

# **Annual Update In Eminent Domain Case Law**<sup>1</sup>

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## **SUPREME COURT**

### **1. Department of Transportation v. McMeans, 294 Ga. 436 (January 21, 2014).**

Issue: Amendment to Answer

On October 27, 2010, the Department of Transportation (“DOT”) initiated condemnation proceedings against property owned by Brian McMeans (“McMeans”), naming McMeans and McMeans Leasing, Inc. (“MLI”), a corporation solely owned by McMeans, as condemnees in the condemnation petition. On November 12, 2010, McMeans filed an answer acknowledging that he was the owner of the property and alleging damages. On December 10, 2010, MLI filed an amendment to the answer filed by McMeans on November 12, “in order to provide that said answer was for MLI, a corporation solely owned by” McMeans. 294 Ga. at 436. This pleading stated that McMeans was the owner of the property, MLI was the leasehold tenant, and that MLI would sustain business losses as a result of the condemnation. At the same time, McMeans filed another answer, in which he alleged damages as a result of the lost uses of the property, interruption to his business income, loss of business, and damage to his business in addition to the value of the condemned real estate. On February 8, 2011, McMeans filed an amendment to his December 10 answer, to add a separate claim for business loss. On a motion by DOT, the trial court struck MLI’s December 10 amendment to the answer, in which MLI sought to substitute itself for McMeans in the first answer filed by McMeans, and McMeans’ February 8 amendment to his December 10 answer, finding that the amendment improperly sought to assert a claim for business loss arising from a business operated by a separate party.

MLI filed a direct appeal, which was dismissed by the Court of Appeals on jurisdictional grounds because it was not an appeal of a final judgment. The Court of Appeals granted McMeans’ interlocutory appeal and reversed the trial court, holding that the trial court erred to the extent that it ruled that McMeans could not plead a business loss based on his failure to include it earlier and that he could not plead a loss from the business he owns and operates on the condemned property.

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<sup>1</sup> This paper incorporates portions of a seminar paper prepared by Anne W. Sapp, “Eminent Domain Case-Law Update” (February, 2015).

The Supreme Court granted to certiorari “to consider whether the Court of Appeals erred in holding that, in a condemnation proceeding, an individual can plead a business loss for a business operated on condemned property by a corporation that is solely owned by that individual.” 294 Ga. at 436. The Supreme Court reversed the decision of the Court of Appeals, stating:

A cardinal precept of corporate law is that corporations are separate legal entities from their shareholders, officers, directors and employees. This is so even in the situation in which a corporation is owned solely by one person. And, this precept is not altered by the fact that the sole owner uses and controls the corporation to promote the owner’s ends. Id. at 437.

In this case, McMeans, individually, owned the real property, and MLI, the corporation and lessee, owned and operated the business on the property. “When the business belongs to a separate lessee, business losses resulting from the condemnation of the leased property should be pled as a separate element of compensation from the value of the leasehold upon which the business is operated.” Id. at 438. Thus, the Supreme Court found that the distinct corporate entity, MLI, owned and operated the business on the condemned property, so MLI was the proper party to assert a claim for its business losses. Reversing the Court of Appeals, the Supreme Court held that the trial court did not err in striking McMeans first amendment to his answer, in which he sought to add a claim for business losses incurred by MLI.

## **2. Dillard Land Investments, LLC v. Fulton County, 295 Ga. 515 (July 11, 2014).**

Issue: Dismissal of Condemnation Action

Fulton County filed a petition for condemnation before a special master under O.C.G.A. § 22-2-100 et seq. to acquire 12 acres of land owned by Dillard Land Investments, LLC (“Dillard”), to expand its library facilities. After a hearing, the special master filed his award of \$5,187,500.00 with the trial court, and the trial court entered its judgment adopting the award. Thereafter, Fulton County filed a voluntary dismissal of the petition. Dillard filed an emergency motion to vacate and set aside the voluntary dismissal. The trial court entered an order granting Dillard's motion to set aside the voluntary dismissal, and Fulton County appealed.

Reversing the trial court, the Court of Appeals ruled that Fulton County was authorized to voluntarily dismiss its condemnation action notwithstanding the entry of the special master’s award. In doing so, the Court of Appeals applied O.C.G.A. § 22-1-2, a statute enacted in 2006 as part of the Landowner’s Bill of Rights and Private Property Protection Act, which entitles property owners to recover their attorney fees and expenses when a condemnor abandons a condemnation action. The Court of Appeals also examined the only prior reported decision citing O.C.G.A. § 22-1-2, Gramm v. City of Stockbridge, 297 Ga. App. (2009), finding this case instructive, even though the condemnation action in Gramm was filed prior to the effective date of the statute. Noting that, unlike the condemnor in Gramm,

Fulton County did not pay the special master's award or take title to the land for any period of time, and filed its voluntary dismissal only two days after the premature entry of the trial court's judgment, the Court of Appeals held that, under these circumstances, the trial court erred by concluding that Fulton County could not unilaterally dismiss the condemnation action. The Court of Appeals also rebuffed cases cited by Dillard as "inapposite" since they were decided under the assessors method of condemnation and all preceded O.C.G.A. § 22-1-2.

