IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 7, 2013 Session

APAC-ATLANTIC, INC., HARRISON CONSTRUCTION DIVISION v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission for the Eastern Division
No. T20090583-1 William O. Shults, Commissioner

No. E2012-01536-COA-R3-CV-FILED-OCTOBER 31, 2013

This is a breach of contract claim brought by the appellant road paving contractor, APAC-Atlantic, Inc., Harrison Construction Division ("APAC"), after the defendant, the Tennessee Department of Transportation ("TDOT"), refused payment of $221,998.36 pursuant to a special "rideability," or smoothness, provision of the parties' written contract. The Claims Commission, William O. Shults, Commissioner, finding the special provision language to be unambiguous, denied the claim. APAC appeals. Discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Affirmed; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., P.J., and JOHN W. MCCLARTY, J., joined.

Michael D. Newton, Chattanooga, Tennessee, and M. Craig Hall, *Pro Hac Vice*, Atlanta, Georgia, for the appellant, APAC-Atlantic, Inc., Harrison Construction Division.

Robert E. Cooper, Jr., Attorney General and Reporter; William E. Young, Solicitor General; and Melissa A. Brodhag, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural Background

The parties entered into the contract giving rise to this action in July 2005 after APAC proposed the winning bid to repave a 6.93-mile section of State Route 336 in Blount County ("the Project"). The contract's rideability provision, Special Provision 411C ("SP 411C"),

was included in most of TDOT's resurfacing contracts in 2005 and had been revised as of July 2004. Pursuant to SP 411C, TDOT utilized a Road Profiler, which consists of a van equipped with sensors and a computer, to perform pre- and post-tests of rideability. The pre- and post-tests compared the smoothness of the road, sectioned mile by mile, before and after resurfacing. For each mile or "lot" of the road, if the test showed improvement in rideability of 30% or more, TDOT paid the contractor 100% of the agreed contract price. If the improvement were less than 30% but more than 15%, partial payment for that lot would result. If the contractor failed to improve rideability by at least 15%, SP 411C required the contractor to take corrective action by removing the deficient asphalt and resurfacing again.

The contract was awarded to APAC on July 8, 2005, with an effective date of July 29, 2005, and a required completion date of November 30, 2005. On October 4, 2005, the parties met for a preconstruction conference, at which APAC project manager Landon Lawson requested that the entire Project be exempted from the rideability requirement of SP 411C. SP 411C provided for possible exemptions of project sections, specifically near the project's beginning and end, bridges, railroad crossings, stop or yield locations, manholes or utility gates, at intersections, and in rural locations with constant changes in elevation and curves. Prior to APAC's beginning work on the Project in October 2005, TDOT project supervisor David Sisson responded to Mr. Lawson's request, stating that a decision regarding which sections would be exempted from the rideability requirement would be made following completion of the Project and upon review of the post-ride test results.

APAC completed the Project by November 30, 2005, as required by the contract. TDOT performed the post-ride test in December 2005 and determined that nearly all of the roadway APAC paved failed the rideability requirement, with the majority of road sections actually less rideable, i.e., rougher, than they had been before the repaving. Todd Davis, APAC's project manager, sent TDOT a letter in January 2006, again requesting exemption of the Project from the rideability requirement and detailing APAC's reasons for considering each lot to be eligible for exemption. Mr. Sisson informed APAC in a March 20, 2006 letter that the Project had failed the rideability requirement and that TDOT would begin assessing damages under the contract against APAC until successful corrective action was completed at APAC's expense. TDOT later exercised its discretion to reduce payment without requiring APAC to undergo the expense of performing the work again.

The initial amount assessed against APAC was $306,360.52. TDOT subsequently reduced the amount deducted from payment to APAC to $232,081.41. At the point when TDOT concluded that APAC was in noncompliance with SP 411C, TDOT had already tendered payment for the Project to APAC. TDOT recovered the full sum of $232,081.41, however, through a $63,643.79 reimbursement payment made by APAC and a $168,437.62

deduction from payment due to APAC for completion of a subsequent project under a separate contract.

APAC filed a claim with the Division of Claims Administration on November 12, 2008, alleging that TDOT had breached the contract and wrongfully deducted $306,360.52 from monies due to APAC. The administrative division transferred APAC's claim to the Claims Commission on February 23, 2009. TDOT filed an answer and counterclaim for the reimbursement still owed at that time on April 24, 2009, and filed a motion for summary judgment on November 22, 2010. Following a hearing, the Claims Commission, finding genuine issues of material fact to exist, denied the motion for summary judgment on April 27, 2011. At this point, the parties stipulated to $221,998.36 in contested damages.

A trial on the merits was held before the Claims Commission on February 27, 2012. Before entry of the final judgment, APAC filed a reply to the State's amended counterclaim on March 12, 2012, alleging that TDOT had wrongfully withheld monies due to APAC. The Commission entered its final judgment on June 20, 2012, finding that SP 411C was unambiguous and ruling that TDOT had not breached its contract with APAC. APAC timely appealed. On December 21, 2012, the Claims Commission entered an amended judgment, dismissing TDOT's counterclaim because having recovered all payment, TDOT was no longer owed any money by APAC. APAC timely appealed the amended judgment.

