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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000312-MR

MAXINE S. FELIX — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 97-CI-00289

LYKINS ENTERPRISES, INC.; FUEL STOP REAL ESTATE COMPANY, A/K/A FUEL STOPS REAL ESTATE COMPANY; DAVID O. LYKINS; FUEL STOPS, INC.; AND WILLIAM T. ESHAM — APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM, SENIOR JUDGE.[1]

ACREE, JUDGE: Maxine Felix appeals the Mason Circuit Court's August 15, 2008 judgment following the court's subsequent denial of her motions pursuant to Kentucky Rule of Civil Procedure (CR) 59 to alter, amend or vacate the court's

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

judgment upon the counterclaim of Lykins Enterprises, Inc., Fuel Stops, Inc., and Fuel Stop Real Estate Company (collectively Lykins), and the order denying her post-judgment motion for damages. We affirm in part, reverse in part, and remand.

Procedural History

On June 17, 2004, the Mason Circuit Court entered judgment compelling Felix to convey certain Ohio real estate to Lykins pursuant to an option contract; the court also ordered Lykins to pay the $200,000 purchase price into an escrow account, but no interest was awarded Felix. The circuit court reserved its ruling on Lykins' claims for damages for the lost rental value of the property while Felix appealed the circuit court's order of specific performance. Felix could have, but did not, appeal the circuit court's failure to award her interest on the $200,000 purchase price.

After this Court entered an opinion on Felix's first appeal ordering the circuit court to dismiss the case on *forum non conveniens* grounds, the Kentucky Supreme Court granted discretionary review, reversed the Court of Appeals' decision, and instructed the circuit court to reinstate its June 17, 2004 judgment. *Lykins Enterprises, Inc. v. Felix*, Nos. 2006-SC-000142-DG, 2006-SC-000624-DG, 2007 WL 4139637 *12 (Ky., Nov. 21, 2007) ("*Lykins I*"). Without revisiting further the lengthy and complicated background of this case prior to the rendering of *Lykins I*, we acknowledge the requirement that we apply Ohio law to the substantive issues before us. *Lykins I* at *6.

In a June 24, 2008 order, the circuit court complied with the Supreme Court's mandate and reinstated its June 17, 2004 judgment, leaving only Lykins' counterclaim for damages. Felix then moved the circuit court for a case management conference. When that motion was heard, Felix urged the court to consider that the Supreme Court had treated this case as one in equity rather than a case at law; Felix argued that treating the case as one in equity allowed her to present her claim for her lost use of the purchase price which went unpaid from 1997 forward. She also asked for a jury trial on the remaining issues.[2] The circuit court indicated its belief that the mandate to reinstate the original judgment precluded Felix's newly asserted claim of damage. Because the circuit court perceived no factual issue in dispute, the court also saw no need for a jury trial. The only factual issue at all – the total rental payments – was later stipulated by counsel for both parties. The circuit court ordered a briefing schedule and hearing. When counsel appeared, they agreed no hearing was necessary and the matter was submitted on the rental payment stipulation and counsels' memoranda.

On August 15, 2008, the circuit court entered judgment awarding Lykins $97,200 for the rental value of the property, plus prejudgment and post-judgment interest at 8% and 12%, respectively.

Felix filed a timely motion pursuant to Kentucky Rule of Civil Procedure (CR) 59 for a new trial and to alter, amend, or vacate the August 15, 2008

[2] During this conference there was also a discussion of attorney fees and punitive damages, neither of which is at issue before us.

judgment.[3] That motion presented the following arguments: (1) that the court failed to order a jury trial despite Felix's jury demand; (2) that the judgment denied Felix the opportunity to present evidence of damages owed by Lykins; (3) that the trial court failed to make specific findings of fact and conclusions of law pursuant to CR 52.01; and (4) that the judgment failed to address the issues raised in Felix's April 25, 2008 motion for case management conference, including her entitlement to prejudgment and post-judgment interest on the purchase price (*i.e.*, the value of her loss of use of the purchase proceeds), and whether the ruling was based in law or in equity.

On October 7, 2008, before the circuit court ruled on her CR 59 motion, Felix filed a supplemental motion for damages. She sought compensation for expenses reasonably related to maintenance of the property including taxes and insurance premiums she incurred between August 1997 and the transfer of the property to Lykins. She also reiterated her claim for prejudgment and post-judgment interest on the purchase price.

