STATE OF MICHIGAN

COURT OF APPEALS

JAMES SMITH, JOHN GATEWOOD, and ODIS SOLOMON Plaintiffs-Appellants, v ROYAL OAK TOWNSHIP, Defendant-Appellee.	UNPUBLISHED August 28, 2012 No. 303939 Oakland Circuit Court LC No. 2010-113507-CK

Before: O'CONNELL, P.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Plaintiffs appeal by right from the summary disposition entered in favor of defendant under MCR 2.116(C)(10). We affirm the summary disposition on the claims asserted by plaintiffs Smith and Solomon and on the contract claim asserted by plaintiff Gatewood. However, we reverse the summary disposition on plaintiff Gatewood's claims of implied contract and promissory estoppel, because the record presents material factual issues on those claims.

Plaintiffs retired from the Royal Oak police force in the 1990s. Later, when each plaintiff became eligible for Medicare, defendant paid for supplemental Medicare benefits for plaintiffs and their dependents. In 2010, defendant informed plaintiffs that it would no longer pay for those retirement medical benefits. Instead, plaintiffs would be covered by a health maintenance organization plan that apparently provided basic Medicare benefits. Plaintiffs challenged defendant's decision and filed suit, asserting claims of express contract, implied in fact contract, and promissory estoppel.

After numerous orders preserving the status quo, the trial court granted summary disposition in favor of defendant. The trial court determined that plaintiff Smith was covered by a collective bargaining agreement that required defendant to provide retirement medical benefits. Citing *Reese v CNH America LLC*, 574 F 3d 315 (CA 6, 2009), the trial court concluded that the collective bargaining agreement did not preclude defendant from altering the level of those benefits. The court also concluded that there was no other express contract applicable to plaintiffs and that, as such, summary disposition was appropriate on the express contract claims.

The trial court then turned to the implied contract claims. The court determined that Smith could not state an implied contract claim because the collective bargaining agreement

precluded pursuit of an implied contract claim. The court went on to determine that the other plaintiffs had failed to present sufficient evidence to create an issue of fact concerning mutual assent for an implied contract. The court concluded that even if there was an implied contract, defendant would have authority to modify any retirement medical benefits provided by the implied contract, again citing *Reese*, 574 F3d 315.

The trial court similarly rejected plaintiffs' promissory estoppel claims. The court concluded that plaintiffs had not presented evidence that defendant promised to provide retirement medical benefits at the existing level of coverage.

We review de novo the trial court's ruling on summary disposition. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the pleadings and the other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey*, 288 Mich App at 7.

We conclude that the record presents no genuine issues of material fact on plaintiffs' contract claims. To avoid summary disposition on those claims, plaintiffs had to present evidence on each of the essential elements of a contract: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). In addition, plaintiffs had to establish that the parties to the alleged contract had authority to bind defendant. See *Sittler v Bd of Control of Mich College of Mining & Technology*, 333 Mich 681, 687; 53 NW2d 681 (1952).

Plaintiffs argue that the collective bargaining agreement, in combination with other documents in the record, creates questions of fact concerning the existence of an express contract to provide a certain level of retirement medical benefits. We disagree. To create an express contract, the documents or the parties' statements must demonstrate both a manifest offer by defendant to provide a particular level of medical benefits and an unambiguous acceptance of that offer by plaintiffs. See *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). The general references in the record to the provision of "medical insurance" do not constitute a manifest offer to provide a particular level of retirement medical benefits. Absent some proof of a manifest offer by defendant and an unambiguous acceptance by plaintiffs, there was no contract as a matter of law, and defendant was entitled to summary disposition on plaintiffs' contract claims.

We recognize that the collective bargaining agreement itself is a contract. That contract is applicable only to Smith (neither Solomon nor Gatewood were members of the collective bargaining unit). The application and interpretation of the collective bargaining agreement (CBA) was a question of law for the court, unless the CBA was ambiguous. See *Butler v Wayne Co*, 289 Mich App 664, 671-672; 798 NW2d2d 37 (2010).

There is no ambiguity in the CBA with regard to retirement medical benefits. The CBA states: "Health Maintenance Organization coverage will be made available to all retirees and

their dependents with such costs being paid for by the Township and only during the life of the retiree." The CBA does not define "Health Maintenance Organization coverage," nor does the CBA specify any particular level of coverage. The CBA requires only that defendant make Health Maintenance Organization coverage available to Smith and that defendant pay any cost of that coverage.

The record demonstrates that defendant made health maintenance organization (HMO) coverage available to Smith through a specified plan. The parties agree that the HMO coverage is the same as basic Medicare coverage and that defendant currently pays nothing for the coverage. The parties also agree that the coverage differs from the retirement medical benefits originally available to Smith. Nonetheless, the coverage fulfills defendant's obligation under the CBA as a matter of law. The trial court properly granted summary disposition in favor of defendant under the CBA.

