

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

R. E. Schweitzer Construction Co.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-954 (C.C. No. 2007-02114)
University of Cincinnati,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

---

D E C I S I O N

Rendered on July 28, 2011

---

*Markesbe & Richardson Co., L.P.A., and Barry A. Rudell, II,*  
for appellee.

*Michael DeWine, Attorney General, and William C. Becker,*  
for appellant.

---

APPEAL from the Court of Claims of Ohio

DORRIAN, J.

{¶1} Defendant-appellant, University of Cincinnati, appeals from a judgment of the Court of Claims of Ohio in favor of plaintiff-appellee, R. E. Schweitzer Construction Company, on appellee's breach of contract claim. For the following reasons, we affirm that judgment.

{¶2} On June 16, 2004, appellant executed a public works contract engaging appellee as the lead contractor for a construction project titled "Demolition, Disassembly & Site Restoration for Pavilions – Phase I." Pursuant to the contract, appellee was to remove four temporary tent-like structures and their associated foundations, utilities, and other improvements from appellant's main campus. The contract provided that appellee would retain salvage rights to the removed structures.

{¶3} Appellant retained THP Limited ("THP") as the associate architect on the project. In that capacity, THP acted as the liaison between appellee and appellant. THP's responsibilities in that regard included review and recommendation pertaining to disputes between the parties.

{¶4} On June 17, 2004, a notice to proceed was issued authorizing appellee to commence work on June 24, 2004. The work was to be completed by September 15, 2004. However, before appellee commenced work on the project, appellant inquired as to whether appellee would relinquish its salvage right to the largest structure, so that it could be transported to and stored at one of appellant's branch campuses for later use by appellant. Appellee submitted a proposed change order setting forth its costs for performing the requested services. THP informed appellee that its proposal was too high. Appellee apparently completed the work while the parties continued to negotiate the cost issue.

{¶5} On November 24, 2004, THP, with appellant's approval, submitted a change order in an amount less than that proposed by appellee and requested that appellee sign it. The change order included language averring that the amount set forth therein constituted complete payment for the additional work. By e-mail dated

November 30, 2004, appellee averred it would sign the change order only after it modified the language purporting to establish that the amount contained therein constituted complete payment for the additional work performed. On December 1, 2004, THP notified appellee that appellant's determination regarding the requested change order was final and instructed appellee to sign and return the change order or to pursue a claim against appellant pursuant to the dispute resolution procedure set forth in Article 8 of the contract.

{¶6} On December 3, 2004, appellee, pursuant to Article 8, submitted a written claim to THP seeking additional compensation for the added services. On December 8, 2004, THP proposed that appellee sign the change order as currently written and that the parties continue discussions to resolve the dispute, without holding appellee to the "full satisfaction" language in the change order. Appellee signed the change order on December 9, 2004, after modifying it to state that it constituted only partial payment for the additional work performed.

{¶7} On January 5, 2005, appellee provided THP a detailed narrative describing the events giving rise to the claim as required by Article 8.1.3.1 of the contract, along with a signed Certification of Contract Claim for \$52,176, filed in accordance with Article 8.1.3.10. On February 16, 2005, THP provided comments on the disputed claim pursuant to Article 8.3.1 and requested that appellee provide further documentation substantiating its claim. In response, appellee on February 23, 2005, submitted a settlement offer of \$32,877. By letter dated May 5, 2005, THP rejected the settlement offer and averred that it would not pay for the services at issue. The parties negotiated the claim until early

January 2006. No decision was ever made as to the validity of the claim through the Article 8 process.

{¶8} On February 16, 2007, appellee filed a complaint in the Court of Claims, asserting a breach of contract claim against appellant for "failing to pay [appellee] for all of the work it performed on the Project." (Complaint, at ¶17.) Appellee also demanded an equitable adjustment of the contract price pursuant to Article 7 of the contract.

{¶9} Appellant filed a motion to dismiss, pursuant to Civ.R. 12(B)(6), or alternatively, for summary judgment under Civ.R. 56, seeking dismissal of appellee's complaint on grounds that it was filed more than two years after the date appellee's cause of action accrued and was thus barred by the statute of limitations in R.C. 2743.16. Appellee opposed appellant's motion and filed a cross-motion for partial summary judgment, contending that it timely filed its complaint.

