

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Larry Renwand, ex rel. State of Ohio

Court of Appeals No. H-09-011

Appellant

Trial Court No. CVH 2008-0689

v.

Board of Huron County
Commissioners, et al.

DECISION AND JUDGMENT

Appellees

Decided: March 19, 2010

* * * * *

Basil W. Mangano and Joseph J. Guarino III, for appellant.

Russell V. Leffler, Huron County Prosecuting Attorney, and
Daivia S. Kasper, Assistant Prosecuting Attorney, for appellees.

Frederick A. Vierow, for amici curiae County Commissioners
Association of Ohio and County Engineers Association of Ohio.

Bethany E. Sanders, for amicus curiae Ohio Council 8, AFSCME,
AFL-CIO.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Huron County Court of Common Pleas that granted summary judgment in favor of appellees, Board of Huron County Commissioners and the Huron County Engineer, on the taxpayer suit filed by appellant, State ex rel. Larry Renwand, seeking to enjoin three bridge construction projects because the work was allegedly awarded in violation of Ohio's competitive bidding laws. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} In September 2007, the Huron County Engineer applied to the Ohio Public Works Commission for funding for projects involving the replacement of five bridges. Three of those bridge projects are the subject of this appeal: the Greenwich East Town Line 79 Road Bridge ("Greenwich Road Bridge"), the Zenobia Road Bridge and the Cook Road Bridge.

{¶ 3} With regard to the three bridge construction projects at issue herein, the Huron County Engineer took steps pursuant to statute to determine whether the work could be done with the engineer's own workforce without going through the process of competitive bidding for the project. Work done "in-house" is referred to as being done by "force account." As defined in R.C. 5543.19(C), "force account" projects are those in which " * * * the county engineer will act as contractor, using labor employed by the engineer using material and equipment either owned by the county or leased or purchased by the county in compliance with sections 307.86 to 307.92 of the Revised Code and

excludes subcontracting any part of such work unless done pursuant to sections 307.86 to 307.92 of the Revised Code."

{¶ 4} The Ohio Revised Code limits the size of a project that can be done by force account by setting a cost threshold of \$100,000 for bridge work. R.C. 5543.19(B) states in relevant part: "In determining whether such construction * * * or repair of bridges or culverts may be undertaken by force account, the county engineer shall first cause to be made an estimate of the cost of such work using the force account project assessment form. When the total estimated cost of the work exceeds one hundred thousand dollars, the board of county commissioners shall invite and receive competitive bids for furnishing all the labor, materials, and equipment necessary to complete the work * * *."

{¶ 5} The record reflects that in December 2007, the Huron County Engineer prepared a Force Account Project Assessment Form for the Greenwich Road Bridge project. The force account bridge project was estimated at \$84,603.16. The estimate included all bridge work to be done by force account by the county engineer's employees and all work to be done by contract in which the county engineer acted as contractor, with the estimated cost for the latter portion to be \$2,000. The Huron County Board of Commissioners awarded the contract for the manufacture and installation of the pre-stressed concrete bridge beams to United Precast, Inc. after advertising for competitive bids pursuant to R.C. 307.86, et seq. All elements of the Greenwich Road project that

were not done by force account were done under contracts competitively bid and awarded by the county commissioners.

{¶ 6} The Zenobia Road Bridge project force account assessment, prepared in February 2007, was estimated at \$82,741.25. The Cook Road project force account assessment was also prepared in 2007 and was estimated at \$69,104.15. As with the Greenwich Road project, both the Zenobia and Cook Road projects assessment forms included all bridge work to be done by force account by the county engineer's employees as well as work to be done by contract in which the county engineer acted as contractor with the work done by a subcontractor. Again, as with the Greenwich Road project, all elements of the Zenobia and Cook Road projects that were not done by force account were done by contracts competitively bid and awarded by the Huron County Board of Commissioners. Both the Cook Road and Zenobia Road Bridge projects were completed in 2007. The Greenwich Road project was completed in September 2008.

