STATE OF MICHIGAN

COURT OF APPEALS

KENNETH DECKER, SHIRLEY DECKER, DEAN EASTMAN, MARILYN EASTMAN, WILLIAM LILIENTHAL, ROSE LILIENTHAL, EDWARD ROTHERMAL, SOPHIA ROTHERMAL, ROBERT SCHRADER, GERALDYN SCHRADER, and DONNA YOUNG,

Plaintiffs-Appellants,

and

CHARLES BROWN, TONI BROWN, and MICKEL YOLAN,

Plaintiffs,

v

CITY OF WYANDOTTE,

Defendant-Appellee.

UNPUBLISHED
December 20, 2002

No. 236372
Wayne Circuit Court
LC No. 99-937487-CK

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

In this breach of contract case, plaintiffs appeal as of right from an order granting summary disposition to defendant. We affirm.

I. Basic Facts and Procedural History

Plaintiffs are retired non-union employees of defendant and the retirees' spouses. It is undisputed that defendant agreed to provide health insurance benefits to plaintiffs during their retirement. However, when plaintiffs reached age sixty-five, defendant required them to pay "a portion of their hospitalization insurance." Plaintiffs filed a complaint alleging that defendant's refusal to provide "fully paid hospitalization insurance" after age sixty-five constituted a breach of contract.

At the outset, it is necessary to clarify plaintiffs' claim. In plaintiffs' brief on appeal and briefs filed in the lower court, plaintiffs variously state that defendant promised: "health insurance benefits after their retirement," "the same health insurance benefits as those provided to the patrolmen under their union contracts," "fully paid hospitalization benefit[s]" and "Medicare premiums." Adding to the confusion, the trial court referred to "Plan B Medicare premiums" and "Part B Medicaid benefits." Additionally, defendant argues that plaintiffs claim defendant agreed to "provide them with Medicare Part B benefits." Based on plaintiffs' complaint, we conclude that their claim was for fully paid hospitalization insurance after age sixty-five.[1]

Defendant filed a motion for summary disposition arguing that there was no genuine issue of fact regarding whether defendant agreed to provide fully paid hospitalization insurance after age sixty-five. Defendant also argued that plaintiffs failed to state a claim upon which relief can be granted with respect to claims based on a collective bargaining agreement and an implied contract. The trial court granted defendant's motion.

On appeal, plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition because there was a genuine issue of fact as to whether defendant expressly or impliedly contracted to provide plaintiffs with fully paid hospitalization insurance after retirement and beyond age sixty-five. Further, plaintiffs argue that even if the evidence does not establish an express or implied contract, a unilateral contract was established by city counsel resolution.

II. Standard of Review

This Court reviews a trial court's decision regarding a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co,* 460 Mich 446, 454; 597 NW2d 28 (1999). Defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Patterson v Kleiman,* 447 Mich 429, 432; 526 NW2d 879 (1994). In reviewing a motion under MCR 2.116(C)(10), the court considers affidavits, pleadings, admissions and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Summary disposition may be granted if the affidavits and other documentary evidence show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

III. Analysis

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[1] In their first amended complaint, plaintiffs alleged, "That the Defendant City agreed to provide **fully paid hospitalization insurance for Plaintiffs and their spouses during the entire period of retirement . . . That the City presently provides fully paid hospitalization insurance only until the retirees reach the age of 65**, at which time the City informs the retirees that they must now pay a portion of their hospitalization insurance, contrary to the contracts between the Plaintiffs and the Defendant."

Although plaintiffs frame the issue as whether there was an express or implied contract for fully paid hospitalization insurance after age sixty-five, the issue is properly framed as one of contract interpretation. Defendant has not denied that a contract for post-retirement benefits exists,[2] nor did the trial court find that such a contract does not exist.[3] Thus, the question presented is whether the contract permits the interpretation that defendant agreed to provide fully paid hospital insurance after age sixty-five. We review de novo the proper construction and interpretation of a contract. *Perry v Sied*, 461 Mich 680, 681, n 1; 611 NW2d 516 (2000). The basic rule in contract interpretation is to ascertain the intention of the parties. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). In the context of a summary disposition motion, the "trial court may determine the meaning of the contract only when the terms are *not* ambiguous." *Id.* A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. *Id.* If the contract is ambiguous, factual development is required to determine the parties' intent and summary disposition is inappropriate. *Id.*

A. Express Contract

Plaintiffs first argue that the trial court erred in granting summary disposition of their claim that defendant breached an express agreement to provide fully paid hospitalization insurance after age sixty-five. We disagree. "An express contract is 'an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing.'" *Benson v DMB*, 168 Mich App 302, 307; 424 NW2d 40 (1988). Plaintiffs rely on several items in evidence to support their express contract claim. We address each in turn.

