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# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-002204-MR

THE OHIO CASUALTY
INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 05-CI-00119

CITY OF PROVIDENCE, KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: This is a bond dispute in which The Ohio Casualty Insurance Company ("TOCIC") appeals from orders entered by the Webster Circuit Court finding a surety bond written by TOCIC for the City Clerk of the City of Providence, Kentucky ("City"), created $300,000.00 in liability for *each* of the seven years the bond was in force. Said finding was contrary to TOCIC's belief

that its maximum liability under the "aggregate and non-cumulative" bond was just $300,000.00 because the bond was written for an "indefinite" period of time and therefore, never renewed during its lifetime even though the insurance agency representing TOCIC sent annual "renewal" notices to the City. In a second order, the trial court denied TOCIC's motion to make additional findings. Having reviewed the briefs, the record and the law, we reverse and remand.

BACKGROUND

On October 1, 1997, Sara Stevens was appointed Providence City Clerk. As an appointee, her term was open-ended. As a public official, she had to be bonded.[1] To satisfy the bonding requirement, Charlotte Little, the retiring City Clerk, contacted Gooch Insurance Associates, Inc. ("GIA") and requested a bond be written for Stevens. Mary Schneider, a customer service representative with

[1] Kentucky Revised Statutes (KRS) 62.060 directs in pertinent part:

> (1) Except as provided by KRS 395.130, the bond required by law to be executed and given by any public official, depository of public funds, or any fiduciary, and other bond required by law for the discharge or performance of any public or fiducial office, trust or employment, shall be a covenant to the Commonwealth of Kentucky from the principal and surety or sureties that the principal will faithfully discharge his duties, and there shall be no other obligation in the bond. The bond shall be limited in a definite penal sum, which shall be determined and fixed by the officer or officers whose duty it is to approve the bond. The bond of each fiduciary shall be fixed in a penal sum of not less than the estimated value of the estate which the fiduciary is in charge of. The officer or officers taking any bond mentioned in this section may, at any time when it appears to be to the interest of the obligee, increase the penal sum of the bond or require a renewal thereof with other or additional sureties.
>
> (2) A bond or obligation taken in any form other than that required by subsection (1) shall be binding on the parties thereto according to its terms.

GIA collected the necessary information, completed an application, and TOCIC issued the following single-page surety bond.

BOND

No. 3429851-10

KNOW ALL MEN BY THESE PRESENTS:

That we, Sara B. Stevens of 129 Oaklawn Dr., Providence, Kentucky 42450 as Principal, and THE OHIO CASUALTY INSURANCE COMPANY, of Hamilton, Ohio, a corporation organized and existing under the laws of the State of Ohio, thereinafter called the Surety) (sic), are held and firmly bound unto Commonwealth of Kentucky for the Use & Benefit of City of Providence, P.O. Box 128, Providence, Kentucky 42450 in the aggregate and non-cumulative penal sum of Three Hundred Thousand and No/100 ($300,000) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

SIGNED, SEALED and DATED this 1st day of October, 1997.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That Whereas, the said Principal has been elected or appointed to (or holds by operation of law) the office of City Clerk for a term beginning on October 1, 1997 and ending on indefinite.

NOW, THEREFORE, If the said Principal shall well, truly and faithfully perform all official duties required by law of such official during the term aforesaid then this obligation shall be void; otherwise to remain in full force and effect.