{¶10} Following a July 13, 2007 oral hearing on the motions, the trial court, on August 27, 2007, filed a decision granting partial summary judgment to appellee and denying appellant's motion for summary judgment. The trial court found, pursuant to R.C. 153.12(B) and 153.16(B), that appellee's cause of action did not accrue, and the statute of limitations did not begin to run, until appellee's administrative remedies under the contract were exhausted on April 12, 2005, 120 days after appellee's filing of the Article 8 claim on December 3, 2004, and, as such, appellee had until April 12, 2007 to file its action. The court accordingly concluded that appellee's February 16, 2007 complaint was timely filed.

{¶11} The matter proceeded to trial in December 2008. Both at trial and in its post-trial brief, appellant urged the court to reconsider the statute of limitations issue. In a

decision filed May 18, 2010, the trial court confirmed its earlier decision, stating that "[b]ased upon the evidence submitted at trial and for the reasons set forth in the entry denying summary judgment, the court finds that plaintiff's complaint was timely filed." (May 18, 2010 Decision, at 3.) The court found in favor of appellee on its breach of contract claim and awarded appellee damages in the amount of \$67,731.82.

{¶12} The court further determined that appellee was entitled to prejudgment interest. In so finding, the court stated that "the money owed to plaintiff became due and payable on November 24, 2004, the date that the change order was approved." (May 18, 2010 Decision, at 9.) The court set the case for a subsequent hearing to allow the parties to present evidence regarding the rate of prejudgment interest to be applied, which, pursuant to Article 8.9.1 of the contract, was to be "the average of the prime rate established at the commercial banks in the City of Cincinnati." Following that hearing, the trial court filed a judgment entry on September 2, 2010, awarding appellee \$21,833.55 in prejudgment interest. Citing *Royal Electric Constr. Corp. v. The Ohio State Univ.*, 73 Ohio St.3d 110, 1995-Ohio-131, the trial court determined that appellee was entitled to prejudgment interest from the date it substantially completed its work on the project. Consistent with its May 18, 2010 decision, the court held that the money owed appellee "became due and payable on November 24, 2004, the date that the change order at issue was approved by defendant." (Sept. 2, 2010 Decision, at 2). The court further determined that appellee was not entitled to prejudgment interest beyond May 18, 2010, the date the court rendered its decision on liability. Accordingly, the trial court determined that appellee was entitled to prejudgment interest from November 24, 2004 to May 18, 2010.

{¶13} Appellant filed a timely notice of appeal and raises two assignments of error for our consideration, as follows:

[1.] The trial court erred to the prejudice of defendant-appellant when it denied defendant-appellant's Motion to Dismiss Motion for Summary Judgment and granted plaintiff-appellee's Motion for Partial Summary Judgment and thereafter failed to reconsider its decision and enter judgment in favor of defendant-appellant after finding that the monies sought herein had become due and payable, and therefore plaintiff-appellee's cause of action had accrued, more than two years prior to the commencement of this action.

[2.] The trial court erred to the prejudice of defendant-appellant when it awarded prejudgment interest to plaintiff-appellee for the period before the date of filing this action.

{¶14} Appellant's first assignment of error asserts the trial court erred in denying its summary judgment motion and in granting appellee's motion for partial summary judgment. Because appellant's motion to dismiss required material outside the pleadings, the Court of Claims properly treated it as a Civ.R. 56(C) motion for summary judgment, rather than a Civ.R. 12(B)(6) motion to dismiss. We review its decision accordingly.

{¶15} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. We apply the same standard as the trial court and conduct an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; see also *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm.*, 73 Ohio St.3d 107, 108, 1995-Ohio-214 (determining that ascertaining when a cause of action accrues is a matter of law and is reviewed de novo).

{¶16} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence mostly strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, citing *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶17} Appellant contends the trial court erred in determining that appellee's cause of action for breach of contract accrued, and the statute of limitations commenced, on April 12, 2005, 120 days after appellee submitted its claim to THP. Appellant contends that appellee's cause of action accrued, and the statute of limitations began to run, on November 24, 2004, the date the trial court determined that appellee had substantially completed work on the project and the monies sought by appellee became "due and payable."

{¶18} Appellee's cause of action, and the trial court's jurisdiction over that cause of action, depends upon the state's waiver of sovereign immunity, codified at R.C.

