

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 4, 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. 2004AP1007**

**Cir. Ct. No. 2003CV1317**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**MARGARET LAUBERT,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL G. MALLEK, II,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Racine County:  
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael G. Mallek, II has appealed from a judgment awarding damages of \$8515.15 to the respondent, Margaret Laubert, following a trial to the court. We affirm the judgment.

¶2 Laubert's complaint alleged that between September 2001 and August 2002, she loaned sums of money to Mallek and made payments on his behalf based upon his representation that he would repay the money, either directly or by paying for her college education or for modifications to her car. Laubert sought to recover the payments based on breach of contract, unjust enrichment, intentional misrepresentation, fraud in the inducement, and conditional gift. Laubert also alleged that Mallek had wrongfully retained a class ring belonging to her.

¶3 At trial, Laubert claimed that Mallek owed her \$11,958.69. After hearing the testimony of Laubert, Mallek, and several other witnesses, the trial court found that Laubert and Mallek had entered into a series of contracts. It found that Laubert made eight direct loans to Mallek and two payments on his behalf, totaling \$7877.30. It found that Mallek breached the contracts when he refused to repay these sums. Based upon these findings and Mallek's stipulation that he owed Laubert \$637.85 for her class ring, the trial court awarded Laubert damages totaling \$8515.15.

¶4 Although not disputing that Laubert made payments to him and on his behalf, Mallek contends that the payments were gifts, arising from the parties' personal relationship. He also contends that a contract could not be found to exist because, even though there was an offer of money by Laubert and the acceptance of money by him, there was no consideration.

¶5 Whether consideration supports a contract is a question of fact. *NBZ, Inc. v. Pilarski*, 185 Wis.2d 827, 838, 520 N.W.2d 93 (Ct. App. 1994). This court must uphold a trial court's findings of fact unless they are clearly erroneous. *Id.* at 839.

¶6 In reviewing findings made by a trial court in a trial to the court, “[i]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact. The reason for such deference is the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976) (footnote omitted). This places the power to choose between conflicting statements in the hands of one who has the opportunity to observe the witnesses’ demeanor, manner of testifying, hesitations and similar nuances in speaking. *Rabata v. Dohner*, 45 Wis. 2d 111, 118, 172 N.W.2d 409 (1969). Moreover, when more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trial court. *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983).

¶7 In awarding damages to Laubert, the trial court expressly found her testimony to be credible, and found incredible Mallek’s testimony that all of the money he received from her was a gift. Laubert presented evidence establishing that she gave Mallek personal checks totaling \$4937, and made payments on his behalf totaling \$2940.30. The trial court found credible her testimony that the parties discussed that these payments were loans, and that Mallek agreed to repay the money. The trial court’s findings are supported by Laubert’s testimony, by testimony from members of her family, and by the testimony of Brad Urbaniak, an employee of Wilde Honda. Urbaniak testified that Laubert made payments to Wilde Honda on Mallek’s behalf and that on three to five occasions he heard Laubert tell Mallek that he had to repay the money and heard Mallek agree.

¶8 The trial court was clearly entitled to believe Laubert’s testimony that she loaned the money to Mallek on the condition that he would pay her back,

either directly or by making car or college payments on her behalf. It was also entitled to believe her testimony that Mallek agreed to pay her back in exchange for the payments.

¶9 We reject Mallek’s argument that the trial court could not find that a contract existed because there was no consideration. The consideration necessary to support a contract may consist of a detriment to the promisee or a benefit to the promisor. *Lovett v. Mt. Senario College, Inc.*, 154 Wis. 2d 831, 837, 454 N.W.2d 256 (Ct. App. 1990). “It is sufficient that something of value flows from the promisee, or that it performed any act or suffered any inconvenience which it was not obligated to, and that it relied upon the strength of the promise as the inducement for such act.” *First Wis. Nat’l Bank of Milwaukee v. Oby*, 52 Wis. 2d 1, 10, 188 N.W.2d 454 (1971).

¶10 The trial court found that Laubert made loans to Mallek, and that Mallek promised to repay those loans. The transfer of money from Laubert to Mallek, directly and by making payments on his behalf, constituted a detriment to Laubert and a benefit to Mallek. Consideration therefore existed.

¶11 Mallek contends that an enforceable contract did not exist because nothing was in writing and no terms for repayment were specified by the parties. However, as to each transaction for which the trial court awarded damages, it found an agreement to loan money and an agreement to repay. Nothing in the law required that the loan agreements be in writing.<sup>1</sup>

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<sup>1</sup> Mallek cites WIS. STAT. § 241.02(1)(c) (2003-04). However, this statute is irrelevant since the evidence did not indicate that the loans or repayment were conditioned on marriage.

¶12 Mallek contends that because the parties never specified a date for repayment, the trial court could not determine that he breached any contract, even if a contract did exist. However, when a contract contains no provision as to the time for performance, a reasonable time is implied. *Delap v. Institute of Am., Inc.*, 31 Wis.2d 507, 512, 143 N.W.2d 476 (1966). “What constitutes a reasonable time within the facts of a given case presents a question of fact.” *Id.* (citation omitted). Because Mallek refused to repay the loans after being asked by Laubert to do so, compelling her to file a lawsuit to recover the money, the trial court was entitled to find that Mallek had a reasonable amount of time to repay the loans and breached the contracts by failing to do so.

¶13 Mallek also contends that the trial court was “arbitrary and capricious” in determining the amount of damages. He contends that the trial court lacked a rational basis for determining which payments were gifts and which were loans.

¶14 Mallek misconstrues the standard of review applicable to this issue. The record indicates that the trial court, in a careful and thorough review, considered each individual transaction to determine which payments were loans and which were gifts. Ultimately, it denied more than \$3000 of the amounts claimed by Laubert based on its findings that the transactions involved were gifts or were otherwise not proven to be loans. The trial court examined each transaction in light of the evidence and made credibility determinations as to which were loans and which were gifts from Laubert. It then awarded the amount

of the unpaid loans as damages. Since its findings are not clearly erroneous, the damages award cannot be disturbed by this court.<sup>2</sup>

¶15 In concluding, we chastise Mallek's counsel for failing to carefully consider the applicable standard of review before pursuing this appeal. The erroneous exercise of discretion standard cited by counsel in the appellant's brief does not govern this appeal. Essentially, this is a sufficiency of the evidence appeal. The trial court's decision was premised on findings of fact and credibility determinations. Its findings of fact could be disturbed on appeal only if they were clearly erroneous. Credibility determinations were for the trial court, and this court was required to accept the reasonable inferences drawn by the trial court from the evidence. Mallek's counsel has essentially attempted to retry this case on appeal. If he had correctly determined the appropriate standard of review and applied it to this case, it is unlikely that this appeal would have been filed.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

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<sup>2</sup> Contrary to Mallek's contention, the trial court was entitled to consider the amounts of the various payments in determining which were loans and which were gifts, reasonably inferring that larger payments were more likely to be loans than gifts.

