



Anne W. Sapp, Chair
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Section Midyear Meeting and Seminar August 2007

The half-day meeting and seminar will include ethics and professionalism credits. Watch for more information and specifics from ICLE.

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Note From the Chair

By Anne W. Sapp
Eminent Domain Section Chair

The past year has been an exciting time for those of us who practice in the area of eminent domain. There were major legislative changes in 2006 and exciting appellate cases in 2007, all of which inspired public interest in the area of eminent domain. As a result, membership in our section has grown, and we enjoyed an extremely well-attended Annual Meeting and Seminar in January 2007 at the Grand Hyatt Buckhead. For those of you who were unable to attend, we had an exciting faculty and enjoyed remarks at the luncheon from Judson Turner, executive counsel to the governor.

Our section is financially secure, and for the first time will participate in the State Bar Annual Meeting this summer as a bronze level sponsor for the Opening Night Festival.

We are also expanding the scope of services that our section offers to our membership. A section directory will be published this summer and delivered to everyone who is a member of the section. The newsletter will be published twice a year, offering court and legislative updates in addition to information regarding expert witness contacts. A half day mid-year meeting and seminar will be held in August with CLE credits being offered in professionalism and ethics.

My term will end June 30, but I will be working closely with incoming Chair Don Janney to continue the exciting work that we started this year. Thank you for giving me the opportunity to serve as your chairman. ♦

Justice Norman S. Fletcher Receives 2007 Pursley Award

At the 2007 meeting of the Eminent Domain Section, Justice Norman S. Fletcher of the Supreme Court of Georgia received the Pursley Award for outstanding service in the field of eminent domain. Justice Fletcher, a native of Fitzgerald, Ga., was appointed to the Georgia Supreme Court by Gov. Joe Frank Harris in 1989. He was Chief Justice of the Court from 2001 until 2005. Justice Fletcher retired from the Supreme Court in 2006.

Justice Fletcher received his B.A. degree in 1956 and his LL.B. degree in 1958 from the University of Georgia. He also earned

an LL. M. from the University of Virginia School of Law in May 1995. While a student at the University of Georgia, he was a member of Sphinx, Gridiron, Blue Key, ODK, Phi Delta Theta fraternity and Phi Delta Phi. He also served as president of his junior and senior classes and of Phi Delta Theta fraternity.

Prior to his appointment to the Supreme Court, Justice Fletcher was engaged in the general practice of law. He began his law practice in 1958 as an associate in the law firm of Mathews, Maddox, Walton and Smith in Rome, Ga. In 1963, he moved to

See Pursley Award on page 8

Application of *Daubert* Standard in Eminent Domain Cases in Light of O.C.G.A. § 22-1-14: A Condemnee's Perspective

By Dan Diffley and Sam Rutherford
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The trial of an eminent domain action brings to the forefront a property owner's constitutional right to just and adequate compensation for property taken by the government. The general issue of dispute in most condemnation matters is the amount of damages to be paid to the property owner. Expert witnesses, including real estate appraisers and business valuation experts, provide most (and sometimes all) of the evidence as to the damages owed in a condemnation action. Given the constitutional rights at issue, these experts, whether offered by the government or by the impacted property owner, should be held to the same standards and rigorous screening by the trial courts as in any other civil matter. Recent legislation in this area should not change this objective.

Daubert in Georgia

As part of the General Assembly's tort reform legislation in 2005, Georgia adopted the *Daubert* standard for the admission of expert testimony "in all civil actions."¹ *Daubert* requires the trial court to serve as a "gatekeeper" and examine the qualifications and the methods applied by an expert. An expert witness may be qualified as an expert by knowledge, skill, experience, training, or education, and may testify in the form of an opinion or otherwise if:

- (1) the testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;
- (2) the testimony is the product of reliable principles and methods; and
- (3) the witnesses apply the principals and methods in a reliable manner to the facts of the case.²

While O.C.G.A. § 24-9-67.1 provides some additional criteria for medical malpractice actions, the statute contains no carve-outs for eminent domain matters, or for real estate appraisers or business damages experts generally.

In 2006, in light of the *Kelo*³ decision, the General Assembly tackled eminent domain reform. Included in that new legislation was a provision related to expert testimony, O.C.G.A. § 22-1-14, which provides as follows:

- (a) When property is condemned under this title or any other title of this code, the value of the condemned property may be determined through lay or expert testimony and its admissibility shall be addressed to the sound discretion of the court.