II. Issues Presented

On appeal, APAC presents four issues, which we restate as follows:

1. Whether the Claims Commission erred by premising its order upon the conclusion that SP 411C was unambiguous and, on that basis, declining to consider parol evidence or interpret the contract against the State as the drafter of an ambiguous contract.

2. Whether the Claims Commission erred by excluding evidence of the State's revisions to SP 411C in subsequent contracts pursuant to Tennessee Rule of Evidence 407 regarding subsequent remedial measures.

3. Whether the Claims Commission erred by failing to find that TDOT breached the implied duty of good faith and fair dealing.

4. Whether the Claims Commission erred by failing to find APAC excused from compliance with SP 411C because TDOT's administration of the contract rendered APAC's compliance with SP 411C impossible.

III. Standard of Review

This is a review of a non-jury proceeding before the Claims Commission. We review the Commission's conclusions of law, including its interpretation of a written agreement, *de novo* with no presumption of correctness. *See Ray Bell Cons't Co., Inc.*, 356 S.W.3d 384, 386 (Tenn. 2011); *Vanbebber v. Roach*, 252 S.W.3d 279, 284 (Tenn. Ct. App. 2007). We presume the factual findings of the Commission to be correct and will not overturn those findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Morrison v.* Allen, 338 S.W.3d 417, 426 (Tenn. 2011); *Skipper v. State*, No. M2009-00022-COA-R3-CV, 2009 WL 2365580 at *2 (Tenn. Ct. App. July 31, 2009). "In order for the evidence to preponderate against the trial court's finding of fact, the evidence must support another finding of fact with greater convincing effect." *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006). We accord the Commission great deference in its assessment of witness credibility and will not re-evaluate that assessment in the absence of clear and convincing evidence to the contrary. *Skipper*, 2009 WL 2365580 at *10 (citing *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 770, 783 (Tenn. 1999)).

IV. Unambiguous Contract Provision

APAC contends that the Commission erred by finding SP 411C unambiguous and therefore failing to consider parol evidence to determine the parties' intent and failing to construe an ambiguous contract against the drafter. APAC argues that the Commission should have considered evidence that APAC reasonably expected the Project to be exempt from application of SP 411C, that the Project contained criteria for exemption listed in SP 411C, and that TDOT's prior course of dealing was to exempt projects with similar characteristics. The State contends that the Commission properly found SP 411C to be unambiguous and therefore properly declined to consider parol evidence or construe the contract against TDOT as its drafter. We agree with the State.

In interpreting a contract, our "initial task is to determine whether the language in the contract is ambiguous." *Ray Bell*, 356 S.W.3d at 386-87 (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002)). "If the contract language is unambiguous, then the parties' intent is determined from the four corners of the contract." *Ray Bell*, 356 S.W.3d at 387 (citing *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998)). This Court has explained the principles applied to determine whether the contract language is clear or ambiguous as follows:

> The language in dispute must be examined in the context of the entire agreement. *Cocke County Bd. of Highway Commrs. v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985). The language of a contract is ambiguous when

> its meaning is uncertain and when it can be fairly construed in more than one way. *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975). "A strained construction may not be placed on the language used to find ambiguity where none exists." *Id.*

Vanbebber, 252 S.W.3d at 284. It is well-settled that "ambiguities in a contract are to be construed against the party drafting it." *Frank Rudy Heirs Assocs. v. Moore & Assocs., Inc.*, 919 S.W.2d 609, 613 (Tenn. Ct. App. 1995). "The parol evidence rule does not permit contracting parties to 'use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract.'" *Staubach Retail Servs.-Se., LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 525 (Tenn. 2005) (quoting *GRW Enters. v. Davis*, 797 S.W.2d 606, 610 (Tenn. Ct. App. 1990)).

The contract provision at issue in this action, SP 411C, provides in pertinent part:

> This provision sets up pavement smoothness requirements and how testing procedures, acceptance, and payment practices will be handled by the Department.
>
> Completed pavement surfaces of traffic lanes, including those on bridge deck surfaces on both the mainline and ramps with stop or yield conditions shall be tested for smoothness with the Road Profiler in accordance with Department procedures.
>
> The Contractor shall be paid monies due for items in the surface mix based on the payment table below. Any lot (1 mile or fraction thereof) of pavement where the Road Profiler's Half Car International Roughness Index value exceeds 70 inches per mile or does not provide at least 15% improvement, as shown in the payment tables below, will require corrective action. Any unacceptable lot(s) will be divided into 0.1-mile sublots for closer evaluation. The Contractor, at his discretion, shall choose those sublots, within the unacceptable lot, to correct in order to bring the overall lot into the acceptable smoothness range. However, the Contractor may not choose more than 3 sublots for repair, unless they are adjacent to each other and there are no more than 6 transverse joints. Otherwise, the entire lot will require corrective action. The minimum corrective action shall be the length of the entire sublot of 0.1 mile. The only acceptable corrective action is mill and inlay. Payment for the corrected 1 mile lot(s) will be based on the Road Profiler's Half Car International Roughness Index after corrective action has been taken.

Each lot of pavement will be tested by one pass of the Road Profiler. If corrective action is required, a second pass will then be made to determine the pay adjustments for the corrected lot(s).

