

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 2004

Cornelia G. Clark
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. 03-3209

Cir. Ct. No. 01CV001967

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DARRYL B. JARACZEWSKI, JAMES C. APPLETON,
ROGER T. MCGRATH AND GARY J. RAPAICH,**

**PLAINTIFFS-RESPONDENTS-CROSS-
APPELLANTS,**

v.

KRUEGER INTERNATIONAL, INC.,

**DEFENDANT-APPELLANT-CROSS-
RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHHEL, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Krueger International, Inc., appeals a judgment awarding four of its former employees over \$4 million for Krueger's breach of a

stockholders agreement (contract). The jury found that Krueger's chief financial officer, Mark Olsen, had apparent authority to commit Krueger to repurchase the stock at its September 30, 2000 value of \$21.16 per share. The Krueger board of directors later voted to redeem the stock at its December 31, 2000 value, \$15.36 per share, a difference of over \$4 million dollars. Krueger argues that: (1) the law ought not recognize the right of an officer to bind the board to repurchase the stock at its price on a given date, particularly when the contract forbids modification by agents; (2) the trial court erroneously admitted testimony regarding Krueger's practices when other employees were terminated or resigned; (3) the trial court should have severed the four plaintiffs' claims and conducted separate trials; and (4) the judgment reflects the wrong measure of damages. We reject each of these arguments and affirm the award to the former employees.

¶2 The former employees cross-appeal the trial court's decision to grant specific performance of the contract, allowing Krueger to make periodic payments and to pay interest as recited in the contract, denying the employees statutory prejudgment and post-judgment interest. Because we agree with the employees that this is an action for liquidated damages for breach of contract and the plaintiffs are entitled to a money judgment with prejudgment and post-judgment interest, we reverse that part of the judgment and remand the matter to the trial court to amend the judgment accordingly.

BACKGROUND

¶3 Each of the four former employees independently decided to leave Krueger in the fall of 2000. Their resignations were effective at the end of December. Before their formal and irrevocable resignations, each of the employees spoke with Mark Olsen, Krueger's chief financial officer, treasurer and

a member of the board of directors. Olsen individually told each of them that if they resigned prior to December 31, their stock would be redeemed at its value at the end of the third quarter, \$21.16 per share. The stockholders agreement gave Krueger the option to redeem a shareholder's stock upon resignation and allowed Krueger ninety days to determine whether and when it would exercise that option. Because the value of the stock decreased after these employees' resignations, the board decided to repurchase the stock at a later date and at a lower price.

APPARENT AUTHORITY

¶4 The law regarding apparent authority derives from common law and applies to corporations. *See e.g., Clay v. Horton Mfg. Co.*, 172 Wis. 2d 349, 355, 493 N.W.2d 379 (Ct. App. 1992). While WIS. STAT. § 180.0801¹ empowers the board of directors to make key policy decisions, the law also recognizes that a corporation of necessity acts through agents. Those acts within the scope of the agent's authority are the acts of the corporation. *See Rudzinski v. Warner Theatres, Inc.*, 16 Wis. 2d 241, 250, 114 N.W.2d 466 (1962). A principal may not cloak an agent with vestiges of authority only to renounce the agent's authority to represent it after others have dealt with the agent to their detriment. *Mattice v. Equitable Life Assur. Soc.*, 270 Wis. 504, 508-09, 71 N.W.2d 262 (1955). Krueger's argument suggests that a corporation should not be held responsible for the commitments of its agents if the board of directors subsequently disapproves of the agent's decision. The law of apparent authority as it applies to corporations

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

would be abrogated by such an approach. Nothing in § 180.0801 overrules the applicability of common law apparent authority when dealing with corporations.

¶5 Krueger argues that the employees failed to establish the elements of apparent authority as a matter of law. The elements of apparent authority are: (1) acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the parties sought to be held; and (3) reliance thereon by the plaintiff, consistent with ordinary care and prudence. See *Pamperin v. Trinity Mem'l Hosp.*, 144 Wis. 2d 188, 203, 423 N.W.2d 848 (1988). Krueger argues that the board did not know of Olsen's representations and did not acquiesce in them and that the employees did not rely, much less reasonably rely, on anything Olsen said or did.

SUFFICIENCY OF EVIDENCE

¶6 The employees presented sufficiency of evidence to allow the jury to find that Olsen was "at least clothed with the powers of a general agent under the doctrine of apparent authority." See *Ivers & Pond Piano Co. v. Peckham*, 29 Wis. 2d 364, 370, 139 N.W.2d 57 (1966). Olsen's longstanding duties and responsibilities as CFO, treasurer and board member establish his apparent authority to effectuate stock redemption transactions for Krueger. The company bylaws give the treasurer authority over all funds and securities of the corporation as well as duties delegated or assigned to the treasurer by the president or the board of directors. The evidence suggested that Krueger's president and majority shareholder, consistent with the corporation bylaws, delegated stock redemption responsibilities to Olsen. Krueger's former vice president of administration testified that Olsen "was the guy that controlled all the funds at KI." All of the resigning employees testified that it was well known both in and out of Krueger

that stock transactions were Olsen's area of responsibility. Olsen's "position description" stated that he was to "provide for the administration of all company sponsored retirement plans and 401(K) savings plans. This evidence points to Olsen's apparent authority to effectuate stock redemption transactions, duties of which the board had full knowledge.

¶7 Evidence of Krueger's dealings with other resigning or terminated employees also establishes the board's acquiescence in Olsen's control over stock valuation issues for retiring employees. The board was aware of Olsen's exclusive role in stock redemption transactions by virtue of the thirty-five to forty transactions he handled between 1995 and 2000. Krueger's own evidence suggests that the board merely served as a "rubber stamp" after the fact for stock redemption transactions effectuated by Olsen.

