

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-0938
STATE OF WISCONSIN**

Cir. Ct. No. 02CV001651

**IN COURT OF APPEALS
DISTRICT IV**

JAMES CAPE & SONS CO.,

PLAINTIFF-APPELLANT,

v.

**STATE OF WISCONSIN DEPARTMENT OF
TRANSPORTATION,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. James Cape & Sons Co. appeals an order dismissing its complaint against the State of Wisconsin Department of Transportation (DOT). The trial court granted summary judgment to the DOT on Cape's claim that the DOT was liable for cost overruns Cape encountered on a

storm sewer project. We conclude that the trial court properly granted summary judgment on the claims, and we therefore affirm.

¶2 Cape bid approximately \$6.8 million on a DOT storm sewer project. A standard DOT specification included in the contract provided that:

All trenches and excavations shall be backfilled immediately after the sewers have been constructed therein. The backfilling material shall be Granular Backfill....

Material from trench excavation which meets the pertinent requirements of Section 209, Granular Backfill, may be used for backfill. Surplus material or material unsuited for backfill shall be used in an embankment, if suitable, or otherwise disposed of

Elsewhere, the contract addressed disposal of excavated material found to be hazardous or solid waste. This provision stated that “[i]f the material is found not to be a hazardous or solid waste, the contractor shall utilize the material for trench backfill as appropriate. If it cannot be utilized as trench backfill, then it shall be disposed of away from the project area, at no additional cost to the [DOT].”

¶3 During the summary judgment proceeding, Cape submitted evidence that it construed the latter provision as giving it discretion to use any and all excavated material as backfill, as long as it was not hazardous or solid waste. It asserted that it based its bid on that interpretation of the contract, in which the latter special provision superceded the standard provision that limited backfill to the prescribed granular material.

¶4 However, after the DOT accepted Cape’s bid, it rejected Cape’s interpretation of the contract, and enforced the requirement that the backfill must consist of granular material. Consequently, Cape allegedly incurred substantial, unanticipated costs in completing the project.

¶5 Cape also encountered extra costs after the parties decided to realign the sewer to avoid moving some power lines. Cape submitted a change order which the DOT accepted after adding some provisions. Cape did not sign the change order as amended by the DOT but proceeded with the realignment project. A third party caused delays in the sewer realignment, costing Cape additional money. The DOT refused to compensate for those additional costs, relying on a provision in the contract that the contractor would not be entitled to any damages attributable to third-party delays.

¶6 In all, Cape sought approximately \$1.5 million dollars in additional compensation from the DOT, and it commenced this action after the state claims board denied its claim and the legislature also failed to authorize additional payment. Cape's complaint included claims for breach of contract, breach of the DOT's duty to negotiate and contract fairly and in good faith, quantum meruit, and unjust enrichment. The issues on appeal are: (1) whether the Cape-DOT contract unambiguously required granular backfill; (2) whether the DOT breached a duty of good faith and fair dealing when it failed to inform Cape of the granular backfill requirement before accepting Cape's bid; and (3) whether Cape was entitled to reimbursement for its delay-related costs, notwithstanding the contract language precluding the DOT's liability for such costs.

¶7 We review summary judgments de novo, using the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Interpretation of a contract is a question of law, which we also review de novo. *Deminsky v. Arlington Plastics Mach.*, 2003 WI 15, ¶15, 259 Wis. 2d 587, 657 N.W.2d 411. If a contract is plain and unambiguous, we construe it according to its plain meaning even if a party has construed it differently. *Dieter v. Chrysler Corp.*, 2000 WI 45, ¶15, 234 Wis. 2d

670, 610 N.W.2d 832. A contract is ambiguous only when more than one construction of it is reasonably available. *Id.*

¶8 We conclude that the parties' contract plainly excludes reimbursement for Cape's extra backfill costs. Cape cannot, and does not, contend that the standard granular backfill provision, viewed by itself, is ambiguous. Instead, it contends that this standard provision conflicts with the special provision that excavated material that is not hazardous or solid waste may be used for backfill "as appropriate." In Cape's view, "as appropriate" encompasses a wider range of material than the specified granular backfill. Furthermore, it notes DOT's concession that special provisions in the contract take precedence over standard provisions, which Cape argues, in this context, would mean that the "as appropriate" provision supercedes the granular backfill provision.

¶9 However, we conclude that the provisions, read together, have only one reasonable meaning. "As appropriate" means "as specified in the contract," which by express provision allows only granular backfill. Cape points to a letter it wrote the DOT, in which Cape set forth a different backfill standard it proposed to use. However, under Cape's proposal, the determination of which backfill to use would have been wholly within Cape's discretion. That is not a reasonable interpretation of the contract, which provides an unambiguous standard for determining "appropriate" backfill materials.

¶10 We also conclude that, as a matter of law, Cape has failed to state a claim for the DOT's breach of its duty of good faith and fair dealing, even though the DOT plainly had such a duty in its dealings with Cape. *See M&I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521. There is simply no authority for the proposition, advanced by Cape, that the

contractual duty of good faith and fair dealing requires one party to explain the plain and unambiguous terms of a contract to the other party.

¶11 Finally, the contract plainly exempted the DOT from liability for Cape's delay-related costs. Cape contends that the realignment work was done outside the contract because Cape never agreed to the DOT's modifications of the proposed change order. Consequently, in Cape's view, the contract's allocation of delay costs does not apply, and it has a valid quantum meruit claim against the DOT to recoup them. After receiving the change order with the DOT's modifications, it is undisputed that Cape proceeded with the realignment work. "[A]cceptance of a proposed modification of a written contract can be signified by the actions of the parties under the objective rule of contracts." *Smith v. Osborn*, 66 Wis. 2d 264, 277, 223 N.W.2d 913 (1974). We conclude that is what occurred here.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

