IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/20/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

GEORGE DICKS COPPOCK, III, dba CAVE CREEK ABODE, Plaintiff/Appellee, v. WILLIAM MUNDELL, in his capacity as Director, ARIZONA REGISTRAR OF CONTRACTORS, an agency of the State of Arizona, Defendants/Appellants.	)	No. 1 CA-CV 12-0667 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. LC2011-000170-001

The Honorable Crane McClennen, Judge

VACATED

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T H U M M A, Judge

¶1 This case involves a challenge by licensee/contractor George Dicks Coppock III, dba Cave Creek Adobe (Coppock) to an

order by the Arizona Registrar of Contractors (ROC) directing a $30,000 payment to homeowners from the Residential Contractors' Recovery Fund. In substance, Coppock argues he could refuse to participate in ROC proceedings for years, then seek de novo review in superior court and properly obtain a remand order for an evidentiary hearing before the ROC (which Coppock did not request when given the opportunity). Finding no error by the ROC, the superior court's order is vacated and the ROC's order is reinstated.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2003, the ROC issued Coppock a Class C-5 contractor's license for residential adobe structures. In early 2005, Coppock entered into a contract to build a home for Jeffrey Arnold and Maria Lourdes Sierra (Homeowners) with payment to Coppock of $578,000. The home was to be completed later in 2005. When the home still was not completed in July 2007, Homeowners filed an administrative complaint against Coppock with the ROC (Case 08-0177) alleging various violations of the Contractors Practice Act, Arizona Revised Statutes (A.R.S.) sections 32-1101 to -1171 (Act).[1] In December 2007, the ROC issued a Corrective Work Order requiring Coppock to correct various deficiencies by appropriate means by the end of December

[1] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

2007. Coppock did not perform the corrective work as required by the Corrective Work Order.

¶3 In June 2008, the ROC filed a citation and complaint, alleging various violations of the Act by Coppock, including "refusal to perform after submitting a bid on work without legal excuse" and "[f]ailure to take appropriate corrective action . . . without valid justification within a reasonable period of time after receiving written directive from" the ROC in violation of A.R.S. §§ 32-1154(A)(1), (A)(23).[2] The complaint put Coppock on notice that a failure to respond within 15 days would be deemed an admission of the charges, meaning Coppock's license could be suspended or revoked without any further proceedings. Coppock failed to timely respond, filing an answer a day late.

¶4 In October 2008, "[b]ased on the entire record," the ROC issued a Decision and Order (2008 Decision) concluding that Coppock "violated the provision of A.R.S. § 32-1154 as charged." The 2008 Decision ordered Coppock's C-5 license suspended if Coppock failed to perform the corrective work by the effective date (March 21, 2009). By its terms, the 2008 Decision was

[2] The other grounds were departure or disregard of plans, specifications or building codes; acting wrongfully or fraudulently resulting in substantial injury to another; failure to complete a construction project in a material respect for the price stated in the contract or modification to a contract; aiding or abetting an unlicensed person to evade the provisions of the Act; knowingly entering into a contract with a person who is not licensed as required and knowingly contracting beyond the scope of a license.

"self-operative," becoming effective if Coppock did not file written confirmation of timely completion of the corrective work. Coppock was informed in writing that the 2008 Decision was "a final administrative decision reviewable by the superior court."

¶5 Coppock never sought judicial review of the 2008 Decision, never performed the corrective work and never provided written confirmation to the ROC. Accordingly, the 2008 Decision became effective and final March 21, 2009. As a result, Coppock's C-5 license was suspended effective March 21, 2009.

