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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001586-MR

ARETE VENTURES, INC. APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00480

UNIVERSITY OF KENTUCKY APPELLEE

AND

NO. 2016-CA-001592-MR

AUTO-OWNERS INSURANCE COMPANY APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00480

UNIVERSITY OF KENTUCKY APPELLEE

AND

NO. 2016-CA-001628-MR

UNIVERSITY OF KENTUCKY CROSS-APPELLANT

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00480

AUTO-OWNERS INSURANCE
COMPANY AND ARETE
VENTURES, INC. CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: Two consolidated appeals and a cross-appeal were brought to this Court from a judgment of the Franklin Circuit Court entered after a trial without a jury. The judgment finds Arete Ventures, Inc. liable to the University of Kentucky for breaching Arete's and UK's contract to construct an equine isolation barn; the judgment also finds Auto-Owners Insurance Company liable to UK for breaching its performance bond incorporating Arete's construction contract and

assuring Arete would perform according to the construction contract's terms. Arete and Auto-Owners present this Court with a variety of arguments that the judgment is unsound.

On cross-appeal, the University challenges the trial court's failure to award pre-judgment interest and its suspension of post-judgment interest for approximately ten months following the judgment.

After thorough review, and following oral argument, we affirm the trial court's judgment finding Arete and Auto-Owners liable to UK. However, we find that the trial court erred as a matter of law by failing to award pre-judgment interest and by suspending the accrual of post-judgment interest.

BACKGROUND

As part of its equine research program, UK needed a facility to quarantine diseased horses (the "Barn"). The design called for: (1) a poured, concrete foundation; (2) steel, reinforced floor slabs; (3) watertight walls made from concrete masonry units reinforced with rebar – vertically, and horizontally laid; (4) wood roof trusses; and (5) twelve horse stalls. After the site was selected and before construction commenced, UK prepared the building pad and retained a geotechnical firm to test the soil to assure proper compaction. Once the site was prepared, Arete began construction pursuant to the design and in accordance with a construction contract between Arete and UK dated September 24, 2007.

Under the contract, Arete was to receive $779,000 for the structure itself and an additional $40,607 for an alternative floor design, for a total contract price of $819,607. As required by the Kentucky Model Procurement Code, KRS[1] 45A.005 *et seq*., Arete obtained performance bonds from two sureties – Auto-Owners for $779,000 and CNA Surety Insurance Company for $40,607. The performance bonds specifically incorporated the construction contract and covered defective work and guaranteed construction in accordance with that incorporated contract and the design.

Construction began October 29, 2007, and Arete completed the Barn in 2008. The contract required Arete to reinforce the walls with vertical and horizontal rebar to prevent cracking. Although unknown during or at the completion of construction, it is now uncontroverted that Arete's subcontractor responsible for that rebar reinforcement failed to install the rebar in accordance with the construction contract or industry standards.

UK conducted a warranty walk-through in 2009 and noticed cracking in the walls. By the time UK discovered the damage, Arete was out of business. However, Arete acknowledged the cracks were its responsibility and attempted to repair them. The attempted repairs were unsuccessful. This prompted UK to investigate the cause of the cracking. Investigators hired by UK concluded the

[1] Kentucky Revised Statutes.

walls were defectively constructed. Defects included runs of rebar that were not lapped and tied together, missing grout that should have filled the cavities of certain blocks or cells, misaligned rebar, and other errors in construction that compromised the stability of the walls.

UK submitted a claim to Auto-Owners and, in accordance with the bond, demanded that Auto-Owners repair the defective walls. Auto-Owners refused, asserting that UK had the opportunity to inspect and prevent the construction defects, failed to take advantage of that opportunity, and paid Arete the full amount of the construction contract. Auto-Owners took the position that its bond was thereafter an indemnity bond, limiting its obligation to reimburse UK only after it paid for necessary remediation.

Pursuant to another provision of the bond, UK engaged another contractor for remediation work. UK claimed total remediation costs of $629,561.93. UK then submitted a second claim to Auto-Owners requesting reimbursement, but Auto-Owners never satisfied that claim.

