

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002422-MR
AND
NO. 2009-CA-000050-MR

BOARD OF EDUCATION OF
WOODFORD COUNTY, KENTUCKY APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM WOODFORD CIRCUIT COURT
v. HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 05-CI-00242

D.W. WILBURN, INC. APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
AND VACATING IN PART AND REMANDING

** ** *

BEFORE: CLAYTON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: The Board of Education of Woodford County,

Kentucky appeals from the “Findings of Fact, Conclusions of Law, and Judgment”

¹ Judge William L. Knopf completed this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

entered by the Woodford Circuit Court in favor of D.W. Wilburn, Inc. in a construction contract dispute between the parties. Wilburn has also filed a cross-appeal in which it asserts that the trial court erred by failing to award the company pre-judgment interest. After our review, we vacate the trial court's award of post-judgment interest to Wilburn and reject Wilburn's cross-appeal for pre-judgment interest, but we otherwise affirm the court's judgment.

Facts and Procedural History

On May 21, 2003, Wilburn, a general contractor, entered into a written contract with the Board to build the new Woodford County Middle School in Versailles, Kentucky. Wilburn was to be paid a total of \$15,624,000 for its efforts. The contract incorporated a set of conditions referred to as the "General Conditions of the Contract for Construction," along with amendments mandated by the Kentucky Department of Education, Division of Facilities Management pursuant to 702 KAR² 4:160. JRA Architects (JRA) was to serve as the Board's agent for the project and was responsible for such tasks as administering the contract and making decisions regarding changes to the project, time extensions, and determining when the project was substantially complete. The majority of these efforts were conducted by JRA architect Robert Deal.

General Condition 8.1.3.2 required that construction of the school be substantially complete within 395 days of the contract execution, unless that date was extended by a change order. General Condition 9.8.1 defined "substantial

² Kentucky Administrative Regulations.

completion” as “the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.” Thus, the project was to be substantially complete by June 19, 2004 – in time for the following school year.

By allowing for extensions via change orders, the contract anticipated the possibility of delays and also included a number of other provisions regarding time extensions. For example, General Condition 4.3.7.1 provided:

If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor’s Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one claim is necessary.

General Condition 8.3.1 further stated:

If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor’s control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

Under General Conditions 9.8.3 and 9.8.4, the project architect was responsible for determining when the project was substantially complete and for submitting to Wilburn a final list of items to be completed to finish the project.

The contract provided that “Final Completion” of the project was to occur “21 days following substantial [completion].” General Condition 9.10.1 explained the process by which final completion and final payment would occur as follows:

Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect’s knowledge, information and belief, and on the basis of the Architect’s on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable.

During the course of its work on the project, Wilburn submitted a number of time extension requests to Deal that, if granted, would have delayed the date for substantial completion beyond the original 395-day term set forth in the contract. Wilburn claims that extensions were required for a number of delays beyond its control, including weather delays, delays resulting from changes and additions requested by the Board, and delays caused by casework and cabinetry provided by the Board. Deal recommended a total of 232 days in time extensions and provided change orders to this effect to the Board for its approval. The Board apparently approved and executed two of those change orders – for a total of 42 days – which moved the new date for substantial completion to July 31, 2004. The

Board acknowledges, though, that it failed to voluntarily approve any other requests by Wilburn for extensions of time to complete the project.

The question of when the project was ultimately due to be substantially complete was of considerable importance given that the contract also contained a liquidated damages provision stating that Wilburn would incur damages of \$1,500 per day for the first fifteen calendar days following the substantial completion date and \$3,000 per day thereafter for each day that substantial completion had not occurred. On numerous occasions during the course of construction, Wilburn requested resolution of the pending extension requests, but it appears that the Board declined to agree to such and instead threatened to resort to liquidated damages if the project was not completed as scheduled. The Board also instructed Deal to double the amount of retainage money it was withholding from Wilburn (from 5% to 10%) to assure Wilburn's performance – despite the fact that Deal and the Kentucky Department of Education advised against it. Accordingly, it is fairly obvious from the record that during the course of construction, the relationship between Wilburn and the Board started to become more contentious and antagonistic in nature.