At the discretion of the Engineer, the following sections of a project may be exempt from this specification: ±50 feet at the beginning and ending of a project, ±50 feet of a bridge approach and departure, ± 50 feet of a railroad crossing, ±50 feet of a stop/yield location, ±25 feet of a manhole/utility gate, and intersections. Also, sections to be considered for exemptions are urbanized areas were [sic] the contractor must use a curb/gutter to match profile and urbanized locations where there are numerous commercial driveways/egresses/ingress's [sic]. Rural locations where there are constant changes in superelevations/switchbacks/reverse curves should also be considered for exclusion. Any exempted sections of roadway must comply with the straightedge requirements specified in section 411.08 of the Standard Specifications.

Any deduction in monies due the Contractor for ride quality shall be made in accordance with this provision under the item for Rideability Deduction.

Payment table for smoothness based on Road Profiler Half Car International Roughness Index values are shown below.

(Emphasis added.) The parties stipulated that Table 2 applied to the Project:

411C- Table 2	
Percent Improvement %**	Percentage paid on bid price of surface items
30 or more	100%
29	99%
28	98%
27	97%
26	96%
25	95%
24	94%
23	93%
22	92%
21	91%
20	90%
19	88%
18	86%
17	84%
16	82%
15	80%
Less than 15	Mill and Inlay*

*The mill and inlay shall be the thickness as specified on the plans for the surface layer

**Percent Improvement = $\frac{\text{Initial Half Car IRI - Final Half Car IRI}}{\text{Initial Half Car IRI}}$ X 100

In its final judgment, the Commission included the following analysis regarding the language of SP 411C:

> [T]he provisions of the July 1, 2004 version of SP 411C were crystal clear at the time this contract was entered into. Table 2 is clear and the circumstances under which its standard could be waived are set out in detail on page 1 of SP 411C. APAC argues that what was urban or rural under this standard and the engineering discretion given to a non-engineer, Mr. Sisson, were ill-defined concepts. Be that as it may, the applicable language said what it said at the time the contract was bid, and it was APAC's prerogative to bid using those terms or refuse to do so. Specifically, Table 2 is found in the version of SP 411C used on this project and sets out a very precise method for calculating the amount APAC would be paid gauged by the percentage of improvement in the smoothness of the road following completion of the project.

The Commission accordingly found SP 411C to contain unambiguous contract language. We agree that the language of SP 411C is unambiguous.

APAC does not dispute that SP 411C clearly indicated that the completed Project would be tested for smoothness using a Road Profiler and the results analyzed for each mile-long lot, with those lots not showing at least 15% improvement divided into 0.1-mile sublots for closer evaluation. APAC also does not dispute that the penalties assessed for sublots requiring corrective action were clearly delineated in Table 2. Primarily at issue is the paragraph of SP 411C, emphasized above, describing possible exemptions from the smoothness specification. APAC argues that because sections of the Project included elements listed as candidates for exemption, the exemption paragraph contained a latent ambiguity because it was open to two interpretations: (1) that of APAC construction supervisors believing the Project would be exempt because of the existence of elements listed and (2) that of the TDOT project engineer and his supervisory TDOT reviewers declaring only two sublots exempted. The exemption paragraph, however, contains no language that guarantees the exemption of sections containing the listed elements. Instead, the paragraph expressly states that exemptions are "[a]t the discretion of the Engineer" and that sections containing the listed elements "may be exempt" and should "be considered" for exemption.

APAC further argues that the exemption language is ambiguous because it does not contain definitions of the contract terms "urban," "rural," "numerous," and "constant" when describing areas to be considered for exemption in the following sentences:

> Also, sections to be considered for exemptions are urbanized areas were [sic] the contractor must use a curb/gutter to match profile and urbanized locations where there are numerous commercial driveways/egresses/ingress's [sic]. Rural locations where there are constant changes in superelevations/switchbacks/reverse curves should also be considered for exclusion.

In interpreting the language of a contract, we are required to use "the usual, natural, and ordinary meaning" of terms. *See Staubach*, 160 S.W.3d at 526; *Adkins v. Blue Grass Estates*, 360 S.W.3d 404, 411 (Tenn. Ct. App. 2011). *Black's Law Dictionary* (8th ed. 2004) 1576 defines "urban" as "[o]f or relating to a city or town; not rural." *Black's Law Dictionary* does not define "rural," although by implication of its opposite, "rural" would be an area not relating to a city or town. *See id. Merriam-Webster's New International Dictionary* (3rd ed. 1993) 1990 does define "rural" in relevant part as "country, open land . . . of, relating to, associated with, or typical of the country." *Merriam-Wester's Dictionary* 1550 defines "numerous" in relevant part as "consisting of great numbers of units: existing in abundance: many, plentiful" and at 485, "constant" in relevant part as "marked by continual recurring or by regular occurrence, operation, or manifestation." We note also that the terms "urban" and "rural" are partially defined in the exemption paragraph by examples offered of conditions sometimes present in urban and rural areas that *may* qualify the roadway in said areas for exemption ("urban" as "where there are numerous commercial driveways/egresses/ingress[es]" and "rural" as "where there are constant changes in superelevations/switchbacks/reverse curves").

In asserting that terms such as "numerous" and "constant" should be defined in order to be deemed unambiguous, APAC is essentially claiming that TDOT should state a minimum number of driveways/egresses/ingresses and a minimum number of changes in superelevations/switchbacks/reverse curves that would qualify a section of roadway for exemption from the smoothness specification. Such a one-size-fits-all pronouncement in the special provision would be arbitrary and would eliminate the discretion of experienced TDOT engineers and supervisors. We cannot conclude that the use of the terms "urban," "rural," "numerous," and "constant" in SP 411C created contract ambiguity. *See Staubach*, 160 S.W.3d at 526 ("A contract term is not ambiguous merely because the parties to the contract may interpret the term in different ways.").

