

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-3784

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BACHMANN CONSTRUCTION COMPANY,

PLAINTIFF-RESPONDENT,

V.

ALLTECH ELEVATOR, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

DYKMAN, P.J.¹ Alltech Elevator, Inc., appeals from a judgment in favor of Bachmann Construction Co., Inc., in the amount of \$4,279. This is a small claims action in which Bachmann sought damages for Alltech's failure to supply a Dover elevator as specified in bidding documents. We conclude the trial

¹ This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

court's finding that Alltech failed to inform Bachmann of Alltech's intention to bid an Alltech elevator instead of a Dover elevator is not clearly erroneous. We further conclude the trial court correctly applied the doctrine of promissory estoppel. Accordingly, we affirm.

BACKGROUND

Bachmann is a general contractor. In 1995, Bachmann solicited bids from subcontractors for a remodeling project for the East Koshkonong Lutheran Church. The bids were to be based upon plans and specifications furnished by an architect. The architect specified a "Dover" brand of elevator. An Alltech representative called the architect and was told in a letter that Alltech could submit an alternative bid for an "Alltech" brand elevator, but that an Alltech elevator was not the equivalent of a Dover elevator.

Alltech submitted a bid for an elevator which included the phrase "per plans and specifications." However, the bid did not indicate that Alltech was proposing to furnish an Alltech elevator as an alternative. At trial, Alltech's representative testified that he included a letter with the bid which identified the elevator as an Alltech, and that he sent both the bid and the letter by facsimile. Bachmann's representative in charge of the project denied receiving the letter.

The church accepted Bachmann's bid. Bachmann eventually discovered that Alltech was not going to furnish a Dover elevator, but an Alltech elevator instead. Bachmann attempted to convince the church to accept the Alltech elevator, but was unsuccessful. Bachmann then purchased a Dover elevator from another source at a cost to it of \$4,204, and sued Alltech for this amount.

The trial court concluded that Alltech was liable for Bachmann's additional expense of supplying a Dover elevator. The court found Bachmann had not received a copy of Alltech's letter, and that Alltech had failed to clearly inform Bachmann that the bid was a voluntary alternate. The trial court also found Bachmann had acted in reliance upon the bid received from Alltech, and that Bachmann attempted to mitigate its damages once the problem was discovered. The trial court granted Bachmann a judgment for \$4,204. Alltech appeals.

DISCUSSION

Alltech argues that Bachmann failed to carry its burden of persuasion that it did not receive a copy of Alltech's letter. When a trial court acts as a finder of fact, that court is the ultimate arbiter of the credibility of the witnesses and the weight to be given to their testimony. *Plesko v. Figgie Int'l*, 190 Wis.2d 764, 775, 528 N.W.2d 446, 450 (Ct. App. 1994). We will not set aside a trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. For this court to reverse the trial court it must believe that the great weight of evidence supports a contrary finding. *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 644, 340 N.W.2d 575, 577 (Ct. App. 1983). Where more than one inference can be drawn from the credible evidence, we must accept the inference drawn by the trier of fact, because it is in a far better position than an appellate court to make these determinations. *Id.* In this case the trial court found that Bachmann did not receive a copy of Alltech's letter. The trial court was able to observe the witnesses as they testified. We cannot. Witness credibility is a matter for trial courts, not appellate courts. Based on the record, we cannot say that such a finding was clearly erroneous.

Alltech next argues that because there was no signed contract between it and Bachmann, it cannot be held liable for Bachmann's loss. Alltech, however, fails to understand the doctrine of promissory estoppel. Under the doctrine of promissory estoppel, liability may be imposed upon a person in the absence of a signed contract. The three elements of promissory estoppel are: (1) the promise must be one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of another; (2) the promise must induce such action or forbearance; and (3) injustice can only be avoided by enforcing the promise. *Grams v. Melrose-Mindoro Jt. Sch. Dist. No. 1*, 78 Wis.2d 569, 578-79, 254 N.W.2d 730, 735 (1977). While the first two elements are questions of fact for the trial court, the third involves an issue of discretion. *Id.* at 579, 254 N.W.2d at 735. The trial court found Alltech made a promise that it would supply and install an elevator "per plans and specifications," and that Bachmann was entitled to rely upon the promise. Next, the trial court found that Bachmann relied upon Alltech's bid. We conclude that these findings were not clearly erroneous.

Finally, the trial court in its discretion ordered Alltech to pay damages equal to the additional amount that Bachmann paid to purchase a Dover brand elevator. The trial court's exercise of discretion will be upheld absent an erroneous exercise of discretion. *Milwaukee Rescue Mission, Inc. v. Redevelopment Auth.*, 161 Wis.2d 472, 490, 468 N.W.2d 663, 671 (1991). A court has properly exercised its discretion when it has examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion using a demonstrated rational process. *Id.* Here the trial court considered the relevant facts and applied a proper standard of law. One puts "per plans and specifications" on a bid at one's peril. By using these words, Alltech should have

realized Bachmann would expect a Dover elevator to be supplied and installed. Though Alltech asserts that its letter put Bachmann on notice of the substitution, the trial court found that the letter did not accompany the bid, and we will not upset this credibility determination.

Bachmann suffered a loss because of Alltech's failure to state that it did not intend to provide the specified equipment. It would be an injustice to allow Alltech to inflict a loss upon Bachmann in its attempt to change a bidding process. Bachmann proved the elements of promissory estoppel. We therefore affirm the trial court's judgment.

By the Court.—Judgment affirmed.

Not recommended for publication. See RULE 809.23(1)(b)4, STATS.