The parties agree that Wilburn did not deliver substantial completion of the project until October 22, 2004 – well after the aforementioned deadline for substantial completion.³ However, Wilburn's remaining requests for extensions essentially left the due date in a state of flux that would not be resolved for months.

³ The Board apparently refused to sign two certificates of substantial completion that were prepared by Deal and tendered to the Board.

In instances where extensions could not be agreed to by the parties, the contract – specifically General Condition 4.4 and its various subparts – gave the project architect the authority to determine whether time extensions were merited.

General Condition 4.4.5 provided:

The Architect will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

Deal made final decisions on Wilburn's long-pending time extension requests in June 2005, extending the substantial completion deadline by 106 days. The result of this decision is that by delivering substantial completion on October 22, 2004, Wilburn had met the new deadline for substantial completion.

However, the Board insists that Wilburn was in technical breach of the parties' contract from July 31, 2004 (the last agreed-upon date for substantial completion) through June 2005. During this time, the Board instructed Deal to deduct \$319,500 in liquidated damages from the balance owed to Wilburn, contending that Wilburn had failed to deliver substantial completion when due. Deal also deducted a number of amounts as actual damages to correct a number of alleged problems that Wilburn had failed to address.

The Board further notes that although substantial completion was achieved on October 22, 2004, final completion was not achieved twenty-one days thereafter, as required by the contract, or at any time within the next 327 calendar

days through September 14, 2005. The Board also notes that the contract does not specifically authorize requests for extension of the 21-day period; however, they acknowledge that the industry custom was to permit such extensions. The Board nevertheless maintains that Wilburn failed to submit sufficient requests for extensions to move the date for final completion.

In response, Wilburn notes that General Condition 9.8.4 required the project architect to submit to Wilburn a punch list of items to be finished and a schedule for completion of those items once the architect signed off on substantial completion. Deal acknowledged that this list was not provided concurrently with a certificate of substantial completion and indicated that as a practical matter such could not have been done given the size of the project. The record also reflects that although an initial punch list was provided to Wilburn, additional punch lists dealing with different areas of the school were submitted well into the summer of 2005. Deal and the Board also executed six construction change directives in December 2004 requiring Wilburn to do additional work even though it was acknowledged that the contract time was in dispute. Wilburn apparently performed this work but was never paid for it despite the fact that Deal approved the amounts to be added to the contract sum.

In July 2005, Wilburn made its last application to the Board for payment in the amount of \$425,763.50. However, Deal certified payment of only \$17,840, leaving a disputed balance of \$406,990. On July 22, 2005, Wilburn filed

suit against the Board in the Woodford Circuit Court.⁴ An amended complaint was filed soon thereafter on July 28, 2005. Wilburn alleged that the Board had defaulted under the terms of the parties' contract by: (1) failing and refusing to pay all owed sums; (2) failing to timely provide furnished items and information as requested and otherwise causing substantial delays and expense to Wilburn; and (3) failing to grant extensions of time for completion of the work, as required by the contract and the surrounding circumstances. Wilburn claimed that the amount owed under the contract, including sums owed as a result of change orders and requested extras, was \$424,830.00.⁵ Wilburn further alleged that the Board had failed to pay for additional work and changes requested during the course of construction, with the sum owed totaling \$11,433.50.

Wilburn further contended that because of certain delays caused by events beyond its control and the Board, extensions of time were required to complete the work. Wilburn indicated that it had submitted change orders requesting such, but – in large part – they were rejected by the Board despite the approval of the Board's architect. Accordingly, Wilburn sought a declaration of rights regarding its entitlement to the requested change orders extending the project's completion date, as well as a declaration concerning the Board's entitlement to liquidated damages.

⁴ Wilburn also sued the Commonwealth of Kentucky Department of Education, but that agency was later dismissed from the litigation by agreed order.

⁵ The claimed owed balance was subsequently amended to \$418,423.50.