THIS BOND is executed by the Surety upon the following express conditions:

> First: The the (sic) Surety may, if it shall so elect, cancel this bond by giving thirty (30) days notice in writing to Mayor of City of Providence, Kentucky and this bond shall be deemed canceled at the expiration of said thirty (30) days; the surety remaining liable, however, subject to all the terms, conditions and provisions of this bond, for any act or acts covered by this bond which may have been committed by the Principal up to the date of such cancellation; and the Surety shall, upon surrender of this bond and its release from all liability hereunder, refund the premium paid, less a pro rata part thereof for the time this bond shall have been in force.
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> Second: That the Surety shall not be liable hereunder for the loss of any public moneys or funds occurring through or resulting from the failure of, or default in payment by, any banks or depositories in which any public moneys or funds have been deposited, or may be deposited, or placed to the credit, or under the control of the Principal, whether or not such banks or depositories were or may be selected or designated by the Principal or by other persons; or by reasons of the allowance to, or acceptance by the Principal of any interest on said public moneys or funds, any law, decision, ordinance or statute to the contrary notwithstanding.
>
> Third: That the surety shall not be liable for any loss or losses, resulting from the failure of the Principal to collect any taxes, licenses, levies, assessments, etc., with the collection of which he may be chargeable by reason of his election or appointment as aforesaid.
>
> By: Sara B. Stevens (Seal) s/s
> The Ohio Casualty Insurance Company s/s

Based on the above language, these are the pertinent facts: the bond was assigned No. 3429851-10; it covered an "indefinite" period of time while Stevens was City Clerk beginning October 1, 1997; it was for "the aggregate and non-cumulative penal sum of" $300,000.00; it references "the term aforesaid" with the only term mentioned being "indefinite"; as surety, TOCIC could cancel the bond by giving

the City thirty days' written notice; and the bond was signed by Stevens as principal and TOCIC as surety.

The bond was issued in favor of the City as obligee. According to a deposition given by Schneider, TOCIC's intent in writing the bond was to limit its maximum liability to $300,000.00. Testimony about the City's intent at the time the bond was purchased was unclear.

Each year, around the anniversary date of the bond's issuance, GIA[2] sent an invoice to the City bearing: the word "renewal"; Stevens' name and bond policy number; effective and expiration dates of the bond's renewal period; the amount of the bond ($300,000.00); and the amount of the premium due. Accompanying each annual invoice sent to the City was an "Agent's Copy" of a "Surety Bond Renewal Notice" generated by TOCIC. Tom Thompson, a bond manager for TOCIC, testified the Surety Bond Renewal Notice was an internal document intended only for insurance agents to track premiums. While not intended to be sent to an obligee (the City), Thompson acknowledged TOCIC could not control how an insurance agency handled the Surety Bond Renewal Notice. Renewal notices bore Stevens' name and bond number; the renewal period

[2] When the bond was issued, GIA represented TOCIC. GIA was subsequently sold to West Kentucky Bank and became known as West Kentucky Insurance. That entity was subsequently acquired by Maverick Insurance.

GIA was jointly owned by James "Eddie" Gooch, his father and brother from 1986 until 1998. James Gooch was not affiliated with the City in 1997. He served as a Providence City Councilman from 2000-2002. He was appointed Mayor of Providence on May 4, 2004, and his first mayoral act was to discharge Stevens from her position as City Clerk. Gooch testified as part owner of GIA, he was aware of Stevens' surety bond in 1997.

with its beginning and ending dates; the amount of the renewal premium; and a statement called "renewal instructions" which read, "bond remains in effect until term of office expires." Each form also contained a note stating: "if continuation of this bond is not desired, please have the release below completed and return before renewal date, unless bond expires by its terms." Based on the language in these renewal notices, as well as Gooch's personal knowledge and expertise in the insurance industry, Gooch and Jerry Fritz, Mayor of Providence in 1997 when Stevens was appointed, testified they believed the City was buying $300,000.00 in coverage *per year* for losses incurred from Stevens' actions as City Clerk.