The Supreme Court granted certiorari "to decide whether a condemnor may voluntarily dismiss a condemnation action, without the consent of the court or the condemnee, after a special master has entered his award valuing the property at issue but before the condemnor has paid the amount of the award into the court registry or to the condemnee" and concluded "that a condemnor is not entitled to voluntarily dismiss a condemnation action unilaterally once the special master renders his award." 295 Ga. at 515.

In reversing the Court of Appeals, the Supreme Court noted "[i]t has long been established that a condemnor may not voluntarily dismiss a condemnation action unilaterally after the assessors have made their award as to the value of the property at issue, that it is the amount of just compensation that the condemnor must pay the property owner for taking." *Id.* at 518. Rejecting the Court of Appeal's holding that this principle does not apply to cases filed under the special master method of condemnation since, unlike the assessors method of condemnation, O.C.G.A. § 22-2-111 requires the superior court to enter a judgment on the special master's award, the Supreme Court held:

Whether rendered by assessors or by a special master, however, the award determining the value of the property has the same dispositive effect on that fundamental issue in the condemnation action. Under both methods, the value award can be changed only by a jury, if either party files a timely and proper appeal for a de novo jury determination of value. The court has no discretion to change the value awarded under either method. If there are no non-value legal objections, the court takes no action as to an assessors' award or simply makes a special master's award the judgment of the court. *Id.* at 519. (Internal citations omitted).

The Supreme Court also noted:

Since the original enactment of the Civil Practice Act and O.C.G.A. § 9-11-41 (a) in 1966, this Court has repeatedly held that the plaintiff's right to dismiss can not be exercised after a verdict[,] or a finding by the judge[,] which is equivalent thereto[,] has been reached ... . The principle at the foundation of these decisions is that, after a party has taken the chances of litigation[,] and knows what is the actual result reached in the suit by the tribunal which is to pass upon it, he can not, by exercising his right of voluntary dismissal, deprive the opposite party of the victory thus gained. *Id.* at 519 – 520. (Alterations in the original).

Based on the foregoing, the Supreme Court held that the Court of Appeals erred in deeming the assessors' cases inapposite, as the precedents involving voluntary dismissal after assessors' awards in condemnation cases accord with the precedents on voluntary dismissal in general, and the principal

expressed those cases “applies with equal force to condemnation actions under the special master method, once the special master has rendered his value decision as the factfinder in the action — a decision on the merits of the case that the superior court has no discretion to alter.” 295 Ga. at 521.

The Supreme Court also held that the Court of Appeals erred in relying on O.C.G.A. § 22-1-12, finding:

The new statute says nothing about when condemnors may abandon a condemnation proceeding. The General Assembly did not shorten or lengthen the time for a condemnor to file a voluntary dismissal, which remains governed by O.C.G.A. § 9-11-41 and this Court's precedents. What the General Assembly did with O.C.G.A. § 22-1-12 is to reallocate the costs imposed on the condemnor and the condemnee if the condemnor abandons a condemnation action at any point. If entitled to voluntarily dismiss unilaterally and without prejudice, plaintiffs, including condemnors, generally may do so even if the dismissal is alleged to be in bad faith and causes “inconvenience and irritation to the defendant.” But unlike most plaintiffs, condemnors that abandon their actions must now pay the property owner's reasonable costs and expenses actually incurred because of the condemnation proceedings, including attorney, appraisal, and engineering fees. *Id.* at 523. (Internal citations omitted).

The Supreme Court further found that Gramm is fully consistent with its decision:

It is clearly too late for a condemnor to voluntarily dismiss its action unilaterally after “the condemnor has obtained a condemnation judgment; the award has been paid and disbursed; the condemnee has filed no exceptions to the taking; and the condemnor has retained possession of the property for a significant period of time.” But it does not follow that voluntary dismissal is allowed at any point before all of those events occur, as the Court of Appeals indicated in this case. Instead, our precedents establish that the relevant event is when the condemnor knows what the value award will be, and that event occurred in this case before the County moved to dismiss its action. Once the special master announces his award, if the condemnor believes that the value placed on the property is too high, the only remedy is to appeal the award for a de novo jury determination of value under O.C.G.A. § 22-2-112, a remedy that the County did not pursue in this case. *Id.* at 523. (Internal citations omitted).