{¶ 7} On July 1, 2008, appellant filed a complaint for preliminary and permanent injunctive relief as a taxpayer suit to enjoin the construction of the three bridges described above. The complaint named the Huron County Board of Commissioners and the Huron County Engineer. It alleged violations of competitive bidding law and force account law with regard to all three bridge construction projects. On July 10, 2008, appellant filed a motion for issuance of a preliminary injunction to stop work on the Greenwich and Cook Bridges. Appellant acknowledged that the Zenobia Road Bridge project had already been completed and that, therefore, no injunctive relief was available.

{¶ 8} On July 25, 2008, appellees filed a memorandum in opposition to the preliminary injunction. Appellees stated that the Zenobia and Cook Road Bridges had been completed in 2007 and that only the Greenwich Road project was ongoing, with a target completion date of August 31, 2008. Appellees argued that there was no violation of competitive bidding law or force account law on any of the projects, in that the portion of the project being completed pursuant to force account was below the limit allowed and the portion for bridge box beams and guardrail were competitively let for bid.

{¶ 9} On July 25, 2008, a hearing was held on the motion for issuance of a preliminary injunction. On July 31, 2008, the trial court issued an order denying appellant's motion on the basis that appellant failed to show a likelihood of success on the merits – specifically, that the county had not violated the provisions of R.C. 5543.19, as the work to be done by the Huron County Engineer's office was below the limits set by statute and the work for the bridge box beams and guardrail were subcontracted and properly awarded by the competitive bid process. The trial court further found that there would be significant injury to the citizens of Huron County from a delay in the completion of the bridge project and the resulting increase in the cost of the work. Finally, the trial court found that appellant had an adequate remedy at law through the Auditor of State.

{¶ 10} Appellant timely filed an interlocutory appeal of that order. Appellees then filed a motion to dismiss the appeal. On October 24, 2008, this court granted the motion to dismiss, finding that the only issue in the appeal had been rendered moot by the

completion of the Greenwich Road project. This court remanded the case to the trial court to proceed to judgment.

{¶ 11} On April 21, 2009, both parties filed motions for summary judgment. Additionally, amicus curiae briefs in support of appellees were filed by Ohio Council 8, AFSCME, AFL-CIO and jointly by the County Commissioners Association of Ohio and County Engineers Association of Ohio.¹

{¶ 12} On July 9, 2009, the trial court issued its decision on the opposing motions for summary judgment. The trial court found that the three construction projects had been completed and that, therefore, appellant's request for injunctive relief on Counts I, II and III were moot. As to Count IV of the original complaint, the trial court found that appellees' position on the law of force accounts was supported by the State Auditor and was correct. Further, the trial court found that appellees complied with force account law and competitive bidding law and were entitled to judgment as a matter of law. Therefore, the trial court granted summary judgment in favor of appellees and denied the motion of appellant. This timely appeal followed.

{¶ 13} Appellant sets forth the following assignments of error:

{¶ 14} "1. The Trial Court erred by granting summary judgment in Respondent's favor on Counts I, II, and III based upon the mootness doctrine where enjoining the bridge construction process when competitive bidding laws have been violated is necessarily capable of repetition yet evading review.

¹Amicus briefs also have been filed with this court in support of appellees.

{¶ 15} "2. The Trial Court erred, as a matter of law, by ruling that an estimate of the total project costs performed by the county engineer pursuant to R.C. 5543.19 and R.C. 117.16(A)(1) need not encompass all costs associated with materials, equipment, and labor on the bridge replacement project.

{¶ 16} "3. The Trial Court erred by restricting the scope of a force account project to just an artificial subdivision of the entire bridge replacement project.

{¶ 17} "4. The Trial Court erred by ruling the installation of the prestressed concrete beams fell outside the scope of the force account project where installation of those beams occurred under an oral contract with the County Engineer's office, and was not part of any competitively bid contract awarded by the Huron County Board of Commissioners.