¶6 In May 2009, Coppock sent a letter to the ROC claiming he had been trying to contact Homeowners "since 4-4-09" (after the 2008 Decision became final) to complete the corrective work. In a July 2009 response, the ROC wrote that Coppock's C-5 license had been suspended "since May 1, 2008 for non-renewal" and, accordingly, he could not perform corrective work. The ROC response also informed Coppock that his C-5 license "shall remain suspended in this matter. [Homeowners] may apply to the Residential Contractors' Recovery Fund." Coppock never responded.[3]

[3] Although Coppock argues the July 2009 ROC letter ordered him to stop performing corrective work, Coppock has not cited to any corrective work he was performing. On appeal, Coppock claims to have held a Class B General Residential Contractor License since April 2008 and argues his B license allowed him to perform the corrective work both before and after the 2008 Decision. There

¶7 Homeowners apparently hired new contractors to complete the corrective work that Coppock failed to perform. As a result, in December 2009, Homeowners filed a claim (Case 09-7110412) seeking reimbursement of $102,208.21 from the Residential Contractors Recovery Fund (Fund) for those costs. After an investigation, Fund inspector Scott Deering concluded that the reimbursable costs for the corrective work totaled $66,495.40 and recommended the Fund pay the Homeowners $30,000, the maximum amount available. *See* A.R.S. § 32-1132(A).

¶8 In January 2011, the ROC provided Coppock a Notice of Claim for Administrative Payout stating Homeowners were to be awarded $30,000 from the Fund. The Notice stated that, pursuant to A.R.S. § 32-1154(F), Coppock had until January 25, 2011 "to request an administrative hearing to contest the amount and/or propriety of the payment" and that his failure to do so "shall be deemed a waiver to contest the amount and/or propriety of the payment awarded."

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is nothing to suggest that Coppock informed the ROC at any time relevant here that he held a B license allowing him to do the corrective work and the reason for that lack of disclosure is not stated in the record. By statute, had the ROC been aware of Coppock's B license, it may have suspended that license based on the suspension of his C-5 license. *See* A.R.S. § 32-1154(A)(21) (having person named on suspended license constitutes grounds to suspend other licenses naming same person). It is undisputed, however, that Coppock did not complete the required corrective work at any time including, as particularly relevant here, from December 2007 (when the Corrective Work Order issued) until March 21, 2009 (when the 2008 Decision became effective).

¶9 Coppock did not request a hearing and did not respond to the Notice. Accordingly, on January 31, 2011, the ROC issued a Decision, Order and Award reimbursing Homeowners $30,000 from the Fund (2011 Decision).[4]

¶10 Coppock then filed a complaint challenging the 2011 Decision in Maricopa County Superior Court, arguing three points summarized as follows:

> Coppock contends the [2011 Decision] was in error because of the following: (1) His failure to complete the required work was because the [ROC] told him he could no longer do contracting work because his C-5 was suspended, when in fact he could have completed the work under his Class B license; (2) his failure to complete the required work was because [Homeowners] denied him access to the premises; and (3) Scott Deering based his Recovery Fund Inspection Report on his conclusion that Coppock had been paid in full under the contract, when in fact Coppock had not received the final draw of $23,594.66.

Given concerns about "unresolved factual issues raised by Coppock," the superior court vacated the 2011 Decision and remanded "for the [ROC] to cause a hearing to be held to resolve the factual issues raised by Coppock, and determine, based on those facts, whether an award from the . . . Fund is appropriate."

[4] The issuance of the 2011 Decision suspended "by operation of law" all "other licenses on which" Coppock was named (including his B license) until repayment to the Fund of the $30,000 "together with all applicable interest."

¶11 This court has jurisdiction over the ROC's timely appeal from the superior court's decision pursuant to Article 6, Section 9 of the Arizona Constitution, A.R.S. §§ 12-913 and -2101(A)(1).

DISCUSSION

A. Standard Of Review.

¶12 The standard of review on appeal is the same standard used by the superior court: "whether the agency's action was arbitrary, capricious, or an abuse of discretion." *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436, ¶ 11-12, 215 P.3d 1114, 1117 (App. 2009) (citations omitted). Applying this standard, "[t]he court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion." *Id.* at 436, ¶ 11, 215 P.3d at 1117 (citation omitted). Subject matter jurisdiction, res judicata and the interpretation of statutes are questions of law subject to de novo review. *See Bonito Partners, LLC v. City of Flagstaff*, 229 Ariz. 75, 83, ¶ 30, 270 P.3d 902, 910 (App. 2012); *Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, 298, ¶ 10, 53 P.3d 1139, 1142 (App. 2002); *TWE Ret. Fund Trust v. Ream*, 198 Ariz. 268, 271, ¶ 11, 8 P.3d 1182, 1185 (App. 2000).

