

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 2005

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. 2004AP3315-FT

Cir. Ct. No. 2004SC455

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

KEITH HITZKE,

PLAINTIFF-RESPONDENT,

V.

JAN EASTERDAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

¶1 BROWN, J.¹ Jan Easterday appeals a decision by the trial court finding that she breached a contract with Keith Hitzke. At trial, she argued that

¹ This case is decided by one judge, pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the contract was unenforceable because it involved an agreement for the sale of goods (a pony) over \$500, which agreement was not in writing, thus violating the Statute of Frauds, WIS. STAT. § 402.201(1). The trial court ruled that the Statute of Frauds did not apply, and she appeals that holding. This court has the authority to affirm a trial court's ruling for reasons other than those announced by the trial court where we can conclude from the record that the trial court was nevertheless correct. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985). We affirm the trial court based on the doctrine of promissory estoppel.

¶2 We will be brief with the facts, eliciting only those that bear upon the issue at hand. Easterday operates a horse stable that is primarily devoted to boarding and breeding, but she also periodically does sales. Keith Hitzke learned that Easterday was trying to sell a show pony owned by a Mr. Kasten. Hitzke asked the price, and Easterday told Hitzke that the price was \$25,000, firm. Easterday explained that Kasten had bought the show pony for \$25,000 on the condition that, when Kasten no longer wanted the show pony, Easterday would resell it for at least \$25,000 and Kasten would get his money back. Negotiations between Hitzke and Easterday ensued, and Easterday eventually promised the same terms to Hitzke—buy the show pony for \$25,000, and if and when he no longer wanted the show pony, she would give him a “guaranteed buy back” of the show pony for the same price. Hitzke bought the show pony for \$25,000. He testified that he would never have gone through with the purchase if Easterday had not issued that guarantee. The check was made to and accepted by Kasten.

¶3 Subsequently, Hitzke desired to exercise the guaranteed buy back and asked Easterday to take the show pony back in return for \$25,000. Easterday's response was that she would try to sell the pony. Hitzke complained that the guarantee called for Easterday to buy the show pony herself, but Easterday

was determined to try and sell it. The show pony was eventually sold, through the efforts of Jan Easterday's horse broker, Lisa Cerra. Hitzke received a check in the amount of \$21,800 which was \$22,000 less two hundred dollars that Cerra took out for a vet bill. Hitzke then sued Easterday for the rest of the \$25,000 guaranteed by Easterday.

¶4 At trial, part of Easterday's defense was that the contract between Easterday and Hitzke was for the sale of goods—a show pony—and that such a contract has to be in writing if it is for over \$500. Because this was an oral contract, Easterday contended that the contract violated the Statute of Frauds, WIS. STAT. § 402.201(1) and was unenforceable. The trial court rejected the contention on two alternative grounds. First, the trial court seemed to be of the opinion that § 402.201(2) meant that the Statute of Frauds only applied as between merchants and did not apply to contracts between nonmerchants. Because the parties were not deemed to be merchants, the trial court ruled that the Statute of Frauds did not apply.

¶5 Alternatively, the trial court observed that WIS. STAT. § 402.201(3) provides an exception to the Statute of Frauds with respect to goods for which payment has been made and accepted or which have been received and accepted. The trial court held that this exception applied in this case for reasons that are not entirely clear to this court. We therefore quote the colloquy between the trial court and Easterday's counsel, in pertinent part:

Court: And ... sub. (3) says a contract which does not satisfy the requirements of sub. (1), but is valid in other respects is enforceable.... [w]ith respect to goods for which payment has been made and accepted or which have been received and accepted.

[Counsel]: [T]he pleading as to this contract claim is as against Jan Easterday who, the testimony is clear, this

gentleman believed she was acting as an agent for Mr. Kasten.

Court: Right. But she made a representation as part of a transaction. She can step outside the activity of her principal and make a representation that you do this, I'll agree to do that. And that—that's where the evidence stands right now. She offered to buy back—or she offered under the testimony to buy back this horse for \$25,000 if this person bought it and it didn't work out. That could be a contract.