To summarize, it would be reasonable for a contractor such as APAC to interpret the exemption paragraph as indicating that sections of the roadway on which it was bidding stood a good chance of being exempted from the smoothness specification, provided the sections contained elements listed as fit for consideration. It would not be reasonable for APAC to interpret the exemption language as absolute assurance that exemptions would be granted. The language is not reasonably subject to the alternative interpretation of guaranteed exemption. *See Ray Bell*, 356 S.W.3d at 388 (determining contract language to be unambiguous where it was "reasonably subject" to only one interpretation). APAC is asking this Court to consider factual background to create an ambiguity where none exists in the plain language of the provision. We must not consider extrinsic evidence in such a situation. *See id.* ("When the contract language is unambiguous it is the duty of the courts to interpret the contract according to its plain terms."); *see generally Faris v. Bry-Block Co.*, 346 S.W.2d 705, 707 (Tenn. 1961) (noting that when interpreting a will, "extrinsic evidence can not be used to create an ambiguity"). We conclude that the Claims Commission properly determined SP 411C to be unambiguous and therefore properly declined to consider parol evidence as to the parties' intent. *See Staubach*, 160 S.W.3d at 525. Having concluded that SP 411C is unambiguous, we further conclude that the Commission properly declined to construe the contractual provision against the drafter. *See Frank Rudy Heirs Assocs.*, 919 S.W.2d at 613.

V. Tennessee Rule of Evidence 407

APAC also contends that the Commission erred by excluding evidence of a June 1, 2006 revision TDOT made to SP 411C and finding it a subsequent remedial measure, inadmissible pursuant to Tennessee Rule of Evidence 407. The State contends that the revision was irrelevant to the instant action because it did not affect the exemption language of SP 411C. In its Final Judgment, the Commission declined to consider versions of SP 411C used in other contracts subsequent to the instant contract, finding that to do so would violate Rule 407 of the Tennessee Rules of Evidence "and/or" the parol evidence rule. We conclude that the parol evidence rule applied to provision revisions made in subsequent contracts and that the Commission did not err in declining to consider such evidence.

As noted in the preceding section of this opinion, the parol evidence rule does not permit the admission of extrinsic evidence to "alter, vary, or qualify the plain meaning of an unambiguous written contract.'" *See Staubach*, 160 S.W.3d at 525 (quoting *GRW Enters.*, 797 S.W.2d at 610). Tennessee Rule of Evidence 407 (2012) provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove strict liability, negligence, or culpable

> conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving controverted ownership, control, or feasibility of precautionary measures, or impeachment.
>
> As our Supreme Court has elucidated:
>
> The purpose of this evidentiary rule is to "encourage remedial measures in order to serve the public's interest in a safe environment." Neil P. Cohen et al., *Tennessee Law of Evidence* § 4.07[2] (5th ed. 2005). The word "subsequent" refers to events that occur after the events giving rise to the lawsuit. *Rothstein v. Orange Grove Ctr., Inc*., 60 S.W.3d 807, 813 (Tenn. 2001). An action is "remedial" if it "chang[es] a situation, usually an unsafe property or product, to prevent the situation from causing further injury." *Id*. As with other evidentiary matters, we review a trial court's decision to admit or exclude evidence under Tennessee Rule of Evidence 407 under an abuse of discretion standard. *See State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). "An abuse of discretion occurs when the trial court applies an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *Id.* (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)).

Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 87-88 (Tenn. 2008).

Testimony of TDOT officials demonstrated that since June 2006, subsequent to the instant contract, TDOT revised SP 411C to include a statement that the specific sections of roadway to be exempted would be included in project plans. Kenneth Egan, Director of Construction for TDOT at the time of trial and testifying by deposition, stated that TDOT's policy from June 2006 forward was to include pre-ride numbers in its repaving contract plans. He and field office supervisor Duanne Manning acknowledged that the revision to SP 411C and attendant decision to include pre-ride numbers were designed to make the process easier for contractors and help prevent disputes such as the instant one. Examples of other contracts between TDOT and APAC, including evaluations of rideability and exemptions granted, were submitted to the Commission as an exhibit to the deposition testimony of Mike Davis, then president of APAC's Tennessee division. The Commission took the matter of whether to consider evidence of other contracts and the 2006 revision to SP 411C under advisement at the trial before reaching the conclusion in its Final Judgment that said evidence was precluded by the parol evidence rule "and/or" Tennessee Rule of Evidence 407.

Having determined that the language of a particular contract is unambiguous, a court, pursuant to the parol evidence rule, is not to consider any evidence extrinsic to the four corners of the contract in determining the contracting parties' intent. *See Staubach*, 160 S.W.3d at 525. Evidence of revisions to subsequent contracts would necessarily be outside the four corners of the parties' original contract and therefore inadmissible pursuant to the parol evidence rule when the contract language is unambiguous. We conclude that in this action, there was no need to apply Rule 407 to revisions in subsequent TDOT contracts because application of Rule 407 was pretermitted by the parol evidence rule. APAC is not entitled to relief on this issue.