PROCEDURAL HISTORY

Auto-Owners brought a declaratory judgment action against UK seeking a ruling that it had no liability under the bond, later amending its complaint to include claims for money damages against UK for alleged negligence, fraud, and breach of implied warranties. UK counterclaimed, asserting breach of the

performance bond, as well as bad faith in refusing to take over the project despite admitting Arete's work was defective. Although Arete was no longer in business, it intervened in the case. Arete sought a declaratory judgment on its liability to UK, asserting a third-party complaint against the masonry subcontractor. UK cross-claimed against Arete for breach of contract, building code violations, and negligent construction and supervision.

The trial court held a twelve-day bench trial and, on November 12, 2015, entered thorough and comprehensive Findings of Fact, Conclusions of Law, and Judgment. Relevant to this appeal, the trial court's judgment stated as follows:

(1) "There was no evidence that UK was negligent in preparing the pad." (Judgment, Findings of Fact at ¶ 12).

(2) "The evidence showed that the design contained adequate details for installing the vertical rebar." (*Id.* at ¶ 27). "[T]here was uncontroverted evidence that the design was adequate." (Judgment, Conclusions of Law at ¶ 36).

(3) UK's expert "testified that the masonry subcontractor . . . incorrectly installed the vertical reinforcement in the walls [and] that the block was also placed during the winter without the required cold weather protection." (Judgment, Findings of Fact at ¶ 30).

(4) "Arete . . . acknowledged that the horizontal cracks were its responsibility." (*Id.* at ¶ 31).

(5) "The Court was persuaded by [expert] opinion that the failure to lap rebar and fully grout all of the cells resulted in discontinuous reinforcement, lack of sufficient strength to resist out-of-plane loads, and was a substantial factor in causing the horizontal wall cracks [because UK's expert] testified that properly installed vertical reinforcement would have prevented the horizontal cracks [and Auto-Owners' expert] testified that he did not think that the horizontal cracking would have occurred if the [re]bars had been continuous." (*Id.* at ¶ 38).

(6) Auto-Owners' expert "determined that the walls were not constructed according to [the] design or the masonry standards referenced in the KBC [Kentucky Building Code;] . . . that the rebar was not placed as intended or protected from cold weather. He concluded that had the reinforcing been placed as described and intended with the masonry standard, among other things, the majority of the cracks would have been prevented." (*Id.* at ¶ 52).

(7) "UK has met its burden of proving each element [of its cause of action for breach of contract against Arete] by a preponderance of the evidence." (Judgment, Conclusions of Law at ¶ 1).

(8) As to the element of causation, the trial court said: "Consultants retained by Arete's surety, Auto-Owners . . . , also determined that the horizontal cracks were serious defects and resulted from the lack of continuous vertical reinforcement." (*Id.* at ¶ 6).

(9) Regarding the bond claim, the trial court said: "UK must prove the existence of a bond and damages flowing from the breach. . . . UK has met its burden." (*Id.* at ¶ 10).

(10) "The evidence shows that [Auto-Owners] breached the Bond." More specifically: "The evidence showed that (a) Arete defaulted; (b) UK terminated the [construction c]ontract; (c) UK exercised its option to demand that [Auto-Owners] remediate the defects; and (d) [Auto-Owners] refused." (*Id.* at ¶ 13).

(11) "The [construction c]ontract, which imposed specific obligations on the surety [Auto-Owners], was still incorporated in the Bond. . . . [Auto-Owners] thus agreed to be bound by the Contract although it did not sign it." (*Id.* at ¶ 14).

(12) Auto-Owners "took the position that it was not obligated to pay UK until it remediated the Barn [defects] itself. The evidence showed that UK submitted another bond claim . . . seeking reimbursement of its remediation costs and [Auto-owners] rejected the claim. Therefore, [Auto-Owners] breached by refusing to neither [sic] remediating nor paying for remediation." (*Id.* at ¶ 16).

(13) The construction contract provided that "UK had the option to correct the work or repair damages and 'the cost and expense incurred in such event shall be paid by or be recoverable from the General Contractor [Arete] or the surety [Auto-Owners].'" (*Id.* at ¶ 21).

(14) "UK incurred total remediation costs of $629,561.93." (*Id.* at ¶ 23).

(15) "[I]t was reasonably foreseeable that if Arete failed to provide [contract and code compliant, and industry standard] reinforcement [of the Barn's walls], there would be damages flowing from it, including the cost of remedying the defect and giving UK the non-defective, code-compliant Barn it bargained

and paid for. . . . UK has proved that its damages flowed from the breach." (*Id.* at ¶ 28).

