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**OPINION OF APRIL 2, 2010, WITHDRAWN**

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001853-MR

ARNOLD W. CARTER

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT  
HONORABLE PAUL F. ISAACS, JUDGE  
ACTION NO. 02-CI-00359

JAMIE D. SMITH AND  
BOURBON COUNTY BOARD OF EDUCATION

APPELLEES

AND

NO. 2007-CA-001891-MR

BOURBON COUNTY  
BOARD OF EDUCATION

CROSS-APPELLANT

v. CROSS-APPEAL FROM BOURBON CIRCUIT COURT  
HONORABLE PAUL F. ISAACS, JUDGE  
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BOURBON COUNTY BOARD OF EDUCATION  
AND ARNOLD W. CARTER

CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: VANMETER, ACTING CHIEF JUDGE; NICKELL, JUDGE;  
LAMBERT,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: This opinion consolidates one appeal and two cross-appeals stemming from a complaint filed by Jamie Smith, a parent and concerned citizen, against the Bourbon County Board of Education on December 3, 2002, and amended on February 4, 2003. The thrust of the amended complaint was that the Board went into executive session on December 19, 2002, to discuss “pending litigation and personnel,” and upon emerging from the closed session, took a vote and announced it had accepted the resignation of Arnold W. Carter as school superintendent, effective December 30, 2002, and had awarded him a twelve-

<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

month personal services contract (PSC) to commence on January 1, 2003. Smith alleged negotiation of the PSC during executive session violated Kentucky's Open Meetings Act (OMA).<sup>2</sup> The trial court agreed finding Carter was an independent contractor under the PSC, not an employee, and as such the consulting contract was not a personnel matter that could be legally discussed in executive session. As a result, Carter appeals from the order of the Bourbon Circuit Court entered on May 31, 2007, voiding his consulting contract due to the OMA violation as well as from an order entered on August 10, 2007, denying his motion to alter, amend or vacate the previously entered order. Smith and the Board have cross-appealed from the same two orders in an attempt to recoup the \$20,536.92 paid to Carter under the consulting contract. We affirm.

#### FACTUAL AND PROCEDURAL HISTORY

On July 1, 2001, Carter became superintendent of the Bourbon County Schools and was to serve in that post until June 30, 2005. His starting salary was \$89,500.00 and his contract permitted termination by “[m]utual agreement of the parties; Death, disability, resignation, or retirement”; or “Discharge of the SUPERINTENDENT for caused (sic) as permitted by law.” On July 25, 2002, the Board voted unanimously to award Carter a 2.7 percent salary increase.

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<sup>2</sup> Codified at KRS 61.800 *et. seq.* According to the General Assembly, the policy of the Act is “that the formation of public policy is public business and shall not be conducted in secret and the exceptions provided for by KRS 61.810 or otherwise provided for by law shall be strictly construed.” KRS 61.800.

2001 and 2002 were turbulent times for the five-member Board.

There were critical newspaper editorials and two members resigned necessitating an election in November of 2002. In the words of Board member Robert (Gus) Koch, the Board was “pretty much of a wreck[.]” He attributed the dissention and disarray to the former Board chairman. Once successors were appointed to fill the unexpired terms of the two members who had resigned, members unofficially met with Carter to determine how his five-year contract could be terminated early so the newly-constituted Board could hire its own superintendent. It is unclear whether Carter requested these meetings or the Board members initiated the discussions as there is evidence to support both theories.

A change in leadership was desired because Carter, according to one Board member, was not providing the necessary guidance required of a superintendent and in the opinion of this same member, either the existing Board was disregarding its policies and procedures or it did not understand them. Carter also had a conflict with Lana Fryman, the principal of Bourbon Central Elementary School, to whom he had given a negative performance review. To transition out of the role of superintendent, Carter suggested he be converted to a consultant for a period of twelve to eighteen months. According to Carter, all five Board members agreed to an early termination, the only sticking point was the length of the consulting contract. Carter stated in his deposition that Board attorney Robert Chenoweth had arranged the conversion of five other superintendents to consultants, including a former Bourbon County superintendent.

