Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Wednesday, April 27, 2016

10:00 A.M. Session

HERON LAKE II APARTMENTS ET AL. V. LOWNDES CO. BOARD OF TAX ASSESSORS (S16A0691)

Owners of apartment complexes that provide low-income housing are appealing a **Lowndes County** judge's order declaring as unconstitutional a state law that benefitted them. At issue is a Georgia statute that prohibits tax assessors from considering tax credits given to low-income housing properties when determining a property's value for the purpose of taxing it.

FACTS: Heron Lake II Apartments, L.P. is one of seven limited partnerships that owns residential rental property in the Valdosta area of South Georgia and is a party to this case. All are eligible to receive federal and state low-income housing tax credits under Section 42 of the federal Internal Revenue Code and Georgia Code section 48-7-29.6. In exchange for receiving a 10-year award of tax credits, the owners agreed to lease their rental units to low-income tenants at below-market rents set by the Georgia Department of Community affairs for a period of 30 years or more. In 2002, Superior Court Judge Harry Jay Altman II of the Southern Judicial Circuit, ruled in *Pine Pointe Housing, LP v. Lowndes County Board of Tax Assessors* that Section 42 tax credits could be considered by tax assessors when assessing low-income housing property. Shortly after, the Georgia Legislature enacted Georgia Code § 48-5-2 (3) (B.1), which states: "The tax assessor shall not consider any income tax credits with respect to real property

which are claimed and granted pursuant to either Section 42 of the Internal Revenue Code of 1986, as amended, or Chapter 7 of this title in determining the fair market value of real property." In March 2015, the Lowndes County Board of Tax Assessors filed a court action asking the Lowndes County Superior Court to declare Georgia Code § 48-5-2 (3) (B.1) unconstitutional, arguing it violated the uniformity clause in the Georgia Constitution. That clause states that "all taxation shall be uniform upon the same class of subjects…." In June 2015, Judge Altman – the same judge who decided the 2002 case – ruled that § 48-5-2 (3) (B.1) was unconstitutional. The apartment owners and investors now appeal to the state Supreme Court.

ARGUMENTS: The apartment owners' attorney argues that the only "real property" subject to taxation is "tangible" real estate and that "intangible" rights, interests, and benefits are not part of real property for the purpose of determining ad valorem property taxes. The uniformity clause of the Georgia Constitution only applies to property in "the same class of subjects." For taxation purposes, there are only two classes of property – tangible property and intangible personal property, the attorney argues. "Thus if tax credits are classified as 'intangible personal property,' they can be assessed differently than real property without violating the uniformity requirement," the attorney argues in briefs. He argues that a "review of Georgia statutory, regulatory, and case law reveals that Section 42 tax credits should be classified as intangible personal property, and thus, not subject to the uniformity requirement of the Georgia Constitution." "Tangible personal property" is defined in the Georgia Code as "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses." "Since Section 42 tax credits cannot be 'seen, weighed, measured, felt or touched,' they are, by the process of elimination, 'intangible' rather than 'tangible' property," the owners' attorney contends. The state Department of Revenue's Appraisal Procedures Manual includes a definition of real property that specifically states: "Real property does not include the intangible benefits associated with the ownership of real estate, such as the goodwill of a going business concern." Also, courts in other states have found Section 42 tax credits to be intangible personal property, the attorney argues. Including the Section 42 tax credits as part of a property's assessed value would violate the constitutional uniformity requirement because assessors do not consider other tax benefits associated with the ownership of real property, such as the federal historic rehabilitation tax credit, the renewable energy/investment tax credit, and Georgia low-income housing credits. "Thus, by singling out Section 42 tax credits for 'special treatment,' the assessors have not only discriminated against low-income tenants by encouraging developers to go to more tax friendly counties, they have also violated the principle of uniformity by assessing some but not all recipients of federal tax benefits."

The attorneys for the County Board of Tax Assessors argue the trial court ruled correctly and its order should be upheld. Following the *Pine Pointe* decision, the General Assembly proposed an amendment to the Georgia Constitution that would have created an exception to the uniformity requirement for Section 42 properties. But in 2002, a majority of voters voted against the amendment and it was never ratified. The developers' argument that "real property" is only tangible real estate and does not include the intangible benefits and rights connected to it "is not the law in Georgia," the attorneys argue in briefs. The state's Appraisal Procedures Manual includes in its definition of "real property," the "bundle of rights, interests and benefits connected with the ownership of real estate." Assessors are required by Georgia statute to see that all taxable property is assessed at its "fair market value," which is defined by statute to mean

