

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 3, 2016**

Diane M. Fremgen  
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. 2015AP568**

**Cir. Ct. No. 2012CV1810**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**IKARIA, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**FREDERICK J. MONTGOMERY, DUNCAN P. L. BATHE,  
ANNE BERSSENBRUGGE, NITRICGEN, INC.,  
CORY CASPER AND TYE T. GRIBB,**

**DEFENDANTS-RESPONDENTS.**

---

APPEAL from a judgment of the circuit court for Dane County:  
RICHARD G. NIESS, Judge. *Affirmed.*

Before Lundsten, Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. Ikaria, Inc. identifies itself as a “biotherapeutics company.” Ikaria sued four of its former employees and one individual Ikaria

never employed, as well as NitricGen, Inc., a company that Ikaria alleges is its competitor. The suit claimed various causes of actions against the defendants and subsets of the defendants, including one cause of action alleging that all defendants conspired to “establish NitricGen for the purpose of using and exploiting confidential, non-trade secret information belonging to Ikaria.”

¶2 Following a four-day bench trial, the circuit court dismissed all of Ikaria’s claims in a written decision. The court’s view was that Ikaria’s claims “involved much smoke but little demonstrated fire.”

¶3 While all claims were dismissed, Ikaria appeals dismissal of only some, namely, the claims against: three former employees (Frederick Montgomery, Duncan Bathe, and Cory Casper), for breach of the implied duty of good faith and fair dealing and for breach of a non-compete clause; Bathe, for breach of a duty of loyalty; and the individual never employed by Ikaria (Tye Gribb), for aiding and abetting Bathe’s breach of the duty of loyalty. Ikaria argues that the court clearly erred in finding facts and erred in applying legal principles. For the following reasons, we affirm the judgment.

## **BACKGROUND**

¶4 After a bench trial, the circuit court made findings that include the following.

¶5 During the pertinent time period, Ikaria marketed and sold products that included a medical delivery system for providing nitric oxide gas to patients with conditions that include acute respiratory distress syndrome. Ikaria’s nitric oxide delivery system was “large and heavy,” rendering the system “impractical for in-home use by patients.” As a result, Ikaria maintained an extensive national

system of service centers “to distribute the tanks of nitric oxide to hospitals and then collect and refill empty tanks.”

¶6 Ikaria explored experimental medical uses of nitric oxide, including topical wound healing, from about 2007 until sometime after the employee-defendants resigned in 2011. However, the potential wound-healing application “never advanced beyond the research stage.” “Instead, [Ikaria’s] canister gas [of nitric oxide] is used [in the form of] inhalation therapy for pulmonary conditions.”

¶7 Four of the five individual defendants in this case were former Ikaria employees: Montgomery, Bathe, Casper, and Berssenbrugge. Montgomery and Bathe, “the two most knowledgeable and important employees in Ikaria’s device development group,” founded the company’s nitric oxide device development team. Montgomery was a “key leader” on Ikaria’s leadership team. Bathe was an engineering manager in the device group. Casper began as a software engineer and was later a project manager. Berssenbrugge was a project manager in Ikaria’s device engineering group. Gribb, the non-employee, was an engineer and inventor and a friend of Bathe’s.

¶8 While employed by Ikaria, Montgomery, Bathe, and Casper each entered into restricted stock agreements with Ikaria that contained, as pertinent here: a non-compete clause, an invention assignment clause, and a confidentiality clause.

¶9 Although the circuit court did not make specific findings on the point, it is undisputed that Montgomery, Bathe, Casper, and Berssenbrugge each announced his or her resignation from Ikaria during the week of April 11, 2011, and left Ikaria within one month.

¶10 All five defendants thereafter established NitricGen, for the purpose of developing inventions and marketing products from such inventions. More specifically, NitricGen sought to develop a bedside nitric oxide generation device to assist in topical wound healing.