Finally, the Supreme Court addressed Fulton County's contention that it is absurd to limit the condemnor's time to abandon an action under the special master method to the period before the special master renders his award, noting that Fulton County

decided when it was ready to seek condemnation of the property at issue, and it also decided to use the special master method, knowing that such a proceeding is required to move quickly. There is nothing “absurd” about requiring the County to live with the consequences of those litigation decisions, as other plaintiffs in civil actions do, after a dispositive ruling on value was announced in the defendant's favor. *Id.* at 523 – 524.

## COURT OF APPEALS

### **1. Emery v. Chattooga County, 325 Ga. App. 587 (January 6, 2014); Cert. denied.**

Issue: Petition to Set Aside Declaration of Taking, O.C.G.A. § 32-3-11

The property that was the subject of the taking was a 60 foot ingress and egress easement across an unpaved road that ran through the condemnee's property and provided access to approximately 20 residents living along the road. Pursuant to O.C.G.A. § 32-3-1, Chattooga County (the "County") filed a declaration of taking to acquire the condemnee's interest in the easement after the other property owners adjoining the road approached the County and agreed to convey their interest in the easement to the County for the purpose of the road being made part of the county road system. The County's declaration of taking stated that the property would be used for the purpose of establishing a public road right-of-way and for the specific purpose of construction, maintenance and repair of a road right-of-way and other related purposes. The condemnee filed a petition to set aside pursuant to O.C.G.A. § 32-3-11, which "authorizes the superior court to set aside, vacate or annul a declaration of taking under certain restricted circumstances, including the abuse or misuse of the powers of this article." 325 Ga. App. at 588 (quoting O.C.G.A. § 32-3-11(b)(3)). This statute, however, further provides that the "power of the court in this respect shall not be construed as extending to a determination of questions of necessity, [and] there shall be a prima-facie presumption that the property or interest condemned is taken for and is necessary to the public use provided for in this article." *Id.* (quoting O.C.G.A. § 32-3-11(a)). Following a hearing, the trial court denied condemnee's petition to set aside and this appeal followed.

On appeal, the condemnee argued that the County abused or misused its discretion when it condemned the property because the condemnation was done for a few private citizens, served no public purpose, and was not reasonably related to the development, growth or enhancement of the public roads of Georgia. While it is true that a "condemnor is not authorized to exercise the power of eminent domain to acquire property to be used by private individuals for private use and private gain," *Id.*, the Court of Appeals found that there was nothing to show that the general public would not have the right to use the road, explaining:

[I]f the public generally have a right and but one person uses the [road], the purpose is deemed to be public; but if the public generally are excluded, and the use of the [road] is limited to that of an individual enterprise, it is not public, and the power of eminent domain can not be exercised for [that] purpose. In other words, the amount of usage by the general public is not controlling. *Id.* at 588 – 589.

Further, evidence was presented that the fire chief had approached the County about acquiring the road after the fire department had responded to a fire in the area, and testimony was presented that paving and maintaining the road would be of benefit to emergency responders. The Court of Appeals also found that

the decision to condemn the property was consistent with the County's policy to acquire, improve and maintain roads as parts of the county were developed, and that the residents requested that they do so. Under these circumstances, the Court of Appeals held that it could not "say that the County acted in bad faith, that it abused or misused its discretion, or that it exceeded its authority when it acted to condemn the property. Accordingly, the superior court did not err by refusing to set aside the taking under O.C.G.A. § 32-3-11." 325 Ga. App. at 589.

**2. ADC Investments, LLC v. Department of Transportation, 325 Ga. App. 685 (February 6, 2014).**

Issue: Remote and Speculative Damages

This condemnation action involved a 25-square foot parcel of real property located in Lawrenceville. The only improvement on the property on the date of taking was a static, double-faced billboard. An entity related to ADC Investments, LLC ("ADC") owned the property and leased the site to ADC, who in turn subleased the property to The Lamar Company, LLC ("Lamar"). Both the lease and sublease had remaining terms of approximately 91 years on the date of taking.

As of the date of taking, the City of Lawrenceville ("City") had a sign ordinance which prohibited digital signs except under certain circumstances. Four days before the condemnation was filed, however, the City had a first reading of a proposed amendment that would permit digital signs under certain circumstances, and less than four months after the date of taking, the City amended its sign ordinance to permit digital signs at certain sites, which included the corridor abutting ADC's property. Nine months after the taking, the City authorized Lamar to erect a digital billboard within 100 feet of the subject property. A Lamar executive testified that Lamar would have located the digital billboard on the subject property but for the condemnation. During discovery, ADC present expert testimony about the anticipated income stream from the digital billboard and its potential effect on the value of its leasehold interest.