A review by the Kentucky Auditor of Public Accounts discovered significant amounts of cash[3] missing from the City's utility fund while it was under Stevens' control. In mid-April 2004, the City put TOCIC on notice it was making a claim against Stevens' surety bond due to losses from the utility fund. On May 4, 2004, Stevens was removed from her position as City Clerk. TOCIC investigated, but could not say it was liable for the loss. In August 2006, Stevens stood trial in federal district court in Owensboro, was convicted of embezzlement and money laundering for which she was sentenced to forty-eight months imprisonment, placed on three years' supervised release, and ordered to pay

[3] The losses amounted to $283,003.00 in 2001; $282,982.00 in 2002; $272,732.00 in 2003; and $62,004.00 in 2004.

restitution of $932,481.67.[4] Before Stevens' federal trial, Eric Smith,[5] a co-defendant, pleaded guilty to conspiring with Stevens.

THE INSTANT ACTION

This civil action began on May 4, 2005, when Stevens filed a complaint seeking injunctive relief against the City[6] for tortious conduct. After being discharged as City Clerk, Stevens alleged defamation; intentional, wanton or reckless conduct; outrage; intentional infliction of emotional distress; and tortious interference with her ability to labor and earn money. The City answered the complaint and filed its own counterclaim alleging Stevens had wrongfully converted funds, mismanaged City assets and breached fiduciary duties.

Several months later, on August 29, 2005, the City moved to add TOCIC as a party, noting TOCIC was seeking a declaratory judgment in federal court alleging similar grounds. Initially, TOCIC opposed being named a party in the state court action claiming it was not an indispensable party to the tort claims. On October 17, 2005, the federal court granted Stevens' motion to dismiss TOCIC's federal declaratory judgment action, deeming it better for the state court to resolve the matter and declining to exercise jurisdiction. *The Ohio Casualty Insurance Company v. Commonwealth of Kentucky,* No. 4:05CV-085-M (U.S.D.C.

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[4] *United States of America v. Stevens, et al,* Case # 4:05-CR-00042 (U.S.D.C. W.D. Ky, Owensboro).

[5] Smith was a Providence Police Officer.

[6] Hon. Crit Luallen, in her capacity as state auditor, and individual Providence City Council members were also named as original defendants.

W.D. Ky. Oct. 17, 2005) (2005 WL 2656745, unreported). On November 4, 2005, TOCIC moved to intervene in the state court case and leave was granted.

In its intervening complaint, TOCIC asked the trial court to declare and adjudicate its rights, duties and obligations under the bond and to enter judgment for TOCIC against Stevens. In October of 2007, the City moved the trial court to enter summary judgment against Stevens and TOCIC. In light of Stevens' being convicted of embezzlement and money laundering, and being ordered to pay restitution, and TOCIC having paid the City $300,000.00 under the bond, the City argued the only remaining issue was whether TOCIC owed the City $632,481.67.

To support its position, the City submitted an affidavit from William J. Warfel, a professor of insurance at Indiana State University. While Warfel had worked in the insurance industry for thirty years, he had little to no experience in the surety industry. Emphasizing distinctions in insurance and surety, TOCIC urged the court to strike Warfel's affidavit.

In its quest for summary judgment, the City relied heavily upon *City of Middlesboro v. American Surety Company of New York,* 211 S.W.2d 670, 306 Ky. 367 (1948), arguing Stevens' bond was a series of separate, independent contracts that renewed annually and allowed the City to recover $300,000.00 in losses *every year* the bond was in effect. This view was contrary to TOCIC's view that Stevens had one continuous bond against which the City could recover a maximum of $300,000.00 regardless of when the loss occurred or the number of years the bond was in effect.

TOCIC responded to the City's motion for summary judgment and filed a cross-motion for the same relief. Citing *Buck Run Baptist Church, Inc. v. Cumberland Surety Insurance Company,* 983 S.W.2d 501 (Ky. 1998), TOCIC argued Stevens' bond was a contract of surety, not of insurance. In addressing whether a construction contract was exempt from binding arbitration, *Buck Run* provided a detailed explanation of the relationship between contracts of insurance and contracts of surety.