2743.02(A)(1). That statute provides, in pertinent part, that "[t]he state hereby waives its immunity from liability \* \* \* and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in [R.C. Chapter 2743]." Pursuant to R.C. 2743.16(A), "civil actions against the state \* \* \* shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

{¶19} Two additional statutes are applicable here. R.C. 153.12(B) provides, in pertinent part, that "[i]f a dispute arises between the state and a contractor concerning the terms of a public improvement contract let by the state or concerning a breach of the contract, and after administrative remedies provided for in such contract \* \* \* are exhausted, the contractor may bring an action to the court of claims in accordance with" R.C. Chapter 2743. As a companion to R.C. 153.12(B), R.C. 153.16(B) provides a time by which administrative remedies and procedures are deemed exhausted. Pursuant to R.C. 153.16(B), "[n]otwithstanding any contract provision to the contrary, any claim submitted under a public works contract that the state or any institution supported in whole or in part by the state enters into for any project subject to sections 153.01 to 153.11 of the Revised Code shall be resolved within one hundred twenty days. After the end of this one hundred twenty-day period, the contractor shall be deemed to have exhausted all administrative remedies for purposes of division (B) of section 153.12 of the Revised Code."

{¶20} In *The Painting Co. v. The Ohio State Univ.*, 10th Dist. No. 09AP-78, 2009-Ohio-5710, this court considered the interplay between R.C. 153.12(B), 153.16(B), and 2743.16(A). In *Painting*, the plaintiff entered into a public works contract with the defendant. Shortly thereafter, a dispute arose between the parties regarding compensation. Pursuant to the dispute resolution procedure set forth in Article 8 of the contract, the plaintiff submitted a written claim to the project administrator on January 27, 2005. After the project administrator rejected the plaintiff's claims, the plaintiff, in accordance with the contract's dispute resolution procedures, filed a written appeal on August 23, 2005 with the State Architect for a final administrative decision. On January 6, 2006, the State Architect notified the plaintiff by letter that the information it submitted was insufficient to justify additional compensation. The plaintiff did not provide any additional information. In September 2007, the plaintiff sent a letter to the defendant concerning the status of its claims and requested that the claims be submitted to alternative dispute resolution as provided in the contract. The defendant responded on October 3, 2007, stating the State Architect's January 6, 2006 letter was the defendant's final decision.

{¶21} On July 29, 2008, the plaintiff filed a breach of contract action in the Court of Claims. The defendant filed a motion for summary judgment, arguing that the statute of limitations in R.C. 2743.16 time-barred the plaintiff's action. The trial court granted the defendant's motion, determining that the statute of limitations began to run 120 days after the plaintiff submitted its claims to the State Architect on August 23, 2005 for a final administrative decision.

{¶22} On appeal, the parties disputed the effect of R.C. 153.12(B) and 153.16(B) in determining when the plaintiff's breach of contract action accrued and the statute of

limitations period commenced. The defendant argued that the plaintiff's cause of action accrued 120 days after the plaintiff filed its written appeal with the State Architect, or December 21, 2005. Defendant alternatively argued that the plaintiff's claim accrued no later than January 6, 2006, when the State Architect sent the final decision letter denying the plaintiff's claims. The plaintiff argued that R.C. 153.12(B) and 153.16(B) did not concern accrual, but rather prescribed a jurisdictional prerequisite for its cause of action. Contending that the State Architect's January 6, 2006 letter was not a final decision, the plaintiff asserted its cause of action did not accrue until the defendant finally rejected its claim on October 3, 2007, since only then did the plaintiff suffer actual damages.

{¶23} This court observed that " '[o]rdinarily, a cause of action does not accrue until actual damage occurs; when one's conduct becomes presently injurious, the statute of limitations begins to run.' " *Id.* at ¶14, quoting *Children's Hosp. v. Ohio Dept. of Pub. Welfare* (1982), 69 Ohio St.2d 523, 526. We further stated "[a] cause of action for money wrongfully withheld accrues when it is actually withheld." *Id.*, citing *Children's Hosp.*, paragraph two of the syllabus, and *Osborn Co. v. Dept. of Admin. Servs.* (1992), 80 Ohio App.3d 205, 208. We found that "[c]onsistent with those principles, R.C. 153.12(B) and 153.16(B), construed together, provide that any claim submitted under a public works contract with the state necessarily will accrue, at the latest, by the end of the 120-day statutory period when, by operation of law, all administrative remedies are deemed exhausted under R.C. 153.16(B), the claim is deemed rejected, and money the state allegedly owes is deemed withheld." *Painting* at ¶14, citing *Children's Hosp.*; *Osborn*.