Prior to trial, DOT moved for partial summary judgment, asserting that ADC should not be able to present evidence of this anticipated future income stream because the property should be valued as of the date of taking and the conversion to digital was impermissibly remote and speculative. The trial court granted DOT's motion, and this appeal followed.

On appeal, the Court of Appeals noted:

It has long been the policy of the Georgia appellate courts to be liberal in allowing matters to be considered by the jury which might affect their collective minds in determining the just and adequate compensation to be paid the condemnee.

But this liberality is not without its bounds. In the context of evidence of zoning changes that would affect value, our Supreme Court has held that for such evidence to be admissible, the condemnee must show that a change in zoning to allow the usage is probable, not remote or speculative, and is so sufficiently likely as to have an appreciable influence on the present market value of the property. *Id.* at 687. (Internal punctuation and citations omitted).

With these principles in mind, the Court of Appeals turned to the primary issue in this case – “whether it was reasonably probable and sufficiently likely that the City of Lawrenceville’s sign ordinance would have been amended to allow a digital billboard, that once permitted it was reasonably probable that Lamar would have converted the static billboard to digital, and that such changes would have had an appreciable impact on the value of the property at the time of taking.” 325 Ga. App. at 687 – 688. Based on the record, the Court of Appeals concluded that “genuine issues of material fact exist as to the reasonable probability that the sign ordinances would have been amended and the billboard converted to digital and that these changes would have an appreciable impact on the present market value of ADC’s property interest.” *Id.* at 688.

The Court of Appeals rejected the DOT’s argument that rezoning and conversion of the billboard were too remote and speculative to be considered as a matter of law, finding that the cases relied on by DOT to be distinguishable, as they involved unimproved land which the condemnee claimed should have been valued as if subdivided and developed. In this case, ADC had a long-term leasehold interest that anticipates possible alteration of a billboard in existence on the date of taking.

DOT also argued that, even if conversion to a digital billboard was reasonably probable, ADC’s expert evidence was inadmissible because “the jury cannot evaluate the property as though the new use were an accomplished fact; the jury can consider the new use only to the extent that it affects the market value on the date of taking.” *Id.* at 689. The Court of Appeals found, however, that ADC’s experts’ deposition testimony reveals that they opined about the present market value of ADC’s leasehold interest and used discounts to account for the time it would take to convert the billboard and discounting the anticipated income stream.

Based on the foregoing reasons, the Court of Appeals reversed the trial court’s partial grant of summary judgment and remanded for further proceedings consistent with its opinion.

### **3. Liberty County v. Eller, 327 Ga. App. 770 (June 26, 2014); Cert. denied.**

Issue: Inverse Condemnation

Martha and Adam Eller (the “Ellers”) filed an action against Liberty County for trespass, continuing trespass, nuisance, inverse condemnation, and damages based on a drainage pipe that discharged storm water run-off into a pond on the Ellers’ property. The County filed motions for summary judgment arguing that the statute of limitation had run on the Ellers’ inverse condemnation claim, and their other claims were barred by sovereign immunity. The trial court denied the County’s motions for summary judgment, and this appeal followed.

The Court of Appeals reversed the trial court’s holding that the County did not waive its sovereign immunity as to claims for tortious interference with contractual relations, adverse impact on credit rating, emotional damages, or the recovery of any related expenses of litigation. The Court of

Appeals noted, however, that if the Ellers have stated a viable claim for inverse condemnation, or a claim for nuisance or trespass that rises to the level of a taking, “then the County has waived sovereign immunity as to all these claims since the Constitution provides for a waiver of sovereign immunity where a county creates a nuisance which amounts to an inverse condemnation.” 327 Ga. App. at 772.

The Court of Appeals also held that the trial court erred in denying the County’s motion for summary judgment because the statute of limitations barred the Ellers’ claim of inverse condemnation by a nuisance. “Inverse condemnation claims based on trespass or nuisance are subject to a four-year statute of limitation.” *Id.* at 772 (citing O.C.G.A. § 9-3-30(a)). “The classification of a nuisance as continuing or permanent directly controls the manner in which the statute of limitations will be applied to the underlying claim.” *Id.* at 773 (Internal punctuation omitted).