> The term insurance contract is nowhere defined in KRS 417.050. The term insurance is defined for certain purposes only in the Kentucky Insurance Code as including sureties. Although Kentucky surety companies are regulated by the Kentucky Insurance Department for certain purposes, there is no indication that the definition found in the insurance code is meant to apply to the Kentucky Arbitration Statute. A contract of suretyship is not a contract of insurance. The distinctions between the two are significant in the context of arbitration because they emphasize why the legislature would not permit an insurer to compel arbitrations.
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> In the insurance code itself, surety insurance is separately defined in KRS 304.5–060. In the absence of a specific definition of insurance in KRS 417.050, the word is used in its common application. *Cf. Louisville Country Club, Inc. v. Gray,* 178 F.Supp. 915 (W.D.Ky. 1959).
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> An insurance policy is a contract of indemnity whereby the insurer agrees to indemnify the insured for any loss resulting from a specific event. The insurer undertakes the obligation based on an evaluation of the market's wide risks and losses. An insurer expects losses, and they are actuarially predicted. The cost of such losses are spread through the market by means of a premium.
>
> In contrast, a surety bond is written based on an evaluation of a particular contractor and the capacity to perform a given contract. Compensation for the issuance of a surety bond is based on a fact-specific evaluation of

> the risks involved in each individual case. No losses are expected. Sureties maintain close relationships with the contractors they bond and require the contractor to sign an indemnity contract in favor of the surety company. As such a surety's relationship to its principal is more like that of a creditor/debtor than that of the traditional insurer/insured. *See* *National Shawmut Bank of Boston v. New Amsterdam Casualty Co.*, 411 F.2d 843 (1st Cir. 1969).

On April 3, 2008, the circuit court entered summary judgment for the City and Luallen on Stevens' tort claims and dismissed her complaint without prejudice, leaving TOCIC and the City as parties. Nearly a year later, on March 10, 2009, the circuit court found material facts existed, denied the competing motions for summary judgment, and scheduled a jury trial on the contract issues. In its order, the court disagreed with TOCIC's characterization of Warfel as "simply an insurance professor,"[7] deemed him qualified as an expert witness, and denied TOCIC's motion to strike his affidavit. However, on December 3, 2010, the trial court granted TOCIC's motion to exclude Warfel as an expert. In light of this ruling, at the bench trial that followed, TOCIC decided not to call James Lee whom it had retained and listed as its own expert witness.

[7] The trial court was impressed by Warfel having testified as an expert about forty times, a curriculum vitae showing thirty years experience in the insurance and surety industry, and his having authored about forty-six articles. Although the trial court characterized Warfel as working in the "insurance and surety industry" for three decades, even Warfel's deposition was weak on detailing any experience with surety bonds. The trial court acknowledged "Warfel testified in his deposition that he has never worked for a surety company, that he has never performed underwriting of surety bond, he has never prepared bond forms, served as an insurance agent or owned an insurance agency."

In denying the competing summary judgment motions, the trial court found: the terms "aggregate" and "non-cumulative" are ambiguous and subject to multiple interpretations; "aggregate" could mean all losses during a given year or all losses during the life of the bond; "non-cumulative" could mean the full $300,000.00 in a year without a loss could not carry forward to the next year, or that the face amount of the bond, $300,000.00, could never increase by any amount; and, Stevens was handling about $4,000,000.00 a year so "it only stands to reason that [the City] operated under a belief that the bond provided $300,000.00 each year it was in effect." Due to the perceived ambiguity, the trial court denied the motion and cross-motion for summary judgment.