¶11 In contrast, “Ikaria has never had under development or commercialization a product or device for sale that generates nitric oxide *in situ*, or by the bedside, although it was researched for a time.” More generally, NitricGen does not offer products or services “that serve the same function as or are a therapeutic alternative to products or services” that Ikaria or its subsidiaries offered, or had under development or commercialization, as of April or May 2011. That is, the defendants “sought a function for their nitric oxide generation technology which was substantially different from anything Ikaria offered, had ever developed or had under commercialization.”

¶12 While NitricGen’s business is based in part on “sparking technologies,” which involve the potential to generate nitric oxide through the use of electrical sparks, “Ikaria affirmatively shut down its” research into a nitric oxide sparking production process in 2009 when Ikaria rejected a request from then-employee Montgomery that Ikaria spend \$600,000 “to further investigate the technology.”

¶13 Before Bathe and Casper left Ikaria, “they were working on duplicating prior art, and hypothesizing various concepts.” “Neither the concept of generating nitric oxide from an electrical spark nor the concept of using nitric oxide for topical wound healing was new or novel as of 2010,” and the employee-defendants did not conceive of the technology controlling the duration of electrical sparks until after they left Ikaria.

¶14 There are four inventions at issue in this case and all four were conceived of or invented by the defendants after those working at Ikaria had left. More specifically, these inventions were based on “substantial work” that the defendants “performed post-Ikaria,” using \$2.3 million that the defendants invested, after which they patented and “preliminarily actualize[d] them.” It was not until June 26, 2001 that “Montgomery reduced all four NitricGen [i]nventions to writing in the first draft of the patent application.”<sup>1</sup>

¶15 Bathe shared with Gribb “opinions and recommendations of Ikaria’s paid consultants about how a specific hypothetical nitric oxide generation device would be regulated,” and this information would technically fall into the category of “Confidential Information” of Ikaria under the confidentiality clause of the agreement. However, these opinions and recommendations “were public information, requiring little effort to access.”

¶16 Bathe “fiddl[ed] around with sparking during his last years with Ikaria.” However, Bathe’s “fiddling” resulted in “no demonstrated advancement

---

<sup>1</sup> While the details of the inventions do not affect our analysis, for general context the four inventions that Ikaria seeks ownership of in this case are:

- Technology that controls the duration of the electric spark, which in part dictates how much nitric oxide is produced.
- Use of a magnetic field near the spark to increase nitric oxide output.
- A sensor that measures spark duration.
- An apparatus that tracks the ability of a filter to improve performance by removing unwanted byproducts of the nitric oxide sparking production process.

of the science during that time.” Ikaria failed to prove that Bathe: “took any action that was directly contrary to Ikaria’s interests and which caused Ikaria harm while he was an Ikaria employee”; “misrepresented the efficacy of nitric oxide generation technology or wound healing as a potential application”; “conceived of any of the four NitricGen [i]nventions and then hid the fact of conception from Ikaria”; “worked on nitric [oxide] generation technology with Ikaria’s resources or misappropriated any of Ikaria’s property”; “used ‘Confidential Information’ to his benefit, beyond defining the parameters of acceptable conduct under the non-compete clause”; “actively competed with Ikaria or affected any of its business relationships while an employee.” “Other than a few e-mails,” Bathe’s participation in research into technology to generate nitric oxide from electrical sparks “was completed on nights and weekends and without use of Ikaria’s time, resources, or equipment, other than a *de minimis* number of articles retrieved from the internet at Ikaria expense.”

¶17 None of the witnesses called by Ikaria at trial “directly had personal knowledge of the events involving defendants’ creation of the four inventions.” Montgomery, Casper, Berssenbrugge, and Gribb “were all thoroughly credible.” Bathe was somewhat inconsistent in his testimony, but nonetheless he was “credible” “regarding the realization of the four inventions, and particularly [regarding] the sequence and timing.”