"the amount a knowledgeable buyer would pay and a willing seller would accept for the property" in a sale. A majority of courts have held that the right to use Section 42 tax credits is a part of real property that is subject to taxation. Many have concluded that because the tax credits make ownership of the property more desirable and are transferred to a purchaser of the property, they enhance the value of the property in the marketplace and therefore, both the tax credits and the restricted rental rates must be considered in assessing the property for tax purposes. "Because the tax credits are rights and privileges that directly relate to the real estate, they are properly considered in assessing the value of low-income housing," an Idaho court ruled in 2006. "Market value, by definition, captures all benefits flowing from the property. Federal low-income housing tax credits are unquestionably part of the stream of benefits that flow from the property. As a practical matter, the tax credits can be considered equivalent to income. If only the reduced rents are considered, however, the value of the land will be artificially depressed and its true market value distorted." The trial court correctly ruled that while intangible, Section 42 tax credits, like rental income, provide a stream of value tied solely to the property. "If an owner sells a Section 42 building, the new owner receives the right to use the remaining income tax credits," the attorneys argue. "The right to use the future tax credits is thus 'connected' with ownership of real estate and is therefore a right in the 'bundle of rights, interests and benefits' that is the 'real property.'" The right to use the Section 42 tax credits "must be considered because, though intangible, the right to use the credits has an effect on the amount a buyer would pay and a seller would accept," the County's attorneys argue.
Attorney for Appellants (Heron): Edward Preston
Attorneys for Appellee (Assessors): Walter Elliott, William Elliott

MCHUGH FULLER LAW GROUP, PLLC V. PRUITTHEALTH, INC. (S16A0655)

In this **Colquitt County** case, an out-of-state law firm is asking the Georgia Supreme Court to throw out a trial court's order that prohibits it from running advertisements soliciting abuse and neglect cases against a nursing home in Moultrie.

FACTS: McHugh Fuller Law Group is a Mississippi-based law firm that specializes in nursing home abuse. In 2015, it began running a statewide advertisement campaign in Georgia against PruittHealth, Inc. to win business from people who "suspect that a loved one was NEGLECTED or ABUSED" at one of its nursing homes. One of the advertisements, which ran in the Moultrie Observer, was a full-page color ad directed at the PruittHealth-Moultrie nursing home that included PruittHealth's service marks and trade names, as well as large, capital lettered, and bold-faced red text of words such as "bedsores," "unexplained injuries," and "death." PruittHealth sued the law firm under the Georgia Deceptive Trade Practices Act, which authorizes a court to issue an injunction (a court order requiring a certain action be halted) against anyone who uses someone's trade name without permission if there is even a "likelihood" that the use will injure the business reputation of the owner or dilute its trade name or mark. The trial court entered a temporary restraining order against the law group, scheduled a hearing and notified the parties that it intended to consider PruittHealth's request for a permanent injunction. The trial court issued another order on June 1, 2015, permanently stopping the law group from running ads that used PruittHealth's trade names, service marks, or other trade styles. The law group filed a motion for reconsideration, which the trial court denied. The law firm is now appealing to the Georgia Supreme Court. In a similar case in 2015, the same law firm

appealed a court ruling that concluded it had engaged in "false and misleading" advertising about a PruittHealth nursing home in Toccoa, GA. In that case, the state Supreme Court threw out the permanent injunction awarded to PruittHealth based on a procedural error and remanded the case to the Stephens County court.

ARGUMENTS: In this case, the same law firm is again asking the high court to vacate the trial court's order granting PruittHealth a permanent injunction and preventing it from running similar advertisements in Moultrie. The law firm argues the court erred by granting a permanent injunction following what was a pre-trial interim hearing. The lawyers did not have a chance to conduct discovery (the pre-trial process in which the parties are required to share documents and information to help build their case). The trial judge erred by ignoring the law firm's objection and going ahead and holding a final trial on the merits, depriving its lawyers of conducting discovery. The law group argues, among other things, that the court erred in determining the ads violated Georgia Code section 10-1-451(b), which is called Georgia's "anti-dilution statute." That statute says dilution occurs "where the use of the trademark by the subsequent user will lessen the uniqueness of the prior user's mark with the possible future result that a strong mark may become a weak mark." The law firm argues that it is not eroding the strength of PruittHealth's mark, but is only identifying specific nursing homes against which it is accepting cases, and that PruittHealth failed to demonstrate that actual injury occurred as a result of the ads. "The trial court abused its discretion by finding McHugh Fuller's advertisement dilutes any trademark of plaintiff," the law firm's attorneys argue in briefs. The firm also points to an informal advisory opinion by an assistant general counsel with the State Bar of Georgia, which stated that the ad complied with the Rules of Professional Conduct regarding attorney advertising. The trial court's order must also be thrown out because it is overly broad and violates McHugh Fuller's constitutional rights under the First Amendment's protection of free speech, the law firm's attorneys argue.

