Benford picked the skis up on December 26 and left with his wife and some friends on a ski trip. On the first day of the trip, Benford had made six or seven ski runs and had fallen uneventfully a couple of times. These falls did not cause the bindings to release. On his last run, Benford was in the process of coming to a stop to assist his wife who had fallen. Because of a change in the slope where he stopped, his center of gravity got out over his skis and he fell. While the right ski did release, the left one did not and he tore ligaments in his left knee. When he returned the skis to the shop, he was given a free week ski rental, good any time.

Because Benford was injured and contended the skis did not release, Jackson, the store manager, had the bindings tested with the Vermont Calibrator, a device used to measure the torque it takes to remove a boot from its binding, and the skis rented by Benford passed the test. All skis rented by the ski shop were tested on this device once a year, and randomly selected sets were tested periodically.

[1] 2. Benford acknowledges that these facts establish the relationship of bailor-bailee, pursuant to OCGA § 44–12–60. Therefore, the relationship between them is governed by the terms of the Rental Agreement and the statutory obligations of a bailor under OCGA § 44–12–63. *Mark Singleton Buick v. Taylor,* 194 Ga.App. 630, 632(1), 391 S.E.2d 435 (1990); *Hall v. Skate Escape, Ltd.,* 171 Ga.App. 178, 319 S.E.2d 67 (1984).

[2] 3. Benford has failed totally to come forward with evidence concerning negligence by the ski shop. *Lau's Corp.,* supra; *Prince v. Atlanta Coca-Cola Bottling Co.,* 210 Ga. App. 108, 109(1), 435 S.E.2d 482 (1993).[1]

[3] Also, even assuming some negligence had been shown, "[i]n Georgia, the general rule is that a party may exempt himself by contract from liability to the other party for injuries caused by his negligence, and the agreement is not void for contravening public policy. [Cits.]" *Hall,* supra at 179, 319 S.E.2d 67. Here, the agreement clearly and prominently did just that. *Mercedes-Benz Credit Corp. v. Shields,* 199 Ga.App. 89, 91, 403 S.E.2d 891 (1991).

[4] 4. Benford's claims of breach of warranty and contract suffer the same fate. There is no showing by Benford of any latent defect in the skis or bindings, such as that in *Hall,* supra. Therefore, the covenant not to sue is not in contravention of OCGA § 44–12–63(3). *Mercedes-Benz,* supra; *Citicorp Indus. Credit v. Rountree,* 185 Ga.App. 417, 422(2), 364 S.E.2d 65 (1987). It is difficult to envision how the waiver language here could have been any clearer.

Judgment affirmed.

POPE, P.J., and SMITH, J., concur.

1. Even had he been able to do so, this is one of those rare cases where, as a matter of law, it can be said that Benford assumed the risk of exactly what happened to him. *Beringause v. Fogleman Truck Lines,* 200 Ga.App. 822, 823, 409 S.E.2d 524 (1991).

223 Ga.App. 797

DEPARTMENT OF TRANSPORTATION

v.

PITMAN.

No. A96A1347.

Court of Appeals of Georgia.

Dec. 4, 1996.

Dissatisfied with the amount Department of Transportation (DOT) offered for his property interest, condemnee appealed condemnation in Superior Court. The Superior Court, Monroe County, McGarity, J., entered judgment for condemnee, and DOT appealed. The Court of Appeals, Pope, P.J., held that trial court did not err in failing to charge jury that condemnee had duty to minimize or mitigate his damages.

Affirmed.

1. Eminent Domain ⚷222(5)

Mitigation charge is only required in condemnation proceedings when there is evidence that condemnee has failed to mitigate his damages.

2. Trial ⚷252(1)

For refusal of a jury charge to constitute error, the charge must be adjusted to the evidence.

3. Eminent Domain ⚷222(5)

In condemnation case, trial court did not err in failing to charge jury that condemnee had duty to minimize or mitigate his damages; condemnor argued that condemnee had no damages whatsoever and presented no evidence that condemnee could have mitigated his damages, but failed to do so.

4. Eminent Domain ⚷222(1)
Evidence ⚷474(1), 536

Condemnee's testimony regarding origin of gas station's business was based on his personal experience working at the station on a daily basis for almost 18 years and this personal experience qualified condemnee as an expert with regard to origin of gas station's business and, even if this was not the case, condemnee's actual personal experience and observations constituted factual basis for his opinion and thus, trial court did not err in failing to give condemnor's requested charge on non-expert opinion testimony.

