

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 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. 03-2759

Cir. Ct. No. 00CV595

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BOULANGER CONSTRUCTION CO., INC.,

PLAINTIFF-RESPONDENT,

V.

UNITED FIRE AND CASUALTY COMPANY,

DEFENDANT,

ADVANCE CONSTRUCTION, INC.,

**DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

V.

TOWN OF HOBART,

**THIRD-PARTY DEFENDANT-
APPELLANT-CROSS-RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Hobart¹ appeals a judgment requiring it to pay Boulanger Construction Co., Inc., for certain work it performed on Hobart's public works project. Hobart argues the circuit court erred by finding Boulanger performed additional work not included in the general contract and by concluding that it was unjustly enriched by Boulanger's efforts. We disagree and affirm that portion of the judgment. However, we also conclude that the amount the court awarded for hauling salvaged material is not supported by the record, and we reverse and remand that portion of the judgment.²

¶2 Advance Construction, Inc., cross-appeals, arguing that the circuit court erred by denying its claims for additional work performed. The circuit court found that Advance had also performed additional work not included in its contract with Hobart, but concluded that the parties' failure to execute written change orders prevented Advance from recovering for that additional work. Because Hobart was unjustly enriched for this additional work, we reverse and

¹ During the course of these proceedings, the Town of Hobart became the Village of Hobart. Our use of the term Hobart encompasses both of these entities.

² Hobart also argues in its brief-in-chief that the court erred by assessing part of its liquidated damages claim against Boulanger, alleging that all liquidated damages should be assessed against Advance. However, Hobart cites no legal authority and the argument is undeveloped. We need not address undeveloped arguments and decline to do so here. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

remand that portion of the judgment denying recovery for Advance with directions to enter judgment in Advance's favor against Hobart in the amount of \$14,400.

BACKGROUND

¶3 On March 10, 1999, Hobart notified Advance that it was the successful bidder for Hobart's road construction project. Advance bid the project by item and in the quantities indicated by Hobart. Advance's bid was incorporated into the general contract for the project. The general contract set a time limit for completion of the project and a per diem liquidated damage rate for project delay. It also required that any changes to the project be accomplished through written change orders.

¶4 The project commenced in the spring of 1999 and experienced problems from the beginning. Boulanger, which performed excavation and hauling work as one of Advance's subcontractors, complained of substantial overruns from the estimates included in the general contract for items it was responsible for completing. Many of the underground utility lines were in different locations than indicated on Hobart's plans, requiring modifications by Hobart's engineers and causing delays and additional work. Also, the existing roadway, which was to be ground up and used as base material for the new roadway, was not as thick as anticipated, providing less recycled material and requiring more new material.

¶5 Other modifications were made at the request of Hobart's residents to accommodate existing driveways and provide adequate drainage. Three-quarters of the cul-de-sacs involved in the project were modified. Approximately 80% of the final phase of the project was cancelled.

¶6 Many of the modifications were made without the parties executing written change orders. Concerns about delay and project overruns were discussed at weekly meetings. Advance and Boulanger claim they were assured that the primary concern was timely completion of the project and that other concerns would be addressed at the completion of the project.

¶7 On December 2, 1999, Hobart issued a certificate of substantial completion for the project, which capped its liquidated damages claim for delay at sixty-two days. Advance then submitted its final bill, which included additional charges for work it claimed was required beyond that contemplated by the general contract. Hobart disputed those additional charges, contending all work had been paid.

¶8 On May 17, 2000, Boulanger filed a complaint against Advance and its bonding company to recover for the additional work it performed on the project. Advance filed a third-party complaint against Hobart, contending Hobart was responsible for payment for the extra work. Boulanger amended its pleadings to add a claim directly against Hobart.

¶9 The case was tried to the court over portions of three days. At the conclusion of the trial, the court found that both Advance and Boulanger had performed additional work not included in the general contract and asked the parties for briefs on whether any legal theory supported recovery for those sums. In its findings of fact, the court determined that Boulanger had performed additional work on Items A-23, A-27 and A-39 of the general contract and that Advance had performed additional work on modifications of cul-de-sacs and storm sewers. It also concluded that Hobart was entitled to liquidated damages for delay, determining that twenty-eight and one-half days of delay were attributable

to Boulanger and fifteen days were caused by Advance. It denied all remaining claims.³ After briefing, the court ruled that Boulanger was entitled to recover from Hobart based on unjust enrichment, but denied recovery to Advance from Hobart due to the lack of written change orders.