VI. Implied Duty of Good Faith and Fair Dealing

APAC contends that the Claims Commission erred by failing to find that in connection with the subject contract, TDOT breached the implied duty of good faith and fair dealing. To support its contention, APAC characterizes the Commission's ruling as finding bad faith on TDOT's part but erroneously concluding that it could not issue such a ruling in the face of finding the contract to be unambiguous. The State posits that the Commission correctly concluded that TDOT did not breach the duty of good faith and fair dealing. We agree with the State.

The Claims Commission entered a comprehensive, detailed Final Judgment in this action, making multiple findings of fact and taking judicial notice of contractors' claims against TDOT that came before the Commission in the years spanning 2000 to 2011. The Commission also noted recent Tennessee appellate court precedent, emphasizing our Supreme Court's holding in *Ray Bell*, 356 S.W.3d 384. In *Ray Bell*, the Supreme Court reversed the Commission's award to a contractor of an incentive bonus, which the Commission had based on its finding of a latent ambiguity in the contract drafted by TDOT. *Id.* The Supreme Court held that the contract in *Ray Bell* was unambiguous and that the Commission had therefore erred in considering extrinsic evidence in its interpretation of the contract. *Id.* (reversing this Court's decision in *Ray Bell Constr. Co., Inc. v. State*, No. E2009-01803-COA-R3-CV, 2010 WL 4810670 (Tenn. Ct. App. Nov. 24, 2010) (J. Swiney dissenting)). The Commission's Final Judgment in the instant action concluded with the following paragraph:

> Regardless of the sometimes disturbing proof in this case, but in [acknowledgment] of the Supreme Court's clear holding in *Ray Bell* regarding the primacy of unambiguous contract language–even in the face of what appears to be compelling parol evidence–the Commission has no alternative but to respectfully **DISMISS** APAC's claim.

The "disturbing proof" noted by the Commission included its findings that (1) TDOT placed an "overwhelming emphasis" on "keeping the project on budget," (2) TDOT officials' testimony differed somewhat regarding the process for application of the SP 411C exemptions, and (3) TDOT's history of dealing with contractors prior to the 2004 version of SP 411C fostered APAC's expectation that exemptions would be granted. In the context of these findings, the Commission stated: "A plausible argument can be made in light of these considerations that the State, perhaps, did not deal fairly and in good-faith with APAC in interpreting and applying SP 411C of CND 214 [the Project]." The Commission, however, immediately followed this statement with its finding regarding the clarity of SP 411C: "On the other hand, the provisions of the July 1, 2004 version of SP 411C were crystal clear at the time this contract was entered into." Our review of the Final Judgment and Amended Final Judgment reveal that although the Commission raised questions regarding whether TDOT's strict adherence to SP 411C and to the original budget on the instant Project was in keeping with the course of dealing APAC had come to expect from working with TDOT on other projects, the Commission did not find TDOT to have breached the implied duty of good faith and fair dealing.

APAC argues on appeal that even with a ruling that SP 411C is unambiguous, the Claims Commission still erred by failing to find that TDOT breached the implied duty of good faith and fair dealing by arbitrarily exercising its discretion in applying SP 411C and by arbitrarily enforcing construction limitations that rendered compliance with SP 411C "extraordinarily unlikely." It is a well settled principle of Tennessee law that every contract includes an implied covenant of good faith and fair dealing in the contract's "performance and enforcement." *Dick Broadcasting Co., Inc. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 661 (Tenn. 2013) (quoting *Lamar Adver. Co. v. By-Pass Partners*, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009)). Our Supreme Court has explained the intersection of this duty with the language of a contract as follows:

> It is true that "the common law duty of good faith does not extend beyond the agreed upon terms of the contract and the reasonable contractual expectations of the parties." *Wallace* [*v. Nat'l Bank of Commerce*], 938 S.W.2d [684,] 687 [(Tenn. 1996)]. Moreover, "'[t]he implied obligation of good faith and fair dealing does not . . . create new contractual rights or obligations, nor can it be used to circumvent or alter the specific terms of the parties' agreement.'" *Lamar Adver. Co.*, 313 S.W.3d at 791 (quoting *Barnes & Robinson Co.* [*v. OneSource Facility Servs., Inc.*], 195 S.W.3d [637,] 643 [(Tenn. Ct. App. 2006)]). However, while the implied covenant of good faith and fair dealing "does not create new contractual rights or obligations, it protects the parties' reasonable expectations as well as their right to receive the benefits of their

> agreement." *Long* [*v. McAllister-Long*], 221 S.W.3d [1,] 9 [(Tenn. Ct. App. 2006)].

Dick Broadcasting Co., 395 S.W.3d at 666. Contracting parties may disavow the implied duty of good faith and fair dealing only by expressly stating their intention to do so. *Id.* at 669.

A. Discretion in Applying Exemptions

When a contract is silent regarding how an agreed-upon term will be implemented, an implied covenant of good faith and fair dealing may be considered in determining whether the party implementing the term acted with good faith and in a commercially reasonable manner. *See, e.g., Dick Broadcasting Co.*, 395 S.W.3d at 656-57 (holding that an implied covenant of good faith and fair dealing applies "where the parties have contracted to allow assignment of an agreement with the consent of the non-assigning party, and the agreement is silent regarding the anticipated standard of conduct in withholding consent. . . ."). We have concluded that the 2004 version of SP 411C was unambiguous in stating that certain conditions could warrant exemption of the rideability requirement in the discretion of the TDOT engineer. The provision was silent, however, regarding whether the TDOT engineer would exercise his discretion regarding exemptions before the contractor began work on the Project or after completion.