At a one-day bench trial on March 21, 2011, the trial court heard testimony from Gooch, Fritz and Thompson. In lieu of live testimony, Schneider's discovery deposition was submitted. Importantly, no one affiliated with the City established the City's thoughts or intentions at the time the Stevens' surety bond was purchased on October 1, 1997. Gooch, mayor at the time the losses were discovered and part owner of the insurance agency representing TOCIC when the bond was written, testified he had never read the bond and did not need to read it because of his prior ownership of GIA and his personal understanding of insurance terms. As for his experience with bonds, he stated he had quoted some rates for bonds, but was uncertain whether any of those quotes materialized into an actual bond. Gooch testified his brother, another part owner of GIA, did most of the bond work for the agency. Fritz, mayor at the time the bond was written, testified he

believed the City purchased $300,000.00 in coverage per year, but admitted his belief was based on the surety bond renewal notices and invoices—items he could not have seen until the bond had been in effect for nearly a year and therefore, could not have formed the basis for his understanding of the surety contract at the time it was executed. Fritz also admitted: he did not read the bond until receiving the premium notice; he may have read the bond sometime during his first year as mayor; the City did not receive subsequent bonds on Stevens; premium notices were related to, but not part of, the bond; he did not discuss the bond terms with anyone; and, the bond probably was not discussed at any City Council meeting.

On behalf of TOCIC, Schneider by deposition, and Thompson at trial, both testified TOCIC intended to limit its maximum exposure to $300,000.00 during the life of the bond. Thompson went on to say that TOCIC would *not* have written a continuing bond that increased in coverage by $300,000.00 each year, but if it had, the bond's premium would have increased by fifty percent each year. Yet, the amount of the City's premium remained constant between 1997 and 2004.

At the conclusion of the proof, both parties were to tender proposed findings of fact. A two-page document captioned "Proposed Findings of Fact, Conclusions of Law and Judgment from City of Providence" appears in the record and says the proposed findings and conclusions are attached, but the item that immediately follows is an eleven-page order typed in a different font and signed by the trial court. No proposed findings and conclusions attributable to TOCIC are contained in the record.

On August 4, 2011, the trial court entered its order on the issue of bond coverage in favor of the City. In reaching its decision, the court focused on the words "aggregate" and "non-cumulative" which it again found to be ambiguous; the impact of "renewal notices" sent to the City; the City's reasonable beliefs; and, the holding of the *Middlesboro* decision, which it found to be controlling. The trial court wrote:

> The definition of the two words can be found in Webster's Ninth New Collegiate Dictionary as follows: (1) aggregate – the whole sum or amount and (2) non-cumulative – not increasing by successive additions. The language in the bond pertaining to the "aggregate amount" could mean the aggregate amount of all losses in a given year. The same language could mean the aggregate amount of loss for the total number of years the bond is in place. Likewise, the term "non-cumulative", could mean that if a city does not have any loss in the first year that in the second year the loss is limited to $300,000 rather than $600,000. In other words, the unused policy amount from the first year does not accumulate with the additional $300,000 purchased by the new premium in the second year. The term "non-cumulative" could also mean that $300,000 was the total amount of coverage in the bond regardless of how many years it is in existence.
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> The court finds that based on the testimony of Gooch and Fritz as well as the amount of money Stevens' was responsible for on a yearly basis (hundreds of thousands of dollars), it is reasonable that [the City] thought they were purchasing a bond that would provide $300,000 of coverage each year the bond was in existence.
>
> Furthermore, based on their circumstances, it is reasonable that [the City] thought the "aggregate" amount was a total of $300,000 per year. Based on the language in the bond and the needs of [the City], the Court finds that it was reasonable for [the City] to believe

that "non-cumulative" meant that the unused policy amounts for previous years did not accumulate coverage that could be used in the event of a loss.

Further, the Court finds that [the City's] assumption that they were purchasing coverage in the amount of $300,000 per year is substantiated by the "renewal notices" for "renewal premiums" they received each year the bond was in place. While much was made at trial of the fact that [the City] choose (sic) to pay the bond premium on an annual basis, the Court finds that [the City's] manner of payment made sense for a continuous bond such as Stevens[']s because she was not an elected official. Stevens did not have a definite term of office like an elected official and it is reasonable that [the City] did not want to pay the bond premium years in advance because Stevens could have decided to end her employment with [the City] at any time.