B. The Superior Court Had Subject Matter Jurisdiction Over Coppock's Appeal From The 2011 Decision.

¶13 The ROC argues that the superior court lacked jurisdiction over Coppock's appeal because it is a collateral attack on the 2008 Decision. Coppock argues that his appeal only seeks review of the 2011 Decision and "does not concern" the 2008 Decision.

¶14 The right to appeal an administrative decision "exists only by force of statute." *Ariz. Comm'n of Agric. & Horticulture v. Jones*, 91 Ariz. 183, 187, 370 P.2d 665, 668 (1962)(citation omitted). Because the time for judicial review of the 2008 Decision has long since passed, the superior court lacked jurisdiction to review that determination, which is final and binding. By contrast, given Coppock's timely appeal from the 2011 Decision, the superior court properly had jurisdiction to review that determination. *See* A.R.S. §§ 12-902(B) (prohibiting parties "from obtaining judicial review" of administrative decisions from which judicial review was not timely requested); 12-905(A) ("Jurisdiction to review final administrative decisions is vested in the superior court."). Accordingly, the superior court had jurisdiction over Coppock's timely appeal from the 2011 Decision. *See* A.R.S. § 12-905(A).

C. The Preclusive Impact Of The 2008 Decision.

¶15 Coppock concedes that this appeal "does not concern" the 2008 Decision and that the 2008 Decision is final and binding.[5] The 2008 Decision resolved a variety of issues, including those that had a significant impact on the 2011 Decision.

¶16 Coppock argues that the 2011 Decision was improper because the requirements of A.R.S. § 32-1154(F) (2010) were not met. Under that statute, payment from the Fund is proper if (1) "a contractor's license has been revoked or has been suspended as a result of an order to remedy a violation" *and* (2) "the contractor refuses or is unable to comply with the order of the registrar to remedy the violation." A.R.S. § 32-1154(F) (2010).[6] The 2008 Decision established both of these elements.

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[5] The doctrine of res judicata also applies to final ROC decisions. *Better Homes*, 203 Ariz. at 298, ¶10, 53 P.3d at 1142. For res judicata to apply, the matter must appear on the face of, or have been actually and necessarily included in, the prior judgment. *Rousselle v. Jewett*, 101 Ariz. 510, 512, 421 P.2d 529, 531 (1966). "The record must show that the prior judgment was based on a determination of certain facts and circumstances which would be re-litigated and govern the outcome of the present litigation." *Id.* at 513, 421 P.2d at 532. Accordingly, even absent Coppock's concession, the application of res judicata would yield the same conclusion.

[6] After the 2011 Decision, the Legislature amended A.R.S. § 32-1154(F) effective July 20, 2011, to eliminate the requirement that the ROC show "the contractor refuses or is unable to comply with the order of the registrar to remedy the violation." 2011 Ariz. Legis. Serv. Ch. 250 (West). That amendment was not retroactive and has no application here. *See* A.R.S. § 1-244.

¶17 As to the first element, the 2008 Decision suspended Coppock's C-5 license.[7] As to the second element, the 2008 Decision found, among other things, that Coppock "refus[ed] to perform after submitting a bid on work without legal excuse" and "[f]ail[ed] to take appropriate corrective action . . . without valid justification within a reasonable period of time after receiving written directive from" the ROC, having violated A.R.S. §§ 32-1154(A)(1), (A)(23). Because the 2008 Decision established those two elements required by A.R.S. § 32-1154(F) (2010), and because that decision is final and binding, those elements cannot be re-litigated in the proceedings leading up to the 2011 Decision and this appeal.

