Missouri Court of Appeals

Southern District

Division One

RICHARD DODSON, CLINT SINGLETON, JAMES STRICKLIN, and WILLIAM CARVER, Plaintiffs - Appellants, vs. PEMISCOT COUNTY MEMORIAL HOSPITAL, d/b/a PEMISCOT MEMORIAL HEALTH SYSTEMS, and KERRY L. NOBLE in his individual capacity, Defendants - Respondents.	)	No. SD29227 Opinion filed: December 30, 2009

APPEAL FROM THE CIRCUIT COURT OF PEMISCOT COUNTY

Honorable Fred W. Copeland, Circuit Judge

AFFIRMED

Richard Dodson, Clint Singleton, James Stricklin, and William Carver ("Appellants") appeal a summary judgment entered in favor of Pemiscot Memorial Hospital ("Hospital"). That judgment ruled as a matter of law that Hospital was not

required to pay Appellants the "prevailing wage" pursuant to section 290.210[1] for work Appellants performed for Hospital. Appellants allege Hospital was not entitled to judgment as a matter of law because: 1) under the Prevailing Wage Law ("the Act"), the work performed by Appellants was "construction" work, not "maintenance work;" and 2) a genuine issue of material fact exists as to the employment status of Appellants. Because the trial court rightly categorized the work performed by Appellants as "maintenance work," the Act did not require Hospital to pay Appellants the higher hourly rate required by the Act and its associated regulations ("the prevailing wage"), and we affirm its judgment.

Facts

All parties agree that Hospital is both a "political subdivision" of the State of Missouri and "an institution supported . . . by public funds" -- making it a "public body" within the meaning of section 290.210(6). Hospital owns and operates as "Caruthersville Nursing Center" ("Nursing Center") a nursing home in Caruthersville. Nursing Center had gradually fallen into disrepair and Hospital's board of trustees ("the Board") closed it from 2001 to 2003, using it during that period of time only for storage. In 2003, the Board decided to reopen Nursing Center and authorized that repairs be made to its interior to restore it from its dilapidated condition and make it attractive to prospective residents.

Appellants began work on the south wing of Nursing Center on November 1, 2004, and completed that work on May 5, 2005. That work consisted of:

a) Repainting of all resident rooms, corridors and common areas;

[1] Unless otherwise indicated, all statutory references herein are to RSMo 2000, and all rule references are to Missouri Court Rules (2009).

b) Replacement of sinks, vanities, and lavatories in resident rooms;

c) Replacement of door and window hardware and locks in resident rooms;

d) Replacement of damaged or discolored floor tiles;

e) Replacement of damaged or discolored ceiling tiles; and

f) Replacement of individual air conditioning units in resident rooms.

Appellants also worked on the emergency room portion of Hospital's main facility in Hayti ("the emergency room") from May 15, 2005, to November 15, 2005. That work consisted of:

a) Repainting of the existing walls of the waiting area, registration area, treatment area, and the hallway;

b) Repairing or replacing damaged or discolored floor tiles in the waiting area, registration area, treatment area, and hallway;

c) Removing curtains between treatment bays and replacing them with drywall partitions; and

d) Enlarging the existing nurse station to accommodate the placement of an automated medication dispensing system.

The emergency room continued to function as an emergency room while Appellants worked on it.

After Appellants had completed their work for Hospital, the Missouri Department of Labor and Industrial Relations, Division of Labor Standards ("the Division"), conducted an investigation into whether the work Appellants had performed for Hospital

should have been paid at the prevailing wage.[2] Hospital had compensated Appellants for their work at the rate of $8.00 per hour, a rate significantly below the prevailing wage. *See* 8 C.S.R. 30-3.010; Annual Wage Order No. 11. After its investigation was completed, the Division determined that the work done on Nursing Center was subject to the Act and should have been paid at the prevailing wage.

After this determination had been made, Appellants sued Hospital to recover -- on all of the work they had performed for Hospital -- the difference between what they had actually been paid and the amount they would have received if paid the prevailing wage. Specifically, Appellant Clint Singleton claimed he was underpaid $27,600.07; Appellant James Stricklin claimed he was underpaid $26,273.51; and Appellant William Carver claimed he was underpaid $14,059.33.

In entering its summary judgment in favor of Hospital, the trial court ruled that the work performed by Appellants was not subject to the prevailing wage as a matter of law because it constituted "maintenance work" -- a category of work the Act specifically excludes from the type that must be paid at the prevailing wage. This appeal timely followed.

