

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2000

Cornelia G. Clark
Acting 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. 99-2121

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TORGER MIKKELSON,

PLAINTIFF-RESPONDENT,

v.

TREMPEALEAU MARINA INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Trempealeau Marina appeals a judgment awarding Torger Mikkelson slightly over \$4,000 based on contract and unjust enrichment. The award is for Mikkelson's expenses associated with constructing a picnic shelter on marina land. Although there is insufficient evidence to support the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

award based on contract, the evidence supports the trial court's exercise of discretion on the basis of unjust enrichment. The judgment is therefore affirmed.

FACTS

¶2 Mikkelson is a member of an association of Mississippi River boat owners. In July 1998, he sought permission from the marina's previous owner, Charles Rober, to build a picnic shelter on marina land.² Rober agreed that Mikkelson could build the shelter and that the boat owners could use it, but that Rober would have no responsibility for its construction or maintenance. Mikkelson and the association raised a portion of the money necessary for construction and intended to eventually recoup the remaining cost through fundraisers. Mikkelson worked on the shelter until October, when construction halted for the year.

¶3 Thereafter, Gene and Vicki Husby began negotiating with Rober to buy the marina. Rober granted the Husbys permission to remodel the shelter before they had completed the purchase. The Husbys claimed that Rober did not inform them about his agreement with Mikkelson and the association. Mikkelson testified at trial that he received an e-mail on March 4, 1999, informing him that the Husbys were purchasing the marina and that the shelter project was cancelled. At about that same time, the Husbys began their remodeling project. The remodeling was completed by March 17, when Mikkelson sent the Husbys an e-mail explaining his ownership interest in the shelter. The Husbys proceeded to final closing and purchased the marina on April 21. Mikkelson sued the marina

² The marina is actually located on land owned by the Village of Trempealeau and is leased long-term.

seeking the costs of the materials he provided for the shelter and the labor expenses he incurred paying someone else to help him build the shelter—Mikkelson did not seek reimbursement for his own labor. The trial court awarded him these expenses, and the marina appeals.³

CONTRACT

¶4 The Husbys contend that the trial court erred by finding that a contract obligated them to reimburse Mikkelson. This court agrees. The burden of establishing the existence of a contract is on the person attempting to recover for its breach. See *Household Utilities v. Andrews Co.*, 71 Wis. 2d 17, 28, 236 N.W.2d 663 (1976). This court reviews de novo whether undisputed facts constitute an enforceable contract. See *Meyer v. Classified Ins. Corp.*, 179 Wis. 2d 386, 396, 507 N.W.2d 149 (Ct. App. 1993).

¶5 The trial court found that a contract existed between Mikkelson and Rober in that Rober agreed to let Mikkelson build and use the shelter on marina property. The court concluded that the contract was breached “because it was no longer being used as originally intended” The court then determined that the Husbys, as purchasers from Rober, were also bound by the contract. However, there is no evidence tying this agreement to the Husbys. As a general rule, a contract between two persons is not binding on persons who are not privy to the contract. See *Udelhofen v. John Hancock Mut. Ins. Co.*, 128 Wis. 2d 216, 220, 381 N.W.2d 579 (Ct. App. 1985). In fact, the court found that during negotiations to buy the marina, the Husbys did not know about Rober’s agreement with

³ The marina does not appeal the trial court’s measure of damages and this court does not address that issue.

Mikkelson. Further, the purchase agreement for the marina, which was admitted as an exhibit, contained a clause stating that the purchasers would not assume any contractual obligations from the sellers.

¶6 The trial court also concluded that the Husbys entered into another contract by agreeing to pay back all the people who contributed to the shelter's construction. After discovering that many members of the boat association had donated \$50 to the original construction, the Husbys wrote a letter stating that store credit would be given to everyone who contributed to the project. A contract consists of an offer, an acceptance and consideration. See *Gustafson v. Physicians Ins. Co.*, 223 Wis. 2d 164, 173, 588 N.W.2d 363 (Ct. App. 1998). The Husbys' letter does not constitute a contract because it is missing consideration. It was written after the marina's purchase and constituted only a gratuitous promise. See *Hoffmann v. Wausau Concrete Co.*, 58 Wis. 2d 472, 486, 207 N.W.2d 80 (1973).

UNJUST ENRICHMENT

¶7 The trial court also held that Mikkelson was entitled to recover based on unjust enrichment. The decision whether to grant relief based on unjust enrichment involves judicial discretion. See *Singer v. Jones*, 173 Wis. 2d 191, 194-95, 496 N.W.2d 156 (Ct. App. 1992). If the trial court reaches a reasoned decision based upon the application of correct legal standards to the record's facts, the discretionary decision will be upheld. See *Smith v. Smith*, 177 Wis. 2d 128, 133, 501 N.W.2d 850 (Ct. App. 1993).

¶8 The Husbys contend that the trial court erred by finding unjust enrichment because they paid Rober for any benefit they received from the shelter.

The Husbys also argue that Mikkelson should be denied recovery because he failed to inform them of his equitable interest before remodeling the shelter.

¶9 Unjust enrichment requires proof of three elements: “(1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit.” *Watts v. Watts*, 137 Wis. 2d 506, 531, 405 N.W.2d 305 (1987). The trial court found that Mikkelson conferred a benefit on the Husbys because the Husbys used all of Mikkelson’s materials for their remodeling project. The trial court concluded that it would be inequitable for the Husbys to retain the benefit without paying Mikkelson.

¶10 The Husbys contend that they paid Rober for the shelter and therefore received no benefit. However, the trial court found that Rober owed a duty to Mikkelson based on their agreement concerning the initial construction of the shelter. The evidence also showed, and the Husbys do not dispute, that they knew about Mikkelson’s adverse claim to the shelter before finally purchasing the marina. Knowledge of an adverse claim precludes them from being bona fide purchasers. *See generally Richards v. Richards*, 58 Wis. 2d 290, 298, 206 N.W.2d 134 (1973). Since the Husbys were not bona fide purchasers, Mikkelson may be granted equitable relief. *See id.*

¶11 The Husbys also raise an equitable estoppel defense, claiming that Mikkelson failed to inform them of his interest in the shelter in a timely manner,

thereby inducing them to act to their detriment while remodeling the shelter.⁴ However, they did not articulate this argument to the trial court, and the trial court did not rule on it. Therefore, that issue is not properly preserved for appeal and this court does not address it. *See County of Columbia v. Bylewski*, 94 Wis. 2d 153, 171, 288 N.W.2d 129 (1980).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

⁴ “If the beneficiary of the constructive trust is estopped by words or conduct from enforcing his equitable interest, the transferee is protected although he did not acquire a legal interest before receiving notice of the equitable claim.” RESTATEMENT OF RESTITUTION § 175(3) (1937).