COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 13, 1995

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3120

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

SUPERIOR WATER LIGHT & POWER CO.,

Plaintiff-Respondent,

v.

KEVIN PETERSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

CANE, P.J. Kevin Peterson appeals a judgment awarding $1,637 to Superior Water Light & Power Company (Superior) for delinquent utility bills and dismissing Peterson's counterclaim. Peterson raises four issues. He argues that: (1) The trial court erred by finding that a contract existed between himself and Superior for fire protection service; (2) alternatively, that the contract is unconscionable; (3) the trial court failed to properly aid him in constructing a proper record and that Superior improperly withheld certain documents from him; and (4) the trial court erred by finding that he did not inform Superior that he had capped the fire protection line until the spring of 1992. None of these issues merits reversal. The judgment of the trial court is affirmed.

Peterson owned the old post office building at 1401 Tower Avenue in Superior. He purchased the building in August of 1984. Shortly thereafter, Peterson contracted Superior to supply regular utilities to the building. In August 1984, Superior began charging Peterson for an extra "fire protection service." This service involved supplying water to a two-inch pipe that ran to various locations within Peterson's building. This service was billed separately. In the event of a fire, hoses could be connected to the sites and a ready supply of water would be immediately available.

When Peterson first informed Superior that he did not want the service, Superior suggested that before discontinuing the service, he should speak to his insurance agent and the fire department to make sure there were no negative ramifications. Superior also told Peterson that he needed only to cap the line and notify it of the capping for the service to be terminated. However, Peterson did not take any immediate action and did not cap the line as required to terminate the service. From time to time, Peterson expressed his desire to terminate the service. Each time Superior informed him that he only had to cap the line and inform it of the capping and that the service would then be terminated.

Peterson testified that in early 1989 the pipes in his building froze and that he capped the line. He claims that he informed Superior of the capping at that time. On the other hand, Superior contends that it was not notified until May of 1992. In any event, Peterson continued to receive and pay the bills for the fire protection service from 1989 through his last bill in April of 1992.

Peterson sold the building in December of 1993. At the time of the sale, he was $1,637 behind on his regular utility payments, and Superior filed suit to recover these delinquent payments. In response, Peterson filed a counterclaim asking for reimbursement of all the payments he made for the unwanted fire protection service. Peterson admits that he owes Superior $1,637 in regular utility payments. The issues raised here regard Peterson's counterclaim concerning the payments he previously made for the fire protection service.

Peterson first argues that the trial court erred by finding that a contract existed between himself and Superior for the fire protection service.

Essentially, Peterson argues that there is insufficient evidence to support this finding and that the record supports the opposite conclusion.

In order for a contract to exist there must be an offer, an acceptance and consideration. ***Goossen v. Estate of Standaert,*** 189 Wis.2d 237, 247, 525 N.W.2d 314, 318 (Ct. App. 1994). The offer and acceptance need not occur expressly and may be implied. ***Theuerkauf v. Sutton,*** 102 Wis.2d 176, 184, 306 N.W.2d 651, 657 (1981). "The essence of an implied contract is that it arises from an agreement circumstantially proved." ***Id.*** The existence of an agreement is determined by the use of an objective standard. "[A]n implied [in fact] contract must be one which arises under circumstances which, *according to ordinary course of dealing and common understanding of men, show a mutual intention to contract.*" ***Id.*** at 185, 306 N.W.2d at 658 (emphasis in original).

Whether an implied contract exists is a question for the finder of fact. ***Patti v. Western Machine Co.,*** 72 Wis.2d 348, 353, 241 N.W.2d 158, 161 (1976).

> [W]hen the trial judge acts as the finder of fact, and when there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Noll v. Dimiceli's, Inc., 115 Wis.2d 641, 644, 340 N.W.2d 575, 577 (Ct. App. 1983) (citations omitted). Further, findings of fact will not be set aside unless they are clearly erroneous. Section 805.17(2), STATS.

It is undisputed that Superior supplied a fire protection service to Peterson for eight years. The record establishes that Peterson paid for this service on a monthly basis and that this service was billed separately. When he objected to the service, he was informed how to terminate the service, but did not do so until many years later. This evidence is more than sufficient to support the trial court's finding that Peterson contracted with Superior for the fire protection service.

Next, Peterson argues that the contract is unconscionable. He argues that Superior held a vastly stronger bargaining position and left him with no other options. He contends that, under these circumstances, the contract is void. Additionally, Peterson asserts that the trial court erred by failing to help him make an adequate record of the lower court proceedings and that Superior withheld certain records from him. He reasons that the trial court should have helped him to better present his case. He believes this has prevented him from adequately pursuing his case.

A reviewing court will not address an issue when "the appellant has failed to give the trial court fair notice that it is raising a particular issue and seeks a particular ruling." ***State v. Gilles,*** 173 Wis.2d 101, 115, 496 N.W.2d 133, 139 (Ct. App. 1992). The reasoning behind this rule has been clearly explained by the supreme court.

> [I]t is the role of an appellate court to correct errors made by the trial court, not to rule on matters never considered by the trial court. [Requiring] objections at trial allows the trial judge an opportunity to correct or to avoid errors, thereby resulting in efficient judicial administration and eliminating the need for an appeal.

Vollmer v. Luety, 156 Wis.2d 1, 10-11, 456 N.W.2d 797, 801-02 (1990).

A review of the record reveals that Peterson never argued to the trial court that the contract was unconscionable. Nor does he ever suggest that the record that was being created was somehow inadequate. These issues are raised here for the first time. Because they were not properly preserved at trial, it would be improper to rule on them now. *See* ***Wirth v. Ehly,*** 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

Finally, Peterson argues that the trial court erred by finding that he did not inform Superior that he had capped the fire protection line until the spring of 1992. Peterson argues that the court found he capped the line in 1989

and therefore the payments made for the fire protection line after this date should be credited toward the judgment against him.

Again, the date upon which the service was terminated is an issue for the factfinder. In these matters, this court must defer to the findings of the trial court unless they are clearly erroneous. Section 805.17(2), STATS. Here the record contains sufficient evidence to support the trial court's findings. The trial court found that although Peterson capped the line in 1989, he failed to inform Superior of the capping until May 1992. Peterson concedes in his testimony that he did not immediately inform Superior when he capped the line. Further, Superior's commercial analyst testified that he was unaware the line had been capped prior to May 1992. Based on the evidence in the record, we cannot say that the trial court's conclusions were clearly erroneous.

By the Court. – Judgment affirmed.

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