As superintendent, it was Carter's responsibility to ensure Board meetings complied with the OMA. During his tenure, Smith alleged six OMA violations by the Board and five of them were resolved in her favor by the Office of the Attorney General (OAG). The substantiated violations included the failure to post a complete agenda, provide proper notice of a special meeting and timely respond to an open meetings complaint. When the Board did not take corrective action, Smith filed a civil complaint against the Board in Bourbon Circuit Court based on two OAG opinions, 02-OMD-121 and 02-OMD-135, stating the Board had violated KRS 61.823 in respect to meetings held on October 24, 2001, February 28, 2002, May 10, 2002, and May 23, 2002. The complaint also alleged noncompliance with KRS 61.810 and 61.815 on July 25, 2002, when the Board went into closed session to discuss Carter's contract and upon emerging increased his salary.

On December 19, 2002, the Board met in regular session for the last time before the newly elected members took office in January of 2003. At some point, as published on the agenda prepared by Carter with input from Chenoweth, the Board voted three to two to go into executive session to discuss "pending litigation and personnel." Lonnie Conley voted against the executive session because he anticipated talk of "a consulting contract or a buyout of [Carter's] contract, of his superintendency contract, which, as I understood, was an illegal thing to do."<sup>3</sup> Chenoweth participated in the lengthy executive session, as did

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<sup>3</sup> A buyout of a public employee's contract is not permitted because of § 3 of the Kentucky Constitution which states:

Carter, who attended only a portion of the closed session. No minutes of the executive session were recorded. Carter stated in his deposition that no litigation was discussed during the closed session in his presence.

According to the depositions of two Board members, much of the executive session was spent negotiating the terms of a consulting contract to be awarded to Carter. At least one member did not believe Carter's resignation should be dependent upon the award of a consulting contract. Three members favored a twelve-month PSC, while two agreed to a six-month contract. The financial terms of the consulting contract, \$133,063.09 spread evenly over twelve months and \$3,000.00 in moving expenses, were reached in the closed session. During that session, Chenoweth distributed to the Board a draft of a PSC reached prior to the meeting between the Board chair and Carter. When the Board returned to open session, a vote was taken, again by a margin of three to two, after which it was announced that Carter's resignation had been accepted and he had been awarded a consulting contract. The meeting was adjourned and the PSC was executed on December 23, 2002.

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All men, when they form a social compact, are equal; and *no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services*; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment. (emphasis added).

The OAG has interpreted this language to refer to “public services actually rendered” in contrast to “public services to be rendered.” OAG 79-448.

Carter's resignation became effective at midnight on December 30, 2002, and his consulting contract commenced immediately thereafter. Under the PSC, the Board retained Carter "as a consultant (independent contractor)" and his duties, as specified in the separate Appendix A, were to periodically consult with the district assessment coordinator, the director of maintenance, the central office contact person, and the directors of elementary and secondary curricula. The frequency of Carter's consulting work was unspecified and no written reports were required. Regarding payment, the PSC stated:

5. That the aforementioned sum of One Hundred Thirty-three Thousand Sixty-three Dollars and Nine Cents (\$133,063.09) payable to CARTER by the BOARD shall be paid in equal monthly installments beginning in January 2003, with no withholding of taxes. It is understood and agreed to by the parties that before any installment amount is paid over by the BOARD to CARTER a periodic report or required work product set out in Appendix A hereto must have been provided or documented to have been worked on to the BOARD by CARTER. It is, however, agreed to and understood by both parties that so long as CARTER performs all work as set out in Appendix A, no basis will exist for nonpayment by the BOARD for services rendered by CARTER even though there is a delay in providing the services.

Carter testified by deposition that he performed all the work he was asked to do, but once Fryman was appointed as the new superintendent and took office in mid-July of 2003, little was requested of him. He admitted the Board never requested, and he never filed, any written reports. Apart from some telephone calls, Carter said he had two face-to-face meetings with the district

assessment coordinator and at Fryman's direction, analyzed test results and served on two committees. He estimated he worked six to eight days on assessment issues, four to eight hours on maintenance issues, four to six hours on school improvement briefings, and three to four hours on enhancing curricula, assessment and instruction. Carter received payments from the Board in January and February of 2003 totaling \$20,536.92.

In February of 2003, Smith filed an amended complaint reiterating original claims and adding a third count asking the trial court to declare null and void the PSC awarded to Carter as a result of the executive session on December 19, 2002; to require Carter to repay any money received from the Board as a result of that meeting; and to require the Board to place in escrow any future sums due Carter under the PSC. Following a hearing, the trial court temporarily enjoined the Board from paying Carter under the PSC and ordered the Board to deposit any money owed to Carter into an escrow account. The Board moved to alter, amend or vacate the temporary injunction for lack of findings of fact and conclusions of law as mandated by CR<sup>4</sup> 65.04(5). No ruling on this motion was located in the appellate record.