A nuisance, permanent and continuing in its character, the destruction or damage being at once complete upon the completion of the act by which the nuisance is created, gives but one right of action, which accrues immediately upon the creation of the nuisance, and against which the statute of limitations begins, from that time, to run. Where a nuisance is not permanent in its character, but is one which can and should be abated by the person erecting or maintaining it, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie. This action accrues at the time of such continuance, and against it the statute of limitations runs only from the time of such accrual. *Id.*

Property owners “may show a continuing nuisance through evidence that an existing condition, such as a culvert or a drainpipe, was improperly maintained.” *Id.* To the extent, however, the owners “complain about the mere presence of the culvert or drain pipe due to improper installation, the nuisance claim is permanent in nature.” *Id.* Upon reviewing the record, the Court of Appeals determined that there was no evidence to support a claim of improper maintenance of the drain pipe and, thus, the Ellers’ nuisance claim was permanent in nature.

“A claim for permanent nuisance is not barred if some new harm that was not previously observable occurred within the four years preceding the filing of their cause of action.” *Id.* at 773 – 774. Although the Ellers argued that they did not personally observe the pipe until 2008, “the issue is whether some new harm that was not previously observed occurred in the four years prior to October 2011, when the complaint was filed.” *Id.* at 774. The Court of Appeals found that there was no evidence showing any change in the run-off or discharge from the drain pipe after it was installed in 2001. Accordingly, the Court of Appeals held that “to the extent that the Ellers assert a claim for permanent nuisance based on the installation of the drainage pipe in 2001, their claim is barred by the four-year statute of limitation.” *Id.* at 774.



#### **4. Toler v. Georgia DOT, 328 Ga. App. 144 (July 10, 2014); Cert. denied.**

Issue: Evidence

DOT condemned 1.7 acres of land in Wilkinson County owned by Charlotte Lord Toler, Raye E. Toler and William T. Toler (the “Tolers”). The property was part of a larger tract, which was encumbered by a 1991 lease agreement under which the Tolers granted J. M. Huber Corporation (“Huber”) the right to mine kaolin and other like minerals. Under the Lease terms, Huber was required to pay the Tolers a lump sum of \$50,000, along with an earned royalty of \$2.07 per ton of mined kaolin, with a periodic cost of living adjustment. Huber had conducted mining on the property in two separate phases and had paid the Tolers over \$1 million under the Lease, but the property was not being actively mined on the date of the taking. Although originally named as a party to the proceedings, approximately ten years into the litigation, Huber assigned all of his rights to any condemnation awards to the Tolers (the “Assignment”). The Tolers did not pay Huber any consideration for the Assignment.

Prior to the trial of the case, the Tolers' filed motions in limine to exclude not only any evidence or commentary regarding the consideration paid by the Tolers to Huber for the Assignment of its claim, but also any evidence concerning the fact and amount of funds deposited by DOT in to the court registry at the time the condemnation case was filed. The trial court denied the Tolers' motion to exclude evidence regarding the Assignment, and denied the Tolers' motion to exclude evidence regarding the fact that funds were paid in to the court registry with instruction that the fact that funds were deposited was proper; however, the amount of the award could not be disclosed to the jury. Additionally, DOT filed a motion in limine to limit the testimony of one of the Tolers' experts, Michael Ginn, an independent mining engineer, which the trial court granted.

At trial, the Tolers sought compensation not only for the loss of their fee simple interest in the property, but also for the business loss Huber suffered as a result of the taking. They alleged that these losses were based on the loss of the ability to sell kaolin that would have been extracted from the 1.7 acres condemned by the DOT. The matter proceeded to trial, and the jury awarded the Tolers \$212,135 for “real property taken and damaged,” but awarded them nothing on their business loss claim. The Tolers appealed the verdict alleging that their business loss claim was hampered by a series of evidentiary ruling by the trial court.

The Court of Appeals reversed the trial court's denial of the Tolers' motion in limine regarding the Assignment, finding that evidence of what the Tolers paid for the Assignment is not relevant to the determination of business loss damages. The relevant inquiry in a claim for business loss centers on causation and the uniqueness of the property; therefore, what the Tolers paid for the Assignment would not be relevant to those determinations. Thus, the trial court erred in denying the Tolers' motion in limine to exclude evidence of the consideration paid for the Assignment.