It is undisputed that at the preconstruction conference, which occurred after APAC was awarded the contract but before APAC had begun work, Mr. Lawson requested that TDOT exempt the entire 6.93 miles of the Project from the smoothness specifications of SP 411C. Mr. Lawson memorialized this request in a letter to Mr. Sisson, dated October 4, 2005, in which he requested waiver based on (1) inability to use a motion transfer vehicle ("MTV") because of overhead obstructions; (2) inability to use an automatic grade control system ("ski pole") due to "insufficient roadway width" and "numerous curves"; (3) other conditions that "severely hamper pavement smoothness[:] manholes & valves, curb & gutter sections, old abandoned railroad crossing, existing rough patches, numerous reverse and super-elevated curves, widened curves, the severely deteriorated condition of the existing roadway surface"; and (4) traffic control specifications limiting work to the hours of 9:00 a.m. to 3:00 p.m.

In his role as TDOT construction supervisor for the Project, Mr. Sisson responded to Mr. Lawson in a letter dated October 7, 2005, with the following decision in pertinent part:

> According to Region one officials the Department cannot waver [sic] the entire project beforehand. If you will go ahead and complete all the pavement

> surfaces including the old abandoned railroad crossing, bridges, manhole, valves, curb & gutter sections and with all the stop and yield condition, then the surface will be tested for smoothness with the road profiler in accordance with T.D.O.T. procedures.
>
> After the surface has been tested and broken down into lots, then we can determine sections to be considered for exemption as stated in SP 411C. Any exempted areas still must comply with requirements specified in section 411.08 of the Standard Specifications.

Mr. Sisson reported to Duane Manning, who oversaw the TDOT field office that administered the contract. Mr. Manning testified that at the time of this Project, TDOT waited for post-ride results to review which sections of roadway did not meet smoothness specifications before determining which of those failing sections would be exempted. He stated that TDOT officials were concerned at that time that contractors would not put as much effort into achieving good rideability on sections they knew would be exempted. He acknowledged that SP 411C was revised in 2006 to state that specific roadway sections to be waived would be included in the project plans and stated this allowed "full disclosure on the front end of the project" to contractors.

We note, however, that such disclosure at the beginning of a project was not an expectation included in the parties' contract at issue in 2005 and that APAC officials knew before beginning work that exemptions would be determined after post-ride test results. In fact, Mr. Lawson testified that following the preconstruction meeting, he "rode the job" with his superintendent at APAC, Gary Loflin, informing Mr. Loflin he was concerned that TDOT would not waive the rideability requirement. In addition, APAC does not dispute that pre-ride test results were available to paving contractors upon request to TDOT but that APAC did not seek those numbers before bidding on this Project. We cannot conclude that TDOT's decision to wait for post-ride results before determining exempted sections was outside a reasonable expectation of the parties' contract. *See Long v. McAllister-Long*, 221 S.W.3d 1, 9 (Tenn. Ct. App. 2006) (noting that the covenant of good faith and fair dealing protects a party's "reasonable expectations" within the confines of "contractual rights or obligations").

APAC also argues that TDOT, particularly project engineer Sisson, breached the covenant of good faith and fair dealing by exercising the engineering discretion afforded in the contract in an arbitrary fashion when determining which roadway sections would be exempt from the SP 411C requirements. As the State notes, SP 411C provided for penalties to be assessed only against the contractor's performance on those lots of the Project for which the post-ride results showed less than 15% improvement from the smoothness of the

original roadway, terming those lots "unacceptable." In other words, the TDOT engineer had no reason to exercise discretion regarding smoothness exemptions for any roadway section that passed the post-ride test. On this Project, it was undisputed that the post-ride numbers revealed an unacceptable level for nearly the entire 6.93 miles, with the roadway in most sections actually rougher than before it was repaved.

APAC stresses that Mr. Sisson did not possess an engineering degree and had not been specifically trained by TDOT in the interpretation of SP 411C exemption criteria. As the Commission noted, however, Mr. Sisson had enjoyed a forty-three-year career with TDOT by the time of this Project and had supervised paving projects for over twenty years. The contract contained no requirement that the "Engineer" for purposes of overseeing the Project hold a four-year engineering degree. The pre-ride and post-ride tests were performed by personnel from TDOT's Material and Test Department, using the Road Profiler as provided in SP 411C.

Mr. Sisson testified that his first knowledge that the Project was not going to meet the rideability standard was when he saw the printed post-ride results, or "Asphalt Roadway Surface Roughness Evaluation," dated December 6, 2005. On January 27, 2006, APAC project manager Todd Davis sent a letter to Mr. Sisson in which APAC requested amendment of the evaluation to allow exemptions for all lots of the Project, with specific reasons delineated lot by lot. APAC later received a letter from Mr. Sisson, dated April 25, 2006, stating that upon review, he had concluded that two locations should be exempt from the smoothness requirement. For both, "curb and gutter" were present that required APAC "to match the existing grade of the curb and gutter." Mr. Sisson further stated in the letter:

> The project contains several private driveways and side streets entering the roadway throughout the project but according to SP411C only in urbanized locations where there are numerous commercial driveways present can the rideability provision be considered for exclusion.
>
> Also, SP411C allows the Engineer at his discretion to exclude sections of roadway in rural locations where there are constant changes in superelevations/switchbacks/reverse curves. It is my opinion that the curves throughout the project are not severe enough to be considered for exclusion.