Carter was not named as a defendant in Smith's complaint. In April of 2003, he moved for leave to intervene and sought a restraining order to prevent the Board from hiring a new superintendent to protect his rights in the event the court determined OMA violations had occurred and his consulting contract was

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<sup>4</sup> Kentucky Rules of Civil Procedure.



void. Carter argued that if the PSC awarded to him on December 19 was void, then his resignation as superintendent was also void. In the alternative, he asked that he be reinstated as superintendent. On May 13, 2003, the trial court denied Carter's motion for leave to intervene "because there is no action that this Court can take which would impair [Carter's] ability to protect his interests." Carter appealed and we reversed holding Carter could intervene as a matter of right. *Carter v. Smith*, 170 S.W.3d 402 (Ky. App. 2004). Discretionary review was denied on September 14, 2005, and Carter's cross-claim was ordered filed by the trial court as of August 1, 2006.

The Board urged dismissal of the cross-claim for failure to state a claim on which relief could be granted, failure to allege jurisdiction and venue, and being untimely. The Board also argued that if the court determined its award of the PSC on December 19 was void, then Carter had created the dilemma by failing, in conjunction with Chenoweth, to properly advise the Board of the OMA requirements. Further, the Board argued "Carter's resignation was not based upon any *quid pro quo* regarding the consulting agreement. Mr. Carter should be aware that the Kentucky Constitution prohibits the 'buyout' of an employment contract for a public official."

On February 23, 2007, Smith moved the court for summary judgment against Carter and asked that the Board be permanently enjoined from making future payments to Carter under the PSC. The Board followed suit and moved for summary judgment against both Carter and Smith. The Board noted that Carter

might be entitled to payment under a theory of *quantum meruit*, but urged that no further compensation be paid to him because he did not plead the theory.

The trial court found in Smith's favor on some, but not all, issues, ultimately concluding the Board did not violate Kentucky's OMA by entering into executive session or by accepting Carter's resignation outside the public's view. However, the court voided the PSC for Carter's consulting services because it was negotiated and awarded during the executive session and a PSC for an independent contractor is not a "personnel" issue that may be legally discussed during a closed session. The court also granted the Board's motion for summary judgment upon concluding Carter was not entitled to payment of further compensation on a *quantum meruit* theory of relief because Carter did not allege the theory. The court released the funds that had been placed in escrow to the Board for school administration use. This appeal and two cross-appeals followed.

## LEGAL ANALYSIS

We begin with the two summary judgment issues presented by Carter's appeal. First, was summary judgment properly granted to Smith on her theory that the PSC negotiated and awarded by the Board on December 19, 2002, was void because it was reached during an executive session that violated Kentucky's OMA? Second, was summary judgment properly granted to the Board to preclude, on a theory of *quantum meruit*, the release of funds being held in escrow until completion of the litigation?

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.”

*Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Here, all parties agree the material facts are undisputed. Thus, our review is *de novo*; we owe no deference to the conclusions of the trial court and our review is limited to questions of law.

*Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). Therefore, we will decide only if the trial court correctly interpreted Kentucky’s OMA in granting summary judgment to Smith and to the Board. *Lach v. Man O’War, LLC*, 256 S.W.3d 563, 567 (Ky. 2008).

We are convinced the Board complied with the OMA by stating on its public agenda that it would go into executive session to discuss “pending litigation and personnel” and by doing so on December 19, 2002. While Carter testified in his deposition that no litigation was discussed during the executive session in his presence, he also acknowledged he did not attend the entire session and the Board was involved in pending litigation that was unrelated to his tenure as superintendent. Furthermore, the Board attorney was in attendance and the closed session may have been used to update the Board on that ongoing litigation. Additionally, the Board was trying to find a way to end Carter’s contract as superintendent without generating a lawsuit. Board members have testified Chenoweth advised them during the executive session about their legal liability if Carter’s contract ended early.