- (b) If any party to a condemnation proceeding seeks to introduce expert testimony as to the issue of just and adequate compensation, Code Section 24-9-67.1 shall not apply.

The intent of O.C.G.A. § 22-1-14 appears to be to exclude condemnation matters from the *Daubert* screening process mandated by the General Assembly in 2005 for all civil cases. The statute arguably gives experts in condemnation matters an "escape clause" from the *Daubert* standard. However, the ambiguities in this statute and its apparent conflict with the policy put forth in 2005, raise questions as to whether state courts in Georgia still may apply the *Daubert* standard to experts in condemnation matters, and if so, whether they should.

Analysis of O.C.G.A. § 22-1-14

O.C.G.A. § 22-1-14 is hardly an example of legislative clarity, and the Georgia appellate courts have not yet issued any decisions on this portion of the new eminent domain statutes. An initial ambiguity is that Subsection (a) does not fully address all damages that can be recovered in a condemnation action. The subsection provides that the admissibility of testimony (both lay and expert testimony) as to value of the property lies within the sound discretion of the trial court. This subsection, however, is silent as to consequential damages, or any sort of business losses or other damages that may be suffered by a property owner or tenant. The question therefore remains: What standard is a court to apply for the business damages expert, accountant, or any other expert testifying concerning something other than the value of the property taken?

Rather than answering this question, Subsection (b) states that O.C.G.A. § 24-9-67.1, the freshly-enacted *Daubert* portion of the evidence code, shall not apply when a party seeks to introduce expert testimony on the just and adequate compensation owed to the condemnee. Thus, unlike the prior subsection, this subsection is not expressly limited to testimony regarding the value of the property. Just and adequate compensation is the central issue to be tried in a condemnation action, and may include various damages amounts, such as consequential damages to the remainder or business damages. So, contrary to Subsection (a), which is apparently limited to property value testimony, Subsection (b) apparently dictates that O.C.G.A. § 24-9-67.1 does not apply to any expert offered in a condemnation case.

Read in its entirety, O.C.G.A. § 22-1-14 presents a number of analytical problems and practical considerations. For example, while Subsection (b) eliminates the standard that would otherwise apply to all experts in a condemnation case, Subsection (a) only expressly grants discretion to trial courts with respect to one subset of such experts. What, then, is a trial court to do when confronted with proffered testimony from a business damages expert? Further, there is the larger question of whether the statute is a prohibition on the use of *Daubert* for experts in condemnation cases, or whether it simply makes application of that standard optional. Putting aside the issue of business damages experts, the critical question is whether a trial court, exercising the discretion granted in Subsection (a), may apply the *Daubert* standard to a real estate appraiser offered in a condemnation case for his opinion regarding the value of the property taken? Or, should Subsection (b) be interpreted to mean that such an application would be an abuse of the trial court's discretion? Thus, this seemingly simple and straightforward statute proves to be anything but when put into practice.

Use of *Daubert* in Condemnation Cases

As illustrated above, O.C.G.A. § 22-1-14, apparently aimed at clarifying the admissibility of testimony in condemnation cases, instead leaves unanswered the question of whether a trial court can and, if so, should apply the *Daubert* standard to proposed experts in a condemnation action. The language of the statute and the benefits of judicial uniformity indicate that both of these questions should be answered in the affirmative.

With respect to the “can” question, Subsection (b) appears simply to negate the mandatory application of *Daubert* provided in O.C.G.A. § 24-9-67.1. Therefore, the door is left open for application of the *Daubert* standard to experts in a condemnation action. When read in context, the “shall not apply” language in Subsection (b) does not refer to the *Daubert* standard itself, but rather to its application being mandatory. Therefore, the statute does not explicitly bar the application of the *Daubert* standard in condemnation actions. Additionally, the fact that Subsection (a) pertains to both lay and expert property valuation testimony suggests that the subsection's focus is on expanding a trial court's discretion regarding property valuation, rather than implicitly reducing a trial court's discretion with respect to experts on other subjects. On the whole, it appears that the General Assembly left it up to the trial court to determine whether *Daubert*, or any other standard, should be applied to proposed experts in condemnation actions.

