

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

June 24, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-2200**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**JOHN E. PICKEL,**

**PLAINTIFF-APPELLANT,**

**V.**

**JOHN HARR, JR. AND DONNA HARR,**

**DEFENDANTS-RESPONDENTS,**

**LARRY LAMPHERE AND REBECCA LAMPHERE,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Burnett County:  
WARREN E. WINTON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Madden, JJ.

MADDEN, J. John Pickel, the purchaser, appeals a judgment enforcing an oral contract for the sale of land, ordering specific performance and

awarding prejudgment interest to John Harr, Jr., and his wife, Donna Harr. Pickel argues that the court erred by finding an enforceable contract, ordering specific performance, basing its ruling on evidence outside of the record and awarding prejudgment interest. We reject each of these contentions and affirm the judgment

## **BACKGROUND**

After the death of Pickel's mother when he was thirteen, John Harr, Jr., became Pickel's legal guardian. Pickel resided with the HARRS, in Burnett County, Wisconsin ("Midtown property"). John remained Pickel's legal guardian until he was released by the court on February 13, 1992, after Pickel's eighteenth birthday on November 10, 1991. John, as Pickel's guardian, oversaw Pickel's sizable financial estate and at Pickel's request continued to do so even after Pickel turned eighteen.

Pickel orally agreed to purchase the Midtown property from the HARRS and on June 6, 1992, Pickel paid Donna \$91,000 from an account jointly held with John. After the June payment was made, both Pickel and the HARRS continued to reside in the home. In the fall of 1992, Pickel requested the HARRS move out. In September of 1992, the HARRS moved to their Clam Lake property. Pickel lived on the Midtown property alone during his senior year of high school until July 1993. The HARRS continued to go to the Midtown property almost daily. During this time, the HARRS requested an additional \$34,000 for the purchase price but Pickel did not pay additional funds.

The parties had a falling out in June 1993 and the HARRS obtained a restraining order removing Pickel from the Midtown Property. Pickel brought suit seeking the return of his \$91,000 payment. The HARRS counter-claimed for specific

performance of the contract. Pickel also made a claim against his aunt and uncle, the Lampheress, for non-payment of a loan, which is not part of this appeal.

At trial, Pickel contended that the purchase agreement was made before his eighteenth birthday, while the Harrs contended the agreement was made after his birthday. The parties also disputed what the agreed upon purchase price was for the property. Pickel contended the price was \$91,000 and the Harrs argued the price was \$125,000.

The court found that although the agreement did not satisfy the statute of frauds, the Harrs had suffered a detriment in reliance upon the transaction because they had moved to another property on relatively short notice, were required to hire out additional work on their home in order to complete it and therefore ended up paying more for their home. The trial court found the purchase price to be \$125,000 and that the agreement was made after Pickel turned eighteen. The court ordered specific performance of the oral agreement and also awarded prejudgment interest to the Harrs. Pickel appeals from that judgment.

## DISCUSSION

Pickel argues that the oral contract is unenforceable because the statute of frauds requires contracts for the sale of land to be in writing. This presents a question of law which we review de novo. *See State v. Keith*, 175 Wis.2d 75, 78, 498 N.W.2d 865, 866 (Ct. App. 1993). While § 706.02, STATS., requires such contracts to be in writing, there are exceptions to the writing requirement. Section 706.04<sup>1</sup>, STATS., allows enforcement in equity of an

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<sup>1</sup> **Equitable relief.** A transaction which does not satisfy one or more of the requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are clearly and satisfactorily proved and, in addition:

(continued)

agreement which is invalid under the statute of frauds, § 706.02. To be enforceable under the equitable alternative of § 706.04, the elements of the transaction must be clearly and satisfactorily proved and the transaction must fall within one of three exceptions. *Spensley Feeds, Inc. v. Livingston Feed & Lumber, Inc.*, 128 Wis.2d 279, 286-87, 381 N.W.2d 601, 605 (Ct. App. 1985). The HARRS argue that the contract falls within the third exception of equitable estoppel because they changed their position to their substantial detriment in reliance on the oral contract. We agree.