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[2]

> The Department of Labor and Industrial Relations is required by law to determine prevailing hourly rates of wages to be paid on public works projects throughout Missouri. § 290.250. The statutory definition of prevailing hourly rate of wages is "the wages paid generally, in the locality in which the public works is being performed, to workmen engaged in work of a similar character." § 290.210(5). In making its determinations, the Department must "ascertain and consider the applicable wage rates established by collective bargaining agreements, if any, and the rates that are paid generally within the locality." § 290.260.1.
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> ***Branson R-IV School Dist. v. Labor & Indus. Relations Comm'n***, 888 S.W.2d 717, 723 (Mo. App. S.D. 1994).

Analysis

"The propriety of summary judgment is purely an issue of law." ***Barekman v. City of Republic***, 232 S.W.3d 675, 677 (Mo. App. S.D. 2007). Therefore, this court's review of the trial court's decision to grant summary judgment "is essentially de novo." ***ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.***, 854 S.W.2d 371, 376 (Mo. banc 1993). "Consequently, we do not defer to the trial court's decision to grant summary judgment." ***Barekman***, 232 S.W.3d at 677. "Instead, we use the same criteria the trial court should have employed in initially deciding whether to grant [summary judgment]." ***Id***. "Summary judgment is correct when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." ***Creviston v. Aspen Prod., Inc.***, 168 S.W.3d 700, 703 (Mo. App. S.D. 2005).

"The moving party bears the burden of establishing a right to judgment as a matter of law." ***Huber v. Wells Fargo Home Mortgage Inc.***, 248 S.W.3d 611, 613 (Mo. banc 2008). "Following the moving party's prima facie showing, summary judgment will be granted if the responding party fails to reply with specific facts showing a genuine issue of material fact exists for trial or with a demonstration that judgment as a matter of law is incorrect." ***Id***. at 613-14 (citing Rule 74.04(c)(6)). "A summary judgment may be affirmed under any theory that is supported by the summary judgment record." ***Creviston***, 168 S.W.3d at 703 (citing ***Kesterson v. Wallut***, 157 S.W.3d 675, 679 (Mo. App. W.D. 2004)). "The record is reviewed in the light most favorable to the party against whom judgment was entered and the non-moving party is granted the benefit of all reasonable inferences from the record." ***Creviston***, 168 S.W.3d at 703.

Was the Work Performed by Appellants "Maintenance Work"?

Appellants' first point alleges the trial court erred in granting summary judgment in favor of Hospital because the work Appellants performed was "construction," not "maintenance work" as those terms are used in the Act.[3] The Act was ratified by the Missouri General Assembly in 1957. ***Chester Bross Constr. Co. v. Missouri Dep't of Labor & Indust. Relations Comm'n***, 111 S.W.3d 425, 427 (Mo. App. E.D. 2003). The pertinent prevailing wage portion of the Act reads as follows:

> Not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed [. . .] shall be paid to all workmen employed by or on behalf of any public body *engaged in the construction of public works, exclusive of maintenance work*. Only such workmen as are directly employed by contractors or subcontractors in *actual construction work on the site of the building or construction job* shall be deemed to be employed upon public works.

Section 290.230.1 (emphasis added).[4] The Act contains a definitions section which gives the following meanings to several of the words used in the above section.

> As used in sections 290.210 to 290.340, *unless the context indicates otherwise*:
>
> (1) "**Construction**" includes construction, reconstruction, *improvement*, enlargement, *alteration, painting and decorating, or major repair*.
> . . . .
>
> (4) "**Maintenance work**" means the *repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased*.
> . . . .

[3] Hospital correctly points out that Appellants' first point relied on fails to comply with Rule 84.04(d)(1)(C) in that it does not state the "wherein" and "why" the work should have been classified as "construction." *See* ***Steinmann v. Davenport***, 248 S.W.3d 8, 13 (Mo. App. E.D. 2008). However, the point is not so deficient as to substantially impede our review of the alleged error. In choosing to review a deficient point on its merits, we do not intend to condone an unacceptable indifference many brief writers seem to display toward the rules that govern appellate practice before this court.

[4] As previously indicated, it is undisputed that Hospital is a "public body" within the meaning of section 290.210(6).

> (7) "**Public Works**" means all fixed works constructed for public use or benefit or paid for wholly or in part out of public funds. [. . .]
> . . . .
>
> (8) "**Workmen**" means laborers, workmen and mechanics.

Section 290.210 (italics added) (bolding in original). The word "repair" is not defined in the Act. The potentially applicable dictionary definitions of the verb "repair" are "**1 a :** to restore by replacing a part or putting together what is torn or broken : [. . .] **b :** to restore to a sound or healthy state[.]" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, ELEVENTH EDITION 1055 (11th ed. 2005). Context is important in determining whether acts like "improvement," "alteration," and "painting" -- which could occur in either the constructing of new things or the repair of existing ones -- are interpreted in a way that does not produce an absurd result.