(16) "Arete and [Auto-Owners] asserted soil swell caused the cracks in the Barn" walls but the assertion "was not supported by [UK's expert's soil] swell test results, the test results obtained by [Auto-Owners'] experts, and the crack patterns." (Judgment, Findings of Fact at ¶ 35). "Notably, [UK's expert's] test results [regarding soil swell] were consistent with those of [Auto-Owners'] geotechnical engineering expert . . . ." (Judgment, Conclusions of Law at ¶ 30).

(17) UK's expert's "analysis proved that soil movement and/or pressure did not cause damage to the wall and did not cause the horizontal cracks. [Auto-Owners'] structural engineer . . . offered no rebuttal and acknowledged [UK's expert's] method was state-of-the-art. There is thus a preponderance of the evidence showing that soil swell was not the cause of the horizontal cracks." (*Id.* at ¶ 31).

(18) Auto-Owners argued that it "should be discharged completely [from its obligation under the Bond] because UK paid Arete without requiring site observations, inspections, or shop drawings of the wall construction [and the trial court reiterated its ruling]

that the claims . . . that UK harmed [Auto-Owners and Arete] by not properly inspecting the construction as it progressed and making accompanying payments are unfounded as those provisions in the [construction c]ontract were solely for the benefit of UK and not mandatory." (*Id.* at ¶ 37).

(19) Citing *Henderson v. Phoenix Ins. Co.*, 233 Ky. 217, 25 S.W.2d 359, 362 (1930), the trial court ruled as a matter of law, that UK's "[m]ere inaction . . . will not discharge the surety." (*Id.* at ¶ 40).

(20) Furthermore, the trial court found as fact "that the required site observations and inspections were performed" albeit by "required code officials[.]" (*Id.* at ¶ 41).

(21) Additionally, the construction contract itself expressly said the inspection provisions would not have the effect of "reliev[ing] the General Contractor [Arete] from any responsibility for the Work assigned to it . . . ." (*Id.* at ¶ 40 n.3).

(22) "The [construction c]ontract expressly provides for recovery of attorney fees against both the general contractor and the surety. . . . UK is entitled to an attorney-fee award against Arete and [Auto-Owners]." (*Id.* at ¶ 54).

(23) "[T]he amount of an attorney-fee award is a matter entrusted to the discretion of the trial court . . . ." (*Id.* at ¶ 55 (quoting *A & A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 514 (Ky. App. 1999))).

(24) "The evidence shows that UK incurred attorney fees of $983,430.71 as of October 31, 2014, which also includes expert fees and court costs. . . . However, the affidavit is not sufficient for the Court to award fees. A more in[-]depth affidavit showing each bill is necessary." (*Id.* at ¶ 56).

(25) Auto-Owners "argues that UK's recovery of attorney fees cannot exceed the Bond's penal sum, which is $816,983.50, as amended." (*Id.* at ¶ 57).

(26) However, unlike "fiduciary bonds under KRS 62.070[,]" that are "limited to the amount of the penalty fixed in the bond[,]" "the construction bond statute, KRS 45A.190, includes no such limitation[. Therefore, Auto-Owners' cumulative] liability is not capped" at the Bond's penal amount. (*Id.* at ¶ 58).

(27) "UK had the express right to make corrections [to Arete's defective construction] and to '***recover all amounts*** for such corrections, ***including costs and attorney's fees***, from the General

Contractor or ***surety***.'" (*Id.* at ¶ 59 (quoting Art. 23.3 of the construction contract) (emphasis in judgment)).

(28) "'When the damages are "liquidated," prejudgment interest follows as a matter of [course].' *Nucor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991). . . . UK incurred remediation costs totaling $629,561.93, recovery of which were expressly provided by the [construction c]ontract." (*Id.* at ¶ 61).

(29) However, "the Court concludes that the equities weigh in favor of not awarding pre-judgment interest to UK under the facts of this case." (*Id.* at ¶ 62).

(30) "A judgment shall bear post-judgment interest of twelve percent (12%) compounded annually from its date. KRS 360.040" (*Id.* at ¶ 63).