{¶24} Applying that proposition of law to the facts of the case, we concluded that, pursuant to the terms of R.C. 153.12(B) and 153.16(B), the plaintiff's cause of action for

breach of contract accrued by December 21, 2005, when the 120-day period lapsed after plaintiff's appeal to the State Architect, regardless of whether the State Architect subsequently issued a final decision on the validity of the plaintiff's claims. Accordingly, we determined that, under R.C. 2743.16(A), the plaintiff had two years, or until December 21, 2007, to file its complaint in the Court of Claims. We determined that the trial court properly granted summary judgment to the defendant because the plaintiff filed its complaint on July 29, 2008, well outside the two-year limitations period in R.C. 2743.16(A).

{¶25} The instant case falls squarely under our holding of *Painting*. In accordance with the administrative remedies outlined in Article 8 of its public works contract with appellant, appellee, on December 3, 2004, notified appellant of its claim for additional compensation. R.C. 153.12(B) required appellee to exhaust its administrative remedies prior to commencing an action on the disputed claim. No decision was ever made as to the validity of appellee's claim pursuant to the administrative dispute procedures outlined in Article 8 and, as such, appellee had nothing to administratively appeal. Accordingly, by operation of R.C. 153.16(B), appellee's administrative remedies were deemed exhausted 120 days after appellee filed its claim, or April 12, 2005. At that point, appellee's claim was deemed rejected, and the money appellant allegedly owed was deemed withheld. Pursuant to R.C. 2743.16(A), appellee had two years from that date, or until April 12, 2007, to file its complaint in the Court of Claims.

{¶26} Appellant's attempts to distinguish *Painting* from the instant case are unavailing. Appellant first contends that this court's decision in *Painting* "did not purport to establish an accrual date for all time, for all contractor claims on state projects."

(Appellant's brief, at 13.) Appellant points to no language in the decision suggesting that we intended to limit our holding to the particular facts and circumstances contained therein.

{¶27} Appellant also argues that the *Painting* decision operates to set the latest time at which a claim may be filed and that an earlier accrual date for this claim would be more appropriate based upon the holding of *Royal Electric*. Although the dispute in *Royal Electric* arose from a state construction contract containing Article 8 administrative dispute remedies, the Supreme Court of Ohio did not consider the appropriate accrual date for statute of limitations purposes or the interplay between R.C. 153.12(B), 153.16(B) and 2743.16. *Royal Electric* concerned only prejudgment interest. Accordingly, *Royal Electric* is irrelevant to the question of when appellee's claim accrued for statute of limitations purposes. Furthermore, *Royal Electric* was decided well before *Painting*. Nevertheless, we did not apply the holding of *Royal Electric* to the statute of limitations discussion in *Painting*, and we decline to apply it to the instant case. Finally, while *Painting* suggests that a claim might accrue before the end of the 120-day period, for example, if the parties resolve the claim or the state definitively indicates that it will not pay the claim, we construe *Painting* to hold that such must occur within the 120-day period following pursuit of contractual administrative remedies. In this case, appellant does not suggest an earlier accrual date within the 120-day period following appellee's pursuit of its Article 8 administrative remedies on December 3, 2004. Rather, appellant maintains only that appellee's cause of action accrued on November 24, 2004, a date preceding appellee's filing of the Article 8 claim.

{¶28} Appellant also submits that appellee's money was actually withheld on November 24, 2004, the date appellant submitted the change order pertaining to the additional services provided by appellee. Thus, argues appellant, *Osborn* mandates that appellee's cause of action accrued on November 24, 2004, the date appellant withheld the money. We first note that this court was not asked to consider the effect of R.C. 153.12(B) and 153.16(B) on R.C. 2743.16 in the *Osborn* case. Further, as noted above, in *Painting*, this court cited the general proposition set forth in *Osborn*. We concluded that R.C. 153.12(B) and 153.16(B), construed together, provide that "[c]onsistent with [that] principle" any claim submitted under a public works contract with the state necessarily will accrue, at the latest, by the end of the 120-day statutory period when, by operation of law, all administrative remedies are deemed exhausted under R.C. 153.16(B), the claim is deemed rejected, and money the state allegedly owed is deemed withheld. Thus, the *Painting* court determined when money is deemed to have been withheld, and concomitantly, when a cause of action accrues, with regard to state construction contracts.<sup>1</sup>