As to the second part of the question, trial courts “should” apply *Daubert* in condemnation actions, as there is no reason to differentiate a condemnation action from any other civil action when it comes to expert testimony.

In O.C.G.A. § 24-9-67.1(f), the General Assembly declared its intention that “the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states.” Given the constitutional right involved in a condemnation action, it is only logical that this policy, even if arguably disclaimed by Subsection (b), should be served. Permitting parties' experts to testify with essentially no parameters for admissibility could pose serious threats to the due process owed to a citizen whose property has been taken through the exercise of eminent domain.

Further, applying *Daubert* analysis in eminent domain cases would provide uniformity and consistency throughout the state. Application of the *Daubert* factors will allow appraisers and valuation experts (and the parties that retain them) to anticipate the standard that will be applied by the trial court. It makes little sense to have a certain area of professionals, such as real estate appraisers, accountants or valuation experts subject to different standards depending on the type of civil case. For example, a real estate appraiser would not have the escape clause set forth in O.C.G.A. § 22-1-14(b) if he were testifying on behalf of a bank in another type of civil case, or on behalf of a property owner in a business dispute, or a divorce matter. To the contrary, the trial court would be required to subject him to the *Daubert* standard.

Additionally, application of the *Daubert* standard does not raise, but rather reduces, fairness concerns for the parties. It is entirely reasonable for a trial court, in exercising its discretion in examining a proposed expert in a condemnation matter, to apply the well-recognized and widely-utilized *Daubert* factors. If such a standard is mandatory in all other civil cases in Georgia, it must at least be permissible in a condemnation matter, especially given the constitutional protections implicated upon a government's exercise of the power of eminent domain.

Conclusion

Despite, or perhaps as a result of, the ambiguities in O.C.G.A. § 22-1-14, the door is left open for application of *Daubert* to guide the admissibility of proposed experts in condemnation actions. Moreover, trial courts should apply *Daubert* in condemnation actions because it promotes uniformity both in how such actions are litigated throughout the state and in how the testimony of real estate appraisers and other experts is considered by trial courts across the spectrum of civil actions. ♦

Endnotes

1. O.C.G.A. § 24-9-67.1. See also *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999).
2. O.C.G.A. § 24-9-67.1(b).
3. *Kelo v. City of New London*, 545 U.S. 469 (2005).

Recent Decisions of Interest

By Donald W. Janney
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Challenges to Takings

City of Stockbridge v. Meeks,
283 Ga. App. 343 (decided Jan. 31, 2007)

The City of Stockbridge filed a condemnation under the special master procedure (O.C.G.A. § 22-2-100 et seq.) to acquire the condemnees' property, on which they operated a florist and gift shop. Although the condemnees had previously agreed to sell their property to the city in exchange for retail space in a new "town center" development with a mixture of private uses, the city decided not to make the exchange and elected to condemn the property as part of an urban redevelopment project. One week before the condemnation petition was filed, the city adopted a resolution declaring that the condemnees' property was needed to build "public facilities," but at the special master's hearing, the city did not state more specifically the purpose for which the property was being condemned. The condemnees then moved to dismiss the petition on the ground that the city had failed to plead that the condemnation was for a public purpose. After the special master denied the motion to dismiss and entered an award recommending condemnation of the condemnees' property, the condemnees filed exceptions to the special master's rulings on non-value issues; and on review, the trial court dismissed the condemnation petition because the city failed to plead a valid public purpose as required by O.C.G.A. § 22-2-102.2. On the city's appeal from the trial court's ruling, the Court of Appeals affirmed and held that § 22-2-102.2 requires a condemnor to "plead both '[t]he facts showing the right to condemn' and 'the necessity to condemn the private property and describing the public use for which the condemnor seeks the property'" and that this requirement "is neither presumed nor conditioned upon a preliminary finding of bad faith in the trial court." *City of Stockbridge*, 283 Ga. App. at 345 (emphasis added).