Despite – or perhaps because of – the filing of this lawsuit, in a letter dated August 10, 2005, the Board gave written notice to Wilburn “to proceed forthwith to correct defective and/or non-conforming work and, as well, complete each and every punch list and warranty item.” Of particular concern was a defective and non-conforming roof that had been installed by a subcontractor.⁶ Deal subsequently tendered a letter to the Board on August 18, 2005 advising its members that “all punch list items [were] not yet completed, warranty items [were] not yet completed, and non-conforming work items associated with the above referenced project [were not completed].” Deal blamed this failure on Wilburn, contending that it had failed to provide enough properly-skilled workmen to address any outstanding items and had otherwise failed to act with due diligence. Accordingly, Deal advised the Board of his belief that there was “sufficient cause to justify termination [of the contract] . . . since the contractor has persistently failed to supply enough workmen to complete the project and has otherwise grossly exceeded the allotted time under the contract.” In a letter dated August 23, 2005, the Board advised Wilburn of its intent to terminate Wilburn’s employment as the project’s general contractor. The contract was terminated the following month, and new contractors were hired to complete any remaining work. Wilburn claims that such was done in violation of General Condition 2.4.1 because no change order was executed indicating the change in work and contract sum.

⁶ Wilburn admitted that the roof was defective because of various leakage issues, and it actually filed suit against the subcontractor because of these issues. That claim was resolved by summary judgment and is not part of this appeal. The record reflects that Wilburn undertook to replace the roof in December 2005 and that issues with the roof still existed at the time of trial.

The case ultimately proceeded to a bench trial that was conducted on July 28, 29, and 30, 2008. Prior to trial, the Board withdrew its claim for liquidated damages but failed to pay any additional sums to Wilburn. The Board instead maintained that it was entitled to withhold at least some of the construction fund balance for the subject project as compensation for close-out expenses to finish all work left incomplete by Wilburn. According to the Board, this amount totaled over \$100,000 and included sums for services by Deal beyond his original contract, the retention of an engineer to advise the Board on the completion of the project, and payments to two roofing companies and a builder to finish the punch list items and to repair the roof. The Board continued to maintain that final completion of the project had not been performed by Wilburn.

After the trial court heard all evidence, it asked the parties to prepare and submit proposed findings of fact and conclusions of law in lieu of giving closing arguments. On September 19, 2008, the court entered “Findings of Fact, Conclusions of Law, and Judgment” that were essentially a word-for-word replication of the proposed findings of fact and conclusions of law tendered by Wilburn. The only difference between the two was the court’s removal of a provision granting Wilburn pre-judgment interest. The court ruled that the Board had breached the parties’ contract in a number of ways and awarded Wilburn judgment for \$415,430.57. By agreed order entered on October 27, 2008, the

judgment was rendered final.⁷ The Board's subsequent post-trial motions were denied. This appeal followed.

Analysis

We first address the Board's argument that the trial court violated Kentucky Rule of Civil Procedure (CR) 52.01 by adopting the proposed findings of fact and conclusions of law prepared by Wilburn's counsel rather than crafting its own. CR 52.01 states, in pertinent part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" This issue is reviewed under an abuse of discretion standard. *Bingham v. Bingham*, 628 S.W.2d 628, 630 (Ky. 1982).

As noted above, the trial court entered "Findings of Fact, Conclusions of Law, and Judgment" that were essentially a word-for-word replication of the proposed findings of fact and conclusions of law tendered by Wilburn. The only significant difference between the two was the court's removal of a provision granting Wilburn pre-judgment interest. The Board contends that by its wholesale adoption of Wilburn's proposed factual findings and legal conclusions, the court effectively failed to meet its responsibilities under CR 52.01.

In support of its argument, the Board complains that the judgment entered by the trial court inadequately failed to acknowledge that the Board had

⁷ The trial court's "Findings of Fact, Conclusions of Law, and Judgment" did not contain any language rendering the court's decision final and appealable because a number of other claims – some involving other parties – remained pending. Those claims and parties are not a part of this appeal.

abandoned its claim for liquidated damages and had confessed judgment in favor of Wilburn as to most of the contract balance, with the exception of just over \$100,000 in close-out expenses to finish construction. The Board also contends that the court failed to acknowledge the Board's confession of judgment relating to the construction-charge directives and its request for an order requiring Wilburn to submit a pay application with supporting documentation to permit Deal to approve payment for any pending change directives. The Board argues that there is no explanation for the trial court's judgment having ignored these confessions of judgment and acknowledgment of deficiencies in the Board's evidence other than a complete abdication of the court's duty as fact-finder under CR 52.01.