The Supreme Court of Kentucky has held the “litigation” exception applies to discussions protected by the attorney-client privilege. *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921, 924 (Ky. 1997). Discussion of any or all of the foregoing items would have been appropriate for an executive session based upon KRS 61.810(1)(c)<sup>5</sup> which permits “[d]iscussions of proposed or pending litigation against or on behalf of the public agency[,]” and KRS 61.810(1)(f) which permits “[d]iscussions or hearings which might lead to the appointment, discipline, or dismissal<sup>6</sup> of an individual employee[,]” to be held in secret. However, “discussion of general personnel matters” is not to occur in private. *Id.* Thus, the Board did not violate the requirements of the OMA by going into executive session to discuss an early end to Carter’s contract as superintendent.

However, the Board ran afoul of the OMA when it negotiated the terms of a PSC with Carter for consulting services behind closed doors. At that point, the Board was no longer discussing the appointment, discipline or dismissal of an employee which may occur in private under the Act, but rather was negotiating for the services of an independent contractor which the OMA does not exempt from public view. As expressed in *Ratliff*, 955 S.W.2d at 924, “[t]he

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<sup>5</sup> The OAG has interpreted the exception to apply “when the chance of litigation involving that agency is more than a remote possibility.” 96-OMD-191.

<sup>6</sup> The OAG has concluded the published agenda must specify whether an appointment, a dismissal or discipline is to be discussed during the closed session. 99-OMD-133. We note that an earlier OAG opinion concluded it was sufficient to state that the purpose of an executive session was “to discuss personnel matters” without identifying the names of the individuals. OAG 83-379.

specific reason given for a closed session must be the only topic of discussion while the Board convenes in secret session.” Here, the Board crossed the line in negotiating the consulting contract because it constituted a matter of neither “personnel” nor “pending litigation.” Negotiation of the consulting contract during the closed session violated the OMA and constituted an illegal act. Therefore, the resulting PSC was voidable by the trial court. *Id.*

The distinction between an *employee* and an *independent contractor* is an important one in the context of this appeal. We have located no other case analyzing this precise issue and the parties have not cited us to authority on all fours. The OMA defines neither the term “employee” nor the term “independent contractor.” Therefore we will give those terms their ordinary meanings. *See generally Jones v. Commonwealth*, 279 S.W.3d 522, 525 (Ky. 2009). According to Black’s Law Dictionary, 543 (7<sup>th</sup> ed. 1990) an *employee* is one “who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance[,]” whereas an *independent contractor* is a person “hired to undertake a specific project but who is left free to do the assigned work and to choose the method of accomplishing it.” *Id.*, at 774. These definitions are in keeping with *Sam Horne Motor Co. v. Gregg*, 279 S.W.2d 755, 756-57 (Ky. 1955), which lists nine factors to be considered in determining whether an individual is an employee or an independent contractor.

The PSC negotiated by the Board and awarded to Carter during the executive session on December 19, 2002, was for the services of an independent contractor, of that there is no doubt because the term appears throughout the consulting contract. By analogy, KRS 342.640 and *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), confirm that under the Kentucky Worker's Compensation Act, an independent contractor is not an employee and it seems wholly appropriate to apply the same approach to our analysis under the OMA. Thus, we hold an independent contractor is not an employee under the OMA and a PSC for an independent contractor is not excepted from the requirement that its negotiation occur in public view.

Carter maintains the submission of his resignation was dependent upon the award of a PSC for consulting services and thus the two were inextricably intertwined. We disagree.

First, Carter's letter of resignation states only that, "[i]n accordance with the contract that you and I signed on December 23, 2002, I hereby submit my resignation as Superintendent, Bourbon County School District." The letter goes on to state that his role as superintendent will end at midnight on December 31, 2002, and he will immediately thereafter begin his role as consultant. Neither document states the PSC is conditioned upon Carter's resignation.

Second, the PSC mentions Carter's resignation, but it does not state the award of the PSC is dependent upon Carter resigning as superintendent. The PSC lists the specific consideration for the consulting contract as payment of

\$133,063.09 and reimbursement of \$3,000.00 in moving expenses. Nothing in the consulting contract specifies the award of the PSC, itself, was consideration for or a condition of Carter's resignation.

Third, for purposes of the OMA, the PSC was a wholly different matter from Carter's resignation and as such it was not excepted from the public view requirements of the Act. KRS 61.800 mandates strict adherence to the Act's requirements and *Ratliff*, 955 S.W.2d at 924 mandates strict reading of the Act's exceptions. Therefore, no matter how firmly attached to the coattails of his resignation, the negotiation of a PSC for Carter's consulting services as an independent contractor was not an appropriate topic for an executive session. Similar scenarios are explored in 95-OMD-93 where the OAG concluded the Louisville/Jefferson County Revenue Commission could not lawfully discuss a protocol for seeking a new employee during a closed session even though the employee it sought to fire could not be discharged until the results of the search were known, and 95-OMD-148 in which the OAG concluded the Louisville Arena Task Force improperly discussed the hiring of a consultant during a closed session under the supposed authority of KRS 61.810(1)(g) and (1)(k).