Additionally, the Court of Appeals found that evidence as to the amount and fact of the DOT's deposit of funds into the registry of the court at the time of the taking was inadmissible. At trial, the DOT told the jury in its opening statement that "the DOT has to deposit the appraised value of the property with the clerk." And later, the trial court charged the jury that "the condemning authority tenders and pays into the court certain monies." 328 Ga. App. at 149. The Court of Appeals reversed the decision of the trial court, holding:

This Court has previously found that evidence as to the amount and fact of the DOT's deposit of funds into the Court at the time of the taking is inadmissible. Accordingly, the trial court erred in denying the Tolers' motion in limine on this ground, which improperly opened the door for the DOT to mention the payment in its opening argument. Additionally, premitting whether the trial court's reference to the Deposit in its jury charge rose to the level of reversible error considering the charge as a whole, we find that it was nevertheless error to reference the Deposit and that it should not be referenced in any subsequent retrial. *Id.*

Finally, the Court of Appeals found that the trial court properly excluded the Tolers' evidence from Michael Ginn, an independent mining engineer hired by Huber prior to the Assignment. During a discovery hearing, Huber's counsel stated that "he never listed Ginn as a potential expert 'on the question and value and [he] will not be listed as a value expert by Huber.'" *Id.* at 150. The DOT argued that these statements were binding admissions in *judicio* and prevented the Tolers from introducing Ginn as an expert on the value of the kaolin on the subject property. The Court of Appeals agreed, concluding that the trial court was within its discretion to find that Huber's agreement not to call Ginn as a valuation witness was binding on Huber and the Tolers, as Huber's assignee.

##### **5. Pennington v. Gwinnett County, 329 Ga. App. 255 (October 9, 2014).**

Issue: Inverse Condemnation

Steve and Brenda Pennington (the "Penningtons") filed a claim against Gwinnett County for inverse condemnation after a cellular phone company decided to locate a cell tower on county land rather than on their land. Although the Penningtons and T-Mobile had entered an option to lease the Penningtons' land, the trial court granted Gwinnett County's motion for summary judgment finding that the Penningtons did not have a "compensable interest in the lease part of the option contract, since it was within T-Mobile's discretion whether or not to exercise the option; [and] that because T-Mobile chose not to exercise the option, the Penningtons could not show that they sustained a loss compensable under their theory of inverse condemnation." 329 Ga. App. at 256 – 257.

The Court of Appeals affirmed the trial court's ruling, holding:

Inverse condemnation is not limited to a taking of real property, but it applies only if the complaining party has a valid property interest in that which is taken. The Penningtons have not shown that they had a valid property interest in that which was allegedly taken. They describe the thing taken as the "business opportunity of leasing a portion of their property to T-Mobile for erection of and use of a cell phone tower"; "the business opportunity of placing a cell tower" on their lot; and "the business opportunity ... of developing their property." But the Penningtons never had a lease with T-Mobile. They merely had an expectation of a lease, which was extinguished when T-Mobile chose not to exercise its option, as was its right. . . .

A contract is not compensable when it merely confers a contingent, future right. [The Penningtons have] done no more than prove that a prospective business opportunity was lost. More than that is necessary to constitute a compensable taking. 329 Ga. App. at 257. (Internal punctuation and citations omitted) (alteration in the original).

**6. Gwinnett County v. Old Peachtree Partners, 329 Ga. App. 540 (October 23, 2014); Cert. denied.**

Issue: Prejudgment Interest

This is the second appearance of this case in the Court of Appeals arising out of a settlement in which Gwinnett County agreed to, among other things, purchase 16.203 acres of property from Old Peachtree Partners, LLC ("Old Peachtree") for \$5.2 million. The settlement was reached to resolve all of the pending litigation between the parties, including a condemnation action that had been filed by the County against 1.867 acres ("Tract 1") and an inverse condemnation action filed by Old Peachtree concerning the 16.203 acre tract ("Tract 2"). The trial court initially concluded that the settlement agreement was unenforceable, but the Court of Appeals reversed and held that the County was bound by the settlement. See Old Peachtree Partners v. Gwinnett County, 315 Ga. App. 342 (2012).

Following remand, the trial court entered an order enforcing the settlement. Pursuant to the trial court's enforcement order, the County tendered the funds into the court registry in the condemnation action against Tract 1, and closed on the transaction for Tract 2. The trial court then awarded prejudgment interest to Old Peachtree for the property acquired in both the direct and inverse condemnation actions and ruled that Old Peachtree was entitled to a trial on its claim for incidental damages.

The County appealed the trial court's award of prejudgment interest on the purchase price of Tract 2 and its grant of a trial on Old Peachtree's claim for incidental damages. Affirming the trial court, the Court of Appeals found that Old Peachtree was entitled to prejudgment interest under O.C.G.A. § 7-4-15, which provides in relevant part:

All liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain, bear interest from the time the party shall become liable and bound to pay them; if payable on demand, they shall bear interest from the time of the demand. . . .

The Court of Appeals ruled that:

Pursuant to this statutory language, if the amount owed under a contract is fixed, certain and ascertainable under its terms the claim is liquidated. If a claim is liquidated under O.C.G.A. §7-4-15, the award of prejudgment interest is mandatory, should be awarded by the trial court as a matter of law, and accrues at the rate of seven percent annum simple interest if the rate is not established in the parties written contract. The only prerequisite is that demand for prejudgment interest [be made] prior to entry of final judgment. 329 Ga. App. at 545 (Internal punctuation and citations omitted) (alteration in the original).

The Court of Appeals found that there was no dispute regarding the purchase price that the County was required to pay to Old Peachtree for Tract 2 under the settlement agreement and, thus, “the purchase price for [Tract 2] was fixed, certain, and ascertainable under the terms of the parties’ contract, such that the debt owed by the County was liquidated and subject to prejudgment interest . . . .” *Id.* at 546. The question then becomes at what point did prejudgment interest begin to accrue.

“Generally speaking, prejudgment interest on an amount owed under a contract starts to run on the date the amount becomes due and payable. Hence, interest on the purchase price owed for real estate starts to run when the purchase money becomes due under the parties contract.” In this case, the parties’ settlement agreement was silent as to when the County was required to pay the purchase price for Tract 2. “When no time for payment of the purchase price is specified in a contract involving the sale of real estate, it is presumed that payment will be by cash upon delivery of the deed at closing.” *Id.* at 546. Accordingly, the Court of Appeals held that prejudgment interest on the purchase price for Tract 2 began to run on the date by which the closing should have occurred in this case.

The Court further noted that “the sole prerequisite for an award of prejudgment interest on a liquidated claim is that a demand be made before entry of final judgment, so that the opposing party has an opportunity to contest an award of interest.” *Id.* at 548. The Court of Appeals found, that Old Peachtree made written demands to the County prior to entry of final judgment, so “the County had a full and fair opportunity to content an award of prejudgment interest in this case.” *Id.*

The Court of Appeals also held that the trial court did not err in concluding that Old Peachtree was entitled to a trial on incidental damages.

## **7. DeKalb County v. Heath, 331 Ga. App. 179 (March 16, 2015); Cert. denied.**

Issue: Inverse Condemnation

In 2011, William Heath, Jr. (“Heath”), filed this inverse condemnation action against DeKalb County (“County”), alleging that a block retaining wall that the County had constructed on his property in 2007 for the purpose of preventing erosion to his property in connection with a storm water drainage

system had been improperly built and maintained; that the retaining wall was failing and continuing to deteriorate each time it rained, which failure had caused flooding and erosion of his property; and that the county's failure to maintain the wall was causing continuing damage to his property. After a bench trial, the trial court awarded Heath \$28,830.00 in damages, which represented the cost of repairing the retaining wall, and this appeal followed.

In a previous inverse condemnation action against the County filed in 2009, Heath alleged that the County had created and maintained a continuing nuisance by failing to properly maintain its sewer and storm water drainage system, and that the failure had resulting in flooding and erosion of his property ("Heath I"). In October 2012, the jury in Heath I awarded Heath \$7,000,000 for the diminished value of his property. When Heath filed this action in March 2011, it was the first time that he alleged that the block retaining wall had been improperly built and maintained; that the wall was failing and continuing to deteriorate and that such failure was continuing to damage his property.

On appeal, the County contended that the trial court erred by ruling that this inverse condemnation action was not barred by the doctrine of res judicata, because Heath could have amended the complaint in Heath I to include damages for the retaining wall failure. The Court of Appeals found this argument without merit, concluding:

[T]he causes of action in the two lawsuits were not identical. Although based on some of the same facts, Heath I concerned the diminished value of Heath's property due to flooding and erosion (and resulted in a damage award therefor), which diminution resulted from the county's failure to maintain its storm water drainage system. The present lawsuit dealt with the ongoing and increasing damage resulting — with each rainfall — from the county's failure to maintain its storm water drainage system, including the deteriorating retaining wall. It is undisputed that the wall had not failed at the time Heath I was filed; the county concedes in its brief that "the failure of the wall due to [the county's] improper maintenance occurred after the first case was filed." And, in connection therewith, in this case Heath sought damages for the cost of repairing the wall to prevent further damage to his property, not diminution damages. Inasmuch as the two actions did not share identical causes of action, and the present action involved a fresh nuisance for which a fresh action would lie, the court correctly rejected the county's res judicata argument. 331 Ga. App. at 182.

The County also argued that the trial court erred by allowing a double recovery, because Heath had already recovered damages in the first trial for the diminution in the value of his property, which included the retaining wall. The Court of Appeals rejected this argument, noting that the trial court awarded damages in the present action for the cost of repairing the retaining wall that the County had constructed, not for the depreciation in the value of Heath's property, as was the basis for award in Heath I. Accordingly, there was no double recovery.