"When contemplating statutory interpretation, our primary responsibility is to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute." ***Chester Bross***, 111 S.W.3d at 427. "Provisions of an entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized." ***St. Louis County v. B.A.P., Inc.***, 25 S.W.3d 629, 631 (Mo. App. E.D. 2000). "It is a settled rule of statutory construction that where general provisions in one part of a statute are inconsistent with specific or particular provisions in another part, the particular provisions must govern." ***State ex rel. City of Kirkwood v. Smith***, 210 S.W.2d 46, 48 (Mo. 1948); ***State ex rel. v. Reynolds***, 229 S.W. 1057, 1058 (Mo. 1921) ("[T]he general provisions of a statute must yield to special provisions where there is a conflict and where the general provisions in one part of the statute are inconsistent with the more specific provisions in another part"). We must also keep in mind that the Act "is intended

to guarantee workers on public projects are paid reasonable wages." ***Chester Bross***, 111 S.W.3d at 427. "Due to the remedial nature of [the Act], we must interpret it broadly so as to accomplish the greatest public good." ***Id***. (citing ***Long v. Interstate Ready-Mix, L.L.C.***, 83 S.W.3d 571, 574 (Mo. App. W.D. 2002)) (brackets in original).

The key issue in this appeal is whether the work Appellants performed for Hospital is considered "maintenance work" as that term is used in the Act. If so, it is a type of work expressly excluded from that required to be paid at the prevailing wage and the trial court correctly entered summary judgment in favor of Hospital. *See* ***State Dep't of Labor & Indus. Relations, Div. of Labor Standards v. Board of Public Utilities of the City of Springfield***, 910 S.W.2d 737, 740 (Mo. App. S.D. 1995) ("§ 290.230 does not require that the prevailing wage be paid for 'construction' work that is 'maintenance work'"). In reviewing prior cases that have addressed whether particular work constituted "maintenance work," it becomes apparent that the resolution of Appellants' first point will require us to discern what the legislature meant when it used the undefined term "facility."

In ***Chester Bross***, *supra*, the Eastern District held that "[m]aintenance work consists of: '(1) work that is repair, not replacement; (2) in[5] an existing facility; and (3) there is no change or increase in the size, type, or extent of the 'existing facility.'" 111 S.W.3d at 427 (quoting ***Board of Public Utilities of the City of Springfield***, 910 S.W.2d at 745). In ***Board of Public Utilities of the City of Springfield***, this district held that "the test to be applied for 'maintenance work' is not the magnitude of the repair; rather, it is

[5] Although the Eastern District repeated our use of the word "in," the actual statutory language is "*of* existing facilities." Section 290.210(4) (emphasis added). While this discrepancy was not an issue in ***Chester Bross*** or ***Board of Public Utilities of the City of Springfield***, the distinction is an important one in the instant case as will hereafter be explained.

whether a change or increase in the size, type, or extent of the existing facility is wrought by the repair." 910 S.W.2d at 744. "The clear inference is that the legislature did not intend that a test for magnitude be used to determine the Act's applicability." ***Id***.

In ***Chester Bross***, the employer was constructing a new highway. 111 S.W.3d at 427. One of its employees, a mechanic, maintained and repaired the machinery his employer used to build the highway. ***Id***. The mechanic's work was performed at the job site. ***Id***. The employer filed a declaratory judgment against the Division, seeking a ruling from the court that the work done by its mechanic was not subject to the Act. ***Id***. at 426. Although a mechanic's maintaining of his employer's equipment would normally be considered "maintenance" under the common understanding of that word, it could not be "maintenance work" as defined by the Act because there was no "existing facility."

> From the record it appears the highway is being constructed rather than being repaired by the workers, and since the highway is being constructed, there can be no "existing facility." Therefore, workers, including the mechanic herein, involved on the site of construction of the highway, by definition, cannot be involved in maintenance work when there is no "existing facility."

Id. at 427-28 (citing section 290.210(4)).

In ***Board of Public Utilities of the City of Springfield***, the Division was seeking a declaratory judgment that the utility was required to pay its contractor the prevailing wage for removing asbestos insulation from around heater pipes. 910 S.W.2d at 742-45. Implicit in the trial court's ruling that such work was "maintenance work" was that the trial court considered the pipes to be the "facility" at issue. ***Id***. at 745-46. In contrast, the Division was arguing that the asbestos insulation itself was the "facility" involved. ***Id***. at 746. The Division's fallback position was that even if the pipes were the facility at issue,

"the work in question changed the type of heater and piping from asbestos insulation covered to something else." ***Id.*** at 746.