(31) As is relevant to this appeal, the Judgment then stated:

1. JUDGMENT shall be entered in favor of the University of Kentucky, which shall recover from Arete Ventures, Inc. and Auto-Owners Insurance Company, jointly and severally, (a) MONEY DAMAGES OF $629,561.93; with POST-JUDGMENT INTEREST at the rate of twelve percent (12%)

compounded annually, from the date of entry of this Judgment until paid pursuant to KRS 360.040.

2. The University of Kentucky, as the prevailing party, is further awarded ATTORNEY FEES and COSTS, which will be determined following the filing of a more detailed invoice outlining all costs and expenses . . . .

. . . .

4. Jurisdiction is retained to enter such further orders as the law may allow, including supplemental judgments . . . .

This order is final and appealable and there is no just cause for delay.

Auto-Owners filed a timely motion to amend the judgment, after which additional procedural steps were undertaken by the parties and the trial court culminating in an Opinion and Order dated September 21, 2016. Auto-Owners' motion to amend the judgment was denied.

However, the trial court's order addressed two matters that are now issues before this Court. First, the court fixed the award of attorney fees in favor of UK at $873,630.68 and awarded UK costs totaling $9,158.60. Second, the trial court ruled that:

> [i]n the interest of fairness, and due to the time required by both the parties and the Court to render a final judgment

> on all of the pending motions, the Court hereby GRANTS in part Plaintiff Auto Owners Insurance Company and Defendant Arete Venture's Motions to Suspend the Accumulation of Post-Judgment Interest and AMENDS the effective date of the accrual of 12% post-judgment interest to the date of this Order.

THE ARGUMENTS

Arete argues: (1) the trial court's factual findings pertaining to the causation of the wall cracks in the Barn are erroneous; (2) the trial court abused its discretion in awarding attorney fees: (a) because Arete did not have an opportunity to challenge the reasonableness of the charges, and (b) because the trial court awarded UK fees not attributable to pursuing the claim against Arete. We find no merit in these arguments.

Auto-Owners argues: (1) a bond obligee is barred from collecting on a construction performance bond when it abandons quality control measures and oversight of the construction project, thereby permitting defective performance of the construction contract by the contractor/principal under the bond; (2) the trial court erred as a matter of law by awarding UK attorney fees: (a) greater than the penal sum stated in the Bond, and (b) contrary to the terms of the construction contract. We find no merit in these arguments.

UK argues the trial court erred as a matter of law: (1) by denying pre-judgment interest on the liquidated damages awarded; and (2) by suspending post-judgment interest from the date of the judgment, November 12, 2015, until denial

of Auto-Owners' motion to amend the judgment, September 21, 2016. We find merit in both arguments.

STANDARD OF REVIEW

When a trial court holds a bench trial and serves as the finder of fact, those findings of fact shall not be set aside unless clearly erroneous. CR[2] 52.01; *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Findings of fact are clearly erroneous if they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Evidence is substantial if, "when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable [people]." *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999). Due regard is given to the trial judge's opportunity to consider the credibility of the witnesses. CR 52.01; *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982). Even if this Court would have reached a contrary conclusion, we will not disturb the trial court's findings that are supported by substantial evidence.

The trial court's conclusions of law are subject to an independent *de novo* review. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

[2] Kentucky Rules of Civil Procedure.

ANALYSIS

Arete's first argument centers on the fact question of causation. If there was substantial evidence that Arete's breach caused the Barn's walls to crack, we cannot reverse the trial court's finding to that effect. We conclude such substantial evidence is in the record. We have described that evidence in our earlier recitation of relevant findings by the trial court.

Arete attempts here, as it attempted before the trial court, to create an issue by setting up a straw-man argument. Arete argues that its breach cannot be the cause of the cracking because it would have taken a 90-mile-per-hour wind to crack the unreinforced walls. Based on this record, that necessarily leaves only one cause, says Arete – UK improperly compacted the pad upon which it defectively constructed the walls. There are several reasons we are not persuaded by this argument.

First, the argument lacks the support of any substantial evidence as nothing in the record indicates UK failed to properly prepare the pad. Second, the evidence was actually to the contrary, that "[t]he swell of the soil supporting the Barn was only about one-half (1/2) of an inch and the swell pressure . . . was not enough to lift it." (Judgment, Conclusions of Law at ¶ 30). That conclusion by the trial court is supported by substantial evidence. Neither Arete nor Auto-Owners

presented evidence that the soil swell would have caused the cracks even if Arete had properly reinforced the walls according to the design and the contract.