{¶29} As noted above, the instant case is governed by our decision in *Painting*. Pursuant to *Painting*, appellee's claim for breach of contract accrued 120 days after

---

<sup>1</sup> During oral argument in this case, an issue was raised concerning the potential applicability of two decisions of this court, *Wiley v. Adjutant General's Dept.*, (Sept. 1, 1994), 10th Dist. No. 94API02-176 and *Lesko v. Riverside Methodist Hosp.*, 10th Dist. No. 04AP-1130, 2005-Ohio-3142, both of which state the general proposition that pursuit of an administrative remedy does not toll a statute of limitations. Neither *Wiley* nor *Lesko* apply to the instant case, as both involved wrongful termination claims, not state construction contracts. In the instant case, the General Assembly has determined, through its enactment of R.C. 153.12(B), that administrative remedies provided for in a state construction contract must be exhausted before a contractor may bring an action to the Court of Claims in accordance with R.C. Chapter 2743. We do not consider this a tolling of the statute of limitations. Rather, as noted above, our interpretation of *Painting* is that it defines, pursuant to R.C. 153.12(B) and 153.16(B), when money "is actually withheld" in state construction contracts.

appellee submitted it to THP. Because appellee commenced its action within two years after the expiration of the 120 days, the trial court did not err in denying appellant's motion for summary judgment and granting appellee's motion for partial summary judgment. Appellant's first assignment of error is overruled.

{¶30} Appellant's second assignment of error contends that the trial court erred in awarding prejudgment interest commencing November 24, 2004. Appellant argues that the trial court, having determined that appellee's cause of action did not accrue until April 12, 2005, erred in awarding appellee prejudgment interest for any period prior to the accrual date. Appellant further contends that the trial court erroneously awarded prejudgment interest from April 12, 2005 through February 16, 2007.

{¶31} The award of prejudgment interest in this case is governed by R.C. 2743.18(A) and 1343.03(A). R.C. 2743.18(A)(1) provides that "[p]rejudgment interest shall be allowed with respect to a civil action on which a judgment or determination is rendered against the state for the same period of time and at the same rate as allowed between private parties to a suit." R.C. 1343.03(A) provides, in relevant part, that "when money becomes due and payable upon any \* \* \* instrument of writing \* \* \* the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract."

{¶32} Prejudgment interest "acts as compensation and serves ultimately to make the aggrieved party whole." *Royal Electric* at 117. Noting that R.C. 2743.18(A)(1) utilizes the word "shall," the Supreme Court in *Royal Electric* determined that "if a judgment or

determination is rendered by the court against the state, the decision to allow or not allow prejudgment interest is not discretionary." *Id.* at 115. The Supreme Court further determined that "in computing the amount of interest owed, the court is required to look to R.C. 1343.03(A) to determine *when* interest commences to run, *i.e.*, when the claim becomes 'due and payable,' and to determine *what* legal rate of interest should be applied." (Emphasis sic.) *Id.*

{¶33} "The trial court must make factual determinations as to when [prejudgment] interest commences to run, based on when the claim became due and payable." *Zunshine v. Cott*, 10th Dist. No. 06AP-868, 2007-Ohio-1475, ¶26, citing *Dwyer Elec., Inc. v. Confederated Builders, Inc.* (Oct. 29, 1998), 3d Dist. No. 3-98-18. "Courts of appeals review such factual determinations under an abuse of discretion standard." *Zunshine* at ¶26, citing *Dwyer, Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-6366, ¶107. An abuse of discretion connotes more than an error of judgment; it implies a decision which is without a reasonable basis, and one that is clearly wrong. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶34} In its September 2, 2010 decision, the trial court, citing *Royal Electric*, determined that appellee was entitled to prejudgment interest from the date it substantially completed its work on the project. To that end, the court held that the money owed appellee became "due and payable" on November 24, 2004, the date appellant issued the change order. The trial court awarded prejudgment interest from November 24, 2004 to May 18, 2010, the date the trial court rendered its decision on liability.