5. Eminent Domain ⚷222(5)

Condemnor's proposed charge stating that "reluctance of the condemnee to part with the property is not the subject matter of consideration for the jury and the same does not constitute compensable damage" was not justified by the evidence and thus, trial court did not err in failing to give this charge; condemnee never attempted to place value on his business damages based on any reluctance or unwillingness to part with gas station.

6. Evidence ⚷555.3

When expert has been qualified, expert may give his opinion without stating the facts upon which the opinion is based, but it always is proper for expert witness to state the facts relied on in forming an opinion when requested to do so.

7. Evidence ⚷555.3

It is error not to allow expert to testify as to facts upon which an opinion is based.

8. Evidence ⚷555.6(2)

In condemnation case, expert's testimony regarding differences between gas station located on the condemned land and the gas station to which condemnee successfully relocated, based on their locations on opposite sides of interstate was offered as part of the factual basis regarding why, in his opinion, the gas stations should not be appraised together and consequently, it was not error to allow expert to testify concerning these matters.

Michael J. Bowers, Attorney General, Harris & James, William C. Harris, Lisa D. Neill-Beckmann, Macon, for appellant.

Pursley, Howell, Lowery & Meeks, Charles N. Pursley, Jr., Atlanta, for appellee.

POPE, Presiding Judge.

In 1987, condemnor Department of Transportation filed a condemnation petition acquiring .615 acres of land located on the east side of Interstate 75. The land was owned by condemnee Chevron U.S.A., Inc. and leased to condemnee Norman Jack Pitman, who operated a Chevron station on the land. Dissatisfied with the amount DOT offered for their respective property interests, both Chevron and Pitman appealed the condemnation in superior court. Chevron, however, resolved its dispute with DOT prior to trial, and it was dismissed as a party. The only issue at trial concerned Pitman's claim for business damages resulting from the loss of his service station.

DOT argued that Pitman had no business damages as a result of the loss of the Chevron station because Pitman successfully relocated his business to a BP station on the west side of the interstate at the same exit as the Chevron station. The BP station was leased in 1980 by Linoco, Inc., whose sole shareholders were Pitman and his wife. After hearing all the evidence in the case,

including that concerning Pitman's purported relocation of the Chevron station's business, the jury returned a $250,635 verdict in Pitman's favor. DOT appeals, asserting four enumerations of error. We affirm.

[1-3] 1. DOT contends that the trial court committed reversible error in refusing to instruct the jury that Pitman had a duty to minimize or mitigate any business damages he might have suffered. We disagree. A mitigation charge is only required in cases like this when there is evidence that a condemnee has failed to mitigate its damages. *Fountain v. MARTA,* 147 Ga.App. 465, 471(10), 249 S.E.2d 296 (1978). In fact, in *Fountain,* we held that it was reversible error for a trial court to give such a charge absent evidence that it was both possible for a condemnee to mitigate its damages and that the condemnee had failed to do so. Id. In the instant case, DOT presented no evidence that Pitman could have mitigated his damages, but failed to do so. Instead, as mentioned above, it argued that Pitman had no damages whatsoever. Accordingly, we conclude that the trial court did not err in failing to charge the jury that Pitman had a duty to minimize or mitigate his damages. The charge clearly was not adjusted to the evidence adduced at trial. For refusal of a charge to constitute error, the charge must be adjusted to the evidence. *Sharp v. Fagan,* 215 Ga.App. 44, 46(4), 449 S.E.2d 648 (1994).

2. During trial, Pitman testified without objection concerning the origin of the Chevron station's business. Specifically, Pitman testified that 90 percent of the Chevron station's business came from northbound traffic on I-75, and that the rest of the business came from local traffic. Pitman also testified that only three 3 percent of the business came from southbound traffic on I-75. DOT contends that Pitman's testimony amounts to opinion testimony from a non-expert witness and that Pitman failed to state the facts upon which his opinion testimony was based. Based on this contention, DOT argues that the trial court erred in failing to instruct the jury that: "A non-expert witness cannot give his opinion unless he also gives the facts upon which he bases his opinion. When an opinion is not supported by the facts testified to as the basis for the opinion, it has no probative value and cannot support a verdict." We cannot agree.