STANDARD OF REVIEW

¶10 Our review presents mixed questions of fact and law. *Halverson v. River Falls Youth Hockey Ass'n*, 226 Wis. 2d 105, 115, 593 N.W.2d 895 (Ct. App. 1999). We do not disturb the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether those facts meet the legal standard for unjust enrichment is a question of law that we review independently. *Halverson*, 226 Wis. 2d at 115.

DISCUSSION

Boulanger's Claims Against Hobart

¶11 Hobart argues the circuit court erred when it granted judgment to Boulanger. The circuit court found Boulanger had performed additional work for which it was not compensated and that Hobart had been unjustly enriched. Hobart contends that all work Boulanger performed was included in the general contract. Thus, Hobart claims unjust enrichment is inapplicable because it has not received and retained any benefit beyond that contemplated by the general contract. Accordingly, Hobart concludes it is not liable to Boulanger and that Boulanger must look to Advance for additional payment.

³ The court also awarded Advance the retainage on the contract held by Hobart, along with \$4,900, which Hobart did not contest it owed, related to other contracts between the parties.

¶12 The circuit court found that Boulanger performed work not contemplated by the general contract regarding three items: A-23, A-27 and A-39. Hobart contends these findings are erroneous, relying on several witnesses' testimony that all work was included in the general contract. However, Hobart ignores testimony on which the court could reasonably rely to find Boulanger did, in fact, perform additional work. It is for the circuit court, as finder of fact, to assess the weight and credibility of witness testimony. WIS. STAT. § 805.17(2). There is ample evidence in the record to support the court's conclusions and, therefore, its findings of fact were not clearly erroneous.

¶13 The bid for Item A-23, excavating and grading, was \$104,400, calculated based on 36,000 cubic yards of excavated material at \$2.90 per cubic yard. Brendon Boulanger testified that he surveyed the site used to store the excavated material and found that substantially more material had actually been excavated from the site. Accordingly, his testimony supports the court's finding that Boulanger performed \$45,530.29 of additional excavation work beyond the amount contemplated by the general contract.

¶14 Item A-27 was for 5,000 cubic yards of crushed aggregate base, which was bid at \$9.50 per cubic yard. Hobart conceded that, due to the lack of recycled material available, an additional 1,489 cubic yards of aggregate base was necessary. Patrick Schrader of Daanen & Janssen, who supplied the material, testified that 23,377.94 tons were delivered to the site. Boulanger alleged that, after converting tons to cubic yards, it had supplied an additional 3,260 cubic yards of material beyond that agreed to by Hobart. However, the court relied on

the conversion rate offered by Hobart's expert, took a reduction for waste and concluded that Boulanger was entitled to payment of \$15,300.⁴

¶15 Item A-39 of the contract involved the hauling and placement of salvaged material and was bid for 13,275 cubic yards at \$2.10 per cubic yard. Although the parties agreed that there was less salvageable material available than expected, they disagreed on the amount. Hobart contended that 8,102 cubic yards were actually removed and paid accordingly. Boulanger originally claimed that 13,199 cubic yards were removed, resulting in a difference from what Hobart paid of \$10,703.70. However, at trial, Boulanger lowered its claim on this item to \$7,898.10 based on 11,863 cubic yards of material. In its findings of fact, the court found Boulanger performed \$10,703.70 of additional work on A-39. Here, the court did make a clearly erroneous finding. Since Boulanger stipulated that 11,863 cubic yards were actually removed, the court erred in awarding excess for 13,199 cubic yards. Accordingly, we reverse and remand that portion of the judgment with directions to enter judgment for Boulanger on this item for the stipulated amount of \$7,898.10—a reduction of \$2,805.60.

¶16 We now turn to the question of whether any legal theory supports Boulanger's recovery for the extra work. Ordinarily, subcontractors must first seek payment from the general contractor before pursuing recovery from an owner. *Superior Plumbing Co. v. Tefs*, 27 Wis. 2d 434, 436-37, 134 N.W.2d 430 (1965). However, Wisconsin courts have allowed subcontractors to recover directly from owners under theories of implied contract or unjust enrichment when

⁴ Boulanger alleges that the circuit court made a clearly erroneous finding due to mathematical error and contends that it is entitled to \$18,620. However, Boulanger has not cross-appealed and cannot benefit on appeal from this error.

the owner has not paid, and is not obligated to pay, the general contractor for the work. *See, e.g., S & M Rotogravure Serv., Inc. v. Baer*, 77 Wis. 2d 454, 465, 252 N.W.2d 913 (1977). The circuit court found that Boulanger performed work not contemplated by the contract and, thus, Boulanger's claims involve work for which Hobart was not obligated to pay Advance under the general contract. Accordingly, Boulanger may look directly to Hobart through unjust enrichment, rather than to Advance, for payment.