The circuit court overruled Felix's CR 59 motion on January 21, 2009, and overruled her supplemental motion for damages on February 12, 2009. Felix filed a timely Notice of Appeal of the August 15, 2008 judgment on February 18, 2009.[4]

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[3] Although Ohio substantive law governs this case, Kentucky law still controls for procedural issues. *See* Restatement (Second) of Conflicts §122 (1971).

[4] Felix's Notice of Appeal did not reference the August 15, 2008 judgment; she identified only the January 21 and February 12, 2009 orders as those from which her appeal was taken. The January 21, 2009 order denying Felix's motion for CR 59 relief is a non-appealable interlocutory order, *Marshall v. City of Paducah*, 618 S.W.2d 433, 434 (Ky. App. 1981); however, her CR 59 motion was filed within ten (10) days of entry of the August 15, 2008 judgment thereby suspending the time within which Felix could file her Notice of Appeal from that judgment. CR 73.02(1)(e). The Notice of Appeal was timely filed within thirty (30) days of the January 21, 2009 order denying CR 59 relief. Lykins did not challenge the Notice of Appeal on the ground

Standard of Review

The August 15, 2008 judgment was decided by the circuit court's application of the law to material facts about which there was no genuine issue. In effect, the judgment was summary. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). The facts relied upon by the parties and the circuit court were stipulated. Therefore, we review the circuit court's application of law to those facts *de novo*.

Denial of Supplemental Motion for Damages

Felix's appeal of the order denying her supplemental motion for damages is wholly without merit. The motion identifies no rule allowing post-judgment relief. Even if we consider each potentially applicable post-judgment rule, we can identify none that would allow the relief Felix sought – permission to present to the circuit court for the first time evidence that she incurred approximately $25,000 in taxes and insurance premiums incident to ownership of the property. While such evidence may have been relevant if presented at the proper time, there is no basis upon which to allow the circuit court to consider this evidence two months after

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that it did not identify the August 15, 2008 judgment. Furthermore, Felix's prehearing statement correctly identified that she was appealing the August 15, 2008 judgment. Finally, the parties briefed the issues as though the Notice of Appeal properly identified the August 15, 2008 judgment as that judgment from which the appeal is taken. Under these circumstances, this Court does not lack jurisdiction to hear the appeal. "Whatever the shortcomings [of a Notice of Appeal], except for tardy appeals and the naming of indispensible parties, we follow a rule of substantial compliance in regards to notices of appeal." *Lassiter v. American Exp. Travel Related Services Co., Inc*., 308 S.W.3d 714, 718 (Ky. 2010). Felix's Notice of Appeal substantially complies with CR 73.03.

the judgment is entered. We cannot say the court erred in any way by denying the motion.

The August 15, 2008 Judgment

The August 15, 2008 judgment is silent as to Felix's claim she was equitably entitled to compensation in the form of interest on the purchase price for not having use of the purchase proceeds from August 1997 forward. The judgment addressed only Lykins' counterclaim which it granted. The judgment ordered Felix to reimburse all rental payments received from Lykins after August 1997 when it attempted to exercise the option to purchase totaling $97,200; the court also awarded prejudgment interest of 8% from the date each monthly rental payment was made until the date of judgment, and post-judgment interest of 12% thereafter.

On appeal, Felix cites *Sandusky Properties v. Aveni,* 473 N.E.2d 798 (Ohio 1984), to support her argument that she is entitled to interest on the purchase price from August 1997. Lykins argues in response that the law-of-the-case doctrine prevents this Court from altering the reinstated judgment, and that the $200,000 purchase price therefore cannot be augmented by interest payments.