We see no reason the Board could not have discussed its desire to replace Carter as superintendent (i.e. dismissal of an employee) during the executive session, returned to open session and announced his resignation, and then negotiated the consulting contract in public view. This approach would have protected Carter's reputation by keeping the discussion of an employee's dismissal

private, *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884, 886 (Ky. 1987), but still allowed the public to have full knowledge of the PSC negotiation and award as mandated by the OMA's requirement that public business be conducted in a public meeting "open to the public at all times[.]" KRS 61.810(1). Based upon the foregoing, we hold Carter's resignation was voluntary and the consulting contract awarded to him became void upon the trial court's issuance of a restraining order in February of 2003 preventing further payment under the PSC.

Next we address whether Carter was properly denied compensation under a theory of *quantum meruit*. Carter did not seek payment under this theory in his intervening complaint; in fact, he did not mention *quantum meruit* as an alternative theory until responding to the Board's motion for summary judgment. The trial court denied relief because Carter did not plead *quantum meruit* in his cross-claim.

One of the definitions given in Black's Law Dictionary, 1255 (7<sup>th</sup> ed. 1990) for the equitable term "*quantum meruit*" is "[t]he reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasicontractual relationship." By Carter's own estimate, he consulted with the school district for less than ten and one-half days<sup>7</sup> throughout the entirety of 2003, yet he received \$20,536.92. We affirm the

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<sup>7</sup> Carter did not specify the precise amount of time he spent consulting; he stated only ranges, i.e. six to eight days, and four to six hours. To arrive at the "less than ten and one-half days" figure, we have taken the greatest number of days (eight) estimated by Carter and converted them to hours based upon a seven and one-half hour workday and then added that total (sixty) to



trial court's award of summary judgment to the Board on the denial of compensation under a theory of *quantum meruit* for these reasons: 1) Carter did not argue he was entitled to payment under a theory of *quantum meruit* in his cross-claim or move for leave to amend his pleading under CR 15; 2) Carter's claim for compensation in the trial court was based solely upon the written PSC and therefore he cannot seek relief from this Court based upon an implied contract, *Prior v. York's Ex'r*, 305 S.W.2d 775 (Ky. 1957); and, 3) Carter received an unconscionably handsome amount of money for the small amount of work he performed.

#### THE CROSS-APPEAL

Both Smith and the Board filed cross-appeals. On May 29, 2009, Smith notified this Court she was adopting the arguments made by the Board in its reply brief and would not file a separate reply brief. Therefore, Smith and the Board allege via cross-appeal that the consulting contract was void from its inception, not void from entry of the restraining order as the trial court concluded. As a result, they seek to recover from Carter the more than \$20,000.00 paid to him for the consulting services he performed. Citing *Fox v. Petty*, 235 Ky. 240, 30 S.W.2d 945 (1930), and *Board of Education of Floyd County v. Hall*, 353 S.W.2d 194 (Ky. 1961), Smith and the Board argue a contract reached in violation of the

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the greatest number of hours (eighteen) estimated by Carter for a total of seventy-eight hours or ten and four-tenths days. In calculating the amount of time Carter spent consulting, the Board's brief states Carter worked about two weeks at an hourly rate of \$256.71.

OMA must be deemed void from inception and cannot result in partial payment of public funds.

While we appreciate the argument advanced by Smith and the Board, we rely instead on the more recent *Ratliff* opinion quoted throughout this decision in which the Supreme Court of Kentucky held that “any action taken as a result of the secret discussions [is] voidable[.]” We are bound by the Supreme Court’s pronouncement. *Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 822 (Ky. App. 2008). Therefore, the \$20,536.92 paid to Carter pursuant to the PSC is not recoverable because the payment was made prior to entry of the trial court’s order enjoining the payment of future sums under the consulting contract. As explained by the trial court in its order denying the motion to alter, amend or vacate its original opinion and order, “[t]he improper consulting contract was not void from its beginning, but became void upon the issuance of the restraining order by [the trial court].”

