

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2012

A. John Voelker
Acting 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. 2011AP503

Cir. Ct. No. 2008CV992

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TRANSWOOD, INC.,

PLAINTIFF-APPELLANT,

V.

WRR ENVIRONMENTAL SERVICES CO., INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Transwood, Inc., appeals a summary judgment dismissing its contract claims against WRR Environmental Services Co., Inc. Transwood argues the circuit court erroneously determined that the contract did not provide for interest charges on late payments. It further argues the court erred

by determining WRR had paid all principal balances due because the court erroneously denied Transwood's request for an extension of time to conduct discovery. We disagree and affirm.

BACKGROUND

¶2 WRR contracted with Transwood to haul and transport WRR's waste product for five years. The contract provided: "Terms of Payment—Shipper agrees that it will make payments for the charges in Exhibit A and Exhibit B within fifteen days from receipt of invoices from Carrier setting forth such charges."

¶3 As hauling services were rendered, Transwood provided invoices to WRR. WRR routinely failed to timely pay the invoices, with some invoices remaining unpaid for three to five months. Approximately four and one-half years into the contract, company officials met to discuss WRR's late payments and outstanding balances. WRR represented that it would attempt to bring its accounts current within forty-five days.

¶4 After the contract expired, Transwood sued WRR seeking payment of \$120,660.12 in unpaid invoices plus \$111,101.30 in interest calculated on all late payments during the five-year contract term. WRR counterclaimed, alleging damages as a result of various breaches over the contract term. WRR later moved for summary judgment on Transwood's claims, arguing that WRR had paid all outstanding invoices totaling \$83,419.19 and that the remaining \$37,240.93 merely constituted a credit it had requested but never received. WRR further argued that the contract did not provide for interest charges. In its response, Transwood acknowledged receipt of the \$83,419.19, but disputed that the

remaining amount was a credit. The circuit court granted WRR summary judgment dismissing Transwood’s claims. Transwood now appeals.

DISCUSSION

¶5 We first address whether the parties’ contract allowed Transwood to charge WRR interest on late payments. This presents an issue of law that we decide independently of the circuit court’s decision. See *Erickson v. Gundersen*, 183 Wis. 2d 106, 115, 515 N.W.2d 293 (Ct. App. 1994). The goal of contract interpretation is to ascertain the parties’ intent. *Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476. The best indication of intent is the contract’s language. *Id.* “We construe ... contract language according to its plain or ordinary meaning.” *Id.* If the contract is unambiguous, our review is limited to the contract itself, without consideration of extrinsic evidence. *Id.*

¶6 Transwood contends the contract is ambiguous because, although it does not expressly provide for interest, it imposes a fifteen-day payment deadline on invoices submitted to WRR. Transwood emphasizes that we “are constrained to apply contract language so that every element has meaning and nothing is surplusage.” See *Maryland Arms Ltd. P’ship v. Connell*, 2009 WI App 87, 320, ¶19, Wis. 2d 147, 769 N.W.2d 145 (Fine, J., dissenting) (citing *Kasten v. Doral Dental USA, LLC*, 2007 WI 76, ¶48, 301 Wis. 2d 598, 733 N.W.2d 300).¹

¹ We remind Transwood’s out-of-state counsel that citations to Wisconsin court opinions issued on or after January 1, 2000, require a public domain citation. See WIS. STAT. RULE 809.19(1)(e); SCR 80.02. Moreover, it is improper to cite a dissenting opinion as if it were the majority.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Transwood argues that for the payment deadline provision “to have any meaning at all, it is obvious that both of the[] ... parties assumed interest and/or late fees would be charged To construe this language of the contract any differently renders the payment provision completely meaningless.”

¶7 We reject Transwood’s contention. The payment deadline provision is not meaningless. Another portion of the contract permits termination prior to the expiration of the five-year term after “written notice, stating verifiable due cause and justification.” Therefore, late payments by WRR would constitute a breach of the contract terms, allowing Transwood to cancel the contract. Transwood’s unilateral decision to nevertheless continue the business relationship cannot vary the parties’ contractual rights or duties. Moreover, Transwood’s interpretation would create even further ambiguity because the contract does not indicate whether late payment will result in interest charges or in a late fee, or how the amount of either is to be determined.