We believe *Sandusky* does provide some guidance in this situation. The Ohio Supreme Court explained in *Sandusky* that the role of the courts in a specific performance action is to "attempt to place the parties in the relative position that they would have been in had the sale of the real estate proceeded according to the agreement." *Sandusky,* 473 N.E.2d at 801. More precisely,

> [w]hen specific performance is granted of a contract to convey real property, the court will enforce the equities of the parties in such a manner as to put them as nearly as possible in the position they would have occupied had the conveyance been made when required by the contract. *It will compensate the purchaser for any loss of the use of the property during the delay by awarding him the rental value of it, or the net rents and profits of it, for the period. It will compensate the vendor for any loss of the use of the purchase money during the delay by awarding him the appropriate interest for the proper period.*

Id. at 800 (quoting 7 A.L.R.2d 1204)(emphasis added). The *Sandusky* court further explained that "the land is the equitable property of the vendee, but held by the vendor in trust for him, and the purchase price is the equitable property of the vendor, but held in trust for him by the vendee." *Id.* at 80 (citing *McCrea v. Martien*, 32 Ohio St. 38, 42-43 (Ohio 1876)).

Clearly, then, it is the law in Ohio that in specific performance actions, the seller of the land should be awarded the purchase price plus interest. Unfortunately for Felix, the trial court did not award interest on the purchase price and she did not challenge that ruling on her first appeal. The Kentucky Supreme Court upheld the trial court's order as it was written, without interest. Lykins properly notes the law-of-the-case doctrine now applies. "It has long been recognized that the final decisions of the court are binding on the parties [and the courts]." *Commonwealth v. Tamme*, 83 S.W.3d 465, 468 (Ky. 2002).[5] This Court has explained the law-of-the-case doctrine as follows:

[5] We agree with the Arizona court's determination that courts treat the law-of-the-case doctrine as "a procedural doctrine rather than as a substantive limitation on the court's power." *Powell-Cerkoney v. TCR-Mont. Ranch Joint Venture, II*, 860 P.2d 1328, 1331 (Ariz. App. 1993) (citations omitted). Consequently, we apply Kentucky law to issues related to the law-of-the-case doctrine.

> *Sowders v. Coleman,* 223 Ky. 633, 4 S.W.2d 731 (1928), enunciates that the doctrine considers as settled "all errors lurking in the record on the first appeal which might have been, but were not expressly, relied upon as error." In view of *Sowders*, and regardless whether the question was litigated in the first instance, it is evident that the law of the case doctrine is applicable to the present case and the explicit decision to award interest, whether correct or erroneous, was finally made on that matter in the first appeal.

Brooks v. Lexington-Fayette Urban County Housing Authority, 244 S.W.3d 747, 751 (Ky. App. 2007).

The Supreme Court's opinion ordering the reinstatement of the circuit court's June 2004 judgment is final. This Court is accordingly prohibited from disturbing the 2004 order awarding Felix $200,000, without interest, just as the circuit court was prevented from so doing. The substantive status quo goal of *Sandusky* was thus, in a sense, thwarted by the procedural doctrine of law-of-the-case. The effect of the trial court's order was to favor the procedural doctrine over the substantive one. We find no abuse of discretion in doing so. *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007) ("Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive." Citation and internal quotation marks omitted.). Felix can therefore make no direct claim to an award of damages in the form of interest on the purchase price of the property.

Felix next argues the circuit court abused its discretion in ordering her to repay Lykins the rental payments she had received since August 1997. Felix's

argument is clearly at odds with the *Sandusky* opinion she cites. *Sandusky,* 473 N.E.2d at 800 ("[The court] will compensate the purchaser for any loss of use of the property during the delay by awarding him the rental value of it, or the net rents and profits of it, for the period."). By ordering specific performance of the option, the circuit court effectively ruled the profits, *i.e.*, the rental payments and other income Felix received from the property since August 1997, were held in trust for Lykins. Accordingly, the court required those sums to be paid to Lykins, just as the purchase price was required to be paid to Felix. This decision is consistent with Ohio jurisprudence.

We next turn to the matter of interest awarded to Lykins on the rental payments Felix held in trust for Lykins. This issue is the most troublesome. At first blush, it would seem facially consistent with *Sandusky*'*s* goal of returning the parties to a status quo, as well as equitable, to deny Lykins the interest on the rental payments since Felix could not recover interest on the purchase price. However, the law-of-the-case doctrine prevents the award of interest to Felix; it does not prevent the award to Lykins of interest on rental payments. Lykins' claim to that interest, like the claim for the rental payments themselves, was reserved by the trial court while Felix appealed the original judgment. Lykins' claim to interest on the rental payments was not an issue on appeal and therefore was unaffected by the law-of-the-case doctrine.