For the foregoing reasons, we hold that the Board’s acceptance of Carter’s voluntary resignation during an executive session was proper, but the Board’s negotiation of a consulting contract with Carter as an independent contractor during that same closed session violated the requirements of the OMA which Kentucky courts must strictly construe. We further hold that the consulting contract awarded to Carter was rendered void as of the date the trial court enjoined the payment of future sums to Carter under the consulting contract. Because the consulting contract was voidable, as opposed to being void from inception, the

\$20,536.92 paid to Carter for consulting work performed in January and February of 2003 is not recoverable by the Board. Therefore, we affirm the orders of the Bourbon Circuit Court in all respects.

VANMETER, ACTING CHIEF JUDGE, CONCURS IN RESULT IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

VANMETER, ACTING CHIEF JUDGE, CONCURRING IN RESULT IN PART AND DISSENTING IN PART: While I concur in the result reached by the majority opinion affirming the trial court's avoiding of the contract between the Board and Carter, I respectfully dissent from so much of the majority opinion as affirms the trial court's refusal to require Carter to reimburse the Board for the monthly payments, totaling \$20,536.92, made to Carter for the months of January and February 2003.

The majority opinion states that this result is dictated by *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921 (Ky. 1997). The issue in *Ratliff*, however, was merely whether the board in that case had properly invoked the "pending litigation" and "personnel" exceptions to the Open Meetings Act in order to discuss a school reorganization plan in closed session. The legal consequence of the voidable action is nowhere mentioned or implied in the opinion. The issue for resolution by this court is the appropriate legal consequence resulting from the avoidance, and the resulting position of the parties. In that regard, *Ratliff* is instructive but contrary to the result reached by the majority opinion, in that the *Ratliff* court plainly states "[d]iscussions between Board members concerning

matters not identified in the open meeting with proper notice are a violation of the Open Meetings Act *and constitute illegal conduct.*” *Id.* at 924 (emphasis added).

Courts have wide powers in fashioning appropriate remedies after contract avoidance:

The legal relations that exist after avoidance vary with the circumstances. In some cases the party who avoids the contract is entitled to be restored to a position as good as that which he occupied immediately before the formation of the contract; in other cases the parties may be left in the same condition as at the time of the avoidance.

*Restatement (Second) of Contracts* § 7 cmt. c (1981). In fact, the General Assembly has granted the courts broad powers to enforce the provisions of the Open Meetings Act by “by injunction or other appropriate order[.]” KRS 61.848(1).

Under certain circumstances, a court may, no doubt, fashion relief in which certain payments are allowed for partial performance of an innocent third party’s contract with a public agency, notwithstanding a violation of the Open Meetings Act. This, however, is not that case. Both the Board and Carter are charged equally with knowledge of the provisions of the Open Meetings Act, and its violation in this instance. Carter received an unconscionably handsome amount of money for the small amount of work he performed. By Carter’s own account, he received two months pay for two weeks work. The better remedy, here, is to restore the parties to the status quo as existed before the illegal contract was entered. My fear is that the result reached by the trial court and affirmed by this

court will, in the future, be seized upon by unscrupulous persons as a means to “front-load” any contractual payments so that such payments effectively will be unrecoverable, notwithstanding any diligence by a successor board or member of the public in holding a school board accountable in properly adhering to the Open Meeting requirements. Furthermore, the result reached in this case, or in future cases, could depend on the speed with which a trial court schedules hearings. By this comment, I do not impugn the dispatch with which the trial court acted in this case. On the contrary, the trial court acted very promptly, and its initial decision to order future monthly payments to be paid into escrow is worthy of Solomon. But, another trial court might not act with equal efficiency or wisdom. In that event, the avoidance remedy provided by statute, *see* KRS 61.848(5), may prove to be rather meaningless.

BRIEFS AND ORAL ARGUMENT  
FOR APPELLANT/CROSS-  
APPELLEE:

Joe F. Childers  
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT  
FOR APPELLEE/CROSS-  
APPELLEE/CROSS-APPELLANT,  
JAMIE D. SMITH:

Neil E. Duncliffe  
Georgetown, Kentucky

BRIEFS AND ORAL ARGUMENT  
FOR APPELLEE/CROSS-  
APPELLANT/CROSS-APPELLEE,  
BOURBON COUNTY BOARD OF  
EDUCATION:

Sam P. Burchett  
Lexington, Kentucky