Upon APAC's request, Mr. Sisson's decision was reviewed by his supervisor at the field office, Mr. Manning, who testified that he personally drove over the roadway, examined the Project lots, and concluded that Mr. Sisson's decision exempting only two locations was correct. Mr. Manning's confirmation of Mr. Sisson's decision was reviewed and confirmed by the regional construction supervisor, Clint Bane. Mr. Bane, who possessed a degree in

civil engineering, testified that he had the authority to override Mr. Sisson's decision but did not because he agreed with Mr. Sisson's "interpretation of what should be exempted from the project . . . ." The exemption decision was ultimately reviewed and approved by Mike Falkenburg, TDOT Assistant Director of Construction at the state level.

We note that in addition to the discretion of the engineer outlined in SP 411C, the parties' contract also contained a provision giving the TDOT engineer authority over evaluation of the work performed and providing for an internal process of appeal. TDOT Standard Specification Section 105.01, included in the parties' contract, provides in relevant part:

> **Section 105.01-Authority of the Engineer.** The Engineer will have full professional and executive charge of supervision of the Work. He will decide all questions which may arise as to the quality and acceptability of materials furnished and work performed, as to the rate of progress, and the amount of work which has been performed at any given time, and all questions which may arise as to the interpretation of the Plans and Specifications, and as to the acceptable fulfillment of the Contract by the Contractor. In all of these matters, the decision of the Engineer will be final and binding; decisions which are of a purely contractual or legal nature, will be subject to appeal in writing by the Contractor to the [TDOT] Commissioner.

Based upon our thorough review of the record, we conclude that TDOT personnel properly exercised their discretion as provided in the parties' contract, including the contract's provision for review of said discretion.

B. Discretion in Construction Limitations

APAC further argues that TDOT breached the implied duty of good faith and fair dealing by arbitrarily placing limitations on construction that rendered compliance with SP 411C unlikely, including (1) only partially granting APAC's request for additional asphalt layering mix; (2) including inaccurate measurements of road width within the project plans, making use of an MTV or automatic grade control system ("ski pole") prohibitive; and (3) restricting the hours APAC could pave to 9:00 a.m. to 3:00 p.m. TDOT argues that APAC's noncompliance was caused by its own failings, including failing to obtain the pre-ride test information for planning purposes, failing to adequately survey the road for itself before bidding on the Project, and failing to use the contractually allocated leveling mix correctly. We conclude that because APAC was aware or should have been aware of construction limitations prior to bidding on the contract, TDOT did not breach the duty of good faith and fair dealing in this regard.

The contract for this Project called for three types of asphalt layering mix: "D," "CS," and "E." Mr. Manning explained that CS mix is "scratch mix" and is utilized to fill in small gaps. E mix is a "leveling mix" or "spot leveler" and is used to fill in ruts, holes, and larger gaps in the road. D mix is the surface mix and is the "final lift" or surface mat of asphalt. The plans provided by TDOT to contractors bidding on the Project included estimated quantities of each mix that would be needed. APAC did not dispute the quantities allocated of D and CS mix, but both Mr. Lawson and Todd Davis testified that the amount of E mix allocated was woefully inadequate to achieve the smoothness requirement of SP 411C.

The contract provided for an estimated 347 tons of E mix. After being informed that TDOT would not decide on exemptions to SP 411C until after the Project was completed, Mr. Lawson inspected the roadway at issue and determined that APAC would need 1,400 tons of E mix, requesting the increased quantity in a letter to Mr. Sisson. Mr. Sisson reviewed the request and granted an increase to 773 tons of E mix. Mr. Lawson and Todd Davis of APAC both testified that the E mix allocated was not enough to complete the paving to the thickness required to comply with SP 411C. TDOT officials testified, however, that the original estimate of 347 tons was the typical amount of 50 tons per mile allowed for similar projects and that E mix was never meant to be employed across the entire Project as APAC attempted to utilize it. APAC argues that TDOT arbitrarily limited the amount of E mix to stay within budget, reducing the amount of shoulder stone allowed for the project to accommodate the added expense of the increase to 773 tons of E mix. Mr. Sisson acknowledged that he adjusted the amount of shoulder stone to counter the expense of additional E mix but maintained that in his opinion as project engineer, 773 tons of E mix should have sufficed to allow APAC to meet smoothness requirements.

APAC also maintains that it was virtually impossible to comply with the rideability requirement without using an MTV or automatic grade control system ("ski pole"). Mr. Lawson explained that an MTV, also known as a "shuttle buggy," allows transfer of asphalt mix directly to the paver without the Contractor having to utilize trucks to carry mix to the paver. When trucks are used to transfer mix, they must be maneuvered very carefully to avoid bumping the paver, causing bumps and unevenness in the freshly laid asphalt. An alternative method, the ski pole, has sensors that note any variation within a thirty-foot section, adjusting accordingly to remove inconsistencies in the pavement. Mr. Lawson and Mr. Loflin believed they would be able to utilize an MTV or ski pole for this Project based on the measurements provided by TDOT on the plans and submitted their bid accordingly. When Mr. Lawson measured the roadway, however, he found that it was narrower than quoted in the plans, forcing APAC to use only a straight edge to smooth the asphalt. TDOT officials opined that an MTV or ski pole could have been utilized on this Project and that in any case, compliance with SP 411C could have been achieved without use of an MTV or ski pole.