This district neither approved nor disapproved the trial court's implicit finding that the heater and pipes were the "facility" at issue but regarded as "specious" the Division's argument that the asbestos itself was a facility. ***Id.*** Assuming a facility was something beyond the asbestos itself, we held "removal of asbestos from around the pipe and heater [did] not 'change' the 'size, type or extent of the existing facility' as would remove this contract from the category of 'maintenance work.'" ***Id.*** (Internal quotations in original). In doing so, we did not resolve "the broad question of whether 'existing facility' means entire building or component parts." ***Id.*** at 745 n.7. Due to the more extensive nature of the work done by Appellants, we must now address that broader question.

In our view, the appropriate definition of "facility" is that used in various administrative regulations -- "a building or part of a building built for a particular purpose."[6] This definition is consistent with Webster's Dictionary which defines "facility" as "something (as a hospital) that is built, installed, or established to serve a particular purpose." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 447 (11th ed. 2008). Giving the word "facility" its ordinary definition produces no absurd results. It allows workers to receive the prevailing wage for work as innocuous as painting when it is done in connection with the construction of new facilities or the expansion of existing ones but excludes it when existing facilities are simply being maintained or refurbished. *See* ***Board v. Eurostyle, Inc.***, 998 S.W.2d 810, 814 (Mo. App. S.D. 1999) ("It is

[6] *See* 1 C.S.R. 20-5.010(2009) ("residential care facility"); 1 C.S.R. 35-1.050 (2009) ("Capitol Building and grounds" as a facility.); See 2 C.S.R. 30-9.010 ("Outdoor housing facility means any structure, building, land or premises, housing or intended to house animals [. . .]); 10 C.S.R. 10-6.200 (2009) ("Hospital means any facility which has an organized medical staff [. . .]).

presumed that the legislature, in enacting a statute, intended a logical result; that it did not intend an unreasonable one"). The definition of facility advocated by the Division in ***Board of Public Utilities of the City of Springfield***, on the other hand, would require us to believe that the legislature intended every wall, every door, every sink, and every toilet to be a "facility" and require public bodies to always pay for their replacement or modification at the prevailing wage -- a result we find unreasonable.

Furthermore, when interpreting a statute, "each word, clause, sentence and section of a statute should be given meaning." ***Missouri Prop. & Cas. Ins. Guar. Ass'n v. Pott Indus.***, 971 S.W.2d 302, 305 (Mo. banc 1998). "The corollary to this rule is that a court should not interpret a statute so as to render some phrases mere surplusage." ***Middleton v. Missouri Dep't of Corr.***, 278 S.W.3d 193, 196 (Mo. banc 2009) (citing ***Spradlin v. City of Fulton***, 982 S.W.2d 255, 262 (Mo. banc 1998)). To consider every wall, door, sink, or toilet to be a "facility" would undermine the legislature's purpose in excluding "maintenance work" from the type of work that must be paid at the prevailing wage.

Assuming the legislature intended the word "facility" to have its usual and ordinary meaning, both Nursing Center and the emergency room on which Appellants were working would be considered "existing facilities." Because there was no change or increase in the size, type, or extent of Nursing Center or the emergency room, the work performed by Appellants constituted "maintenance work" under the Act and the trial court was correct in ruling that such work was not subject to the prevailing wage. Point I is denied.

Appellants' second point alleges summary judgment was inappropriate because a genuine issue of material fact exists as to whether Appellants were the employees of

Hospital's general contractor (Stricklin Brothers Construction Company) or were directly employed by Hospital.[7] Even if we assume the few factual averments Appellants denied in their response to Hospital's summary judgment motion were sufficient to call into question Appellants' employment status, that status would be at issue only if the trial court erred in concluding that the type of work they had performed -- whether as employees or subcontractors -- was not subject to the prevailing wage. Because the court correctly ruled that the work Appellants performed for Hospital was "maintenance work" not subject to the prevailing wage, Appellant's second point is moot.

The judgment of the trial court is affirmed.

Don Burrell, Judge

Bates, P.J. - Concurs

Barney, J. - Concurs

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Division I

[7] To avoid running afoul of the constitutional prohibition against the legislature setting the compensation of employees of public bodies, the Act has long been interpreted to not apply to employees of public bodies. *See* ***City of Joplin v. Industrial Comm'n of Mo.***, 329 S.W.2d 687, 692 (Mo. banc 1959).