However, in order to determine the extent to which Lykins' claim authorizes a right to interest, we must first determine whether the issue of prejudgment

interest is a procedural or substantive matter. If procedural, the law of Kentucky will apply; if substantive, the law of Ohio will apply. "The forum court decides whether to characterize given laws as substantive or procedural." Dustin K. Palmer, Comment, *Should Prejudgment Interest Be a Matter of Procedural or Substantive Law in Choice-of-Law Disputes?*, 69 U. CHI. L. REV. 705, 709 (2002)(footnote omitted).

Generally speaking, whether prejudgment interest is procedural or substantive remains a debatable question. However, all courts recognize

> that prejudgment interest rules have both substantive and procedural features, and that one rationale or the other may be more compelling depending on the legal context. Rules granting prejudgment interest inherently serve both substantive and procedural purposes: promoting early settlement of claims and compensating the plaintiff for the inability to utilize funds that were rightly due earlier.

Id. If, in the balance, a court views the purpose of prejudgment interest as promoting claims settlement rather than compensating the plaintiff, it will be considered procedural and governed by the law of the forum. If not, prejudgment interest will be considered substantive and, in this case, governed by Ohio law.

Kentucky has never addressed this issue directly. However, our Supreme Court said that in a breach of contract claim, prejudgment interest is due as damages, thereby indicating our judiciary's view that prejudgment interest is substantive.

> "If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all

> deductions to which the party in breach is entitled" [and] interest is due as a matter of course[.]

Nucor Corp. v. General Elec. Co., 812 S.W.2d 136, 144 (Ky. 1991)(quoting *Restatement (Second) of Contracts* § 354, "Interest as Damages"). This is consistent with the majority of states. *ARY Jewelers, L.L.C. v. Krigel*, 277 Kan. 464, 85 P.3d 1151, 1160 (Kan. 2004) (citing Annot., 78 A.L.R. 1046, 1048, and *Cooper v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1307 (Del. Super. 1986) (the majority view among states is that "prejudgment interest, like the issue of damages, is substantive, and the state whose laws govern the substantive legal questions also governs the question of prejudgment interest"). Therefore, we conclude for purposes of this case, that prejudgment interest is substantive. Consequently, the law of Ohio governs the award of prejudgment interest.

Under Ohio law, does Lykins have a right to recover interest on the rental payments? If this were a case in which Felix breached the contract and for which Lykins was entitled to damages, the answer would be an unequivocal yes as is made clear in *Royal Electric Constr. Corp. v. Ohio State Univ.*, 652 N.E.2d 687 (Ohio 1995).

> [I]n a case involving breach of contract where liability is determined and damages are awarded . . . , the aggrieved party is entitled to prejudgment interest on the amount of damages found due . . . . The award of prejudgment interest is compensation to the plaintiff for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court.

Royal Electric, 652 N.E.2d at 692. Furthermore, in contract breach cases the award of prejudgment interest in Ohio is not discretionary with the trial court. "The Ohio Supreme Court has explicitly determined that the aggrieved parties . . . *must be awarded interest* if they are to be made whole." *Landis v. Grange Mut. Ins. Co.*, 717 N.E.2d 1199, 1203-04 (Ohio Com.Pl. 1999)(citing *Royal Elec*. 652 N.E.2d at 692; emphasis supplied).

But Felix did not breach the option contract. As the Kentucky Supreme Court acknowledged, if it had concluded that legal principles rather than equitable ones prevailed and the option should be strictly construed, it would have ruled that "the trial court erred when it granted summary judgment for Lykins and ordered Felix to perform under the terms of the option." *Lykins I*, 2007 WL 4139637, *9. The Supreme Court also acknowledged that Lykins, not Felix, was in default. *Id.* at *11. Therefore, Lykins was not damaged because of any breach of the contract by Felix. The Supreme Court merely granted Lykins the equitable relief it sought despite its failure to timely exercise the option. This does not mean the principles addressing contract breaches in *Royal Electric* should not be followed. It simply means we must read the case closer and consider it in conjunction with *Sandusky's* goal of attempting to reach something reminiscent of the status quo.

We read the heart of *Royal Electric*, and *Sandusky* too, as being concerned with making parties whole.

> "[W]e are more persuaded by those states that have moved away from the medieval notion that interest is evil. [citations omitted] [P]rejudgment interest does not punish the party responsible for the underlying damages .