¶8 Transwood alternatively argues that the contract language is ambiguous when considered in light of extrinsic factors. Extrinsic factors, however, cannot be considered to render ambiguous an otherwise unambiguous contract. See *Town Bank*, 330 Wis. 2d 340, ¶33; *Energy Complexes, Inc. v. Eau Claire Cnty.*, 152 Wis. 2d 453, 468, 449 N.W.2d 35 (1989). Because the contract unambiguously does not permit interest charges for late payments, WRR was entitled to summary judgment dismissing Transwood’s claim for unpaid interest.

¶9 Transwood next argues the circuit court erroneously dismissed Transwood’s claims for principal amounts owed because the court deprived Transwood of the opportunity to conduct discovery.

¶10 Based on the evidence presented during the summary judgment proceedings, WRR owed no principal balance to Transwood. Transwood admitted it was paid the \$83,419.19. Regarding the remaining \$37,419.19, WRR averred it had requested a credit in that amount because of an overpayment it made to Transwood, but Transwood denied the request. Transwood presented no affidavit, invoice, or other evidence denying WRR's averment or showing that Transwood was owed that amount for services rendered. A wholly unsupported assertion cannot create an issue of material fact. There being no dispute that WRR owed no principal to Transwood, WRR was entitled to summary judgment dismissing Transwood's claim. *See* WIS. STAT. § 802.08(2).

¶11 Transwood nonetheless argues summary judgment was inappropriate because the circuit court did not permit additional time to depose several WRR employees. “[W]hether to refuse a motion for summary judgment in order to give an opposing party additional time to obtain essential facts to defeat summary judgment is a highly discretionary ruling.” *Kinnick v. Schierl, Inc.*, 197 Wis. 2d 855, 865, 541 N.W.2d 803 (Ct. App. 1995). We will uphold the decision if it is supported by a reasonable basis in the record. *Rechsteiner v. Hazelden*, 2007 WI App 148, ¶30, 303 Wis. 2d 656, 736 N.W.2d 219.

¶12 We conclude the record here provides a reasonable basis for the court's decision not to delay the summary judgment proceedings to permit Transwood further discovery. Transwood filed its claim on October 31, 2008. The court entered a scheduling order on August 10, 2009, which required that dispositive motions be filed by December 31, 2009, and set a trial date of May 17, 2010. Transwood did not attempt to schedule any depositions until December 22, 2009, when it sent opposing counsel a letter requesting available dates to depose

four individuals. After stipulating to an extension of the filing deadline, the parties filed their respective summary judgment motions on January 6 and 8, 2010.

¶13 In Transwood’s brief opposing WRR’s motion, Transwood asserted it was “of paramount importance,” that it have an opportunity to conduct depositions, and that “without such opportunity [it] ‘cannot for reasons stated present by affidavit facts essential to justify the party’s opposition.’” *See* WIS. STAT. § 802.08(4). The brief did not, however, actually state any reasons why any particular facts could not be presented by affidavit, much less identify what facts or type of facts it sought.

¶14 Transwood’s brief on appeal is similarly deficient. It states:

If Transwood would have been allowed to take the depositions of WRR personnel, Transwood would have been able to establish its claims and ultimately obtain a judgment in its favor given WRR’s breach of contract and refusal to pay the principal amounts due and the interest charges accrued for delinquent and late payments made by WRR during the life of the parties’ contract.

Transwood does not, however, explain why it needed to depose WRR employees to obtain evidence that Transwood performed transportation services for which it was not paid. If Transwood was truly owed money by WRR, Transwood should have been able to produce affidavits or invoices to that effect.

¶15 Transwood had ample time to schedule depositions prior to the deadline for filing dispositive motions. *See Rechsteiner*, 303 Wis. 2d 656, ¶33 (court not required to provide more time to do nothing). That fact, together with Transwood’s failure to explain why any further discovery was needed, provides sufficient justification to affirm the circuit court’s decision. *See id.*, ¶31 (appellant must offer more than a conclusory allegation of error).

By the Court.—Judgment affirmed.

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