¶18 While Ikaria “had every right to be highly suspicious of the timing of” the inventions made “post-termination” of employment, the record does not support findings that Montgomery, Casper, Berssenbrugge, or Gribb were “untrustworthy” or that they conspired “over a substantial time period,” or that they subsequently conspired “in a cover-up of Bathe’s and Gribb’s allegedly nefarious conduct.” Montgomery, Bathe, Casper, and Berssenbrugge “were

employed by the company for many years in positions of trust which, on this record, they fulfilled with great fidelity and integrity.”

¶19 Based on these findings, the circuit court concluded that: Montgomery, Bathe, and Casper did not breach the non-compete, invention assignment, or confidentiality clauses of the restricted stock agreement; no defendant breached the implied duty of good faith and fair dealing inherent in the three clauses of the restricted stock agreement referenced above; no defendant breached a duty of loyalty to Ikaria, or aided and abetted such a breach; Gribb did not tortiously interfere with the Ikaria contracts of Montgomery, Bathe, and Casper; and no defendant was unjustly enriched by conduct challenged by Ikaria. Accordingly, the court entered judgment in favor of the defendants and dismissed the operative complaint in its entirety.<sup>2</sup>

## DISCUSSION

¶20 Each of Ikaria’s arguments fails to come to grips with our standard of review. Following a bench trial, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” WIS. STAT. § 805.17(2) (2013-14).<sup>3</sup> In the role of fact finder, the circuit court “is the ultimate arbiter of the credibility of the witnesses and the weight to be given to their testimony.” *Plesko*

---

<sup>2</sup> Ikaria does not appeal dismissal of its claims against Berssenbrugge and NitricGen, but we refer to these two defendants to provide context for the arguments of the parties and challenged decisions of the circuit court.

<sup>3</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

*v. Figgie Int'l*, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). “When evidence supports the drawing of either of two conflicting but reasonable inferences, the trial court, and not this court, must decide which inference to draw.” *Id.* at 776.

I. ALLEGED BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

¶21 We first address Ikaria’s argument related to its claim that the former employee-defendants breached the implied covenant of good faith and fair dealing (hereafter, “implied duty of good faith”) inherent in their restricted stock agreements. Ikaria argues that the court made errors of law and ignored “substantial evidence” in concluding that the defendants did not breach the implied duty of good faith. In particular, Ikaria argues that the court failed to properly consider whether the defendants “denied Ikaria the benefit of the parties’ bargain” under the invention assignment clause by, according to Ikaria’s view of the evidence, intentionally “timing their resignations to avoid their otherwise clear contractual obligations to assign their inventions to Ikaria.”

¶22 We now briefly explain the applicable legal standards in addition to the standard of review already summarized, the terms of the invention assignment clause, and our reasons for concluding that Ikaria’s challenges to the circuit court’s decision are unavailing, given Ikaria’s failure to point to clear error in the court’s fact finding and credibility determinations.

¶23 Contract interpretation “presents a question of law, which we determine independently of the conclusions rendered by the circuit court.” *Tufail v. Midwest Hospitality, LLC*, 2013 WI 62, ¶22, 348 Wis. 2d 631, 833 N.W.2d 586. We attempt “to give effect to the parties’ intentions,” bearing in mind that

“unambiguous contract language controls contract interpretation.” *Id.*, ¶25 (quoted source omitted).

¶24 Turning to the implied duty of good faith, “[e]very contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties.” *Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶27, 348 Wis. 2d 360, 842 N.W.2d 240 (quoting *Chayka v. Santini*, 47 Wis. 2d 102, 107 n.7, 176 N.W.2d 561 (1970)). Under this implied “duty of cooperation,” a party may commit a breach when it follows “the letter but not the spirit of an agreement,” because otherwise courts would allow compliance with contracts that is “in form, not in substance,” and permit parties to “accomplish[] exactly what the agreement of the parties sought to prevent.” *Beidel*, 348 Wis. 2d 360, ¶27 (quoting *Chayka*, 47 Wis. 2d at 107). At the same time, “[a] party may not ... employ the good faith and fair dealing covenant to undo express terms of an agreement.” *Beidel*, 348 Wis. 2d 360, ¶29.

