 Ga. App. 217, 218 – 219 (1998)).

[3] Although not mentioned in the opinion, the trial court also ruled that Zenith was not entitled to claim business damages for the Wendy's on Parcel 5 resulting from the taking of portions of Parcel 6.

7. White v. Department of Transportation, 343 Ga. App. 491 (October 27, 2017)

Issue: Consequential damages for a contiguous tract

This appeal arises from a declaration of taking and petition to condemn property filed by the DOT for the widening of State Route 16. The petition was filed against land known as Parcel 32, which consists of a shopping center with multiple, separately owned but connected buildings, one of which is owned by James White, Jr. ("White") on an 8,125 square foot tract of land ("Tract A") also owned by White. White also owns a parking and access easement on Parcel 32 that provides White, his tenants and his customers nonexclusive parking in the shopping center parking lot, ingress and egress from State Route 16 over Parcel l32, and an additional 20-foot wide easement for access from the shared parking lot around the shopping center to the rear of White's building for loading dock access. White was the only party to file a notice of appeal in the condemnation action against Parcel 32.

White's real estate appraiser testified in a deposition that White was owed compensation in the amount of $2,445 for the condemnation's impact solely to his parking easement on Parcel 32. Additionally, he testified that he calculated the consequential damages to be a 50 percent reduction in the estimated value of Tract A due to the taking of a portion of Parcel 32 (from $122,400 to about $60,000), which he based on the addition of a wall and guardrail that affect building visibility, the steep grading on the driveway that affects accessibility, the taking of a sign, and potential increased water flow from steep grading. White's appraiser testified that White's property consisted of a building and an easement, neither of which would be worth much without the other.

White appealed the trial court grant of DOT's motion for partial, finding that while White may seek compensation for his easement interest in the land (Parcel 32), he could not recover consequential damages for the diminished value in his contiguous property (Tract A) in the condemnation proceeding itself, finding instead that White needed to pursue those claims in an inverse condemnation action.

The Court of Appeals agreed with the trial court, finding that White's consequential damages claim to Tract A must be pursued in an inverse condemnation action. In doing so, the Court of Appeals stated:

> It is axiomatic that (2) in order for a condemnee to recover consequential damages to the remainder of his property when only a part is taken, it must appear that the damages to the remainder proximately and naturally arose from the condemnation and taking of the *condemnee's own property*. "(3) Consequential damages to a contiguous tract of land having a different ownership from that in which the taking occurs may be real and may in fact exist, but a *separate owner's claim for consequential damages to his land contiguous to the tract where the taking occurs cannot be asserted in a condemnation action*. Consequential damages to the 'remainder of the tract in which the taking occurs' are the only consequential damages that may be recovered in the condemnation action."

343 Ga. App. 493 (quoting DOT v. Simons, 151 Ga. App. 807, 810 (1) (1979), quoting Georgia Power Co. v. Bray, 232 Ga. 558, 560 (1974), and citing Southwire Co. v. DOT, 147 Ga. App. 606, 607 (1) (1978)) (emphasis in original).