{¶ 18} "5. The Trial Court erred by failing to rule that where the installation contract occurs under the force account, any materials installed by virtue of the installation contract must also be included in the force account estimate.

{¶ 19} "6. The Trial Court erred in ruling that a relator in a taxpayer suit to enjoin the misappropriation of public funds caused by a county's violation of the competitive bidding and force account statutes has an adequate remedy at law through the Auditor of State whose only recourse is lowering the force account limits going forward and does nothing to address the misappropriation of public funds.

{¶ 20} "7. The Trial Court abused its discretion in failing to issue a preliminary injunction halting work on the Greenwich Road Bridge Project and preventing the release

of public funds where the County clearly violated the competitive bidding law, R.C. 307.86, with respect to the Project.

{¶ 21} "8. The Trial Court erred by failing to award Relator his costs, including a reasonable compensation for his attorneys where Relator was entitled to the relief sought in his Complaint."

{¶ 22} Appellant's first and seventh assignments of error will be addressed together as they are interrelated. In support of Assignment of Error No. 1, appellant asserts that the trial court erred by granting summary judgment in appellees' favor on counts I, II and III of the motion for a preliminary injunction based on the mootness doctrine. In support of Assignment of Error No. 7, appellant asserts that the trial court abused its discretion by failing to issue a preliminary injunction to stop work on the Greenwich Road Bridge project because the county violated the competitive bidding law.

{¶ 23} Our review of summary judgment determinations is conducted on a de novo basis, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996-Ohio-336. Summary judgment will be granted when there remains no genuine issue of material fact and, considering the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 24} The first three counts in the complaint asked the trial court to enjoin construction on the Zenobia (Count I), Greenwich (Count II) and Cook Road (Count III)

Bridges. However, at the time appellant filed the complaint in July 2008, the Zenobia and Cook Road projects had been completed and the bridges were open for public use. In our October 24, 2008 decision on appellees' motion to dismiss appellant's appeal, we found that the only issue in the appeal had been rendered moot and granted the motion to dismiss. Then, in its decision on summary judgment in June 2009, the trial court again found that appellant's request for an injunction as set forth in Counts I, II and III of the complaint was moot because the work on all three bridges had been completed by then.

{¶ 25} In the original motion for a preliminary injunction, appellant acknowledged that once a construction project is completed, there is no injunctive relief available. It is undisputed that by September 2008, all three bridge projects had been completed.

"Actions become moot when resolution of the issues presented is purely academic and will have no practical effect on the legal relations between the parties." *Wagner v. City of Cleveland* (1988), 62 Ohio App.3d 8, 13. Further, "[t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green* (1895), 159 U.S. 651, 653.

{¶ 26} Completion of the three bridge projects rendered it impossible for the trial court to grant appellant any effectual relief by issuing an injunction. Reasonable minds can only conclude that appellees were entitled to judgment as to the request for an

injunction and the trial court did not err by granting summary judgment as to that issue. Accordingly, appellant's first and seventh assignments of error are not well-taken.

{¶ 27} Assignments of Error Nos. 2 and 3 will be addressed together. In Assignment of Error No. 2, appellant asserts that the trial court erred by restricting the scope of the force account estimates for each project to the work performed under the force account because the applicable statutes require that the estimates encompass the total cost of the bridge reconstruction. Appellant argues that pursuant to R.C. 5543.19(B) and 117.16(A)(1), all labor, materials and equipment used in reconstructing the bridges should have been included in the force account assessment forms. In support of Assignment of Error No. 3, appellant argues that even if the trial court did not err when it adopted a narrower construction of R.C. 5543.19(B) limiting the total cost estimate to work performed under the force account, the trial court erred by failing to find that the cost of the prestressed concrete beams fell within the force account project.