¶25 The invention assignment clause provides, in pertinent part, with emphasis as in the original:

The [employee] acknowledges that while the [employee] is an employee of ... [Ikaria], the [employee] may conceive of, discover, invent or create inventions, improvements, new contributions, literary property, computer programs and software material, ideas and discoveries, whether patentable or copyrightable or not (all of the foregoing being collectively referred to herein as “Work Product”) .... The [employee] acknowledges that all of the foregoing shall be owned by and belong exclusively to [Ikaria] and that the [employee] shall have no personal interest therein and the [employee] does hereby assign all rights, title and interest therein to [Ikaria]; provided that they are either related in any manner to the business (commercial or experimental) of [Ikaria] ..., or are, in the case of Work Product, conceived or made on [Ikaria’s] time or with the use of [Ikaria’s] facilities or materials ....

¶26 Ikaria does not dispute that the invention assignment clause, as pertinent to the issues it raises, addresses only the work-related new ideas and inventions of Ikaria-employed defendants generated while employed by Ikaria, not those generated after the defendants left employment with Ikaria. In addition Ikaria now concedes that it “does not dispute that Defendants conceived of their inventions after their group resignations from Ikaria in April 2011.” What this leaves we will call Ikaria’s “brink-of-invention” argument. Ikaria argues that the defendants breached the implied duty of good faith by allegedly intentionally timing their resignations to occur when the defendants, as Ikaria puts it, were on “the brink of completing their inventions, so that they could evade a narrow reading of the Invention Assignment Clause.”

¶27 We reject the brink-of-invention argument because it is premised on views of the facts that were both expressly and implicitly rejected by the circuit court, and because Ikaria fails to point to clear error by the court in finding any pertinent fact. Assuming without deciding that Ikaria is correct that it would have been a breach of the implied duty of good faith inherent in the agreements for the Ikaria-employed defendants to intentionally time their resignations so that only some final step in the process leading to the ultimate conception of each invention remained to be done, the court’s findings negate the necessary underlying factual premise.

¶28 We will not repeat the circuit court findings already summarized above that, taken as a whole, easily negate Ikaria’s factual premise. It is sufficient to highlight one critical finding, namely, that the defendants not only conceived of all four inventions after the employee-defendants had resigned, but that these conceptions-of-invention were based on “substantial work” that the defendants “performed post-Ikaria.”

¶29 Ikaria argues that it presented “substantial evidence” at trial supporting its brink-of-invention argument, and its appellate briefing devotes much space to summarizing evidence that, if relied on by the fact finder, would support such an argument. This approach is flawed. Ikaria effectively asks us to reweigh witness credibility and the evidence generally and override factual inferences drawn by the circuit court. However, as stated above, we are obligated to view the evidence in the light most favorable to the circuit court’s fact finding, including its credibility determinations, and there was a factual basis for the circuit court to reject the brink-of-invention notion.

¶30 One example of the evidence cited by Ikaria is illustrative. Ikaria points to evidence that, during the year before the resignations, some of the defendants built five sparking devices, using a sparker from a barbeque grill, and that in March 2011 those defendants tried about 30 iterations or reconfigurations of this equipment to see what different results they could get in sparking. However, assuming that these events occurred, these facts would not be inconsistent with the court’s findings. They would represent merely the type of preliminary “fiddling” to which the court referred repeatedly in its findings and would not undermine the court’s finding that the defendants did not conceive of the new sparking technology until after the employee-defendants resigned from Ikaria. In the end, Ikaria fails to direct us to any pertinent finding of the circuit court that is inconsistent with evidence that was uncontroverted.