Mayo v. City of Stockbridge, ___ Ga. App. ___
(Case No. A06A1703, decided March 27, 2007)

In another condemnation by the City of Stockbridge under the special master procedure (O.C.G.A. § 22-2-100 et seq.), the special master awarded \$58,000 as compensation for the taking of the condemnee's property in fee. The city paid the amount of the award into the registry of the trial court, and the trial court entered a judgment condemning fee simple title to the property. The condemnee filed a notice of appeal for a jury trial and thereafter withdrew the amount of the award from the court's registry. After the jury returned a verdict for the condemnee in the amount of

\$63,361 as compensation for the taking, the City moved for an award of attorney's fees under O.C.G.A. § 22-2-84.1, which the trial court granted. (The opinion does not disclose the amount of fees awarded to the city.) On appeal from the judgment entered on the jury's verdict, the condemnee challenged, among other things, the legality of the taking and the award of attorney's fees to the city. The Court of Appeals rejected the condemnee's challenge to the taking and found that the condemnee failed to show that she had raised the issue before the special master and then excepted to the special master's ruling on the issue. In addition, the Court of Appeals concluded that by withdrawing the amount of the special master's award from the registry of the trial court, the condemnee had acquiesced in the judgment vesting title and, therefore, was estopped from protesting the condemnation. With regard to the award of attorney's fees, the Court of Appeals pointed out that while § 22-2-84.1 was repealed in 2006 (with respect to condemnation proceedings filed on or after Feb. 9, 2006), the statute applied at the time of the jury trial in July 2005 and upheld the award.

Date of Taking

Orv v. Georgia Transmission Corp., ___ Ga. ___ (Case No. S06G1952, decided March 26, 2007), reversing 280 Ga. App. 251 (2006)

In a special master proceeding filed in 2001 to condemn an easement for an electric transmission line, the special master awarded \$15,775 as the value of the property taken and \$16,000 in consequential damages to the condemnee's remaining property. The condemnee filed exceptions on non-value issues and an appeal to a jury on value issues. In an order issued in March 2002, the trial court overruled the condemnee's exceptions to the special master's rulings and entered a judgment condemning the easement, which included a "danger tree" provision like that at issue in *Mosteller Mill, Ltd. v. Georgia Power Co.*, 271 Ga. App. 287 (2005). While the case was pending for trial, the Court of Appeals handed down its decision in *Mosteller Mill*, which as a practical matter nullified the "danger tree" provision in the judgment entered in 2002. The condemnor then amended the petition to delete the "danger tree" provision; and the condemnee filed a motion to elect Oct. 13, 2005, (the date on which the condemnor amended the petition) as the date of taking. In a pretrial order entered that same day, the parties stipulated that the 2002 judgment was also amended to reflect the amendment to the petition. Nevertheless, the trial court rejected the condemnee's elec-

tion as to the date of taking and ruled that the date of taking was Oct. 21, 2001, which was the date on which the condemnor filed its original petition.

In an interlocutory appeal from the trial court's ruling, the Court of Appeals focused on the parties' stipulation in the pretrial order that the petition was amended to delete the "danger tree" provision and determined that the amendment "effectively deleted mere surplusage in the petition." *Orr*, 280 Ga. App. at 255. Relying on O.C.G.A. § 22-2-109(a), the Court of Appeals held that "the date of taking for the purposes of valuation is the date of the filing of the original condemnation petition" and affirmed the trial court's ruling. *Orr*, 280 Ga. at 255 (emphasis added).

The Supreme Court of Georgia later granted certiorari in the *Orr* case to review the decision by the Court of Appeals with respect to the date of taking. In a unanimous opinion, the Supreme Court reversed and observed that § 22-2-109(a), by its express terms, applies only to condemnations for public road and street purposes. Moreover, the Supreme Court noted that O.C.G.A. §§ 22-2-110 and 22-2-111 are not limited to condemnation actions for public roads and streets and that under these statutory provisions, no taking occurs until the condemnor has paid the amount of the special master's award into the registry of the trial court. Hence, the Supreme Court concluded that the Court of Appeals had erred in deciding that the date of taking was the date of filing of the original condemnation petition.