> . . , but, rather, it acts as compensation and *serves ultimately to make the aggrieved party whole*.

Landis, 717 N.E.2d at 1203 (Ohio Com.Pl. 1999)(quoting *Royal Elec.*, 652 N.E.2d at 692; emphasis supplied). If the goal is to make Lykins whole, we must award prejudgment interest under Ohio law. However, we must also account for the fact that, by virtue of our prior ruling regarding the law-of-the-case doctrine, Lykins will not have to pay prejudgment interest to Felix on the purchase price.

To make Lykins whole, prejudgment interest must be added to the award of rental payments, but then there must be a deduction of the amount of prejudgment interest on the purchase price that Lykins gets to keep because of the law-of-the-case doctrine. If we did not require such a deduction, Lykins would enjoy a windfall, and not merely be made whole.

Considering *de novo* the application of Ohio law to the facts of this case, we conclude the circuit court erred by failing to deduct from Lykins' award the value of retaining control of the purchase price until it was paid into escrow. *See Sys. Data, Inc. v. Visi Trak Corp.*, 655 N.E.2d 287, 288 (Ohio Mun. 1995) ("Interest is the compensation allowed by law . . . for the use, detention, or forbearance of money."); *accord Curtis v. Campbell*, 336 S.W.2d 355, 361 (Ky. 1960)("[E]quity and justice demand that one who uses money or property of another . . . should at least pay interest for its use in the absence of some agreement to the contrary."). A second error is more obvious – the circuit court applied the wrong interest rate.

The circuit awarded interest "at the statutory rate of 8%, compounded annually from the date of each rent payment and until the date of judgment[.]"

This would be correct under Kentucky law. However, as we previously held, issues related to the award of prejudgment interest, including the interest rate, are matters of substantive law governed by Ohio jurisprudence.

"[I]n computing the amount of [prejudgment] interest owed, the court is required to look to [Ohio Revised Code] R.C. 1343.03(A) to determine when interest commences to run, *i.e.*, when the claim becomes "due and payable," and to determine *what* legal rate of interest should be applied." *Royal Electric Constr. Corp. v. Ohio State Univ.*, 652 N.E.2d 687, 691 (Ohio 1995)(Emphasis in original). R.C. 1343.03(A) states, in pertinent part: "[W]hen money becomes due and payable upon . . . contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the [Ohio] Revised

Code[.]"[6] The interest rate applicable to this case, therefore, is the fluctuating rate of interest determined pursuant to R.C. 5703.47 by the Ohio tax commissioner.[7]

Ordinarily, we would simply remand this case to the circuit court to calculate the award of damages and enter a corrected judgment consistent with this opinion. However, the Supreme Court's comments in *Lykins I* clearly urged expedition; we quote the Supreme Court to that effect, with slight modification:

> [A]t oral argument before this Court both parties indicated their willingness to have this matter, which has been pending for nearly ten years, finally resolved without the additional delay a remand . . . would entail. . .

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[6] In its entirety, R.C. 5703.47 states:

> (A) As used in this section, "federal short-term rate" means the rate of the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of three years or less, as determined under section 1274 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1274, for July of the current year.
>
> (B) On the fifteenth day of October of each year, the tax commissioner shall determine the federal short-term rate. For purposes of any section of the Revised Code requiring interest to be computed at the rate per annum required by this section, the rate determined by the commissioner under this section, rounded to the nearest whole number per cent, plus three per cent, shall be the interest rate per annum used in making the computation for interest that accrues during the following calendar year. For the purposes of sections 5719.041 and 5731.23 of the Revised Code, references to the "federal short-term rate" are references to the federal short-term rate as determined by the tax commissioner under this section rounded to the nearest whole number per cent.
>
> (C) Within ten days after the interest rate per annum is determined under this section, the tax commissioner shall notify the auditor of each county in writing of that rate of interest.

[7] Each year, in conformity with R.C. 5703.47, the Ohio tax commissioner publicly issues an "Administrative Journal Entry" establishing the legal rate of interest. PDF versions of many of these public documents are available online. Links to them are found at an Ohio tax commission web page, http://tax.ohio.gov/divisions/ohio_individual/individual/interest_rates.stm. This same page also includes a table of interest rates thus determined going back to 1983. The table indicates the following relevant interest rates: 1997 – 9%; 1998 – 9%; 1999 – 8%; 2000 – 8%; 2001 – 9%; 2002 – 7%; 2003 – 6%; 2004 – 4%; 2005 – 5%; 2006 – 6%; 2007- 8%; 2008 – 8%; 2009 – 5%; 2010 – 4%; 2011 – 4%.