{¶ 28} In its June 2009 judgment, the trial court found that the work done by the county engineer or overseen by him as a contractor properly fell below the \$100,000 limit for force accounts and that, although the entire project exceeded the force account limit, the work done under the county engineer as contractor did not. The trial court further concluded that the county followed the required procedure for competitive bids throughout the entire project.

{¶ 29} Appellant's arguments are based on the premise that the force account, and the force account project assessment form, must include all costs of the entire

construction project – in other words, the entire project must be estimated at a cost of under \$100,000 in order to employ force account work. However, pursuant to R.C. 5543.19(C), "force account" means that "** * * the county engineer will act as contractor, using labor employed by the engineer, using material and equipment either owned by the county or leased or purchased in compliance with sections 307.86 to 307.92 of the Revised Code and excludes subcontracting any part of such work * * *.*" (Emphasis added.) Force accounts, therefore, can be part of a larger project in which other work is subcontracted out and awarded after a bidding process.

{¶ 30} Pursuant to R.C. 117.16(A)(1), "[the Auditor of State shall] develop a force account project assessment form that each public office that undertakes force account projects shall use to estimate or report the cost of a force account project." If the subcontracted portion of the project is not part of the force account project, it need not be included in the estimate.

{¶ 31} Based on the foregoing, as the trial court found herein, while the total cost of each bridge project individually exceeded the force account limit, the force account work done on each bridge with the county engineer as contractor did not. The record reflects that the Huron County Engineer included all force account bridge project work in the force account project assessment form. Further, it is undisputed that all bridge work that was not done by force account was done by contract competitively bid and awarded by the Huron County Board of Commissioners in compliance with the competitive bidding law.

{¶ 32} Accordingly, the trial court did not err by finding that a force account estimate need only include force account work and that the scope of the force account work need not encompass the entire construction project. Appellant's second and third assignments of error are not well-taken.

{¶ 33} As his fourth and fifth assignments of error, appellant asserts that the trial court erred by failing to find that the manufacture and installation of the pre-stressed concrete beams used for the bridges should have been included in the force account estimate. Appellant argues that installation of the beams occurred under an oral contract with the county engineer's office and was not part of any competitively bid contract awarded by the county commissioners.

{¶ 34} Appellant correctly states that the trial court found that the county engineer did not act as contractor for the portion of the project involving the pre-stressed concrete beams. Both parties refer to evidence in the record regarding the handling of the contracts regarding purchase and installation of the bridge beams. However, we find that this is another issue that has been rendered moot by the completion of the bridge projects. Therefore, appellant's fourth and fifth assignments of error are moot and not well-taken.

{¶ 35} As his sixth assignment of error, appellant asserts that the trial court erred by ruling that the auditor of state has jurisdiction over the review of force account project decisions and that a complaint to the auditor, rather than a taxpayer suit, is the proper method of challenging such decisions. Appellant argues that the authority of the auditor to prospectively lower the county's force account limits on future projects, pursuant to

R.C. 117.16, does not address the violations related to the three bridge projects at issue and is inadequate to protect the competitive bidding process created by the General Assembly.

{¶ 36} As we have found, the controversy regarding force account work and competitive bidding on the three bridge projects is now moot. Appellant now asks this court to render a decision on the authority of the Auditor of State to review force account projects. However, such an opinion in this case would simply be advisory. An appellate court is not required to render an advisory opinion. "The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case." *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, ¶ 10. Accordingly, appellant's sixth assignment of error is not well-taken.

{¶ 37} As his eighth assignment of error, appellant asserts that the trial court erred by failing to award him costs, including reasonable attorney's fees, because he was and is entitled to the relief sought. However, because appellant did not prevail on his claims, including his request for injunctive relief as set forth in his complaint, he is therefore not entitled to costs and fees. Accordingly, appellant's eighth assignment of error is not well-taken.

{¶ 38} On consideration whereof, this court finds that appellant is not entitled to judgment as a matter of law and the trial court did not err by denying appellant's motion for summary judgment and granting summary judgment in appellees' favor. The

judgment of the Huron County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.