COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1355

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MICHAEL LEBAN, D/B/A WATERFORD SPORT AND MARINE,

PLAINTIFF-APPELLANT,

V.

SUN PATIO, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Michael Leban appeals from an order dismissing his action against Sun Patio, Inc. for its refusal to take back recreational boats Leban could not use in his business because he was not granted a Mercury/Mariner engine dealership. We conclude that the trial court correctly

dismissed the action before submitting the case to the jury because Leban had waited an unreasonable amount of time before revoking his acceptance of the boats. We affirm the order.

On September 7, 1994, Leban ordered boats from Sun Patio. The boats were to be "pre-rigged" with Mercury/Mariner motors, assuming that Leban was approved as a Mercury/Mariner dealer. The boats were delivered without engines. Although Sun Patio was made aware in October 1994 that Leban would not be set up as a Mercury/Mariner dealer, Leban apparently was not aware that his dealership status had been denied until March 1995. In March, believing that Sun Patio had agreed to take back the boats if he was not granted the Mercury/Mariner dealership, Leban asked Sun Patio to take the boats back or move them to other dealers. Sun Patio indicated that it would see what could be done. When it became apparent that Sun Patio was not going to pick up the boats, Leban, through his attorney, wrote Sun Patio a letter rejecting the nonconforming goods. The letter was dated October 23, 1995.

Leban's complaint alleged breach of contract, breach of express warranty under § 402.313(1)(b), STATS., and misrepresentation. The case was tried to a jury. Sun Patio's motion to dismiss the action at the close of Leban's case was granted. Leban does not appeal the dismissal of his cause of action for misrepresentation.

We will reverse a judgment directing a verdict only if we are convinced that the trial court was "clearly wrong." *See* ***Foseid v. State Bank***, 197 Wis.2d 772, 784, 541 N.W.2d 203, 208 (Ct. App. 1995). The standard for reviewing whether the trial court erred in directing a verdict is whether, when viewing the evidence most favorably to the party against whom the verdict is

sought to be directed, there is any evidence to support a contrary verdict or sustain a cause of action. *See* ***Carl v. Spickler Enters., Ltd.***, 165 Wis.2d 611, 624, 478 N.W.2d 48, 53 (Ct. App. 1991). A verdict should be directed only when the evidence gives rise to no dispute as to material issues or when the evidence is so clear and convincing as to reasonably permit unbiased and impartial minds to come to but one conclusion. *See* ***Voith v. Buser***, 83 Wis.2d 540, 550, 266 N.W.2d 304, 309 (1978).

The trial court ruled that Leban failed to act within a reasonable time in revoking his acceptance of the boats. *See* § 402.608(2), STATS. ("[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it …."). The trial court looked at Leban's March 1995 notification that he would not be granted a Mercury/Mariner dealership as the event which gave grounds for revocation of acceptance of the boats. We agree that Leban's notice was the culminating event requiring him within a reasonable time to revoke his acceptance. The failure of the boats to be pre-rigged with Mercury/Mariner motors was already known to Leban. The March notification that he would not be granted the dealership meant that the nonconformity in the boats would never be cured—the boats would never be pre-rigged with the Mercury/Mariner motors.

Reasonableness is generally a question of fact for the jury. However, the passage of time may be so long as to permit a determination that as a matter of law revocation of acceptance was not effected within a reasonable time. *See* ***Schaefer v. Weber,*** 265 Wis. 160, 166-67, 60 N.W.2d 696, 699 (1953). This is such an instance. Seven months passed between Leban's notice that the nonconformity in the boats would not be cured and his notice of revocation of

acceptance. Leban's October 23, 1995 notice was not within a reasonable amount of time.

Leban suggests that between March and September he repeatedly asked Sun Patio to take the boats back and Sun Patio represented that efforts were being made to find other dealers to take the boats. That the parties were attempting to work out a compromise did not relieve Leban of his obligation to comply with the law and revoke his acceptance within a reasonable time. Although § 402.608(2), STATS., may favor a party's attempt to obtain an adjustment of the nonconformity, *see* WIS. STAT. ANN. § 402.608, UNIFORM COMMERCIAL CODE COMMENT, para. 4 (West 1995), acting within a reasonable amount of time remains the benchmark of an effective revocation. Leban waited too long.

Leban argues that the nonconformity which justified revocation of acceptance was Sun Patio's refusal to take the boats back. He points out that his revocation of acceptance came only forty-five days after he became aware in September 1995 that Sun Patio was not going to pick up the boats. This claim is valid only if Sun Patio's agreement to take back the boats in the event Leban was not granted the dealership was part of the contract. The written documents do not reflect such an alleged side agreement. The agreement cannot be established by evidence of an oral promise. *See* § 402.202, STATS.

Even assuming that Sun Patio's refusal to take back the boats was the nonconformity, it was still determined as a matter of law that Leban waited an unreasonable amount of time. In the alternative, the trial court assumed that Sun Patio's refusal to take the boats back was the nonconformity. It concluded that the notice of revocation more than forty-five days after Leban's realization

that Sun Patio would not take the boats back was not within a reasonable time. The trial court was not clearly wrong. *See* ***Tegen v. Chapin***, 176 Wis. 410, 415, 187 N.W. 185, 187 (1922) (delay of fifty-seven days unreasonable as a matter of law); ***Knobel v. J. Bartel Co.***, 176 Wis. 393, 399, 187 N.W. 188, 190 (1922) (delay of twenty-five days unreasonable as a matter of law). Prior to September 1995, Leban had been in frequent contact with Sun Patio about the boats. Between early September and October 23, 1995, there was no communication between the parties. Sun Patio could only wonder what Leban intended to do when it had a right to notice within a reasonable period.

Finally, Leban argues that oral notice in March 1995 that the goods were nonconforming was sufficient notice of revocation. Yet Leban concedes that when he contacted Sun Patio in March 1995, it was not with the intent to revoke acceptance but was to attempt to get Sun Patio to comply with the contract by taking the boats back. Leban cannot take the inconsistent positions of arguing that the contract required Sun Patio to take back the boats and that he revoked the contract as early as March 1995 by oral communications attempting to obtain compliance with the contract. *See* ***Godfrey Co. v. Lopardo***, 164 Wis.2d 352, 363, 474 N.W.2d 786, 790 (Ct. App. 1991) (judicial estoppel prohibits a party from asserting in litigation a position that is contrary to, or inconsistent with, a position asserted previously in the litigation by that party). Additionally, Leban did not argue before the trial court that he had given an oral notice of revocation. We deem the issue waived by his failure to assert it before the trial court. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.