Third, Arete's analysis fails to apply the proper rule for making the causal connection between a contract breach and the damages claimed. The causal link between breach and damages is the factfinder's conclusion that it was reasonably foreseeable at the time of making the contract that a breach will result in the damages claimed. As support for this principle, the trial court cited *Bank of Louisville Royal v. Sims*, where it is said that, "[a]s in other cases of breach of contract, 'proximately caused' damages, whether direct or consequential, would be those which could be reasonably foreseeable by the parties as the natural and probable result of the breach." 435 S.W.2d 57, 58 (Ky. 1968).

More recently, the Supreme Court has reiterated the jurisprudential evolution here, stating that the causal connection element is comprised of two elements:

> Cause-in-fact and legal or consequential causation. Cause-in-fact involves the factual chain of events leading to the injury; whereas, consequential causation concerns the concepts of foreseeability and the public policy consideration on limiting the scope of responsibility for damages. In Kentucky, the cause-in-fact component has been redefined as a "substantial factor" element as expressed in Restatement (Second) of Torts § 431. The scope of duty also includes a foreseeability component involving whether the risk of injury was reasonably foreseeable.

Gonzalez v. Johnson, 581 S.W.3d 529, 532 (Ky. 2019) (quoting *Lewis v. B & R Corporation*, 56 S.W.3d 432, 437 (Ky. App. 2001) (internal footnotes omitted)).

Where the rebar was not lapped and connected there was no vertical reinforcement, allowing the walls to "hinge" vertically when affected by lateral or out-of-plane force. Cracking of the wall – whether caused by the wind or a half-inch soil swell or the kick of a horse – was reasonably foreseeable as the natural and probable result of Arete's breach. The contract Arete agreed to perform, as well as the Kentucky Building Code, required Arete to provide vertical reinforcement according to the masonry industry standards. It failed to do so. UK was entitled to recover the cost of remediating that failure.

Auto-Owners claims UK is barred from collecting on the bond because it unilaterally chose to abandon all quality control measures and oversight of Arete's construction before paying the full consideration for the project. For the same reasons stated by the trial court, we disagree.

The terms of the construction contract are clear that the inspection provisions would not have the effect of "reliev[ing] the General Contractor [Arete] from any responsibility for the Work assigned to it . . . ." Based on substantial evidence, the trial court found that various building code officials performed the same type of inspections that UK would have performed. Furthermore, the trial court found those inspections referenced in the construction contract were for the

benefit and protection of UK and not to protect the surety from the negligence of its principal.

The first Kentucky authority Auto-Owners cites for this argument is *Henderson v. Phoenix Ins. Co*., 233 Ky. 217, 25 S.W.2d 359 (1930). It is the authority the trial court relied upon, too. We find the trial court's understanding of the case more in line with our own. The trial court quoted *Henderson* for the proposition that UK's "[m]ere inaction . . . will not discharge the surety." *Id.* at 362. We add this applicable gem: "Mere indulgence or forbearance and failure to notify the surety of a possibility or even a probability of default on the part of the principal do not release him." *Id.* at 361-62. We also point out that *Henderson* says, "It is the surety's business [Auto-Owners' business] to see that the principal [Arete] performs the duty which he [Auto-Owners] has guaranteed." *Id.* at 362 (quoted in *American Druggists' Ins. Co. v. Nat. Resources and Environmental Protection Cabinet*, 687 S.W.2d 555, 557 (Ky. App. 1985)). This direct quote is more to the point of this issue than the interpretation Auto-Owners urges.

Contrary to these principles, Auto-Owners asserts that UK accepted the defects in the Barn walls by failing to inspect the construction and require shop drawings. This, Auto-Owners claims, constitutes a waiver of any claim against the surety based on the principal's defective construction. Auto-Owners relies on *McClain v. Coleman*, which states:

> if the creditor does any act which, in contemplation of law, alters the surety's liability, increases his risk, or deprives him, even for a moment, of the right to pay the debt and assume the position of the creditor, or of his right to seek indemnity, the surety is thereby discharged[.]

