

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1696

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**T.J.C., INC., D/B/A TANK REMOVAL SPECIALIST,
INC.,**

PLAINTIFF-RESPONDENT,

V.

WESTERFELD OIL COMPANY, INC.,

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

**MJ ENVIRONMENTAL CONSULTANTS, INC. AND RELIANCE
INSURANCE COMPANY OF ILLINOIS,**

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County:
MICHAEL G. GRZECA, Judge. *Affirmed.*

Before Vergeront, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Westerfeld Oil Company, Inc., appeals a money judgment in favor of T.J.C., Inc. The court found Westerfeld liable for environmental cleanup work T.J.C. performed on its behalf, and awarded judgment of \$201,585.90 plus 18% prejudgment interest. The issues are whether T.J.C. reasonably relied on the apparent authority of Westerfeld's agent to authorize certain work, whether public policy bars T.J.C.'s recovery of any amount beyond its bid of \$22,275 for the work, and whether T.J.C. was entitled to 18% prejudgment interest. We affirm.

¶2 Westerfeld hired MJ Environmental Consultants, Inc. to manage the removal of contaminated soil located on property it had recently sold. The removal was required under state environmental laws and regulations and also under Westerfeld's contract with the buyer of the property. MJ drew up remediation plans intended to meet the State's standards and to qualify Westerfeld for reimbursement from what is known as the PECFA fund, as provided in WIS. STAT. §§ 101.143 and 101.144 (1999-2000).¹ The plans were then submitted to the Wisconsin Department of Commerce, as part of the reimbursement process. *Id.* The department authorized a plan for the excavation of 650 tons of soil at a cost not to exceed \$36,344.50.

¶3 Relying on the 650-ton figure, T.J.C. bid \$22,275 on the clean up project and was hired to remove the soil. However, it became evident in the course of the work that T.J.C. would have to excavate much more contaminated soil to meet the State's environmental standards for the site. MJ authorized T.J.C.

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

to excavate the extra soil and T.J.C. did so, eventually removing approximately 6,500 tons from the site.

¶4 T.J.C. subsequently billed Westerfeld over \$219,000 for its work. It commenced this action when Westerfeld paid only \$17,850 towards that bill.

¶5 At trial, the parties litigated whether T.J.C. could recover from Westerfeld under the theory of apparent agency. Implied or apparent agency is established by proving acts by an agent or principal justifying belief in the agency, knowledge of those acts by the defendant, and reliance on those acts by the plaintiff, consistent with ordinary care and prudence. *Schaefer v. Dudarenke*, 89 Wis. 2d 483, 489-90, 278 N.W.2d 844 (1979). On appeal, Westerfeld contended that T.J.C. failed to satisfy the third criterion because it acted unreasonably when it relied upon MJ to authorize the additional excavation. The trial court concluded, however, that there was an apparent agency created that made Westerfeld liable. Additionally, the court found that Leon Westerfeld, president and majority owner of the company, was present during the excavation, knew the cost and scope of the dig had vastly increased, and never objected to the tenfold increase in the amount of soil removed. Consequently, the court awarded T.J.C. the full amount of its claim as well as 18% prejudgment interest.

¶6 T.J.C. may recover under the theory of apparent agency. Westerfeld does not challenge the finding that Leon Westerfeld knew the original plan was to excavate only 650 tons, was present at the dig site and learned that he would have to pay for much more excavation but never objected to nor questioned the additional work nor the added cost. As the trial court noted, even if the agent's act did not bind the principal, "it is well settled that a principal's failure to repudiate the transaction raises an inference of affirmance of the agent's unauthorized

transaction.” *ABC Outdoor Adver., Inc. v. Dolhun’s Marine, Inc.* 38 Wis. 2d 457, 461, 157 N.W.2d 680 (1968). That ends the matter.

¶7 Westerfeld next contends that public policy should bar T.J.C.’s recovery beyond its bid price because the extra excavation was done without MJ providing any advance notice to the Department of Commerce and because the taxpayers might have to reimburse Westerfeld for all or part of the additional unauthorized cost. However, whether reimbursement may or may not occur has nothing to do with T.J.C.’s right to collect from Westerfeld for work done under contract that Westerfeld was required to accomplish under State law and its contract with the buyer of the contaminated property.

¶8 The trial court properly awarded 18% prejudgment interest. In connection with its bid for the project, T.J.C. provided MJ with a written contract providing for 18% interest (1.5% per month) on unpaid balances. MJ accepted the bid and approved the contract, as did Leon Westerfeld, and work proceeded according to its terms. Westerfeld never objected to any of those terms and has no basis to avoid them now. WISCONSIN STAT. § 138.04 allows parties to contract for an interest rate greater than 5% on unpaid balances if the rate is clearly expressed in writing, as it was here.

By the Court.—Judgment affirmed.

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