> . [G]iven the unusually long pendency of this case and the fact that the issue has been well briefed, both here and before the [Mason Circuit] Court . . . , we shall honor all parties' request that we not remand but finally decide the merits of their decade-old dispute.

Lykins I, 2007 WL 4139637 *3, *5.

This case is now thirteen years old.[8] Because there are no factual disputes and because the bulk of damages to which Lykins is entitled can be calculated by this Court as easily as by the circuit court applying Ohio law, we will do so.

To be made whole, Lykins shall be reimbursed the stipulated total of rental payments: 83 consecutive payments from August 1997 to June 2004 at $1,200 per months equaling $97,200. Lykins is also entitled to prejudgment interest at the legal rate determined by the Ohio tax commissioner pursuant to R.C. 57.03.47, and which under that statute is simple interest only. *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 884 N.E.2d 1056, 1059, 1062 (Ohio 2008). We have calculated that interest in two tables included in the Appendix attached to and made a part of this opinion.

Table 1 calculates simple interest that accrued on the rental payments through June 2004 when the payments stopped in the amount of $26,100. Table 2 calculates simple interest that accrued from July 2004 through June 2010 in the amount of $34,992. The sum of the reimbursement of rental payments and interest calculated in Tables 1 and 2 is $158,292. This is only a subtotal, however.

[8] This appeal was held in abeyance for several months during the pendency of a bankruptcy proceeding involving Lykins.

Table 3 calculates the value to Lykins of retaining the purchase money from August 1997 to June 2004 (when it was paid into escrow) as equivalent to the prejudgment interest accrued on that amount under Ohio law. That amount is $109,500. To prevent a windfall to Lykins, we must deduct that amount from the $158,292 subtotal. This calculation determines that Lykins' damages as of June 30, 2010 are $48,792. Again, this is only a subtotal.

Lykins is entitled to an additional sum for interest accruing on the unreimbursed rental payments from July 2010 until the rental payments are reimbursed if reimbursement occurs on or before the entry of the corrected judgment. Because the Ohio tax commissioner determined that the interest rate applicable during 2010 and 2011 is 4%, interest shall accrue on the unreimbursed rental payments ($97,200) at the rate of 0.33% for each month of 2010 and 2011 beginning with July until paid, if paid prior to entry of the corrected judgment.

Because awards of post-judgment interest are procedural, *ARY Jewelers*, 85 P.3d at 1161 ("research has revealed no jurisdiction which considers postjudgment interest to be a question of substance"), we leave the award of post-judgment interest at the rate of 12% intact as appropriate under Kentucky law. The 12% interest rate will apply to the total award, including the interest, as calculated to the date of judgment. *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 410 (Ky. 2005) ("In addition to the principal amount awarded, the judgment provided that the award would bear prejudgment interest . . . , and that the judgment itself [including prejudgment interest] would bear post-judgment

interest of 12%."); KRS 360.040 ("A judgment shall bear twelve percent (12%) interest compounded annually from its date.").

Finally, according to the briefs, the purchase proceeds remain in escrow. Upon proof satisfactory to the circuit court that the subject property has been conveyed to Lykins, all purchase proceeds remaining in escrow, including any accumulated interest thereon, should be immediately released to Felix.

For the foregoing reasons, we affirm in part and reverse in part, with instructions to the circuit court to enter a new judgment awarding damages to Lykins and releasing the purchase proceeds to Felix in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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APPENDIX A

Table 1. Interest Accrued from August 1997 to June 2004 on Individual Monthly Rental Payments of $1,200 based on Ohio Prejudgment Interest Rates[9]