208 Ky. 163, 270 S.W. 736, 739 (1925) (citation omitted).

Auto-Owners misinterprets *McClain*. The salient portion of this quote is found in the second half. To justify Auto-Owners' discharge, it would not have been enough for the trial court to have found UK's act altered the surety's position regarding liability, risk, or right to pay the debt, it would have been necessary to find UK's act also prevented the surety from assuming the position of UK in order to seek indemnity from the principal. There is no evidence that UK did so.

According to *National Union Indemnity Company v. Standard Oil Company*, the general rule as to surety liability is as follows:

> [A] creditor is under no obligation to be actively diligent in pursuit of his principal debtor. He may forbear the prosecution of his claim, and remain inactive, without impairing his right to resort to the surety, particularly when his forbearance amounts to no more than a mere inaction or passivity. Therefore, the mere neglect of a creditor to sue or to attempt to collect a debt at the time it falls due does not discharge the sureties, although the principal had ample means at the time, and subsequently became insolvent. Thus a gratuitous indulgence of the principal, whether extended at his request or without it, and whether it is yielded by the creditor from sympathy and from an inclination to favor him, or is the result of mere passiveness, will not operate to discharge the surety.

262 Ky. 392, 90 S.W.2d 375, 377 (1936) (citation omitted). Nothing suggests UK's failure to inspect or demand shop drawings affected Auto-Owners' liability under the bond, nor did such inaction affect Auto-Owners' ability to seek indemnity from Arete.

Both Arete and Auto-Owners challenge the award of attorney fees to UK. We address the various arguments separately.

Nothing in this case caps an award of attorney fees (whether the award is considered separately or in combination with the award of compensatory damages) at the penal sum stated in the bond of $816,983.50.

While no Kentucky court has yet to consider this issue, it is simply a matter of statutory and contract interpretation. Performance bonds are addressed as part of the set of statutes comprising the Kentucky Model Procurement Code. When interpreting them, courts "should not add or subtract from the statute, nor should we interpret the statute to provide an absurd result." *Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004). The trial court properly zeroed in on KRS 45A.190(2), which requires performance bonds in construction contracts involving a cost greater than $40,000. The statute reads as follows:

> When a construction contract is awarded in an amount in excess of forty thousand dollars ($40,000), the following bonds shall be furnished to the Commonwealth, and shall be binding on the parties upon the award of the contract:

> (a) A performance bond satisfactory to the Commonwealth executed by a surety company authorized to do business in this Commonwealth, or otherwise supplied, satisfactory to the Commonwealth, in an amount equal to one hundred percent (100%) of the contract price as it may be increased; and
>
> (b) A payment bond satisfactory to the Commonwealth executed by a surety company authorized to do business in the Commonwealth, or otherwise supplied, satisfactory to the Commonwealth, for the protection of all persons supplying labor and material to the contractor or his subcontractors, for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent (100%) of the original contract price.

KRS 45A.190(2). The legislature declined to include language limiting the surety's liability to *only* the penal sum. If the legislature intended to cap recovery, it would have included the cap in the statute. The trial court even pointed out that the legislature *did* put a cap on recovery for fiduciary bonds, illustrating its ability to decide when it desired caps and when it did not. *See* KRS 62.070. Because KRS 45A.190 does not include language of limitation, we must look elsewhere if we are to be persuaded by the appellants. What does the bond in this case say?

The bond under the terms of which Auto-Owners is obligated to UK says Auto-Owners contracted to:

> satisfy all claims and demands incurred under such contract, and shall fully indemnity and save harmless [Arete] from ***all costs*** and damages which it may suffer by reason of failure to do so, ***including attorneys' and consultants' fees***, and shall reimburse and repay [UK] all

> outlay and expenses which [UK] without limitation, may incur in making good any default, then this obligation shall be void, otherwise to remain in full force and effect.

(Emphasis added). This language does not limit the amount of attorney fees in any way. Rather, the language is expansive and comprehensive. Nothing in the bond imposes limits. What about the construction contract to which Auto-Owners became bound when it incorporated that contract into the bond?

