

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2002

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. 02-1345

Cir. Ct. No. 01-CV-36

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**VERN CRAMER, D/B/A CRAMER EXCAVATING AND
HAULING,**

PLAINTIFF-APPELLANT,

v.

MARINETTE COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marinette:
TIM A. DUKET, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Vern Cramer, d/b/a Cramer Excavating and Hauling, appeals a summary judgment dismissing his claim against Marinette County. Cramer was the operator of a landfill jointly owned by Marinette and Oconto Counties. He brought claims for breach of contract and negligence against

Marinette County after the counties decided to operate the landfill themselves. The trial court denied Cramer's summary judgment motion and instead granted it in favor of the County after determining no contract existed and Cramer could not have suffered damages as a result of any negligent action by the County. On appeal, Cramer disputes the trial court's conclusions, arguing correspondence between him and the County establishes a contract, and that he should be allowed to pursue his negligence claim. We determine, however, that Cramer did not have a contract with the County and that his negligence claim is barred because he suffered no damage. Accordingly, we affirm the trial court's judgment.

BACKGROUND

¶2 Marinette County and Oconto County jointly own the Mar-Oco Landfill. In 1991, Cramer entered into a contract with the counties' joint Solid Waste Committee to operate the landfill. The contract had a term of three years and Cramer and the counties renewed the contract in 1994 and 1997.

¶3 In 2000, the Solid Waste Administrator for Marinette County solicited bids for the landfill's operation. Cramer and another company, Superior Services, both submitted bids. The Solid Waste Committee also considered purchasing equipment to allow the counties to operate the landfill. The administrator sent letters to both Cramer and Superior informing them of the possibility that the counties would take over the landfill's operation and asked them to keep their bids open while the Committee considered this proposal. The administrator's letter to Cramer read:

Vern, thank you for submitting a proposal for operation of the Mar-Oco Landfill. The Landfill Committee, as you may already know, received two proposals (Cramer Excavating and Hauling and Superior Services, Inc.) for operation of the Mar-Oco Landfill. The Committee had

also been investigating the possibility of purchasing their own equipment to operate the landfill. At the April 24, 2000 meeting, the Mar-Oco Landfill Committee made a motion to recommend to the Marinette and Oconto County Boards to purchase the necessary equipment to operate the landfill. The final decision of whether to purchase the equipment will be made by the County Boards in late May.

The purpose of this letter is to request written confirmation as to whether you will honor your proposal for operation, as submitted, until June 1, 2000. Please notify me in writing, prior to Friday, May 10, 2000 whether or not you will honor your proposal, as submitted. If I do not hear from you, I will assume that you are not writing to honor your original proposal. Please keep in mind that there is always a chance that one or both of the County Boards may not agree with the Committee's recommendation to spend the funds to purchase the necessary equipment to operate the landfill.

¶4 Cramer responded to the administrator, writing, "This letter is to inform you that I will honor my proposal for operation of the Mar-Oco Landfill as submitted, until June 1, 2000." Superior also agreed to honor its bid. The committee decided to recommend the purchase of the equipment to the county boards. In May 2000, the Marinette County Board approved the purchase 17-12. The Oconto County Board approved 24-5.

¶5 Cramer brought claims of breach of contract and negligence against Marinette County. He argued first that Marinette County's approval of the equipment purchase violated WIS. STAT. § 65.90(5)(a)¹ and the corresponding Marinette County procedural rule requiring the publication of notice and two-thirds county board approval for all unbudgeted expenditures. Cramer claimed he and the committee had a contract with a condition precedent to operate the landfill.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

The agreement, he argued, was if the counties decided not to operate the landfill themselves, then he would be awarded the contract. Because the Marinette County Board's approval was not by the required two-thirds, he claimed the condition precedent was not satisfied and the County breached the contract by going ahead with the equipment purchase. In addition, Cramer argued the county board's improper approval of the purchase was negligent.

¶6 The trial court denied Cramer's summary judgment motion and instead granted summary judgment to the County. The court determined no contract existed and therefore there could be no breach. In addition, the court determined Cramer could not recover for his negligence claim because he could not prove he would have received the landfill contract even if the County's approval was illegal. Cramer appeals.

DISCUSSION

¶7 We review summary judgment decisions de novo, applying the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We will affirm a summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *M & I First Nat'l Bank v. Episcopal Homes Mgmt.*, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶8 When the facts are undisputed, the existence and interpretation of a contract are questions of law that we review de novo. *Gustafson v. Physicians Ins. Co.*, 223 Wis. 2d 164, 172-73, 588 N.W.2d 363 (Ct. App. 1998). A contract consists of an offer, an acceptance and consideration. *Id.* An offer and acceptance exist when mutual expressions of assent are present. *Id.*

¶9 Cramer contends the administrator's letter and his response create a contract with a condition precedent. We disagree. The letter simply asked Cramer to keep his bid open while the Solid Waste Committee made its final decision. It did not tell Cramer he would receive the contract if the committee's proposal did not receive the proper approval from the county boards. Even Cramer recognized this in his response to the letter by indicating that he would keep his proposal open until June 1, 2000. The administrator's letter did not make Cramer any offer, nor could it be construed as an acceptance of his bid. Consequently, there was no contract. *See id.* Consequently, there can be no breach, and the trial court properly granted the County summary judgment on Cramer's contract claim. Further, because there was no contract, we need not address Cramer's claim regarding the County two-thirds approval as a condition precedent.

¶10 In addition, we determine the trial court properly granted the County summary judgment on Cramer's negligence claim. Common law negligence is comprised of the following four elements: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 259-60, 580 N.W.2d 233 (1998). Assuming, without deciding, that Cramer could prove the first three elements and that the Marinette County Board's approval of the expenditure was illegal, we nonetheless agree with the trial court's conclusion Cramer could not prove he was damaged by the board's actions.

¶11 Cramer's negligence claim assumed that he would have received the landfill contract in the event the committee's plan was not approved. The committee, however, was under no obligation to award Cramer the contract. The committee had bids from both Cramer and Superior. Further, as the trial court

noted, the committee could have come up with any number of proposals for the landfill. Without any showing that he would have received the contract had the committee's proposal fallen through, Cramer could not recover for any alleged negligence by the Marinette County Board.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.