¶17 To recover based on unjust enrichment, Boulanger must establish: (1) it conferred a benefit upon Hobart; (2) Hobart had appreciation or knowledge of the benefit; and (3) Hobart accepted or retained the benefit under circumstances that make it inequitable for Hobart to retain the benefit without payment. *See id.* at 460. Hobart contends these elements have not been met.

¶18 All of Hobart's arguments challenging the circuit court's conclusion that Hobart was unjustly enriched hinge on its assertion that it has received no benefit because all the work performed was included in the general contract. Hobart's arguments merely repeat its challenges to the circuit court's findings of fact that Boulanger performed work beyond the general contract. We have already concluded that those findings are supported by the record. Boulanger performed additional work, and, accordingly, Hobart benefited from that additional work. Hobart's engineers were present on a continuous basis and were aware of the work being performed. It is inequitable for Hobart to retain the benefit of Boulanger's additional work without paying for the value of that work.

Advance's Claims Against Hobart

¶19 Advance cross-appeals the circuit court's denial of recovery for additional work it did beyond the general contract. The court found that Advance had, in fact, performed extra work relating to modifications of cul-de-sacs and storm sewers, but held the change order requirement of the contract barred Advance's recovery for those sums. Advance argues that the parties waived the change order provision and modified the contract to reflect the changes demanded by Hobart's engineers. Alternatively, Advance claims it, like Boulanger, should recover under unjust enrichment.

¶20 Hobart contends that all work Advance performed was included in the general contract as written. Hobart's argument challenges the circuit court's findings of fact, which are based on its assessment of the weight and credibility of testimony. *See* WIS. STAT. § 805.17(2). The circuit court found that Advance had performed \$14,400 of additional work on the modifications to cul-de-sacs and storm sewers. It concluded that the modifications were "not envisioned in the contract." Both Robert Boulanger and Glen Joski testified regarding the unusually large number of changes to the cul-de-sacs and storm sewers and regarding the additional work necessitated by those changes. Accordingly, the circuit court's findings are supported by the record and are not clearly erroneous. *Id.*

¶21 While the circuit court found that Advance had performed additional work, it denied recovery for that work. It concluded:

It occurs to this Court that both parties were neglectful in obtaining a change order when the work was being done. Had they done so, this additional work for cul de sac modifications and storm sewer concrete cuts could have been resolved. The failure of both parties in that regard leaves Advance without recourse. I find that Advance is not entitled to this additional \$14,400.

However, a contract may be modified orally even if it provides that it may only be modified in writing. *S & M Rotogravure*, 77 Wis. 2d at 468-69. A written change order requirement “may be avoided where the parties evidence by their words or conduct an intent to waive or modify such a provision.” *Id.* at 469.

¶22 The circuit court did not address whether the parties had waived the written change order requirement of the general contract and orally modified the contract to reflect the changes to the cul-de-sacs and storm sewers that were not originally included. However, the court did make sufficient findings for us to conclude, as a matter of law, that Advance is entitled to recovery based on unjust enrichment. Advance may recover based on unjust enrichment if: (1) it conferred a benefit upon Hobart; (2) Hobart had appreciation or knowledge of the benefit; and (3) Hobart accepted or retained the benefit under circumstances that make it inequitable for Hobart to retain the benefit without payment. *See id.* at 460.

¶23 Hobart’s arguments against unjust enrichment are grounded in the absence of a benefit, since it claims all the work was included in the general contract. However, the circuit court found that additional work was performed, and we have already concluded that this finding was not clearly erroneous. *See* WIS. STAT. § 805.17(2). This additional work was a benefit to Hobart, as it was necessary to complete the project. The circuit court also found that Hobart’s engineers were present at the site on a daily basis and were aware of the work being performed, a finding that is amply supported in the record. Thus, Hobart had knowledge of the benefit that Advance was giving Hobart by performing the additional work. Finally, Advance completed the additional work at the direction of Hobart’s engineers, and Hobart has not paid Advance or anyone else for the additional work it required. Accordingly, it would be inequitable for Hobart to retain the benefit of the additional work without payment. We reverse and remand

that portion of the judgment denying recovery for Advance with directions to enter judgment in Advance's favor and against Hobart in the amount of \$14,400.

REMAND

¶24 Consistent with this opinion, on remand the circuit court shall reduce that portion of the judgment to Boulanger from Hobart by \$2,805.60. Further, it shall increase the portion of the judgment to Advance from Hobart by \$14,400.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. Costs to Boulanger on the appeal and to Advance on the cross-appeal.

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