¶8 The record also supports the jury's finding that each of the employees relied on Olsen's representations. Krueger argues that one of the employees, Darryl Jaraczewski, made his decision to resign before he spoke with Olsen and that he enlisted the assistance of an attorney and two certified public accountants, showing that he did not rely on Olson's representation. That argument fails for two reasons. First, detrimental reliance does not mean that Jaraczewski's resignation was based solely on Olsen's representations. All that is required is that he justifiably relied upon Olsen's apparent ability to speak for the board on the valuation date. Second, Krueger's president was attempting to dissuade Jaraczewski from resigning. Although Jaraczewski had submitted a letter of resignation and it appeared that the president was unable to change his mind, the jury could reasonably find that the final decision was not reached until after Jaraczewski spoke with Olsen. In fact, the company asked Jaraczewski for an additional letter of resignation after he spoke with Olsen.

¶9 Krueger argues that the employees' reliance, if any, on Olsen's representation was unjustifiable because the contract itself forbade modification without the board's consent. The "modification" in question consists of electing between two options for the date of stock valuation. The general contractual provisions that gave the board authority to approve all transactions and resolve any questions, controversies or interpretations of the agreement do not specifically prohibit reliance on an officer and director's decision to lock in a certain date for stock valuation. The jury could reasonably find that the employees were justified in believing that Olsen spoke for the corporation on that question. Krueger attempts to characterize Olsen's decision as a "mistaken interpretation of an existing agreement." The jury could reasonably find that Olsen's actions and the company's longstanding practices established Olsen's apparent authority to effectuate stock redemption transactions for Krueger, functions that are not reasonably described as an "interpretation" of the contract.

IMPEACHMENT TESTIMONY

¶10 Krueger next argues that the trial court erroneously admitted testimony regarding stock transactions involving two other former employees. The court allowed that testimony to impeach Olsen's testimony. Olson was asked about a hypothetical employee fired in November 2000 "you would not have authority to issue a call letter to that employee without the express approval of the Board of Directors?" Olsen answered, "No, not necessarily true. Because there are situations where I would have met with Resch [the president] and in a case of a termination, we may have called someone's stock immediately." Krueger argues that the circuit court misinterpreted Olsen's testimony and allowed impeachment evidence based on an inconsistency when there was none.

¶11 Olsen's testimony was not so clear that we can say that it was not subject to impeachment. Olsen testified that stock redemption call letters were issued only after and upon authorization of the board of directors. Specific instances where that procedure was not followed are relevant to determine whether the board acquiesced in Olsen's decisions regarding stock valuation. In addition, evidence regarding the circumstances of other employees' stock redemptions was relevant to show that Krueger did not always pay the lowest possible price when repurchasing stock and that the board of directors did not always initiate the stock redemption action. Whether the board's actions should be distinguished in cases where the employee was terminated is a matter for the jury to determine. It goes to the weight of the evidence, not its admissibility.

JOINDER OF PLAINTIFFS

¶12 The trial court properly exercised its discretion when it denied Krueger's motion to sever the four plaintiffs' cases. WISCONSIN STAT. § 803.04(1) allows joinder of actions arising out of the same series of transactions or occurrences if any question of law or fact common to all of these persons will arise in the action. The four nearly simultaneous resignations and Olsen's identical advice to the four employees constitute a series of transactions and the cases involve similar factual and legal issues.

MEASURE OF DAMAGES

¶13 Krueger's argument that the court applied the wrong measure of damages was not properly preserved for appeal. The time to argue the appropriate measure of damages is at the jury instruction conference. The failure to object to a jury instruction at conference waives any error in the instructions or special verdict. See *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

Krueger requested only the pattern breach of contract jury instructions and requested no special instruction on damages with respect to expectation interest versus reliance interest. Therefore, we will not address that issue.²

¶14 The trial court erred when it granted specific performance on the contract rather than money damages with statutory interest. Specific performance was not sought in the complaint or presented to the jury. We conclude that Krueger waived its contractual rights to periodic payment and reduced interest payments by failing to present that issue to the jury. Krueger should have argued to the jury that the employees were only entitled to the present value of the periodic payments allowed by the contract and should have requested an appropriate jury instruction on that theory. In addition, by breaching the contract, Krueger forfeited its right to specific performance. As its counsel conceded at the jury instruction conference, “if you breach, you don’t get specific performance, you get damages for breach of contract.”

STATUTORY INTEREST

¶15 Finally, the effect of the trial court’s ruling is to deny the employees statutory interest, in favor of the lower interest rates set forth in the contract. Due to Krueger’s breach of the contract, the statutes, not the contract, control the award of interest payments. The jury awarded the exact amount the employees requested, an amount equaling the number of shares of stock multiplied by the

² We also note that Krueger gave little consideration to the waiver argument in its reply brief but spent the first twenty five pages of its cross-respondent’s brief inappropriately arguing that issue under the guise that it relates to specific performance and prejudgment and post-judgment interest. WIS. STAT. RULE 809.19(6) does not allow a party to place arguments in its cross-respondent’s brief that belong in the appellant’s reply brief.

difference in value between the two dates in question. Because that amount was known with absolute certainty no later than January 1, 2001, the employees are entitled to five percent interest per annum from that date through August 14, 2003. *See Clug & Smith Co. v. Sommer*, 83 Wis. 2d 378, 384, 265 N.W.2d 269 (1979). The employees are also entitled to twelve percent interest per annum on the verdict pursuant to WIS. STAT. RULE 814.04(4). On remand, the trial court shall enter a money judgment for the employees with pre-judgment and post-judgment interest.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. Costs to the respondents-cross-appellants.

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