Claims for Business Losses

Dept. of Transportation v. Camvic Corp., ___ Ga. App. ___ (Case No. A06A2489, decided March 19, 2007)

DOT brought a condemnation action under the declaration of taking procedure (O.C.G.A. § 32-3-1 et seq.) to acquire commercial property owned by Camvic Corp. and leased to CVS Corp. The taking restricted access to the property and reduced the number of parking spaces for CVS's store on the property. Camvic and CVS filed timely notices of appeal for a jury trial; and DOT, Camvic, and CVS subsequently entered into a consent judgment that Camvic and CVS had been justly and adequately compensated for their respective property interests, except for CVS's claims for business losses, damages to trade fixtures, and relocation expenses. Several months later, DOT filed a motion in limine to exclude evidence of business losses on the ground that CVS had failed to plead specifically for recovery of business losses in its notice of appeal. Finding that DOT had actual notice of CVS's claim for business losses, the trial court denied the motion in limine. On DOT's interlocutory appeal from the trial court's ruling, the Court of Appeals affirmed and held, among other things, that DOT had not contested the sufficiency of CVS's notice of appeal, but instead participated in a con-

sent judgment that reserved the claim for business losses for a jury trial.

Condemnation of Private Ways

Read v. Georgia Power Company, 283 Ga. App. 451 (decided Feb. 6, 2007)

Read, who leased a landlocked lot on Lake Rabun from Georgia Power Company, brought an action under O.C.G.A. § 44-9-40 et seq. (allowing a Superior Court to "grant private ways to individuals to go from and return to their property and places of business") against Georgia Power and several adjacent tenants. Georgia Power owned all of the land involved in fee simple and leased the landlocked lot to Read pursuant to a 15-year agreement, which provided, in part, as follows: "'No estate shall pass from Lessor to Lessee hereunder[;] Lessee shall have a usufruct only, not subject to levy, sale or attachment.'" (*Read*, 283 Ga. App. at 451.) The trial court subsequently granted a motion for summary judgment filed by Georgia Power and the adjacent tenants and ruled that under the language of the lease, Read had only a usufruct and could not acquire an easement by necessity. On appeal, the Court of Appeals affirmed the trial court's ruling and held that because the conveyance of a usufruct passes no property interest to the tenant, Read "does not 'own' an 'interest' and therefore cannot pursue an easement by necessity under O.C.G.A. § 44-9-40." (*Read*, 283 Ga. App. at 453.) (Note: A petition for certiorari is currently pending before the Georgia Supreme Court in Case No. S07C0864 to review this decision by the Court of Appeals.) ♦

We Need You!

We need the input of all members to help make this newsletter interesting and informative. Please contact the editor, Susan G. McCathran, at smccathran@bellsouth.net with any specific topics you would like to see addressed in the newsletter, or if you are interested in writing an article for an upcoming newsletter.

Don't Miss

In the November 2007 issue of the *Eminent Domain Section Newsletter*, Christian Torgrimson and Sarah Tosone will discuss the use of eminent domain to acquire wetlands for mitigation purposes.

Experts in Areas of Eminent Domain Law

This list is provided as a reference for our members. The Eminent Domain Section does not endorse or recommend any expert. If you know of an expert who does not appear on this list, but should, please contact the editor.

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Pursley Award

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LaFayette, Ga., to form a partnership with the late George P. Shaw and Irwin W. Stolz Jr. While in private practice, he represented the State of Georgia as a Special Assistant Attorney General (1979-89) and he also served as LaFayette City Attorney (1965-89) and Walker County Attorney (1973-88). He continued his general practice in LaFayette until his appointment to the Supreme Court.

Justice Fletcher has a distinguished record of service to the legal profession and the community. He served as a member of the Board of Visitors of the University of Georgia Law School (1989-95), and was its Chairman (1994-95). He is a fellow of the American Bar Foundation and the Georgia Bar Foundation and is a Master in the Joseph Henry Lumpkin Inn of Court. In 1989 he served as co-chair of the State Bar's Commission on Lawyer

Disciplinary Reform. Prior to his appointment to the Supreme Court, Justice Fletcher served as a member of the State Disciplinary Board (1984-87), chair of the Investigative Panel (1986-87), chair of the Local Government Section of State Bar (1977-78), President of City Attorney's Section of Georgia Municipal Association (1978-79), board member of Attorney's Title Guaranty Fund (1971-75), President of Lookout Mountain Bar Association (1973-74), and President of the University of Georgia Law School Association (1977). While residing in LaFayette, Justice Fletcher served three terms on the board of the LaFayette Chamber of Commerce and is the former president of the LaFayette Rotary Club.

Charles N. Pursley Jr., for whom the award is named, accepted the award for Justice Fletcher at the annual luncheon meeting of the Eminent Domain Section in Atlanta in January 2007. ♦

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