"With regard to performance bonds, it has been held that if the contract is incorporated into the bond, the bond and the underlying contract should be read together to determine the intention of the parties as to what and who is covered under the bond." *ABCO-BRAMER, Inc. v. Markel Ins. Co.*, 55 S.W.3d 841, 844 (Ky. App. 2000) (citing *Royal Indemnity Co. v. International Time Recording Co. of New York*, 255 Ky. 823, 75 S.W.2d 527 (1934); *Federal Union Surety Co. v. Commonwealth*, 139 Ky. 92, 129 S.W. 335 (1910); *Blair & Franse Const. Co. v. Allen*, 251 Ky. 366, 65 S.W.2d 78 (1933)). Under Kentucky law, a contract is construed as a whole, and all writings that are part of the agreement are construed together. *Id.* at 845 (citing *Cook United, Inc. v. Waits*, 512 S.W.2d 493 (Ky. 1974)). In this case, the penal amount of the bond will cap Auto-Owners' liability at the penal amount only for damages attributable to defective construction by the principal, Arete, but there is additional liability for the full amount of attorney fees and costs awarded to the obligee, UK. We see no error of law here.

Arete argues that the trial court erred by reviewing the attorney fees *in camera*. Arete's argument relies heavily on the unpublished Kentucky Court of Appeals case – *LeMaster v. Appletree Plaza Ltd. Partnership*, Nos. 2003-CA-002773-MR and 2004-CA-000033-MR, 2005 WL 327103 (Ky. App. Feb. 11, 2005). In that case, this Court determined that attorney fees, reviewed *in camera*, deny the opposing party the ability to challenge the amount. However, this case differs from *LeMaster*. In *LeMaster*, the opposing party was only privy to a general summary. *Id*. at *2. The detailed billing records were not provided to the opposing party, only the court. *Id*. In this case, UK served multiple affidavits as early as July 2014. Auto-Owners and Arete filed briefs on the fee issue, and the trial court held a hearing in December 2015. More briefs were filed, and the trial court held a second hearing in July 2016. Therefore, Auto-Owners and Arete had ample opportunity to challenge the amounts UK requested.

Arete also argues that it should not be responsible for attorney fees UK expended in its bond dispute with Auto-Owners. However, the entire litigation process centers on Arete's breach of contract and its failure to properly repair the defects in the facility. Both Arete's and Auto-Owners' claims arise from the same nucleus of facts and are interwoven. Arete's failure to perform its contractual duty is the reason UK incurred any attorney fees.

As the trial court noted, UK was careful not to claim damages that were not directly attributable to Arete's breach, and the trial court was careful to identify UK's attorney fees attributable to its bad faith claim against Auto-Owners. Having examined the record, we see no abuse of discretion in the trial court's determination of attorney fees and costs.

This leaves UK's cross-appeal seeking pre-judgment interest from July 5, 2012, when it made the final payment for remediating Arete's defective construction, until the entry of judgment. The trial court denied pre-judgment interest. UK claims this is error because its damages were liquidated. "[P]rejudgment interest is awarded as a matter of right on a liquidated demand . . . ." *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005). When damages are liquidated, pre-judgment interest follows as a matter of course. *Nucor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136, 141, 144 (Ky. 1991). The question is, "Was this amount liquidated?"

In the judgment, the trial court did not rule whether UK's damages were liquidated. However, in its September 21, 2016 Opinion and Order denying Auto-Owners' motion to amend the judgment (among other things), the trial court said, "The University of Kentucky's damage claim was for a certain, *liquidated* amount, the cost of remediation . . . ." (Emphasis added). We agree.

"A 'liquidated amount' is one which can be determined by simple calculation, can be determined with reasonable certainty, can be determined pursuant to fixed rules of evidence or can be determined by well-established market values." *Hazel Enterprises, LLC v. Ray*, 510 S.W.3d 840, 843 (Ky. App. 2017) (citations omitted). Damages are liquidated if:

> susceptible of being made certain by mathematical calculation from known factors. . . . By contrast, "unliquidated damages" . . . cannot be determined by a fixed formula so they are left to the discretion of the judge or jury. In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict.

22 Am.Jur. 2d Damages § 489 (2007) (citations omitted). Although Arete contested liability, there was no evidence to contradict the cost of remediating Arete's breach. Such uncontradicted proof as invoices from the remediating contractor constitute factors that make the calculation of damages a matter of addition. Arete had received and applied to its use that calculable amount, and more. "It is self-evidence [sic] that equity and justice demand that one who uses money or property of another for his own benefit, particularly in a business enterprise, should at least pay interest for its use in the absence of some agreement to the contrary." *Curtis v. Campbell*, 336 S.W.2d 355, 361 (Ky. 1960).

