Cite as 2011 Ark. App. 447

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA10-1257

FIRST ELECTRIC COOPERATIVE CORPORATION APPELLANT	**Opinion Delivered** June 22, 2011
V.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, NINTH DIVISION [NO. CV-07-5211]
BLACK, CORLEY, OWENS & HUGHES, P.A., AND BUILDING DESIGN SERVICES, INC. APPELLEES	HONORABLE MARY SPENCER MCGOWAN, JUDGE
	AFFIRMED

ROBERT J. GLADWIN, Judge

First Electric Cooperative Corporation (FECC) appeals from partial summary judgment orders in favor of appellees Black, Corley, Owens, & Hughes, P.A. (Black), and Building Design Services, Inc. (BDS).[1] The circuit court ruled that FECC's breach-of-contract claims against Black and BDS were time-barred. We affirm.

The facts are essentially undisputed. FECC contracted with architect Black in 2001 to design its new headquarters in Jacksonville. Black then engaged BDS to assist in designing the building's heating, ventilation, and air-conditioning (HVAC) system. Construction on the building was substantially complete by March 2004.

[1] The partial-summary-judgment orders did not dispose of all of the claims in the case, but the circuit court properly certified an immediate appeal from both orders pursuant to Ark. R. Civ. P. 54(b).

Thereafter, FECC experienced problems with various aspects of the new facility, including the HVAC system. In 2007, FECC sued the general contractor, Flynco, Inc., for breach of contract. The complaint did not name Black and BDS as defendants at that time because repairs to the HVAC system were ongoing.

By early 2009, however, the HVAC system still was not functioning properly. FECC wished to continue the repair efforts but recognized that any cause of action it might have against Black and BDS would be barred by March 2009. *See* Ark. Code Ann. § 16-56-112(a) (Repl. 2005) (imposing a statute of limitations of five years after substantial completion). Consequently, FECC's attorney drafted tolling agreements that extended the limitations period to January 1, 2010. Representatives of Black and BDS signed the agreements and continued to try to rectify the problems with the HVAC system.

When subsequent repair attempts proved unsuccessful, FECC filed an amended complaint in December 2009, naming Black and BDS as defendants in the Flynco litigation. Despite the tolling agreements' extension of the five-year-limitations period, Black and BDS pled the statute of limitations as a defense, noting that FECC's amended complaint was filed five years and nine months after substantial completion. They also argued in motions for summary judgment that the tolling agreements were contrary to Arkansas law, in particular Ark. Code Ann. § 16-56-112(f) (Repl. 2005), which reads as follows:

> (f) Nothing in this section [16-56-112] shall be construed as extending the period prescribed by the laws of this state for bringing any cause of action, *nor shall the parties to any contract for construction extend the above prescribed limitations by agreement or otherwise.*

(Emphasis added.)

In response, FECC argued that Black and BDS were estopped to deny the agreements' validity and that subsection (f) prohibited extension agreements only where the agreements were contained in an original construction contract. Following a hearing, the circuit court granted Black's and BDS's motions for summary judgment. The court acknowledged the inequity of allowing Black and BDS to escape the effect of the tolling agreements but determined that Ark. Code Ann. § 16-56-112(f) compelled no other result. This appeal followed.

We first address FECC's argument that Ark. Code Ann. § 16-56-112(f) does not prohibit the particular tolling agreements in this case. FECC urges that its tolling agreements do not offend section 16-56-112's purpose of avoiding stale claims;[2] that the agreements actually further public policy by encouraging settlement and avoiding litigation; and that subsection (f) should be interpreted only to prohibit extension agreements contained in original construction contracts.

Issues of statutory construction are reviewed de novo. *Scoggins v. Medlock*, 2011 Ark. 194, 381 S.W.3d 781. The basic rule of statutory construction is to give effect to the intent of the legislature. *Dachs v. Hendrix*, 2009 Ark. 542, 354 S.W.3d 95. Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning

[2] *See Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003); *Rogers v. Mallory*, 328 Ark. 116, 941 S.W.2d 421 (1997); *Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 646 S.W.2d 696 (1983); *Carlson v. Kelso Drafting & Design, Inc.*, 2010 Ark. App. 205, 374 S.W.3d 726.

of the language used. *Id*. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id*. In short, our task is to read the laws as they are written. *Fitton v. Bank of Little Rock*, 2010 Ark. 280, 365 S.W.3d 888.