¶18 The 2008 Decision precludes two of Coppock's three arguments in the proceedings leading up to the 2011 Decision. Coppock argues he did not perform the corrective work because (1) the ROC erroneously told him in July 2009 "to stop performing corrective work because his C-5" license had been suspended and (2) his claim that "from April 4, 2009 through July 14, 2009" he was "denied access by the Homeowners." By March 21, 2009, however, Coppock had been subject to a

[7] Coppock has taken different positions on this issue and, in his answering brief, appears to argue that suspension of his C-5 license by the 2008 Decision was ineffective because the license had previously expired by non-renewal earlier in 2008 (and also that he had a valid B license). The ROC, however, has the authority to impose discipline (including suspension) on licenses that have already expired. *See* A.R.S. § 32-1154(C).

Corrective Work Order for fifteen months, had failed to perform the corrective work as required, had been found to have "refus[ed] to perform after submitting a bid on work without legal excuse" and found to have "[f]ail[ed] to take appropriate corrective action . . . without valid justification within a reasonable period of time after receiving written directive from" the ROC.

¶19 What the ROC may have told Coppock in July 2009 or that the Homeowners refused him access to the property from April 4, 2009 forward does not excuse Coppock's refusal to perform the required work in the 15 months prior to the effective date of the 2008 Decision. As noted above, those findings reflected in the 2008 Decision are final and binding and cannot be challenged here. Accordingly, the 2008 Decision precludes Coppock's arguments in the proceedings leading up to the 2011 Decision about action by the ROC or Homeowners interfering with his ability to do corrective work after the effective date of the 2008 Decision.[8]

¶20 Turning to Coppock's third argument –- whether he received the $23,594.66 draw -- the ROC contends that, because

[8] Given this conclusion, this court need not address Coppock's argument that the ROC, in the July 9, 2009 letter, "acted illegally and completely without statutory authority, when it ordered Coppock off the job and prohibited him from performing the repair work."

Coppock did not raise that issue in the proceedings leading up to the 2008 Decision, it cannot be raised in proceedings involving the 2011 Decision. Contrary to the ROC's argument, however, none of the grounds alleged or found in the 2008 Decision required a determination of whether Coppock received the final draw and the record does not indicate that issue was necessary to resolve the issues addressed in the 2008 Decision. *See Rousselle v. Jewett*, 101 Ariz. 510, 512, 421 P.2d 529, 531 (1966) ("Rights, claims, or demands –- even though they grow out of the same subject matter –- which constitute separate or distinct causes of action not appearing in the former litigation, are not barred in the latter action because of res judicata."). Thus, whether Coppock received the final draw was not decided in the 2008 Decision, meaning that Coppock properly could have presented that issue for resolution in the proceedings leading up to the 2011 Decision.[9]

D. Coppock Waived Any Objections To The 2011 Decision.

¶21 The ROC argues that Coppock did not request a hearing in the proceedings leading up to the 2011 Decision as required by A.R.S. § 32-1154(F) and, therefore, waived any right to contest that decision.

[9] Given this conclusion, this court does not address or decide Coppock's arguments that A.R.S. § 41-1098.08(H) allows him the right to appeal or that the ROC should be estopped from arguing that he was not entitled to judicial review.

¶22 "When determining the meaning of a statute, [this court] look[s] first to the plain language of the statute as the most reliable indicator of its meaning." *Nordstrom, Inc. v. Maricopa County*, 207 Ariz. 553, 556, ¶ 10, 88 P.3d 1165, 1168 (App. 2004) (internal quotation omitted). When interpreting a statute, this court strives "to give effect to the legislative intent behind the statute," and "to give [the words of the statute] a fair and sensible meaning and to avoid absurd results." *State v. Razo*, 195 Ariz. 393, 394, ¶ 3, 988 P.2d 1119, 1120 (App. 1999); *Walgreen Ariz. Drug Co. v. Ariz. Dep't of Revenue*, 209 Ariz. 71, 73, ¶ 12, 97 P.3d 896, 898 (App. 2004). When the language of a statute is subject to various interpretations, an agency's interpretation of its own statute is entitled to "considerable deference by the judiciary." *Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 208 Ariz. 147, 154-55, ¶¶ 30-31, 91 P.3d 990, 997-98 (2004).