¶31 Ikaria also argues that the circuit court’s decisions are “pervade[d]” with “fundamental error” based on the court’s purported understanding that “Ikaria could not prevail unless it presented eye witness testimony of the Defendants committing the acts in question.” This is a meritless argument. It is based on two observations of the circuit court: (1) that Ikaria had offered “almost entirely

circumstantial” evidence to prove “the ‘when’ and ‘what’” regarding the defendants’ conduct leading to the creation of the four inventions; and (2) that Ikaria’s evidence had at best “negat[ed] the defense case,” which was insufficient to meet “the requisite burden of proof” and to “establish[] that the four inventions were created during the Ikaria employment relationship, or otherwise in violation of the restrictive covenants.” Neither of the court’s observations resembles the notion that, as Ikaria characterizes the court’s supposed position, “Ikaria could not prevail unless it presented eye witness testimony of the Defendants committing the acts in question.”

¶32 Similarly, Ikaria argues that the circuit court “disregarded Ikaria’s voluminous circumstantial evidence,” and in support Ikaria cites various items of evidence that, at least as now characterized by Ikaria, could have supported findings of fact different from those made by the circuit court. However, as with its argument addressed above, Ikaria fails to demonstrate that the court disregarded or obviously misconstrued any piece of evidence, and does not explain why we should conclude that any finding of the court was clearly erroneous. Therefore, the facts found and inferences drawn by the circuit court stand.

¶33 We now turn to Ikaria’s argument that we should reverse the circuit court’s dismissal of Ikaria’s implied duty of good faith claim because the court allegedly misstated three legal principles. Ikaria contends that the court misstated the following legal concepts: the liability standard for breach of the implied duty of good faith; the doctrine that ambiguous provisions in contracts should be construed against their drafters; and the benefit of the bargain to which Ikaria was entitled under the invention clause. However, Ikaria fails to account for the fact that we review *de novo* the application of a legal standard to a given set of facts. *See Madison Reprographics, Inc. v. Cook’s Reprographics, Inc.*, 203 Wis. 2d

226, 238, 552 N.W.2d 440 (Ct. App. 1996). We conclude that, regardless of how the circuit court characterized any legal principle, when the correct legal standards are applied to the court's findings of fact, which Ikaria fails to show are clearly erroneous, there was no breach of the implied duty of good faith.

¶34 For all these reasons, we reject Ikaria's arguments relating to its claims of breach of the implied duty of good faith.

## II. DEFENDANT BATHE'S ALLEGED BREACH OF THE DUTY OF LOYALTY TO IKARIA AS A "KEY" EMPLOYEE

¶35 Ikaria argues that, in dismissing its claim against Bathe for breach of his duty of loyalty to Ikaria, the circuit court "appeared to disregard" "overwhelming" evidence that Bathe, a "key employee of Ikaria," "act[ed] adversely to Ikaria's interests." Again, however, this amounts to a request that we reassess witness credibility, the relative weight of particular pieces of evidence, and the reasonable inferences arising from the evidence.

¶36 As stated above, the circuit court found that Bathe was a "key employee" of Ikaria. While the parties may disagree on the correct definition of the duty of loyalty, we will assume without deciding, in favor of Ikaria, that as a key employee Bathe was required to act solely for Ikaria's benefit in all Ikaria-related matters, even at the expense of Bathe's own interests, and could not act adversely to Ikaria's interests by serving or acquiring any private interest in opposition to Ikaria's interests.

¶37 Ikaria now attempts to demonstrate, through citation to various pieces of trial evidence, that the circuit court committed clear error in its findings related to Bathe's alleged breach of loyalty. Ikaria argues that the court clearly erred in finding that: (1) Bathe merely "fiddl[ed] around with sparking during his

last years with Ikaria,” and this resulted in “no demonstrated advancement of the science during that time”; (2) there was a lack of evidence that Bathe “conceived of” any of the four inventions and “then hid the fact of conception from Ikaria,” or “worked on nitric [oxide] generation technology with Ikaria’s resources or misappropriated any of Ikaria’s property”; and (3) Bathe was “employed by the company for many years in [a] position[] of trust which, on this record, [he] fulfilled with great fidelity and integrity.”