PruittHealth's attorneys are asking this Court to affirm the trial court's order prohibiting the law firm from using their marks in any manner. They argue that the trial court gave advance notice it intended to make a decision based on the merits of the case and that the court was therefore authorized to issue a permanent injunction. The trial court properly issued the order and did not abuse its discretion in imposing a permanent injunction and finding that the ads violated Georgia's anti-dilution statute. They say the trial court properly determined that the advertisements injured PruittHealth's business reputation and diluted its trademark. They also argue that the fact the ads had been reviewed by the assistant general counsel for the State Bar has no bearing on this case, as they were reviewed to determine if they were "false, fraudulent, deceptive or misleading" under Georgia's Rule of Professional Conduct 7.1, not to determine if they violated Georgia's anti-dilution statute. Finally, the "permanent injunction is not overly broad, nor does it violate Appellant's [i.e. McHugh Fuller's] rights under the First Amendment," PruittHealth's attorneys argue.

Attorneys for Appellant (McHugh Fuller Law Group): Shannon Sprinkle and Tyler Wetzel of Carlock, Copeland, & Stair, LLP, and Charles Peeler of Flynn, Peeler, & Phillips, LLC.
Attorneys for Appellees (PruittHealth): Jason Bring, Richard Mitchell, and J. Ryan Hood of Arnall, Golden, Gregory, LLP, and Gregory Talley of Coleman Talley, LLP.

FULTON COUNTY V. CITY OF ATLANTA (S16A0689)

Fulton County is appealing a trial court's order that has declared void the Fulton County Industrial District that the Georgia legislature created 36 years ago.

FACTS: The Fulton County Industrial District is an area of high-value industrial development in the west central portion of Fulton County. The value of the land, which corresponds to high tax revenue, has helped fuel a dispute over its ownership. In 1979, a local constitutional amendment was passed by the state legislature and ratified by voters, protecting the district from municipal encroachment, or in other words, from annexation or incorporation by the City of Atlanta. The amendment did, however, allow for the taxation of properties within the Industrial District for education purposes.

In 1983, the State of Georgia adopted a new constitution, which no longer allowed for local amendments, but allowed for local amendments pre-dating that Constitution to be continued through certain avenues, such as a local act or ordinance. So in 1983, the General Assembly also enacted House Bill 85, which was a local act that continued the 1979 local constitutional amendment.

In addition to the properties within the Fulton Industrial District that are in unincorporated Fulton County, at least four properties were within the municipal boundaries of the City of Atlanta and therefore within the territorial boundaries of the Atlanta Independent School System. Under the local amendment, properties within the industrial district contributed to school taxes depending on whether they were within the City of Atlanta or the unincorporated area of Fulton County. The 1979 amendment specifically stated that "Fulton County is hereby prohibited from levying any tax for educational purposes on taxable property within Fulton County which is located within the boundaries of an independent school system," i.e. within the City of Atlanta.

In February 2015, House Bill 476 was introduced to repeal the 1979 local amendment, and therefore the establishment of the Fulton Industrial District. However, the bill was not adopted, and the City of Atlanta eventually filed a "declaratory lawsuit" against the County, asking the court to "declare" the local constitutional amendment invalid. The County filed a motion asking the court to dismiss the City's suit on the grounds that it was barred by sovereign immunity, the legal doctrine that protects local and state governments from being sued. The trial court, however, ruled in favor of the City. It denied the County's motion to dismiss, declared the 1979 local amendment void *ab initio* (from the beginning), and held that the 1983 Act that continued the amendment was also void. Fulton County now appeals to the state Supreme Court.