A case on point with the one at bar is *City of Middlesboro, et al. v. American Surety Company of New York,* 211 S.W.670 (Ky. App. 1947). In *City of Middlesboro* the City of Middlesboro purchased a $5,000 bond for the City tax collector and the City clerk. For eight (8) years the City paid its $60.00 annual premium as consideration for execution of the bond for the City clerk, and the bond was renewed. *Id.* at 670. The City, upon learning of the breach of the City clerk's duty, sought to hold the surety liable for the amount of $40,000.00 or $5,000.00 for each of the eight (8) years its bond remained in effect. The surety sought to limit its liability to the sum of $5,000.00 and relied upon a term in its bond which stated, "that in no event shall the liability of the surety for any one or more defaults of the principal during any one or more years of this suretyship exceed the amount herein specified." *Id.* at 670.

> The question presented to the Court was whether a bond and its renewals together constituted one single contract or whether each is a contract in and of itself. In response to that issue the Court stated that the answer to such question "depends

primarily on the facts of the particular case and the contract of suretyship itself. *Id.* at 671. The Court of Appeals stated that:

> The question, then, whether a bond and the renewals thereof constitute multiple contracts or one continu[ing] contract, thereby affecting the limit of liability of the surety, depends primarily on the facts of the particular case and the contract of suretyship itself. *Id.*
>
> [. . .]
>
> Or, to put it another way, suppose the City had insured with one company for the first year, with another company for the second year, and so on with a different company each year for eight years. In the event of a loss, similar to that in the instant case, obviously there could be recovery of $5,000 from each company. Can it be justifiably argued that if it insures with one company and renews with the same company its protection is reduced to a total of $5,000 for all the years?"
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> [. . .]
>
> Or to put it another way, if the employee has defaulted to the limit of liability under the original bond during the first year, the second year's renewal premium buys nothing.
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> [. . .]
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> The obligation of the bond is to make good the loss occurring during its term. The obligation of each renewal is to make good the loss occurring during the renewal term. Each stands upon its separate consideration. We think the bond and the renewals were separate and distinct contracts and established separate and distinct liabilities. *Id.* at 673.

The Court determined that the renewal of the bond created a new contract and a new limit of liability for each successive year.

The facts and issues in *City of Middlesboro* are very similar to the case currently before the Court. In this case [the City] received "renewal notices" for a "renewal period" drafted and issued by [TOCIC]. Based on those notices as well as the amount of money Stevens was responsible for in any given year, [the City] reasonably believed they were paying the "renewal premium" for the "renewal period" set forth on the notices. The Court finds, as did the Court in *City of Middlesboro,* that the renewal notices were separate and distinct contracts for the time set forth in each particular notice and stands upon the consideration paid each year for said renewal. Even though the bond was continuous had [the City] not paid the renewal premium each year [TOCIC] would have cancelled the bond for non-payment.

The Court finds, based on the facts of this case and testimony presented at trial, as well as the legal conclusions set forth above, the Court finds that "aggregate" in the Stevens bond meant that $300,000 was the total amount of coverage per year. The court also finds that "non-cumulative" in the Stevens bond meant that unused policy amounts from previous years where no loss occurred did not accumulate to cover a loss in future years. Therefore, the Court finds that [the City] was entitled to $300,000 of coverage per year under the bond.

THEREFORE, for the reasons set forth above, the Court finds in favor of the INTERVENING DEFENDANTS, THE CITY OF PROVIDENCE. This is a final and appealable order.

We note that in the above-quoted order, the trial court acknowledged the Stevens' bond was "continuous." The trial court also commented on language included in renewal notices sent to some, but not all, TOCIC clients stating:

> [t]his Certificate is executed upon the express condition that the Company's liability under said bond **and this and all continuation certificates issued in connection therewith** shall not be cumulative, **and shall not in any event exceed the amount set forth in said bond**, or said amount as it may have been increased or decreased by any rider(s) or endorsement(s) properly issued by the company."

(Emphasis in original). This language never appeared in notices sent to the City.