Kentucky courts have historically – if somewhat inconsistently – frowned upon the practice of a court's adopting proposed findings of fact and conclusions of law tendered by counsel because of a concern that the court might delegate, if not abdicate altogether, its fact-finding and decision-making responsibilities under CR 52.01. *See Bingham*, 628 S.W.2d at 629; *Kentucky Milk Marketing & Anti-Monopoly Comm. v. Borden Co.*, 456 S.W.2d 831, 834 (Ky. 1969). With this said, however, the Supreme Court of Kentucky has held that tendered findings and conclusions adopted by a trial court should not be easily rejected “in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility under CR 52.01[.]” *Bingham*, 628 S.W.2d at 630. In *Bingham*, no reversible error was found to have occurred since the record showed that the trial judge “prudently examined the

proposed findings and conclusions and made several additions and corrections to reflect his decision in the case.” *Id.* at 629. In a more recent case where both parties submitted proposed findings of fact, as occurred here, the Supreme Court held simply that it was “not error for the trial court to adopt findings of fact which were merely drafted by someone else.” *Prater v. Cabinet for Human Res., Commonwealth of Ky.*, 954 S.W.2d 954, 956 (Ky. 1997).

We can certainly understand the basis for the Board’s argument that the trial court has done nothing more here than mechanically adopt the findings of fact and conclusions of law made by Wilburn. Unlike the trial court in *Bingham*, the court here did little in terms of making additions or corrections to the proposed findings and conclusions. Indeed, in reading the proposed judgment and the actual judgment side-by-side, one would be pressed to see any difference at all between them with the exception of the court’s elimination of a provision for pre-judgment interest. With this said, we decline to hold that the trial court abdicated its fact-finding responsibilities in this case simply because the court adopted the findings drafted by Wilburn. *See id.* A number of the Board’s complaints are merely quibbles about the fact that the court did not acknowledge its concessions in a more direct manner, but this alone does not render the court’s judgment faulty. Whether the court’s findings of fact were incorrect or otherwise deficient, however, is a different question that leads us to the Board’s next argument.

The Board contends that the trial court erred in awarding Wilburn the total amount of the disputed contract balance because the evidence did not

establish that Wilburn was entitled to the entirety of that sum. The Board further contends that it presented other uncontested evidence that supported a decision in its favor as to its entitlement to certain close-out damages. Because these issues all involve the trial court's findings of fact, we review those findings for clear error. CR 52.01; *Moore v. Asente*, 110 S.W.3d 336, 353-54 (Ky. 2003). A trial court's findings of fact are not erroneous if they are supported by substantial evidence. *Commonwealth v. Deloney*, 20 S.W.3d 471, 474 (Ky. 2000). "The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). "Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, 'due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses' because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore*, 110 S.W.3d at 354, *quoting* CR 52.01. If the trial court's findings of fact are not clearly erroneous, "then the appellate court's role is confined to determining whether those facts support the trial judge's legal conclusion." *Deloney*, 20 S.W.3d at 473-74.

The trial court ultimately concluded that the Board breached the subject contract in multiple ways, including withholding funds owed to Wilburn, refusing to execute valid change orders or to sign certificates of substantial completion, and otherwise delaying and hindering Wilburn's efforts to achieve

final completion. The court also concluded that the Board had failed to adequately establish that it was entitled to certain close-out expenses. Because of this, the court concluded that Wilburn was entitled to the full amount of the contract balance. Although the record before us does not overwhelmingly support the court's decision, we cannot say that its findings of fact were clearly erroneous or its conclusions of law otherwise wrong. We question the court's apparent allowance of certain procedural deficiencies by Wilburn in requesting (or failing to request) change orders for extensions of the time for final completion while frowning upon such deficiencies for the Board in other areas or in its failure to file a counterclaim for close-out expenses. However, the court's decision was based on a number of other grounds, so we cannot say that any errors in this respect are fatal to that decision. Thus, the Board's assertion that the portion of the court's judgment awarding Wilburn the full contract balance and denying its claim for close-out expenses was made in error is rejected.