From this passage, we understand the court to have reasoned that Easterday made a separate agreement with Hitzke, above and beyond the buy-sell agreement with Kasten and that the agreement is evidenced by payment having been made and accepted or goods having been received and accepted.

¶6 Neither of the two rationales expressed by the trial court work. With respect to merchants, the statute does not exempt nonmerchants. Rather, WIS. STAT. § 402.201(2) exempts merchants from the Statute of Frauds so long as “within a reasonable time a writing in confirmation” is received and the party receiving it has reason to know its contents. Section 402.201(2) has no application to this case. Regarding § 402.201(3), while it is true that money changed hands, both when Hitzke bought and sold the pony, payment was not made by Hitzke to Easterday nor was payment made by Easterday to Hitzke. This exception to the Statute of Frauds is likewise inapplicable.²

¶7 Nonetheless, the trial court made pertinent findings of fact which we find to be noteworthy. The court stated:

But he didn't want to lose the investment. He was concerned about that. And that he wanted this, as he

² This explains why Hitzke's motion for frivolous costs and fees on appeal is untenable.

described it, an exit strategy. The horse still needed a vet check according to him, that his wife thought it was too expensive. And so he was getting some cold feet on the transaction. And this is what he said Ms. Easterday said: If this horse does not work out, I would give you a guaranteed buy back of the horse.

Based upon that he felt that if it didn't work out, he could sell it back. Got that from Jan, and then talked to his wife, and they agreed that they would proceed with the sale. *He would not have done that purchase without the assurance.* (Emphasis added.)

¶8 Thus, it is clear from the trial court's decision that Easterday made a promise to Hitzke, a promise which he relied upon and that has not been fully honored, to his detriment. While Hitzke did not plead it and while the trial court did not use the term, this is nonetheless a classic case of promissory estoppel. Promissory estoppel has three elements: (1) The promise was one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise did induce such action or forbearance; and (3) injustice can be avoided only by the enforcement of the promise. *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). We are satisfied that it would be an injustice for Easterday to be relieved of responsibility for the balance of the \$25,000 she promised should Hitzke no longer want the show pony.

¶9 We surmise that Easterday will object that promissory estoppel was not pled. Our answer is that, while it may not have been pled, all the elements existing in promissory estoppel were tried, and the relevant facts supporting the doctrine were found by the trial court. It has long been the law that an appellate court may sustain a trial court's ruling on a theory or on reasoning not presented to the trial court. *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). Such is the case here.

¶10 We note that in *Babler v. Roelli*, 39 Wis. 2d 566, 159 N.W.2d 694 (1968), our supreme court did nearly the same thing that we do in this case. In *Babler*, like here, the theory of promissory estoppel was not pled in the trial court. Still, this is what the supreme court wrote:

In *Winnebago Homes Inc. v. Sheldon*, [29 Wis. 2d 692, 700-01, 139 N.W. 2d 606 (1966)], we made it clear that the failure to plead a cause of action for promissory estoppel in the trial court precludes the plaintiff, as a matter of right, from raising the question for the first time on appeal. However, in the instant case, the facts which plaintiff relies upon to support this new cause of action are of record, and the defendant-respondent has been able to defend on the basis of the facts as found by the trial court. Under these circumstances, where the consideration of promissory estoppel for the first time on appeal does not result in hardship or inequity to either party, we will proceed upon the basis of the facts found by the trial court to dispose of the plaintiff's contention upon the merits.

Babler, 39 Wis. 2d at 572-73. Based on *Holt, Liberty Trucking* and *Babler*, we are confident that our action is supported by law and promotes justice.

¶11 The Statute of Frauds is not applicable in an action involving promissory estoppel. *Janke Constr. Co. v. Vulcan Materials*, 386 F. Supp. 687, 697 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976). Therefore, the purely legal defense of Easterday on appeal is to no avail, and we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

