COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP472 **Cir. Ct. No. 2001CV2675**

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

HANS NOELDNER,

PLAINTIFF-RESPONDENT,

V.

IMAGO SCIENTIFIC INSTRUMENTS CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Imago Scientific Instruments Corporation appeals from the circuit court's judgment in favor of Hans Noeldner. The issues are: (1) whether the circuit court's finding that Noeldner's letter of September 26,

2000, did not contain a material misrepresentation of fact is clearly erroneous; and (2) whether the circuit court properly valued damages. We affirm.

¶2 Imago first argues that Noeldner's statement in his letter of September 26 that suggested that he had not yet been issued stock options in lieu of compensation for his work in 1999 was a material misrepresentation of fact, which caused Imago to mistakenly issue to Noeldner the stock options that Noeldner is now suing to enforce.

¶3 A "misrepresentation" is "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." ***Schnuth v. Harrison***, 44 Wis. 2d 326, 338, 171 N.W.2d 370 (1969) (citation omitted). A misrepresentation is "material" if it would likely affect the conduct of a reasonable person. ***Id.*** Even an innocent misrepresentation may serve to void a contract because "it would be unjust to allow one who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations." ***Id.*** at 337-38. We will uphold the circuit court's factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2003-04);[1] ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 846, 593 N.W.2d 103 (Ct. App. 1999). "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." ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 The circuit court concluded that Noeldner had not misrepresented the facts when he inquired by letter about the stock option issue because Noeldner and Imago had not yet entered into a contract regarding the 1999 stock options. The circuit court based its legal conclusion that no contract had been formed between the parties regarding the 1999 stock options on its factual finding that Noeldner expressly rejected the stock option plan presented by Imago in February, 2000. This factual finding, in turn, was supported by the trial testimony of Tom Kelly, Imago's president and CEO, who testified that Noeldner spoke to him shortly after receiving the plan and objected to the high price of the stock options; the testimony of Scott Wiener, an Imago employee, who testified that Noeldner expressed objections to the plan to him; and by the testimony of Noeldner himself. The circuit court's finding that Noeldner did not assent to the stock option plan is not clearly erroneous because it is well grounded in the trial testimony. Because Noeldner did not assent to the plan, no contract existed. Therefore, Noeldner did not misrepresent the facts when he asked about the status of the 1999 stock options in his September 26 letter.

¶5 Imago next challenges the circuit court's valuation of damages. Imago contends that the circuit court erred in valuing Noeldner's damages as the fair market value of the stock on the date Imago breached the stock option agreement, less the price to exercise the option. Imago argues that there is no fair market valuation for a stock that is not regularly bought and sold on the open market. We disagree. Imago cites to no authority, and we are unaware of any, which states that such stock can never be assigned a fair market value as a matter of law. Here, Noeldner presented sufficient evidence to establish as a matter of fact the fair market value for the stock, including testimony from Imago about the value it placed in the stock, and the price placed on the stock in two recent sales.

Therefore, we uphold the circuit court's valuation of Noeldner's damages based on the stock price of $8.00 per share.

By the Court.—Judgment affirmed.

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