1. Collective Bargaining Agreement

Plaintiffs alleged, "the specific hospitalization benefits for the Plaintiffs were determined by the contract provision of the [FOP], Wyandotte Lodge No. 111." However, it is undisputed that plaintiffs were not union members at the time they retired. Because plaintiffs, as non-union members, were not parties to this collective bargaining agreement, the trial court did not err in ruling that plaintiffs failed to state a claim for which relief could be granted pursuant to this agreement.

2. Personnel Handbook

Plaintiffs argue that the statements in the personnel handbook constituted an express promise that defendant would provide fully paid hospitalization insurance after age sixty-five. The portion of the personnel handbook upon which plaintiffs rely provides:

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[2] In its answer to plaintiffs' complaint, defendant stated, "Defendant admits that the City provides fully paid hospitalization insurance until the retirees or their spouses reach the age of 65, at which time the City informs them that they must pay a portion of their hospitalization insurance."

[3] Plaintiffs' confusion in this regard is evident in its brief which states, "the failure of the Trial Court to find the existence of a health insurance contract between the retirees and the City is contrary to the case law in the State of Michigan, and contrary to the facts established through the discovery process."

> You may also continue your group health insurance benefits during retirement. For this continuation of benefits, we will pay the entire cost of the premiums for you and your spouse, or your dependents under the age of 19. This does not apply to employees on a deferred retirement.
>
> Complete details on the extent of coverage will be made available to you.

However, the evidence indicates that none of the plaintiffs saw or knew of this personnel handbook until the time of litigation. Thus, there was no mutuality of agreement on its terms. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). Additionally, the final sentence indicates that details "will be made available." Therefore, the trial court did not err in finding that the handbook alone did not constitute an express promise that defendant would provide fully paid hospitalization insurance after age sixty-five.

3. Retirement Letters from Defendant to Plaintiffs

Plaintiffs also argue that defendant sent a written notice to each of them, at the time of retirement, that included an express promise to provide fully paid hospitalization benefits after age sixty-five.

a. Plaintiffs Eastman, Decker, and Young

The retirement letters to plaintiffs Eastman, Decker and Young stated in relevant part, "Hospitalization—the city will pay all premiums for retiree and spouse until death or employed elsewhere where such coverage is offered." We agree with the trial court that the phrase "where such coverage is offered" amounted to "no promise at all." The language is insufficiently specific to create an express contract for fully paid hospitalization coverage after age sixty-five. Although the letter states that defendant will pay all premiums until the retiree or spouse's death, it also contains the limiting language "where such coverage is offered." Therefore, the trial court did not err in finding that the letters to Eastman, Decker and Young did not contain an express promise that defendant would provide fully paid hospitalization insurance after age sixty-five.

b. Plaintiffs Rothermal and Schrader

The letter to plaintiff Rothermal stated, "The City will continue to pay for you and your spouse under the Retirees Group of the City of Wyandotte as described in the attached." The letter to plaintiff Schrader was substantially similar. The document attached to the letters read as follows:

> RETIREE HOSPITALIZATION COVERAGE:
>
> At the employee's option, the employee may select one of the following coverages when applying for retirement benefits:
>
> OPTION I
>
> (1). The City will provide the following group health insurance for each retire employee and will pay one hundred percent (100%) of the premiums for such insurance provided that:

* * *

> (2). Said coverage will be Blue Cross/Blue Shield MVF-1, Semi-Private Coverage, with a Coordination of Benefits provision, First Aid Emergency Rider (FAE) and Master Medical Option 1. . . . . **This coverage will also be continued as Blue Cross/Blue Shield Medicare Complementary coverage when the retiree or spouse become eligible for Medicare, as long as retirement benefit payments are being made. . . .**
>
> OPTION II
>
> (1). The City will provide the following group health insurance for each retire employee and will pay one hundred percent (100%) of the premiums for such insurance provided that . . .
>
> (2). Said coverage will be Blue Cross/Blue Shield MVF-1, Semi-Private Coverage, with a Coordination of Benefits provision, First Aid Emergency Rider (FAE) and Master Medical Option 5, and a $5.00 Co-Pay Drug Rider. . . . **This coverage will also be continued as Blue Cross/Blue Shield Medicare Complementary coverage when the retiree or spouse become eligible for Medicare, as long as retirement benefit payments are being made. . . .** (Emphasis added).

