

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 98-1066-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

HUSER IMPLEMENT, INC.,

PLAINTIFF-RESPONDENT,

V.

ROBERT WENDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County:
LEWIS R. MURACH, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Robert Wendt appeals a judgment awarding Huser Implement, Inc., \$6,627.06 in damages, plus costs, interest and a contribution toward attorneys fees, on Huser's claim that Wendt failed to pay for certain farm

equipment and repairs provided by Huser.¹ Wendt assigns error to the trial court's rejection of his affirmative defenses of estoppel and failure to mitigate damages, and its refusal to grant his counterclaim under the Consumer Credit Act. Upon review, we conclude that the record supports the trial court's determinations, and therefore affirm.

BACKGROUND

Wendt purchased a four-wheel-drive John Deere tractor and some other farm machinery from Huser in December 1992, with financing from John Deere Credit Services. Throughout 1993 and 1994, Huser extended credit to Wendt for a number of other goods and services. Huser imposed a finance charge on Wendt's unpaid balance from time to time, but did not disclose to Wendt the percentage rate to be charged or the time from which such fees would accrue.

Among other transactions, Wendt executed a purchase agreement in 1993 for a running gear tractor, badger box and corn head. The purchase was contingent on Huser being able to arrange financing. When Huser was unable to arrange the financing, Wendt informed Huser that he would be unable to make payments, and asked Huser to pick-up the equipment. Huser did not pick up the running gear tractor and badger box until two to three years later, and never picked up the corn head, which had apparently frozen to the ground at some point.

Wendt defaulted on the John Deere tractor payments, and John Deere Credit Services, through its agent Huser, foreclosed in 1996. Wendt executed a voluntary surrender agreement in which he agreed to return the tractor,

¹ This is an expedited appeal under RULE 809.17, STATS.

and Huser agreed to attempt to resell it for John Deere and apply the proceeds, including any overage, to Wendt's outstanding balance. Huser then exercised its own option to purchase the tractor from John Deere. At the time of the foreclosure, the tractor had about 1,906 hours of use on it and was appraised at between \$34,000 and \$35,000. Huser eventually resold the tractor to Scholten's Equipment Company for \$30,500. In the meantime, it rented the tractor out for an additional 366 hours at a rate of approximately \$22 an hour.

ANALYSIS

Standard of Review.

Whether a party exercised ordinary care to minimize its damages is a question for the fact-finder. *See generally Sprecher v. Weston's Bar, Inc.*, 78 Wis.2d 26, 42, 253 N.W.2d 493, 500 (1977). We will uphold a trial court's factual determinations unless they are clearly erroneous. Section 805.17(2), STATS.

The decision to provide an equitable remedy such as estoppel rests within the circuit court's discretion. *Williams v. Kaerek Builders, Inc.*, 212 Wis.2d 150, 162, 568 N.W.2d 313, 318 (Ct. App. 1997). We will not reverse a court's discretionary action so long as the court applied the correct legal standard to the facts of the case to reach a reasonable result. *Id.*

Whether a certain set of facts satisfies a provision of the Wisconsin Consumer Act is a mixed question of fact and law. In reviewing such a question, we must first determine whether the facts found by the trial court were clearly erroneous, and then consider whether they fulfill the applicable legal standard. *See generally, Peplinski v. Fobe's Roofing, Inc.*, 193 Wis.2d 6, 19, 531 N.W.2d 597, 602, (1995).

Mitigation of Damages.

An injured party has a duty to use reasonable means to minimize its losses, and cannot recover damages for losses which could have been avoided. *Kuhlman, Inc. v. Heileman Brewing Co., Inc.*, 83 Wis.2d 749, 752, 266 N.W.2d 382, 384 (1978). Wendt claims that Huser could reasonably have reduced its damages by promptly retrieving its equipment after learning that Wendt's financing had not been approved. Huser counters that the lengthy delay was caused by Wendt's own failure to cooperate with repossession efforts. Jerry Huser testified that he had difficulty contacting Wendt, and that Wendt refused to allow Huser to retrieve the corn head. The trial court, which was in the best position to judge the credibility of the parties, found Huser's evidence more persuasive. We will not disturb its determination.

Wendt also claims that the trial court should have subtracted \$2,000 from the damage award for the recovered value of the running gear tractor and the badger box that Huser repossessed. However, both Wendt and Jerry Huser testified that Huser had already credited \$2,000 to Wendt's account. To reduce the damage award by an additional \$2,000 would relieve Wendt of his obligation to pay the other debts which were satisfied by the prior credit. The trial court properly included the entire purchase price of the running gear and badger box in the damage award, because Huser had already minimized its damages.

Estoppel.

Equitable estoppel is appropriate when a party has committed some action or inaction which induced reliance by another to the other's detriment. *Mercado v. Mitchell*, 83 Wis.2d 17, 26-27, 264 N.W.2d 532, 537 (1978). Wendt maintains that Huser should be estopped from recovering more than the value of the John Deere tractor on the repossession date because Huser had promised to try to sell the tractor for its appraised value, which was at that time \$4,000 greater than its purchase price, and then to apply the overage to Wendt's balance.

Wendt claims that he relied to his detriment on Huser's promise when he voluntarily surrendered the tractor. However, the trial court found that the voluntary surrender agreement protected Wendt from having John Deere seek a deficiency judgment against him in the event that the tractor could not be sold for the amount which Wendt owed Deere. Despite the appraised value, there was no guarantee that there would be an overage, and there was no agreement that Huser would be obligated to resell the tractor a second time after buying it from John Deere. The trial court's determination that there was no second resale agreement between the parties was not clearly erroneous, and we agree with the resulting conclusion that Wendt had failed to establish the elements of estoppel.

Open-Ended Credit Plan.

Huser did not attempt to recover interest payments from Wendt. Wendt nonetheless contends that Huser violated the Wisconsin Consumer Act by failing to provide written disclosure of the terms of the parties' open-ended credit plan as required under § 422.308, STATS., and should therefore be subject to the penalties provided in § 425.304, STATS. Huser disputes that the parties had an

open-ended credit plan, instead characterizing its sales of goods and services to Wendt as ordinary credit transactions.

Under § 421.301(27)(a), STATS., an open-ended credit plan is an agreement in which the creditor permits the customer to make purchases or obtain loans. The customer has the privilege of paying the balance in full or in installments. A finance charge may be imposed, and the creditor treats the arrangement as an open-ended credit plan. If the creditor treats each extension of credit as other than an open-ended plan, the ordinary credit transaction rules apply. Section 421.301(27)(c).

The trial court's factual finding that the parties did not have an open-ended credit plan was supported by evidence that Huser billed Wendt on monthly invoices for all goods and services provided and that no written credit plan existed. This finding is not clearly erroneous, and we will not disturb it. Section 805.17(2), STATS. Furthermore, the finance charge limitations set forth in § 422.201, STATS. for ordinary consumer credit transactions do not apply when the transaction is primarily agricultural in nature, as here. Section 422.201(12). We therefore conclude that the trial court properly denied Wendt's counterclaim under the Wisconsin Consumer Credit Act.

By the Court.—Judgment affirmed.

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