[4] It is clear from the record that Pitman's testimony regarding the origin of the Chevron station's business was based on his personal experience working at the Chevron station on a daily basis for almost 18 years. This personal experience certainly qualified Pitman as an expert with regard to the origin of the station's business. Even if this were not the case, Pitman's actual personal experience and observations would constitute a factual basis for his opinion. Consequently, we conclude that the trial court did not err in failing to give DOT's requested charge on non-expert opinion testimony.

[5] 3. We also conclude that the trial court did not err in failing to charge the jury that "the reluctance of the condemnee to part with the property is not the subject matter of consideration for the jury and the same does not constitute compensable damage." Although this charge appears to be a correct statement of law, see *Central Ga. Power Co. v. Mays,* 137 Ga. 120, 122(2), 72 S.E. 900 (1911); *Fountain v. MARTA,* 147 Ga.App. at 470(9), 249 S.E.2d 296, the charge was not justified by the evidence of record. Unlike the condemnee in *Fountain,* a review of the record in the instant case demonstrates that Pitman never attempted to place a value on his business damages based on any reluctance or unwillingness to part with the Chevron station. He never testified that he objected to the taking, and he claimed no damage from any reluctance to part with his business interest. The only damage claim Pitman made was based on the difference between the value of his business interest in the Chevron station before and after the taking. Contrary to DOT's contention, the mere fact that Pitman stated that the BP station had originally been leased with the intent that one day Pitman's son would run that station while Pitman and his wife ran the Chevron station does not evince an attempt by Pitman to place a value on the property interest taken based on any reluctance or unwillingness to part with the Chevron station. The statement was not made

during any discussion as to value, and the statement only informed the jury about the reason the BP station originally had been purchased in 1980.

4. During the course of the trial, Pitman called certified public accountant Ross Lane to testify as an expert witness. The record shows that after Lane testified about his appraisal of Pitman's Chevron station's business both before and after the taking, Pitman asked him why he did not take into account income information from the BP station in his appraisal. In explaining that the two stations were unrelated, independent businesses, and that the appraisal of one was not relevant to the other, Lane relied in part on the fact that the stations were on different sides of the interstate. When asked what difference it made to his evaluation which side of the interstate the stations were on, DOT objected on the ground that such testimony was outside the scope of Lane's field of expertise. The trial court overruled the objection. DOT contends that the trial court committed reversible error in doing so. We disagree.

[6, 7] The record shows that Lane was an expert qualified to appraise the value of service stations. When an expert has been qualified, the expert may give his opinion without stating the facts upon which the opinion is based, but it always is proper for the expert witness to state the facts relied on in forming an opinion when requested to do so. *McDaniel v. Dept. of Transp.*, 200 Ga. App. 674, 675(1), 409 S.E.2d 552 (1991); *State Highway Dept. v. Howard*, 119 Ga.App. 298, 303(6), 167 S.E.2d 177 (1969). In fact, it is error not to allow an expert to testify as to the facts upon which an opinion is based. Id.

[8] In the instant case, Lane's testimony regarding the differences between the Chevron and BP stations, based on their locations on opposite sides of the interstate, was offered as part of the factual basis regarding why, in his opinion, the stations should not be appraised together. Moreover, the testimony regarding the distinction to be made between stations on opposite sides of a road was based on Lane's personal experience as an accountant. Consequently, it was not error to allow Lane to testify concerning such matters.

Judgment affirmed.

ANDREWS and SMITH, JJ., concur.

223 Ga.App. 787

HARALSON

v.

The STATE.

No. A96A1164.

Court of Appeals of Georgia.

Dec. 4, 1996.

Certiorari Denied March 7, 1997.

Defendant was convicted in the Gwinnett Superior Court, Oxendine, J., of possession with intent to distribute marijuana, in violation of Georgia Controlled Substances Act. Defendant appealed. The Court of Appeals, Andrews, J., held that: (1) government adequately disproved entrapment defense; (2) guilty verdict on possession count was not mutually exclusive of acquittal on weapons count; (3) trial court did not improperly express its opinion on testimony of rebuttal witness; (4) pattern jury charge on entrapment was adequate; (5) trial court properly refused to allow character evidence of defendant's reputation in business community; (6) trial court properly excluded defendant's sister's testimony; and (7) trial court properly admitted testimony about defendant's prior drug use.

Affirmed.

Pope. P.J., dissented and filed opinion, in which Blackburn, J., joined.

1. Criminal Law ⚷569

Evidence that defendant had prior, independent experience in sale of marijuana and that defendant readily sold ten pounds of marijuana to undercover police officer was