¶38 Ikaria’s core argument is that the circuit court committed clear error when it rejected Ikaria’s proposed finding that Bathe was aware, while he still worked at Ikaria, “that Ikaria remained interested in developing [a nitric oxide]-generation device, but Bathe decided to secretly usurp that corporate opportunity for himself.” However, in support of this proposition Ikaria cites testimony and documentary evidence from which varying inferences can be drawn. Some of these inferences support Ikaria’s theory, but some do not. As the defendants argue, the circuit court had a basis to choose between the competing inferences and find that Bathe took no actions adverse to Ikaria’s interests in, as the defendants put it, “sporadically tinker[ing] with electrical circuits, look[ing] for a new job and send[ing] some personal e-mails” related to these topics.<sup>4</sup>

---

<sup>4</sup> Our conclusion that the circuit court had a sufficient basis to dismiss the claim against Bathe for breach of his duty of loyalty to Ikaria disposes of Ikaria’s separate argument that the court improperly dismissed the claim against Gribb for aiding and abetting Bathe’s alleged breach of his duty of loyalty. The defendants make this point in their brief on appeal and Ikaria provides no reply to it.

### III. THE NON-COMPETE CLAUSE

¶39 Ikaria argues that the circuit court “clearly erred,” and “ignored” key evidence, in determining, based on its finding that NitricGen was not a direct competitor with Ikaria during the pertinent time period, that Bathe, Casper, and Montgomery did not breach the non-compete clause. We reject Ikaria’s argument because, again, Ikaria’s argument amounts to nothing more than a request that we view and weigh a piece of evidence reflected in the record differently than the circuit court did.

¶40 The non-compete clause addressed conduct of Bathe, Casper, and Montgomery for a period of one year after termination of their employment. They were prevented from “directly or indirectly” providing “services to a ‘Direct Competitor’” of Ikaria that dealt in “Competitive Products or Services” which “serve the same function as or are a therapeutic alternative to products or services” that Ikaria offered for sale or had under development or commercialization at the time the employees terminated employment.

¶41 As summarized above, the circuit court found that NitricGen “is in the business of researching and developing an *in situ*, or by the bedside, nitric oxide generation device for the function of topical wound healing on patients,” while “Ikaria has never had under development or commercialization a product or device for sale that generates nitric oxide *in situ*, or by the bedside, although it was researched for a time.”

¶42 Ikaria argues that these findings are contradicted by evidence that “indisputably showed” that, during the pertinent time period, the defendants not only explored the use of a nitric oxide device in topical wound healing treatments, but were also “researching, developing and attempting to sell their NO-generation

device as an alternative to Ikaria’s products and core medical application.” For support, Ikaria cites evidence showing that, after the defendants left Ikaria, (1) NitricGen filed a patent application for the defendants’ nitric oxide generation device drafted by Montgomery that lists “hypoxic respiratory failure of the newborn” as one medical use; and (2) on behalf of NitricGen, Bathe and Montgomery made a pitch to Ikaria’s chief technology officer that Ikaria pay a \$300,000 fee to evaluate whether to invest in NitricGen’s device.

¶43 However, the factual assertions to which Ikaria reduces this evidence, even if true, are not inconsistent with the circuit court’s decision. The fact that the patent application filed after the defendants left Ikaria cited a medical use that, *if pursued*, could serve the same function as a product of Ikaria does not establish that the defendants attempted to sell any device as an alternative to any of Ikaria’s products. And, even if Bathe and Montgomery explored the potential for Ikaria to invest in NitricGen’s device, that action could be construed as merely an invitation to participate in a joint venture in an area new to Ikaria.

## CONCLUSION

¶44 For these reasons, we affirm the circuit court.

*By the Court.*—Judgment affirmed.

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