Regarding the limited hours during which APAC could perform work, TDOT's project plans included a "special note" that all resurfacing operations would be suspended "BETWEEN 7:00 A.M. AND 9:00 A.M. AND BETWEEN 3:00 P.M. AND 6:00 P.M. DUE TO "'PEAK HOUR TRAFFIC VOLUMES.'" APAC officials interpreted this restriction as limiting operational hours to 9:00 a.m. to 3:00 p.m. APAC argued that the need to stop and start paving operations more often due to the restriction on hours hampered its ability to maintain smoothness across the roadway. APAC officials acknowledged, however, that TDOT imposed no prohibition against the contractor working at night or in the very early morning.

In its Final Judgment and after noting its concerns regarding TDOT's course of dealing with APAC, the Claims Commission made the following findings of fact regarding APAC's failure to comply with SP 411C:

> APAC's failings on this project were numerous. Mr. Loflin, an APAC vice-president and engineer, struck the Commission as an extremely competent and honest witness. He admitted candidly that this was a job he would not be proud to admit his company had done. (TR 250). Further, he conceded that he never thought E-mix would be used to cover the entire length of the project, and that the project plans called for only spot-leveling. Although there was some confusion at APAC as to whether the pre-ride smoothness levels were available to it for use as a benchmark with which to compare the quality of its work on this project, the proof shows that APAC never attempted to obtain the pre-ride information (TR 245-246).
>
> Additionally, Mr. Lawson, who prepared APAC's bid, also impressed the Commission with his forthright testimony. He conceded that he inspected Montvale Road and noted that the TDOT engineering plans prepared for the bid process were inaccurate with regard to the width of the road. He also discovered that in places, the surface of the road had subsided. Further the proof showed that the length of this project was accessed by no less than one hundred fifty-two (152) driveways, forty-five (45) side roads, and twenty-three (23) business entrance[s] (EXH 14). This data was obviously available to APAC since its offices are located in Blount County and its hot-mix plant in close proximity to SR 336. Likewise, the Commission finds that Lawson's inspection should have revealed to him that the MTV and AGCS [automatic grade control system] equipment were unusable on this job due to overhanging objects and the width of the road, and that the authorized daytime paving schedule might contribute to a less than smooth surface. These were all considerations that APAC should have taken into account before agreeing to accept this job in light of the requirements of SP 411C.

The evidence does not preponderate against the Commission's finding that APAC knew or should have known the condition and width of the roadway, which Mr. Loflin testified was two and one-half miles from APAC's Maryville office. APAC entered into the contract with full knowledge of TDOT's plans, including estimated quantities of paving materials, road measurements, and traffic control restrictions. We are unable to conclude that TDOT exercised its discretion outside the reasonable expectations of the parties' contract. The evidence does not preponderate against the Claims Commission's finding that TDOT did not breach the implied covenant of good faith and fair dealing.

VII. Defense of Impossibility

APAC next contends that the Commission erred by not finding TDOT in breach of contract for administering the contract so as to render APAC's compliance with SP 411C impossible. In support of its contention, APAC argues the same difficulties posed in the previous section of inadequate quantities of material, inability to use necessary equipment, and restricted operational hours. APAC cites *Hinchman v. City Water Co.*, 167 S.W.2d 986, 991 (Tenn. 1943) for the following definition of impossibility in Tennessee contract law:

> "The new rule as stated in the opinion herein, is: 'The essence of the modern defense of impossibility is that the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved, rather than that it is scientifically or actually impossible.'"

(clarifying the rule in denying petition to rehear and quoting Williston on Contracts (Revised Ed.), Vol. 6, p. 5410). We note that the rule cited has since been further explicated by this Court as two rules: (1) a "rule of supervening impracticability whereby the occurrence of an unforseen circumstance following the formation of the contract excuses a party's performance" and (2) a rule of "existing impracticability," whereby "'at the time a contract is made, a party's performance under it is impracticable without his fault *because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made*.'" *Patterson v. Methodist Healthcare-Memphis Hosps.*, No. W2008-02614-COA-R3-CV, 2010 WL 363314 (Tenn. Ct. App. Feb. 2, 2010) (emphasis in original) (quoting *Restatement (Second) of Contracts* §§ 261, 266(1) (1981)).

Having concluded in the previous section that APAC entered into the contract with full knowledge of TDOT's plans and with ready access to the roadway to be paved, we conclude that neither the rule of supervening impracticability nor the rule of existing

impracticability apply to excuse APAC's noncompliance with SP 411C. APAC is not entitled to relief on this issue.

VIII. Conclusion

For the reasons stated above, we affirm the order of the Tennessee Claims Commission denying APAC's claim. The costs on appeal are assessed against the Appellant, APAC-Atlantic, Inc., Harrison Construction Division. This case is remanded to the Claims Commission, pursuant to applicable law, for collection of costs assessed below.

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THOMAS R. FRIERSON, II, JUDGE