We conclude the judgment, to the extent it denied pre-judgment interest at the legal rate, must be reversed.

UK also appeals the trial court's suspension of post-judgment interest for approximately ten months after entry of the final judgment entered on November 12, 2015. As support for its decision, the trial court expressed a belief it was unfair to have delayed ruling on Auto-Owners' post-judgment motions. The court claimed a proper use of its discretion, "[i]n the interest of fairness," to alter the final judgment date to the date it denied those post-judgment motions. We conclude that, in this case, the scope of the court's discretion was not sufficiently broad to allow suspension of post-judgment interest.

Although "KRS 360.040 grants a prevailing party the right to recover post-judgment interest on a judgment . . . from its date[, t]he statute has been interpreted as [being subject to] factors [that] make an award of interest inequitable." *Strunk v. Lawson*, 447 S.W.3d 641, 650 (Ky. App. 2013) (citing *Courtenay v. Wilhoit*, 655 S.W.2d 41, 42 (Ky. App. 1983) (internal quotation marks omitted)). The trial court implied such factors are present, but we disagree.

Cases in which equity justified ignoring or overriding KRS 360.040 often involve special circumstances and usually involve special proceedings. For example, such equities might arise in the dissolution of a marriage. *See Courtenay*, 655 S.W.2d at 42 (ex-wife not entitled to post-judgment interest on decree incorporating ex-husband's agreement to make periodic payments toward a fixed sum until ex-husband failed to make such periodic payment); *see also Ensor v.*

Ensor, 431 S.W.3d 462, 477 (Ky. App. 2013) ("the cases . . . refer only to money awards containing deferred payments for portions allocated to the non-paying spouse"). Some involve foreclosures in which substantial time passed after the judgment when judgment debtor tendered payment to judgment creditor and before the trial court's approval of sale and judgment. *Hazel Enterprises*, 510 S.W.3d at 845 ("equity demands that [judgment creditor] should not benefit from a fifteen-month delay for which it was solely responsible after rejecting [judgment debtor's] attempt at full compliance").

The purpose of post-judgment interest is "to place [judgments] upon the same footing as other liquidated demands and thus insure compensation to the creditor for the loss of the use of his money during the period in which he was wrongfully deprived of it." *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 583 (Ky. 2009) (emphasis and citation omitted). The trial court concluded that the appellants in this case deprived UK of money to which it was entitled. Upon entry of the November 12, 2015 judgment, appellants themselves could have suspended the accrual of post-judgment interest by paying the damages amount to UK.

Furthermore, there was no change in the compensatory damages award between the November 12, 2015 final judgment and the September 21, 2016 Opinion and Order suspending post-judgment interest and determining previously awarded attorney fees. We must look at the difference in the two rulings. "If the

differences are only minor, interest will begin accruing upon entry of the original judgment." *Strunk*, 447 S.W.3d at 650 (citing *Stephens v. Stephens*, 300 Ky. 769, 190 S.W.2d 327 (1945)). In *Strunk*, "[n]one of the modifications reflected in the amended judgment changed the thrust of the original judgment. The result was unchanged and costs were still awarded to the [prevailing party]. Under *Stephens*, post-judgment interest was properly awarded from the original judgment date[.]" *Id.* The same must be said here.

The bottom line is this: KRS 360.040 "grants the prevailing party the right to recover post-judgment interest on a judgment at twelve percent (12%) interest compounded annually from its date. KRS 360.040. If there are no factors making it inequitable to require interest, it will be allowed, . . . and the interest must be at the rate set out in the statute."[3] *Chesley v. Abbott*, 524 S.W.3d 471, 489 (Ky. App. 2017), *review denied* (Aug. 16, 2017) (citing *Courtenay*, 655 S.W.2d at 42 (internal quotation marks omitted)). We see no factors making it inequitable to comply with KRS 360.040 and require interest on the judgment to accrue between the Judgment and the Opinion and Order.

[3] The statute was amended in 2017, reducing the post-judgment interest rate to six percent (6%) per annum. 2017 Kentucky Laws Ch. 17, § 1 (HB 223).

CONCLUSION

For the foregoing reasons, this Court affirms the Franklin Circuit Court in part, reverses in part, and remands for an order awarding UK pre-judgment and post-judgment interest consistent with this opinion.

ALL CONCUR.

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