Month	1997 -9%	1998 -9%	1999 -8%	2000 -8%	2001 -9%	2002 -7%	2003 -6%	2004 - 4%	Total
8/97	$45	$108	$96	$96	$108	$84	$72	$48	
9/97	$36	108	96	96	108	84	72	48	
10/97	$27	108	96	96	108	84	72	48	
11/97	$18	108	96	96	108	84	72	48	
12/97	$9	108	96	96	108	84	72	48	
1/98		108	96	96	108	84	72	48	
2/98		99	96	96	108	84	72	48	
3/98		90	96	96	108	84	72	48	
4/98		81	96	96	108	84	72	48	
5/98		72	96	96	108	84	72	48	
6/98		63	96	96	108	84	72	48	
7/98		54	96	96	108	84	72	48	
8/98		45	96	96	108	84	72	48	
9/98		36	96	96	108	84	72	48	
10/98		27	96	96	108	84	72	48	
11/98		18	96	96	108	84	72	48	
12/98		9	96	96	108	84	72	48	
1/99			96	96	108	84	72	48	
2/99			88	96	108	84	72	48	
3/99			80	96	108	84	72	48	

[9] Rates used in this Appendix are taken from the Ohio tax commissioner's annual determination of the legal interest rate, as required by R.C. 5703.47, and published at the Ohio Department of Taxation website, http://tax.ohio.gov/divisions/ohio_individual/individual/interest_rates.stm.

4/99	72	96	108	84	72	48
5/99	64	96	108	84	72	48
6/99	56	96	108	84	72	48
7/99	48	96	108	84	72	48
8/99	40	96	108	84	72	48
9/99	32	96	108	84	72	48
10/99	24	96	108	84	72	48
11/99	16	96	108	84	72	48
12/99	8	96	108	84	72	48
1/00		96	108	84	72	48
2/00		88	108	84	72	48
3/00		80	108	84	72	48
4/00		72	108	84	72	48
5/00		64	108	84	72	48
6/00		56	108	84	72	48
7/00		48	108	84	72	48
8/00		40	108	84	72	48
9/00		32	108	84	72	48
10/00		24	108	84	72	48
11/00		16	108	84	72	48
12/00		8	108	84	72	48
1/01			108	84	72	48
2/01			99	84	72	48
3/01			90	84	72	48
4/01			81	84	72	48
5/01			72	84	72	48
6/01			63	84	72	48
7/01			54	84	72	48
8/01			48	84	72	48
9/01			36	84	72	48
10/01			27	84	72	48
11/01			18	84	72	48
12/01			9	84	72	48
1/02				84	72	48
2/02				77	72	48
3/02				70	72	48
4/02				63	72	48
5/02				56	72	48
6/02				49	72	48
7/02				42	72	48
8/02				35	72	48
9/02				28	72	48
10/02				21	72	48
11/02				14	72	48

12/02	7	72	48		
1/03		72	48		
2/03		66	48		
3/03		60	48		
4/03		54	48		
5/03		48	48		
6/03		42	48		
7/03		36	48		
8/03		30	48		
9/03		24	48		
10/03		18	48		
11/03		12	48		
12/03		6	48		
1/04			24	24	
2/04			20	20	
3/04			16	16	
4/04			12	12	
5/04			8		
6/04			4	4	
			TOTAL	$26,100	

Table 2. Interest Accrued from July 2004 through June 2010 on Total Rental Payments of $97,200 based on Ohio Prejudgment Interest Rates

2004 – 4%	2005 – 5%	2006 – 6%	2007 – 8%	2008 – 8%	2009 – 5%	2010 – 4%	Total
$1,944	$4,860	$5,832	$7,776	$7,776	$4,860	$1,944	

Table 3. Value to Lykins of Retaining Purchase Money from August 1997 to June 2004 based on Ohio Prejudgment Interest Rate

1997 -9%	1998 -9%	1999 -8%	2000 -8%	2001 -9%	2002 -7%	2003 -6%	2004 - 4%	Total
$7,500	$18,000	$16,000	$16,000	$18,000	$14,000	$12,000	$8,000	
							TOTAL	$109,500

Table 4. Calculation of Damages to be Awarded Lykins

Reimbursement of Rental Payments	$ 97,200
Plus accrued interest on Rental Payments August 1997 to June 2004 (Table 1)	+ $ 26,100
Plus accrued interest on Rental Payments July 2004 to June 2010 (Table 2)	+ $ 34,992
Subtotal	$158,292
Minus Value of Retaining Purchase Money (Table 3)	- $109,500
Total Damages to Lykins through June 2010	$48,792