The trial court found the contract to be for \$125,000 with \$34,000 to be paid at the end of Pickel's senior year in high school, June 1993. The HARRS were to live with Pickel until that time, but Pickel had requested they leave the property in the fall of 1992. The earlier than expected move date forced the HARRS to incur additional expenses. John had anticipated doing much of the construction of his new home himself, but because of the advanced move out date, the HARRS

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- (1) The deficiency of the conveyance may be supplied by reformation in equity; or
  - (2) The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied; or
  - (3) The party against whom enforcement is sought is equitably estopped from asserting the deficiency. A party may be so estopped whenever, pursuant to the transaction and in good faith reliance thereon, the party claiming estoppel has changed his or her position to the party's substantial detriment under circumstances such that the detriment so incurred may not be effectively recovered otherwise than by enforcement of the transaction, and either:
    - (a) The grantee has been admitted into substantial possession or use of the premises or has been permitted to retain such possession or use after termination of a prior right thereto; or
    - (b) The detriment so incurred was incurred with the prior knowing consent or approval of the party sought to be estopped.

had to hire out most of that work. The Harrs moved out early in good faith reliance upon the transaction, suffered detriment because of additional construction costs and an early move from their home, which cannot be effectively recovered without enforcing the transaction. These elements satisfy the requirements of § 706.04(3), STATS.

Next, Pickel argues that the contract is unenforceable because it is unconscionable. A contract is unconscionable when no decent, fair minded person would view the result of its enforcement without being possessed of a profound sense of injustice. *See Foursquare Properties v. Johnny's Loaf & Stein*, Wis. 2d 679, 681, 343 N.W.2d 126, 127 (Ct. App. 1983). No such sense of injustice results from the enforcement of this contract.

The parties agreed to the purchase price after Pickel had reached the age of majority. The price of \$125,000, although higher than the approximate \$91,000 fair market value, is not disproportionately so. The Harrs had great affection for the Midtown property and were reluctant to sell. They valued the house and land in the vicinity of \$110,000. Their great affection for the land justified higher compensation in order to entice them to sell. The contract is not unconscionable merely because the purchase price is over the fair market value.

Pickel next argues that the trial court erred by granting the remedy of specific performance. Specific performance is an equitable remedy addressed to the sound discretion of the trial court. *Kimball v. Swanson*, 47 Wis. 2d 472, 481, 177 N.W.2d 375 (1970). Pickel concedes that there are numerous cases holding specific performance is an appropriate remedy in contracts for a land sale. Pickel asserts that the cases dealing with specific performance involve a purchaser seeking specific performance rather than a seller. That, however, does not

significantly change our review of the trial court's discretion in this case. Specific performance is an appropriate remedy for land contracts. See *Anderson v. Onsager*, 155 Wis.2d 504, 455 N.W.2d 885 (1990). The record supports the court's exercise of discretion in this regard. Pickel is alleged to have let the buildings fall into disrepair while he was in sole possession and the HARRS have re-established their lives on their Clam Lake land. The court was within its discretion in ordering specific performance.

Pickel contends that the trial court erred by basing its decision on facts not in evidence. He argues that it is a fundamental rule of law that a case must be decided on the evidence admitted at trial along with whatever common knowledge and life experiences the fact-finder possesses. Although some facts examined by the trial court were not admitted into evidence, these facts did not effect the court's decision. After reviewing the record, we are convinced that the record supports the trial court's decision.

Finally, Pickel argues that the trial court erred by awarding the HARRS prejudgment interest. Prejudgment interest may be awarded when damages are either liquidated or measurable against a reasonably certain sum. *Pollack v. Calimag*, 157 Wis.2d 222, 242, 458 N.W.2d 591, 601 (Ct. App. 1990). Whether prejudgment interest is appropriate is determined as a matter of law. *Id.* at 243, 458 N.W.2d at 601. The trial court found that the HARRS demanded payment of \$34,000 of Pickel when the HARRS, at the direction of Pickel, vacated the premises in September 1992. Pickel was obligated to pay the \$34,000 when the HARRS vacated and demanded it. Therefore, the trial court's award of prejudgment interest was proper.

Pickel argues undue influence. Because this issue was not raised before the trial court and we will not consider it for the first time on appeal. *State v. Holland Plastics Co.*, 111 Wis. 2d.497, 331 N.W.2d 320 (1983).

Therefore, because we conclude an enforceable contract existed and the trial court did not err by ordering specific performance and prejudgment interest, the judgment is affirmed.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