¶23 In relevant part, A.R.S. § 32-1154(F) (2010) provides that the ROC

> shall serve the contractor with a notice setting forth the *amount claimed or to be awarded*. If the contractor contests the *amount or propriety of the payment*, the contractor shall respond within ten days of the date of service by requesting a hearing to determine the amount or propriety of the payment. Failure by the contractor to respond in writing within ten days of the date of service shall be deemed a waiver by

> the contractor of the right to contest the *amount claimed or to be awarded*.

(Emphasis added). Because he clearly did not timely respond, Coppock argues the statute only prevents him from contesting "the amount claimed or to be awarded," and that he remains free to challenge "propriety of the payment" for the first time in superior court without raising any such challenge administratively.

¶24 Coppock's argument fails to account for the statutory requirement that, if he wanted to contest the "propriety of the payment," he was required to respond and request a hearing within ten days of service of the notice. A.R.S. § 32-1154(F) (2010). Coppock admittedly failed to do so and the time to do so has long since passed. Coppock's argument presumes that there are no consequences for that failure. But a party's failure to take timely action required by an express statutory provision typically constitutes a waiver or estoppel, even when the statute does not expressly direct such a result. Reading A.R.S. § 32-1154(F) (2010) to "avoid absurd results," Coppock's failure to timely challenge the propriety of the payment means he waived any such challenge. *See Walgreen Ariz. Drug Co.,* 209 Ariz. at 73, ¶ 12, 97 P.3d at 898.

¶25 Alternatively, assuming that the statute is ambiguous about the consequences for his failure, the construction the ROC

gives the statute is entitled to great deference. *Ariz. Water Co.*, 208 Ariz. at 155, ¶ 31, 91 P.3d at 998. The ROC clearly construed Coppock's failure as constituting a waiver. In fact, the ROC told Coppock *in advance* it would consider his failure to timely challenge the propriety of the payment as a waiver. The ROC's Notice of Claim for Administrative Payment expressly informed Coppock that if he did not request an administrative hearing, that failure "shall be deemed a waiver to contest the amount and/or propriety of the payment awarded." This construction by the ROC is consistent with "the exhaustion of administrative remedies doctrine, which compels parties to avail themselves of all available administrative processes before seeking the aid of a court." *Ariz. Dep't of Econ. Sec. v. Redlon*, 215 Ariz. 13, 16, ¶ 5, 156 P.3d 430, 433 (App. 2007) (citing cases). Under this construction, Coppock waived any right he had to contest the propriety of the payment.

¶26 Finally, even under Coppock's view, he has not shown that the ROC erred. As noted above, quite apart from any claimed ambiguity in A.R.S. § 32-1154(F) (2010), the 2008 Decision precludes Coppock's arguments in the proceedings leading up to the 2011 Decision about action by the ROC or Homeowners precluding his ability to do corrective work after the effective date of the 2008 Decision. As to his third argument (regarding the receipt of the final draw), even if Coppock did not receive

the $23,594.66 final draw, at most, that fact would have lowered (but not eliminated) the amount awarded against the Fund in the 2011 Decision.[10] Accordingly, that issue is a challenge to the "amount . . . to be awarded," which Coppock admits was waived.

CONCLUSION

¶27 The superior court's order is vacated and the ROC's 2011 Decision ordering payment from the Fund of $30,000 to the Homeowners is reinstated.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
MAURICE PORTLEY, Presiding Judge

/S/_____
DONN KESSLER, Judge

[10] In fact, because the cost to complete the corrections totaled $66,495.40, and the maximum amount available to the Homeowners from the Fund was capped at $30,000 (a difference of $33,495.40), it is likely that any credit to Coppock for the final draw would not have made a difference in the 2011 Decision.