STATE OF MICHIGAN

COURT OF APPEALS

KATTERMAN TRUCKING, INC.,

Plaintiff-Appellant,

v

DALE LAIDLAW and SHERYL LAIDLAW, d/b/a GOODLAND TRUCKING,

Defendants-Appellees.

UNPUBLISHED
January 23, 1998

No. 199283
Lapeer Circuit Court
LC No. 94-020017-CK

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

Following a jury determination that there was no agreement or contract for the defendants to supply and the plaintiff to pay for gravel, a judgment of no cause of action was entered. Plaintiff now appeals as of right. We reverse and remand for a new trial.

Plaintiff first argues that where plaintiff's complaint, based on the facts, included a count for promissory estoppel, the trial court was required to instruct the jury on the law with regard to promissory estoppel and to make allowance for such a count on the verdict form. The facts show that plaintiff relied on a written quotation from defendants for pricing of gravel in its bid for a construction project, and that defendants withdrew the offer subsequent to the award of the job to plaintiff. Defendants contended that, when they quoted a price, they had no idea of the amount of gravel that would have been needed for the project and therefore, their promise was not sufficiently clear and definite to be enforced.

The issue of jury instructions is reviewed for an abuse of discretion. *Joerger v Gordon Food, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997), citing *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). "Jury instructions are reviewed by this Court in their entirety and should not be extracted piecemeal. Reversal is not required if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id*. at 173. A new trial is appropriate when an error of law has occurred in the proceedings. MCR 2.611(A)(1)(g).

Questions of law are subject to review de novo. *Bieszck v Avid Rent-A-Car*, 224 Mich App 295, 297; 568 NW2d 401 (1997).

According to the Michigan Court Rules regarding instructions to the jury, before or after arguments or at both times, a court has to instruct the jury on the applicable law, the issues presented by the case and, if a party requests, that party's theory of the case. MCR 2.516(B)(3). In addition, a court may at any time during the trial, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury to understand the proceedings and arrive at a just verdict, MCR 2.516(B)(2). However, the court need not give the statements of issues or theories of the case in the form submitted by a party if the court presents to the jury the material substance of the issues and theories of each party, MCR 2.516(A)(5).

The elements of promissory estoppel are: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Joerger*, *supra* at 173. Promissory estoppel requires an actual, clear and definite promise, *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993), citing *State Bank of Standish v Curry*, 442 Mich 76, 84-85; 500 NW2d 104 (1993). Promissory estoppel, specifically, is employed to "alleviate an unjust result of strict adherence to established legal principles." *Hebrew Teachers v Jewish Welfare*, 62 Mich App 54, 60; 233 NW2d 184 (1975).

In *State Bank of Standish*, *supra* at 84 n6, the Court quoted from *Maxwell v Bay City Bridge Co*, 41 Mich 453, 468; 2 NW 639 (1879), regarding the need to give proper instructions to the jury and the function of the jury in cases concerning promissory estoppel:

> [T]he question of [the doctrine of estoppel's] application in any case is a mixed question of law and fact, and in cases of jury trial must be submitted to the jury under proper instructions. Now however clear the facts in support of the estoppel may seem to be, it is always possible that there may be qualifying or overruling facts; and the conclusions from the evidence must be drawn by the jury, -- not by the court.

Here, review of the record shows that defendants' proposition to supply gravel at a certain price was sufficiently clear and definite for the jury to consider it a promise, and not merely an opinion, or an indefinite, equivocal belief that did not demonstrate an intention with regard to future conduct. Defendants faxed a proposal, quoting $2.64 per ton loaded for gravel of a certain quality. The proposal specifically referred to the appropriate road project, was signed by defendants, and provided ninety days for acceptance. The one material element that was lacking in defendants' faxed proposal was the quantity of gravel. In *State Bank of Standish*, *supra* at 86, the Court, quoting Feinman, *Promissory estoppel and judicial method*, 97 Harv L R 678, 691-692 (1984), stated:

> [I]f the expression is made in the course of preliminary negotiations when material terms of the agreement are lacking, the degree of certainty necessary in a promise is absent.

However, the Court accepted that a promise may be stated in words, either orally or in writing, or may be inferred wholly or partly from conduct, and that circumstances surrounding the making of a representation are important to the determination of whether a manifestation rises to the level of a promise. *Id*. at 86. The Court also noted that where the parties have left open some matters to be determined in the future, enforcement is not precluded if there exists a method of determining the terms of the contract either by examining the agreement itself or by other usage or custom. *Id*. at 89.

Objectively viewed, it would have been possible for the jury to find that the circumstances surrounding the making of defendants' proposal suggest that the proposal was not merely words of assurance or statements of belief, but a clear, specific and certain promise of future action. *State Bank of Standish*, *supra* at 90. There was some previous course of dealing between plaintiff and defendants, indicating that in 1990 or 1991 plaintiff purchased a small amount of gravel from defendants. Again in 1993, plaintiff was informed by defendants that it could buy gravel for another smaller road project from defendants. In addition, plaintiff testified that prior to the proposal, defendant was made fully aware of the large quantity of gravel involved. Objectively viewed, there was no reason to question plaintiff's claim that it had no knowledge of any restriction on defendants' ability to supply the amount of gravel that was needed for the project. The jury could have found that defendant was generally aware of the large quantity needed, and that the exact amount of gravel would have been determined after the acceptance of plaintiff's bid for the project.

Plaintiff presented evidence by which a reasonable jury could have found plaintiff's promissory estoppel claim to be meritorious. The instructions as given inadequately presented the issue to the jury. As a result, reversal is required.

Plaintiff next argues that the court was required to instruct the jury regarding the possibility that alternative methods of acceptance were not precluded when the offer merely suggested, but did not prescribe, a manner of acceptance. According to plaintiff, a contract was created when plaintiff accepted defendants' faxed proposal by telephone and letters responding to the fax. Defendants argued, however, that the contract could have been formed only if plaintiff signed the fax where, on the fax, defendants had indicated that acceptance could be had in this manner. The court did instruct the jury that a contract may be oral or it may be in writing, and that plaintiff had the burden of proof that there was an oral contract between it and defendants. Also, the verdict form posed the question "Was there an agreement or contract for . . . defendant[s] to supply and . . . plaintiff to pay for gravel?" To this question the jury answered "No." However, the jury was never instructed that

> frequently in regard to the details of methods of acceptance, the offeror's language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed. [1 Restatement of the law of contracts 2d, § 60, comment a.]

In *Ludowici-Celadon Co v McKinley*, 307 Mich 149, 153; 11 NW2d 839 (1943), the Court held that an acceptance of an offer to contract may be implied from the acts and circumstances of the parties, and that the manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct. Here, without instruction on alternative methods of acceptance of an offer,

the jury was not sufficiently apprised of the applicable law and that this failure to instruct might have prejudiced plaintiff.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ William B. Murphy

I concur in result only.

/s/ Hilda R. Gage