The foregoing language does not state that defendant agrees to fully pay hospitalization insurance after age sixty-five. Rather, it specifies that defendant will only provide complementary coverage when the retiree or spouse becomes eligible for Medicare. Therefore, the trial court did not err in finding that the letters to Rothermal and Schrader did not contain defendant's express promise to provide fully paid hospitalization insurance after age sixty-five.

Both in the lower court and on appeal, the parties refer to *Sommer v City of Wyandotte,* unpublished opinion per curiam of the Court of Appeals, issued November 17, 1995 (Docket No. 152632).[4] We note that *res judicata*[5] is not applicable based on *Sommer* because plaintiffs, as non-union members, were not parties to the *Sommer* class action. However, plaintiffs contend the same contract language construed in *Sommer* must be construed in this case. "An unpublished opinion is not precedentially binding under the rule of *stare decisis*." MCR 7.215(C).

After reviewing the parties' arguments and the *Sommer* opinion, we agree with the trial court's statement, "It is a gross understatement for the court to state that the arguments of the respective parties concerning the persuasive effect of *Sommers* [sic] are not entirely clear (with respect, neither is the opinion of the Court of Appeals itself)." Likewise, on appeal, plaintiffs fail

[4] This Court's judgment in *Sommer* was reversed in part by *Sommer v City of Wyandotte,* unpublished order of the Supreme Court, entered March 25, 1997 (Docket No. 105647).

[5] Ordinarily, *res judicata* bars a subsequent relitigation that is based on the same transaction or events as earlier litigation. *Pierson Sand & Gravel, Inc v Keeler Brass,* 460 Mich 372, 380; 596 NW2d 153 (1999).

to adequately analyze and apply *Sommer*. A party may not "simply . . . announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his opinion." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Aside from the lack of precedential authority and plaintiffs' failure to adequately discuss and apply this factually complex case, we find the *Sommer* opinion of little assistance in this case because the facts of the case and the exact language of the various contracts is not discussed with enough detail for us to provide us with guidance.

c. Plaintiff Lilienthal

Plaintiff Lilienthal retired from defendant's employ to become police chief in Brownstown Township whereupon he enrolled in the township's health insurance. Subsequently, plaintiff Lilienthal requested that defendant re-enroll him in its coverage. Defendant advised him that it would only provide complementary coverage. Based on this evidence, the trial court did not err in finding defendant did not promise to provide plaintiff Lilienthal with fully paid hospitalization insurance beyond age sixty-five.

4. Communiqué

Plaintiffs argue that on March 20, 1990, defendant "sent a communiqué to all department heads" which provides evidence of a contract for fully paid hospitalization insurance beyond age sixty-five. However, the memo contains the same language as the retirement letters to plaintiffs Rothermal and Schrader which, as discussed above, does not constitute a promise that defendant would provide fully paid hospitalization insurance to plaintiffs beyond age sixty-five.

For these reasons, we find that the trial court did not err in dismissing plaintiffs' breach of express contract claim pursuant to MCR 2.116(C)(8) and (C)(10).

B. Unilateral Contract--City Council Resolution

Plaintiffs also argue that in bargaining sessions between union patrolmen and defendant, defendant adopted the same benefits for non-union employees. Plaintiffs argue that this was evidenced by a city council resolution. However, plaintiffs only produced evidence of a proposed resolution stating:

> "RESOLVED by the City Council that Council hereby approves the wage and fringe adjustments . . . as recommended by the Director of Administrative Services and Director of Financial Services."

Plaintiffs argue that this "resolution" constituted a promise that defendant would pay benefits to plaintiffs which plaintiffs would accept by working. We disagree.