{¶35} Appellant does not appear to challenge the trial court's factual finding that the money owed appellee became due and payable on November 24, 2004, the date appellant issued the change order, as being an abuse of discretion. Rather, appellant seems to argue that, as a matter of law, the trial court was required to award prejudgment interest commencing from the same date the claim accrued for statute of limitations purposes. In support of its argument, appellant cites *Royal Electric* and *Rabin v. Anthony Allega Cement Contractor, Inc.*, 10th Dist. No. 00AP-1200, 2001-Ohio-4057. Neither case supports appellant's position. The issue in *Royal Electric* was whether an award of prejudgment interest was dependent upon whether the claim was liquidated or unliquidated, or whether the sum due was capable of ascertainment prior to being determined by the court. Although the Supreme Court in *Royal Electric* held that "[t]he award of prejudgment interest is compensation to the plaintiff for the period of time between accrual of the claim and judgment," *id.* at syllabus, it did not state that the phrase "accrual of the claim" for prejudgment interest purposes equates to "accrual of the claim" for statute of limitations purposes.

{¶36} In *Rabin*, the Ohio Department of Transportation ("ODOT") asserted that the plaintiff's claims against it were filed outside the two-year statute of limitations in R.C. 2743.16. Relying on *Royal Electric*, ODOT asserted that damages claims in construction contract cases accrue as a matter of law upon substantial completion of the work. Building upon that premise, ODOT further asserted that claim accrual is logically the same for purposes of both prejudgment interest and the statute of limitations. Accordingly, ODOT argued that the plaintiff's claims accrued, and the statute of limitations on those claims began to run, upon substantial completion of the work. This court stated

that "[w]hile ODOT correctly asserts a claim accrues at the same point in time for prejudgment interest and statute of limitations purposes, ODOT's statute of limitations argument nonetheless fails: *Royal Electric* does not hold construction contract claims accrue as a matter of law on substantial completion of the work." *Id.* This court noted that the discussion of accrual and substantial completion in *Royal Electric* did not change the law with respect to the time a claim accrues but merely indicates that, in the particular case, the plaintiff's claims had, as a factual matter, accrued when the various projects were substantially complete. *Id.* This court's statement regarding accrual dates for prejudgment interest and statute of limitations purposes being the same was not the holding of the case and must be considered only in the context in which it was made, i.e., in explaining ODOT's flawed reliance upon *Royal Electric*.

{¶37} As argued by appellee, the instant case involves two separate accrual dates. On the one hand, Article 8 of the parties' contract and R.C. 153.12(B) and 153.16(B) governed the method of determining when appellee's cause of action accrued for statute of limitations purposes. By contrast, the parties' contract and applicable statutes are completely silent as to the accrual date for prejudgment interest. As noted above, appellant has not challenged the trial court's factual finding that the money became due and payable the date the change order at issue was approved by appellant, November 24, 2004, the same date the court found appellee substantially completed the work. Therefore, we find the trial court did not abuse its discretion in making this determination.

{¶38} Appellant also argues that the trial court erred in awarding appellee prejudgment interest from April 12, 2005, the date 120 days following the filing of

appellee's Article 8 claim, through February 16, 2007, the date appellee filed its complaint. Appellant contends that appellee offered no explanation at trial for its delay in commencing the action, and, in the absence of such explanation, the trial court abused its discretion in awarding prejudgment interest for the period prior to the filing of the action.

{¶39} R.C. 2743.18(A)(2) provides that "[t]he Court of Claims, in its discretion, may deny prejudgment interest for any period of undue delay between the commencement of the civil action and the entry of judgment or determination against the state, for which it finds the claimant to have been responsible." "The Court of Claims' decision to grant or deny prejudgment interest pursuant to R.C. 2743.18(A)(2) may be reversed only on a finding of an abuse of discretion." *Rabin*. As noted by appellee, the trial court in this case was well aware that it could deny prejudgment interest for any period of time for which it found appellee to have been responsible. Indeed, the trial court did so by disallowing appellee prejudgment interest beyond the date of the decision adjudicating appellant's liability.

{¶40} As noted above, the parties continued to negotiate the claim giving rise to the judgment and corresponding prejudgment interest until January 2006. As such, the delay in commencing suit was not solely attributable to appellee. Moreover, the state had use of appellee's money for the period of the delay. The Court of Claims' award only returns to appellee the money the state would not have earned had appellee commenced suit earlier. Under these circumstances, we cannot say that the Court of Claims' decision to award prejudgment interest for the period prior to the filing of the action was without any reasonable basis or was clearly wrong. Appellant's second assignment of error is overruled.

{¶41} Having overruled both of appellant's assignments of error, we hereby affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

BROWN and FRENCH, JJ., concur.

---