On October 10, 2011, TOCIC filed a notice of appeal to this Court challenging orders entered on August 4, 2011, and September 13, 2011. On November 16, 2012, a panel of this Court dismissed that appeal as interlocutory because while the orders stated they were final, they did not recite, as required by CR 54.02, that there was "no just reason for delay."[8] *Watson v. Best Financial Services, Inc.,* 245 S.W.3d 722 (Ky. 2008). In the wake of the dismissal, TOCIC moved the trial court to correct its clerical error and a new order was entered December 12, 2012, stating the previously entered orders remained the same but for correction of the final sentence in both to read: "This is a final and appealable Order, and there exists no just cause for delay in its entry." It is from the order entered December 12, 2012, that this appeal flows.

ANALYSIS

[8] *Ohio Cas. Ins. Co. v. City of Providence,* No. 2011–CA–001872–MR, 2012 WL 5631000 (Ky. App. 2012, unpublished).

Intentions of parties forming a contract must be determined from the four corners of the contract—in this case, the bond itself. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). Only if the terms of the bond are ambiguous, may the court turn to extrinsic evidence. As explained in *Elmore v. Commonwealth,* 236 S.W.3d 623, 627 (Ky. App. 2007),

> we recognize that "[a]n ambiguous contract is one capable of more than one different, reasonable interpretation." *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32, 33 (Ky. 1981); *see also Frear v. P. T.A. Industries, Inc.*, 103 S.W.3d 99, 106 n. 12 (Ky. 2003). To determine if an ambiguity truly exists, we must evaluate whether the provision in question is susceptible of contradictory interpretations. *Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 905 (Ky. App. 1994). If an ambiguity exists:
>
> > "the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written," by evaluating extrinsic evidence as to the parties' intentions.
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> *Frear*, 103 S.W.3d at 106, quoting *Whitlow v. Whitlow*, 267 S.W.2d 739, 740 (Ky. 1954). If it is not ambiguous, a contract will be enforced strictly according to its terms. *O'Bryan v. Massey–Ferguson, Inc*., 413 S.W.2d 891, 893 (Ky. 1966); *Frear,* 103 S.W.3d at 106. A court will interpret those terms "by assigning language its ordinary meaning and without resort to extrinsic evidence." *Id.*

The appropriate starting point for our analysis is Stevens' surety bond. As stated in *Middlesboro,* 211 S.W.2d at 771, whether a bond creates multiple

contracts or one single contract "depends primarily on the facts of the particular case and the contract of suretyship itself."

*Middlesboro* is a fascinating case. Neither party disputes its relevance, they simply disagree on its application. For us, one of the pivotal distinctions in this case and *Middlesboro*, however, is that Stevens being appointed rather than elected, her bond was written for an "indefinite" period rather than a specific term. In contrast, the Middlesboro tax collector and clerk was elected to a one-year term, and re-elected to seven additional one-year terms thereafter. Knowing this distinction, it was reasonable to conclude in *Middlesboro* that a separate and independent bond was issued for each new term of office. That, however, is not the Stevens' scenario. Stevens was appointed to one open-ended term that lasted seven years (1997-2004). Under the terms of the bond—to which both Stevens and TOCIC agreed—it was for the penal sum of $300,000.00 "during the term aforesaid" and the only term mentioned in the bond was "indefinite." Based upon the precise language of the Stevens' bond, we cannot hold its amount doubled in the second year and continued to grow by $300,000.00 each year thereafter with the payment of the same annual premium. In applying the directives concerning contractual interpretation as set forth in *Elmore,* we hold there was no need in the present case to resort to extrinsic evidence because of the intention of the parties as stated in the bond, the subject matter of the bond, the situation of the parties and the conditions under which the bond was written. It was only by considering extrinsic evidence—particularly the renewal notices

forwarded to the City by the insurance agency, not the surety, *after* the bond had been executed—that the trial court perceived an ambiguity in the bond terms.