To begin with, plaintiffs did not plead facts to support this claim, nor did they specifically make a claim for breach of a unilateral contract in their complaint. Another flaw in plaintiffs' argument is that there is no evidence of either the recommendations referred to in the resolution, or the actual resolution itself. Plaintiffs admit that they have not provided the actual resolution because defendant "claims that these resolutions [sic] are not available." In fact, defendant

maintains, "no such resolution exists" and produced affidavits of the director of financial services and the controller stating that no such resolution took place. Moreover, the "secondary evidence" provided by plaintiff does not demonstrate a resolution that defendant would provide fully paid hospitalization insurance to plaintiffs beyond age sixty-five.

Plaintiffs also argue that defendant's agents testified to their belief that the benefits for union and non-union employees were the same. However, these "beliefs" do not constitute a contractual agreement. Even if they do provide circumstantial evidence that a contract existed, the other evidence cited by plaintiffs does not constitute a contractual agreement that defendant would provide that defendant would provide plaintiffs with fully paid hospitalization insurance beyond age sixty-five. Therefore, we find that the trial court did not err in dismissing plaintiffs' breach of unilateral contract claim.

C. Implied Contract

Plaintiffs finally argue that there was an implied agreement for fully paid hospitalization insurance after age sixty-five. We disagree.

Courts will recognize an implied contract "where parties assume obligations by their conduct." *Williams v Litton Systems, Inc*, 433 Mich 755, 758; 449 NW2d 669 (1989). "A contract implied in law is an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation." *In re McKim Estate*, 238 Mich App 453, 457; 606 NW2d 30 (1999), quoting *In re Lewis Estate*, 168 Mich App 70, 74-75; 423 NW2d 600 (1988). A contract implied in fact arises "'when services are performed by one who at the time expects compensation from another who expects at the time to pay therefore.' The issue is a question of fact to be resolved through the consideration of all the circumstances . . . ." *Id.* at 458.

To begin with, plaintiffs' complaint does not contain a claim for breach of implied contract. In fact, the complaint states, "contrary to the express, clear, and mandatory language of the contract, the Defendant City has failed to comply with the terms of the contracts." Neither the original complaint nor the amended complaint contain any facts supporting a claim for breach of implied contract. Because plaintiffs never pleaded a claim for breach of implied contract, we find the trial court did not err in granting summary disposition of this claim.[6] "[T]his Court will not reverse where the trial court reached the right result for the wrong reason." *Lane v Kinder Care Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

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[6] Furthermore, "An implied contract cannot be enforced where the parties have made an express contract covering the same subject matter." *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991). As discussed above, defendant did not deny that it contracted to provide plaintiffs with health care benefits after retirement. The dispute arose when defendant notified plaintiffs that these benefits would not continue past age sixty-five. The fact that the parties had an express contract for health insurance benefits, precludes a finding that the parties had an implied contract regarding the extent of those benefits.

Nevertheless, we find that the trial court did not err in ruling that the "past conduct of the parties is . . . insufficient to create an implied contract." Elements required to establish an implied contract include: (1) parties being competent to contract, (2) proper subject matter, (3) consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). An implied contract must satisfy the elements of mutual assent and consideration. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990), quoting *Lowery v Dep't of Corrections*, 146 Mich App 342, 359; 380 NW2d 99 (1985).

Mutual assent means that there has been a "meeting of the minds." *Kamalnath v Mercy Hospital*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). A meeting of the minds must occur on all the material facts. *Id.* at 548, quoting *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990), citing *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988). To determine whether mutual assent has occurred, an objective test is used to examine "the express words of the parties and their visible acts," and the question should be asked whether a reasonable person could have interpreted the conduct or words in the alleged manner. *Id.*

Here, plaintiffs have failed to present enough evidence to satisfy the element of mutual assent. Plaintiffs cite only to plaintiffs' beliefs, defendant's agents' beliefs and "the practice of the City in providing Plaintiffs-Appellants with the same retirement benefits as the union police officers." However, plaintiffs provide no *evidence* of this practice. Therefore, a reasonable person could not have interpreted the parties' conduct and words to mean that an implied contract existed whereby defendant would provide plaintiffs with fully paid hospitalization insurance beyond age sixty-five.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio