Court of Appeals

of the State of Georgia

ATLANTA, MAR 17

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

COURT OF APPEALS CASE NO. A93A1872

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY et al. v. HENRY W. LEIBOWITZ et al.

There being an equal division of the Judges of this Court when sitting as a body in connection with the consideration of the above styled case, it is ordered that said case be immediately transferred to the Supreme Court of Georgia in accordance with Article VI, Section V, Paragraph V of the Constitution of the State of Georgia.

On dispositive issues, the Judges of this Court are equally divided as follows: McMurray, P. J., Birdsong, P. J., Beasley, P. J., and Blackburn, J., being for affirmance, and Pope, C. J., Cooper, Johnson and Smith, JJ., being for reversal. Andrews, J., disqualified.

Attached to this order are copies of the draft opinion of this Court reflecting the view of the Judges as to the dispositive issues.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta MAR 17

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William L. Martin

MARCH 17, 1994

In the Court of Appeals of Georgia

A93A1872. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY et al. v. LEIBOWITZ et al. (Bi-123)

BIRDSONG, Presiding Judge.

Metropolitan Atlanta Rapid Transit Authority and Fulton County (collectively MARTA) appeal from a judgment in favor of Henry E. Leibowitz, Alan J. Lease, and Leibowitz and Lease, D.D.S., P.A., in a condemnation case. Drs. Leibowitz and Lease jointly owned the condominium which was leased to Leibowitz and Lease, D.D.S., P.A., to conduct a dental practice.

After Fulton County, on behalf of MARTA, condemned the condominium, appellees, as condemnees, appealed contending the compensation tendered was not just and adequate. Subsequently, the jury returned a lump sum verdict for appellees; MARTA now appeals.

MARTA contends the trial court erred by charging the jury that relocation expenses, including costs of renovating the replacement facility, might be awarded without also instructing

the jury that they must first find that the property taken was unique under Georgia law. MARTA also contends that the trial court erred by admitting evidence of the cost to purchase new personal property for the replacement facility. Held:

1. Appellees have moved to dismiss the appeal because MARTA has not paid into court the difference between the amount originally tendered and the amount of the judgment. This contention is based upon this court's holding in MARTA v. Funk, 206 Ga. App. 868 (426 SE2d 623) (Funk I), reversed on other grounds, MARTA v. Funk, 263 Ga. 385 (435 SE2d 196) (Funk II), that the payment of the judgment into court did not render that appeal moot. Appellees assert that under Funk I either the payment is required (and thus payment is a precondition for appeal), or if payment is voluntarily made, the appeal becomes moot under OCGA § 5-6-48 (b).

Although our law earlier required such payments in appeals from judgments based on jury verdicts for amounts exceeding the original payment or tender to the condemnee because of the "first paid" requirement of our State Constitution (see Paulk v. Georgia Power Co., 231 Ga. 721, 722 (204 SE2d 154); City of Gainesville v. Loggins, 224 Ga. 114, 117 (160 SE2d 374)), following ratification of Art. I, Sec. III, Par. I (b), Ga. Const. (1983), this requirement no longer exists because public transportation cases were added to the type of condemnation cases for which payment is not required until the amount is

finally fixed and determined by law. See Dougherty County v. Snelling, 132 Ga. App. 540, 541-542 (208 SE2d 362); State Highway Dept. v. Howard, 119 Ga. App. 298, 301 (167 SE2d 177). Accordingly, payment of the excess amount is not a precondition to maintaining an appeal and, therefore, appellees' motion is denied.

2. The general principles involved in this appeal are controlled by our Supreme Court's recent decision in Funk II. Although condemnees are entitled to just and adequate compensation for property taken by condemnation, to damages to their separate business interests, and to recovery of relocation expenses incurred in moving businesses, they are not entitled, however, to renovation expenses of the new facility to which they moved their practice. Id. Because of the specific errors asserted in this appeal, however, reversal is not required.

3. Although the instant case was tried and judgment entered before our decision in Funk I, MARTA's notice of appeal and brief were not filed until more than six months after that decision. Nevertheless, MARTA restricted its challenge to the trial court's instructions to the theory of uniqueness which was rejected in Funk I. In so doing, however, MARTA restricted the permissible scope of appellate review to an issue which had been previously resolved against it by this court. Appellate review is limited to the errors enumerated (Roberts v. Cotton States Mut. Ins. Co., 186 Ga. App. 371, 373 (367 SE2d 272)), and the

scope of review cannot be later expanded to include new issues. City of College Park v. Georgia Power Co., 188 Ga. App. 223-224 (372 SE2d 493). Consequently, our review is limited to the error in the charge enumerated by MARTA and we are not free to consider other errors which are not asserted on appeal.

MARTA's first enumeration of error contends only that the trial court erred by charging the jury it could award relocation expenses, including costs to build out the replacement facility, without also charging that the jury must first find the property taken was unique under Georgia law. As this is not a correct statement of the law, the trial court did not err by giving a charge without including the erroneous concept of uniqueness. Whether business property is unique has no bearing on the recovery of relocation expenses. Funk I, supra at 871. See also Funk II, supra at 386-387.

Although as the dissent maintains the charge given may be contrary to Funk II, because of MARTA's tactics in this case, we cannot reach that issue. MARTA did not object on that basis in the trial court, did not enumerate the giving of such a charge as error, and has not raised this issue in this court. Consequently, as MARTA'S objection below was based solely upon the erroneous theory of uniqueness, the objection did not raise any issue concerning renovation expenses before the trial court sufficient to preserve the issue for appellate review. See Christiansen v. Robertson, 237 Ga. 711, 712 (229 SE2d 472). To

be reviewable the objection must be unmistakable in directing the trial court's attention to the claimed error and must be stated with such particularity to leave no doubt about the specific ground of challenge. The grounds of error urged must fully apprise the court of the error committed and the correction needed to cure it. Georgia Power Co. v. Maddox, 113 Ga. App. 642, 646 (149 SE2d 393). Therefore, because of the limited objection below, no issue about renovation expenses was preserved for appellate review.

Additionally, MARTA bears responsibility for the erroneous charge since it requested a series of charges on the award of relocation expenses which, coupled with its failure to object, induced the giving of the erroneous charge. As one cannot complain of a result he procured or aided in causing (Locke v. Vonalt, 189 Ga. App. 783, 787 (377 SE2d 696)), MARTA is not entitled to a reversal on this basis.

Moreover, contrary to the dissent's assertion, OCGA § 5-5-24 (c) has no application here since that section must not be allowed to vitiate OCGA § 5-5-24 (a). Widener v. Mitchell, 137 Ga. App. 730, 731-732 (224 SE2d 868); Nathan v. Duncan, 113 Ga. App. 630, 638 (149 SE2d 383). Thus, the issues in which OCGA § 5-5-24 (c) apply are rare. Moore v. Sinclair, 196 Ga. App. 667, 672 (396 SE2d 557). To constitute harmful error within the meaning of OCGA § 5-5-24 (c), an erroneous charge or failure to charge must result in a gross injustice, sufficient to raise a

question whether the appellant has been deprived of a fair trial. Hamrick v. Wood, 175 Ga. App. 67, 68 (332 SE2d 367). See also Foskey v. Foskey, 257 Ga. 736, 737 (363 SE2d 547). In this appeal, however, it is hard to perceive such unfairness as MARTA has not sought reversal under this theory asserted by the dissent. Under our rules of appellate practice, MARTA has waived this issue by not raising it on appeal.

While as the dissent asserts, courts must be alert to prevent unwarranted expenditures of public funds, at some point public agencies must be responsible for their actions, including their litigation strategies, and it is not the proper function of this court to protect MARTA from itself. Thus, this court should not grant MARTA more protection than it has sought. Moreover, we have a responsibility to all litigants, including MARTA, so that they are not forced to incur the costs of repeated trials when the error was induced and may otherwise have been resolved correctly in the first instance. Accordingly, this enumeration of error provides no basis for granting relief.

4. MARTA's second enumeration of error contends "the trial court erred in admitting as evidence of 'relocation expenses' the cost to purchase new personal property for use in a replacement facility." Although an objection based on the principle that evidence concerning expenses of renovating a new facility was not relevant would have merit (see Funk II), the

transcript shows that no timely objection was made on this or any other basis. Instead, after Dr. Leibowitz was permitted to testify about these costs without objection, and was cross-examined about these items at length, MARTA moved to strike the testimony of Dr. Leibowitz because he sought compensation for personal property.

Since this objection focused solely on the property as personalty and raised no issue of relocation expenses, MARTA did not pose a timely objection at trial to the admission of this evidence on the specific grounds now asserted in its enumeration of error or argued in its brief. Under these circumstances, there is nothing for us to review. Dairyland Ins. Co. v. McIntosh, 171 Ga. App. 782, 783-784 (321 SE2d 110). Moreover, a motion to strike cannot be used to strike testimony that was admitted without contemporaneous objection. See Guthrie v. Bank South, Douglas, 195 Ga. App. 123, 126 (393 SE2d 60). Compare Mable v. State, 261 Ga. 379, 381 (405 SE2d 48). Accordingly, this enumeration of error is also without merit.

Judgment affirmed. McMurray, P. J., Beasley, P. J., and Blackburn, J., concur. Pope, C. J., Cooper, Johnson and Smith, JJ., dissent. Andrews, J., disqualified.

A93A1872. MARTA et al. v. LEIBOWITZ et al.

POPE, Chief Judge dissenting. (Bi-123)

While I concur in Divisions 1 and 4, I must dissent to the remaining divisions. As the majority correctly points out in Division 2, this case is controlled by our Supreme Court's recent decision in MARTA v. Funk, 263 Ga. 385 (435 SE2d 196) (1993). In Funk, our Supreme Court held that recoverable relocation costs do not include expenses of renovating newly leased business premises. The Funk decision did not work a change in the law, it simply clarified what constitutes recoverable relocation cost.

In this case the trial court charged the jury as follows: "I charge you that relocation and moving costs are recoverable as part of just and adequate compensation. If you find from the evidence that the site to which the condemnees business moved required modification and alteration to make the site suitable for their operation of the business, then the cost of modifying the new site to make it suitable and appropriate as the new business location are properly recoverable as part of the relocation cost." That was an erroneous statement of the law,

and specifically directed the jury to award cost of renovation expenses to the condemnees contrary to the law of Georgia.

Counsel for MARTA objected to that charge on the grounds that unless uniqueness of the property was shown, a charge on relocation cost was unauthorized. Because the charge requested by MARTA was also not a correct statement of the law, the majority holds that the enumeration of error concerning the charge is without merit. Pursuant to OCGA § 5-5-24 (c) this court is required to consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made. Our Supreme Court found in Funk that a charge which was ambiguous enough to allow the jury to award renovation costs as relocation costs constituted harmful error and entitled MARTA to a new trial. It logically follows that the charge in this case which specifically directed the jury to award renovation cost to the condemnees constituted substantial error as a matter of law and deprived MARTA of a fair trial. Certainly if we would be required to consider this erroneous charge even if no objection had been made, we must consider the charge when, as in this case, objection was made but not on the grounds later articulated by our Supreme Court in Funk. MARTA is entitled to a new trial based on the trial court's erroneous charge on recovery of renovation costs.

Furthermore, we must be mindful of the result of failing to

order a new trial in this case. If allowed to recover the cost of renovating and decorating their offices, the condemnees in this case, two orthodontists and their professional corporation, will be enriched rather than compensated from the public treasury. Department of Transp. v. Gunnels, 255 Ga. 495, 500 (6) (340 SE2d 12) (1986) (Weltner, J., concurring). While an orthodontist practice would require certain renovations to any newly leased space, the condemnees have already been compensated from the public treasury for the uniqueness of their former business location, and any additional payment for renovation and decoration constitutes double recovery, a burden the taxpayers should not bear.

I am authorized to state that Judge Cooper, Judge Johnson and Judge Smith join in this dissent.