**8. Evans v. Department of Transportation, 331 Ga. App. 313 (March 19, 2015); Cert. applied for.**

Issues: Evidence and Jury Charges

This case involves a dispute over the value of undeveloped timberland containing subterranean mineral deposit that was condemned by the Georgia Department of Transportation (“DOT”). Following a jury trial, the jury awarded \$50,000.00 to the condemnees, which was far below what they had sought as compensation for the condemned property.

On appeal, the condemnees contended the trial court erred in denying their motion in limine seeking to exclude evidence related to the City of Gordon’s zoning ordinance and the reasonable probability of a special exception being granted for kaolin mining, arguing that zoning is not a relevant factor for consideration by the jury in valuing property in condemnation cases involving mineral deposits. The Court of Appeals, however, affirmed the ruling of the trial court, finding that it is “well established that in determining what constitutes just and adequate compensation, the jury may consider existing zoning and possible or probable future zoning change which are sufficiently likely to have an appreciable influence upon the present market value of the condemned property.” 331 Ga. App. 313. (Internal punctuation omitted). “Hence, evidence regarding the City of Gordon’s zoning ordinance, and the reasonable probability that a special exception for kaolin mining would be granted by Gordon City Council in the future, was relevant to the jury’s valuation of the condemned property in this case.” *Id.* The Court of Appeals also found that “allowing the jury to consider zoning in condemnation cases involving mineral deposits is consistent with the long-established policy of Georgia appellate courts to be liberal in allowing matters to be considered by the jury which might affect their collective minds in determining the just and adequate compensation to be paid to condemnee.” *Id.* at 317. (Internal punctuation omitted). The Court of Appeals further found “that a private party negotiating to buy property containing mineral deposits would take zoning restrictions into account in arriving at a purchase price, and thus “zoning restrictions ... unquestionably affect the market value of property,” the touchstone for determining just and adequate compensation. *Id.* (Internal punctuation omitted). For these reasons, the Court of Appeals concluded “that, as in other types of condemnation cases, zoning considerations are relevant to a jury’s determination of what constitutes just and adequate compensation to the condemnee in cases involving mineral deposits.” *Id.*

The condemnees also contended that the trial court erred in permitting opinion testimony from the DOT’s expert real estate appraisers concerning the reasonable probability that a special exception to the zoning ordinance would not be granted by the Gordon City Council to permit mining kaolin on the condemned property, arguing that the testimony was improper because zoning considerations are not relevant in mineral deposits cases and the testimony was wholly speculative. The Court of Appeals,

however, affirmed the ruling of the trial court, concluding that no manifest abuse of discretion occurred in admitting the testimony. The Court of Appeals found that given the record evidence, “we cannot say that the opinion testimony of the DOT’s expert real estate appraisers regarding the likelihood of a change in zoning was wholly speculative. To the extent that the appraisers may have speculated to some degree in reaching their conclusions regarding the likelihood that a special exception would be granted for kaolin mining, that factor went to the weight of their testimony rather than its admissibility.” 331 Ga. App. at 320. The Court of Appeals also rejected the condemnees argument that testimony regarding what a legislative body might do in the future is too speculative to be admissible, holding:

[O]ur Supreme Court has held that a trial court did not abuse its discretion in allowing expert testimony that there was a reasonable probability that condemned property would be rezoned, where the testimony was predicated on the expert’s knowledge of the current zoning status of the property and an investigation into the property and the surrounding areas. That is the situation here with the opinion testimony of the DOT’s real estate appraisers, and thus we conclude that the trial court acted within its discretion in allowing their testimony related to zoning. *Id.* (Internal citations omitted).

The condemnees further contended that the trial court erred in charging the jury “that in valuing the condemned property, it should consider the existence of the kaolin deposits on the property, regardless of whether the condemnees had mined it or had plans to mine it at the time of the taking.” *Id.* The trial court also charged the jury that:

[I]n considering “uses” of the condemned property as part of its valuation of the property on the date of the taking, it could only consider uses that were lawful under the zoning ordinance in effect on that date, or uses for which there was a possibility or probability would become lawful under the zoning ordinance in the immediate future sufficient to have an effect on the value of the property. *Id.* at 320 – 321.

Unpersuaded by the condemnees’ argument, the Court of Appeals affirmed the trial court’s charges, holding:

[T]he jury charges on mineral deposits and zoning considerations, when construed together, were not conflicting and were an accurate statement of the law. In arriving at its ultimate valuation of the condemned property, the jury was properly allowed to consider the intrinsic value of the mineral deposits, as well as the possibility of lawfully mining those deposits under the present zoning ordinance or the grant of a special exception. We therefore discern no error by the trial court in its charges to the jury in this case. *Id.* at 322.