We disagree with the trial court's conclusion that the City thought it was buying $300,000.00 of coverage for each successive year of Stevens' service as clerk. That may well have been the City's wish and desire after the losses were revealed, but there was no credible evidence they bargained for such language on the relevant date—October 1, 1997. Further, there was specific testimony from Thompson that TOCIC would not have written such a bond, and from Schneider that TOCIC intended to limit its liability to $300,000.00 for the life of the bond. We think it disingenuous that the City would expect its coverage to double, triple, quadruple, etc. while it paid the same annual premium. The City could not reasonably expect any surety to take that sort of risk for the same return.

We are unconvinced the annual invoices, even though they were coupled with Surety Bond Renewal Notices generated by TOCIC, lead Fritz to believe the City was purchasing $300,000.00 in coverage per year. He may have *assumed* that, but he never questioned nor confirmed that fact when a change in the bond could have been made. Gooch testified that as a result of this experience, the City now buys a one-year surety bond for the city clerk from a different surety each year. The City could have instituted this practice in 1998 and avoided the conundrum identified in *Middlesboro*—that, "if the employee has defaulted to the limit of liability under the original bond during the first year, the second year's renewal premium buys nothing." *Middlesboro,* 211 S.W.2d at 775.

Our view today is consistent with *Brulatour v. Aetna Casualty & Surety Co*., 80 F.2d 834, 836 (2d Cir. 1936), which cites several authorities supporting the view that irrespective of a company sending annual "renewal premiums," there is but one single contract when a bond is for an indefinite term. As stated in *Brulatour*,

> [t]he authorities support the appellant's claims. *Leonard v. Aetna Casualty & Surety Company* (C.C.A.4, Nov. 12, 1935) 80 F.(2d) 205, *Fourth & First Bank & Trust Co. v. Fidelity & Deposit Co. of Maryland*, 153 Tenn. 176, 281 S.W. 785, 45 A.L.R. 610, and *National Bank of North Hudson v. National Surety Co*., 105 N.J. Law, 330, 144 A. 576, illustrate the rule that, where the bond is for an indefinite term, the date it begins to run being the only date given, the fact that the premiums were paid annually does not make the relation a series of separate yearly contracts. *Russeks Fifth Ave., Inc., v. Aetna Casualty & Surety Co*., 239 App.Div. 913, 265 N.Y.S. 953 (First Dept. 1933), construed a bond similar to that before us as continuous and providing only noncumulative coverage. The bond there omitted 'in consideration of an annual premium,' but this does not lessen the weight of its authority, since this recital is contained in the bonds construed in the cases previously cited and was held to be of no effect. *See, also, State ex rel. Freeling v. New Amsterdam Casualty Co.*, 110 Okl. 23, 236 P. 603, 42 A.L.R. 829, and *Park Falls State Bank v. Fidelity & Deposit Co*., 206 Wis. 413, 240 N.W. 154, where the bond was held continuous and the liability thereon single against a contention that the guaranty was annually severable into separate contracts. The cases resulting differently were based on different facts.

From our reading of the bond, TOCIC was entitled to summary judgment as a matter of law. On October 1, 1997, the City and TOCIC bargained for issuance of a single surety bond that would commence on October 1, 1997, and

continue in effect for an indefinite period of time inclusive of however long Stevens remained City Clerk. If the City incurred losses during Stevens' term as City Clerk, TOCIC would be liable for "an aggregate and non-cumulative penal sum" of $300,000.00—meaning TOCIC's maximum exposure would be $300,000.00 regardless of when the loss occurred. In return for a maximum of $300,000.00 in coverage, the City paid an annual premium that remained constant.

WHEREFORE, the orders of the Webster Circuit Court finding for the City of Providence are hereby REVERSED and the matter is remanded to the circuit court for entry of an order consistent with this Opinion. In light of our result, the other issues raised by TOCIC on appeal are deemed moot and will not be addressed.

ALL CONCUR.

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