We next address the question of whether Wilburn was entitled to pre-judgment interest and post-judgment interest. For reasons that are unclear from its judgment, the trial court awarded Wilburn post-judgment interest on the contract balance but declined to award pre-judgment interest. The Board has appealed from the court's award of post-judgment interest, and Wilburn has cross-appealed from the court's failure to award pre-judgment interest. Wilburn claims that it was entitled to pre-judgment interest pursuant to KRS 360.010 and that it should have applied to the \$319,500 that was improperly withheld as liquidated damages

beginning at the point at which Wilburn first applied for pay after damages began being withheld. The question of whether Wilburn was entitled to interest is a pure question of law requiring interpretation of a statute and application of precedent. Therefore, it is subject to *de novo* review. See *Neurodiagnostics, Inc. v. Ky. Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321, 325 (Ky. 2008).

“It is a well-settled principle that neither a state nor public agency is liable for interest on public debts unless there is statutory authority or a contractual provision authorizing the payment of interest.” *Powell v. Board of Educ. of Harrodsburg*, 829 S.W.2d 940, 941 (Ky. App. 1991). Moreover, because of sovereign immunity principles, “a statute waiving immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so specified.” *Id.*; *Ky. Dept. of Corr. v. McCullough*, 123 S.W.3d 130, 140 (Ky. 2003). Wilburn contends that interest was authorized in this case pursuant to KRS 45A.245⁸ of the Kentucky Model Procurement Code (KMPC). In support of its position, Wilburn cites to *Univ. of Louisville v. RAM Eng’g & Const., Inc.*, 199 S.W.3d 746 (Ky. App. 2005), in which this Court held that the General Assembly

⁸ KRS 45A.245 provides:

(1) Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

(2) If damages awarded on any contract claim under this section exceed the original amount of the contract, such excess shall be limited to an amount which is equal to the amount of the original contract.

had waived sovereign immunity for contract actions involving agencies of the state with the enactment of KRS 45A.245. *Id.* at 749.

In response, the Board argues that the aforementioned precedent is inapplicable in this case because KRS 45A.245 lies outside the scope of the provisions of the KMPC that may be adopted by a local government entity such as a board of education. KRS 45A.343(1) gives local public agencies⁹ the option of adopting the provisions of KRS 45A.345 to 45A.460 of the KMPC, and it appears that such has occurred here. KRS 45A.343(1) further provides that “[n]o other statutes governing purchasing shall apply to a local public agency upon adoption of these provisions.” The Board contends that in light of this clear, unequivocal language, KRS 45A.245 cannot be held to apply here. We agree.

Wilburn objects to what it perceives as the inherent unfairness of this position, claiming that the General Assembly could not possibly have intended that a local public agency adopting the KMPC could avoid paying interest for a breach of contract.¹⁰ However, we cannot utterly ignore the plain meaning of the words in a statute. *Revenue Cabinet v. O’Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). In fact, “[t]he plain meaning of the statutory language is presumed to be what the

⁹ The parties appear to be in agreement that the Board – or, more specifically, the school district governed by the Board – is a “local public agency” as defined by KRS 45A.345(11).

¹⁰ Wilburn also argues that KRS 45A.245 must apply here because it provides for the Commonwealth’s waiver of sovereign immunity in contract cases. However, KRS 160.160 is the statute that actually operates to waive a board of education’s sovereign immunity and to render it subject to suit. KRS 160.160(1); *Powell*, 829 S.W.2d at 941. We also note that applying KRS 45A.245 in this case would raise the potentially thorny jurisdictional question of why this action was brought in Woodford Circuit Court since that statute plainly provides that applicable contract actions “shall be brought in the Franklin Circuit Court[.]” However, because we hold that KRS 45A.245 does not apply here, we need not address that question further.

legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source.” *Id.* (citation omitted). If the General Assembly wanted KRS 45A.245 to apply to local public agencies who have adopted the KMPC, it could have so provided or otherwise incorporated an interest provision into the portions therein applicable to such agencies. Consequently, Wilburn was not entitled to either pre- or post-judgment interest.

Conclusion

For the foregoing reasons, we vacate the Woodford Circuit Court’s award of post-judgment interest to appellee D.W. Wilburn, Inc. but otherwise affirm the judgment of that court. We also deny Wilburn’s cross-appeal requesting pre-judgment interest. This matter is remanded for correction of the judgment consistent with this opinion.

ALL CONCUR.

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