Applying these standards, we conclude that the language of subsection (f) could not be clearer. It unambiguously prohibits parties to a construction contract from extending "by agreement or otherwise" the five-year-limitations period set forth in section 16-56-112(a). Subsection (f) makes no distinction as to the parties' motives or purposes in signing an extension agreement, no matter how mutually advantageous or consistent with public policy the agreement may be; it simply declares that such an agreement is forbidden. Subsection (f) also does not, as FECC suggests, proscribe only those extension agreements that are contained in the parties' original construction contract. Had that been the legislature's intent, it could easily have been expressed. Instead, the legislature chose a clear, uncomplicated prohibition on extension agreements, without exception.

We further note that our supreme court has identified the five-year-limitations period in section 16-56-112(a) as a statute of repose. *Ray & Sons Masonry Contrs. v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003). A statute of repose establishes a date on which the plaintiff's cause of action simply ceases to exist. *See id*. It is typically "an absolute time limit beyond which liability no longer exists *and is not tolled for any reason* . . . ." *Id*. at 219, 114 S.W.3d at 200 (emphasis added). Our supreme court has consistently refused to

"graft judicially created exceptions onto the statute of repose." *Carlson*, 2010 Ark. App. 205, at 5, 374 S.W.3d at 729. Given this authority, we are hesitant to impose on subsection (f) any construction not warranted by its own clear terms.

FECC nevertheless argues that parties may waive the effect of a statute of repose, citing *First Interstate Bank v. Central Bank & Trust Co.*, 937 P.2d 855 (Colo. Ct. App. 1996). *First Interstate*, however, is readily distinguishable. There, the court was not faced with a legislative ban on extension agreements, such as we have here. In fact, the Colorado court observed that its legislature could have, but did not, restrict the parties' ability to waive the statute of repose.

We therefore decline to interpret subsection (f) in a manner that would permit the parties to toll, by agreement, section 16-56-112's statute of repose. Subsection (f) reflects a clear legislative mandate against such agreements, and we will not alter that mandate by judicial fiat. *See Carlson*, *supra*.[3]

Next, FECC argues that the doctrines of estoppel and waiver should prevent Black and BDS from denying the validity of the tolling agreements. We disagree. Subsection (f) provides that the limitations period may not be extended by agreement "or otherwise." The parties cannot create through estoppel or waiver the very type of agreement prohibited by subsection (f). To do so would undermine the intent of subsection (f) and would "graft judicially created

[3]FECC also contended for the first time during oral argument that subsection (f) does not apply to its tolling agreement with BDS because FECC had no contract for construction with BDS. A party's attempt to raise an issue during oral argument that was not raised in its appellate brief comes too late for our determination, and we will not address the issue. *State Farm Mut. Auto Ins. Co. v. LaSage*, 262 Ark. 631, 559 S.W.2d 702 (1978).

exceptions onto the statute of repose," which we will not do. *Carlson*, 2010 Ark. App. 205, at 5, 374 S.W.3d at 729. Notably, there is no indication in this case that Black or BDS created the illegal infirmity in the tolling agreements or acted to take advantage of the situation through fraudulent means or superior knowledge. FECC was represented by counsel and drafted the tolling agreements of its own accord, either without regard to subsection (f) or without awareness of its existence.

We therefore affirm the partial summary judgment in favor of Black and BDS.[4] Like the circuit court, we acknowledge the apparent inequity of voiding agreements that the parties executed in good faith and on which FECC relied to its detriment. We are, however, bound by the clear language of section 16-56-112(f), and any modifications of that language must come from the legislature rather than this court.

Affirmed.

PITTMAN and BROWN, JJ., agree.

[4] Our ruling makes it unnecessary to reach BDS's alternative argument that FECC had no contract with BDS, nor was FECC a third-party beneficiary of BDS's contract with Black.