ARGUMENTS: "For decades, the City of Atlanta has cast its longing eye on the Fulton County Industrial District – an area of high-value (and therefore high-tax-value) industrial development in the west central portion of Fulton County," attorneys for the County begin their briefs. "Nearly four decades later, the City now challenges the 1979 local constitutional amendment in an effort to get the camel's nose into the tent: to pave the way for City annexation of property within the Fulton Industrial District into the City's taxing jurisdiction." Fulton County's attorneys argue the trial court erred in denying the County's defense that sovereign immunity bars the City's declaratory judgment lawsuit. "It is well-established that, 'A county is not liable for any cause of action unless made so by statute,'" the attorneys contend. Under the Georgia Constitution, sovereign immunity of the state and its departments may only be waived by an act of the General Assembly, and this provision extends to counties. In recent decisions,

both the state Supreme Court and the Georgia Court of Appeals have recognized that sovereign immunity bars declaratory judgment claims against the State and county-level governments. Fulton County argues, among other things, that the trial court was incorrect in ruling the 1979 local amendment was void from inception and that it was not properly continued through the General Assembly's enactment of HB 85. They assert that the trial court failed to use the correct version of the Georgia Constitution in its analysis. The trial court ruled that the 1979 local amendment violated what is referred to as the "Single Subject Rule", which prohibits combining unrelated measures into the same legislative act, citing the 1983 Constitution as its support for this rule. The City claims that in establishing the Fulton Industrial District, the same constitutional amendment prohibited Fulton County from levying school taxes within Atlanta's boundaries. Because the County had previously been able to levy taxes for county schools in Atlanta even though Atlanta had an independent school system, the City claimed the new prohibition in the 1979 amendment was a kind of quid pro quo. But the two measures were contingent on each other's passage, and while Fulton voters approved the industrial district in a referendum, the school tax repeal failed. The County points out, however, that the 1983 Constitution was established after the local amendment was passed. And the 1979 local amendment was valid under the 1976 Constitution, the version the County claims applies here. The County's lawyers argue that the local amendment would still be valid even under the standard established in the 1983 Constitution. The County also argues that the trial court was incorrect in declaring void the 1983 continuation act (HB 85), which continued the local amendment. The County's attorneys argue that the General Assembly followed the proper steps to assure that HB 85 was properly passed, including the requirement of public notice. They ask this Court to find that HB 85 was constitutional, and therefore the 1979 local amendment was properly continued. The Georgia Supreme Court should reverse the trial court's order declaring the amendment and continuing act void.

The City of Atlanta argues that the trial court properly declared the amendment and act void, and Fulton's sovereign immunity poses no bar to the lawsuit. "Because the instant action challenges the constitutionality of legislative acts, it is permitted by Georgia law," the City's attorneys argue in briefs. "The fact that a legislative act's constitutionality may be challenged in a declaratory judgment claim is ingrained in Georgia law." They also argue that the local amendment violated the "Single Subject Rule", in that it addressed two separate issues – the creation of the Industrial District and the guidelines for educational taxation within the District – in the same amendment. "Other than forbidden political shenanigans, there is no inherent or necessary connection between these proposals," the City's attorneys contend. "The combination of those two unrelated proposals into a single piece of legislation and referendum is precisely the type of legislative chicanery the Single Subject Rule exists to prohibit." The creation of the Fulton Industrial District was contingent on a separate repeal of an earlier amendment that allowed Fulton County to levy a tax for county schools in Atlanta even though the City had its own school system. Together, the two "reflect an obvious quid pro quo, with the separate initiatives addressed in separate amendments and referenda, but made contingent on each other's passage," the City's attorneys argue. "To get the Fulton Industrial District created and prevent annexation by Atlanta, Fulton had to give up levying school taxes in Atlanta." However, while the electors approved the amendment establishing the industrial district, they did not approve the school tax repeal. As a result, in 1979, the General Assembly combined the two previously

separate amendments into a single measure. For these reasons, the local amendment was invalid from the beginning, the City contends. The attorneys also argue that even if the Court finds that the local amendment wasn't void from the beginning, it was never properly continued after the 1983 Constitution. They assert that while the General Assembly twice attempted to continue the amendment, they failed to do to so in a way that passes constitutional review. They argue that the first attempt, through HB 85, was invalid in that it did not fully meet the public notice requirement when it omitted in the notice any mention of the prohibition against Fulton levying school taxes in Atlanta. They cite the second attempt as SB 509, but claim this bill was also invalid in that the public notice inaccurately described the school tax portion of the amendment. The 1979 amendment, the City contends, "was void the day it was passed as an impermissible exercise in political horse trading," and the trial court correctly declared it as unenforceable.
Attorney for Appellant (Fulton County): Larry Ramsey and Kenneth Robin of Jarrard & Davis, LLP, Jerolyn Ferrari; Patrise Perkins-Hooker; Kaye Burwell, Cheryl Ringer, and Marvin Harkins of the Office of the Fulton County Attorney
Attorneys for Appellees (City of Atlanta): Emmet Bondurant, David Brackett, and Robert Ashe III of Bondurant, Mixson & Elmore, LLP; Robert Highsmith, Jr. of Holland & Knight, LLP; Joseph Young of Joseph D. Young, P.C.