As an alternative to their express contract theory, plaintiffs contend that the evidence indicates the parties had a contract implied in fact. To prevail on the implied contract claim, plaintiffs must establish that the parties' conduct demonstrated a mutual intention to form a binding contract with regard to the level of retirement medical benefits. See *Erickson v Goodell Oil Co*, 384 Mich 207, 211-212; 180 NW2d 798 (1970).

An implied contract is not actionable when there is an express contract covering the same subject matter. *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991). In this case, the CBA covered the topic of retirement medical benefits. Accordingly, because Smith was subject to the CBA, he cannot pursue an implied contract claim. *Id*.

Solomon's implied contract claim also fails. He argues that documents in the record, including the personnel manual, create a question of fact regarding an implied contract for a particular level of retirement benefits. The manual stated that retirees and their spouses were entitled to the same level of health insurance coverage as full-time employees. However, the manual also expressly stated that it was not a binding contract, as follows: "The policies and procedures in this manual do not constitute a legal contract . . . ." Given this limitation on the effect of the manual, Solomon cannot rely on the manual to support his implied contract claim.

The other documents in the record are similarly insufficient to create a question of fact regarding mutual assent to a particular level of retirement benefits. The record indicates that discussions took place concerning Solomon's retirement and that one topic of those discussions was retirement medical benefits. The trial court correctly determined that the discussions lacked any indication of mutual assent to a particular level of benefits. Moreover, as defendant correctly asserts, any implied contract to provide retirement medical benefits was indefinite regarding the level of benefits. See *Reese*, 574 F 3d at 327. Because the record lacks any evidence establishing mutual assent to a particular level of benefits between defendant and Solomon, the trial court correctly granted summary disposition in favor of defendant on Solomon's implied contract claim.

However, unlike the other plaintiffs, Gatewood submitted documentary evidence regarding the parties' understanding of the level of retirement medical benefits that defendant would provide. Gatewood submitted a March 29, 1999, memorandum regarding retirement. The

memorandum was addressed to Gatewood from Township Clerk Gwendolyn Turner, bearing her handwritten initials. The memorandum stated, among other things: "Your current medical coverage will be maintained."

In addition to the memorandum, Gatewood submitted an affidavit from Township Trustee David Ford. Ford attested that he attended the Trustees' meeting in which the trustees considered Gatewood's retirement. Ford further attested that the trustees "voted to provide the post-retirement benefits stated in the March 29, 2009 [sic] letter to Mr. Gatewood, specifically including medical insurance benefits for him and his dependents." Ford continued, "When we approved his benefits, as described in the referenced documents, we understood and intended that they would not be subject to reduction or elimination after his retirement."

Viewed in the light most favorable to Gatewood, Ford's affidavit and Turner's memorandum are sufficient to present a factual issue as to whether defendant and Gatewood reached a mutual assent in 1999 concerning the continuation of his medical benefits throughout his retirement. Although Ford refers to a letter dated 2009 (as opposed to the 1999), Ford's statements create a question of fact concerning an implied 1999 contract. The record also presents a question of fact as to whether the Township Trustees actually ratified the terms of Gatewood's retirement package (assuming, for the purposes of summary disposition, that ratification was required). Defendant submitted an affidavit indicating there was no record of the ratification; but Ford attested that the Trustees expressly approved Gatewood's retirement package. Given these factual issues, the trial court erred in entering summary disposition against plaintiff Gatewood on his implied contract claim.[1]

The same factual issues require reversal of the summary disposition on Gatewood's promissory estoppel claim. The promissory estoppel claim required proof that (1) defendant promised to provide a specific level of retirement medical benefits; (2) defendant should reasonably have expected the promise to induce Gatewood to take some action; (3) Gatewood took some action in reliance on the promise; and (4) justice or equity requires enforcement of the promise. See *Ardt v Titan Ins Co*, 233 Mich App 685, 692; 593 NW2d 215 (1999) (reciting the elements of promissory estoppel). In this case, the documentary evidence indicates that defendant may have made a definite promise to continue Gatewood's medical benefits throughout his retirement. Gatewood attested that he relied on general assurances of continued retirement medical benefits, and that he would have sought alternative employment had he known that his medical benefits could change after retirement. Questions of fact remain regarding whether these alleged assurances constituted a definite promise for purposes of the promissory estoppel and regarding whether Gatewood relied on any other alleged promise.

[1] Defendant asserts that the statute of frauds, MCL 566.132, bars the implied contract claim and that municipalities cannot enter into implied contracts. We disagree with both assertions. See *Hill v Gen Motors Acceptance Corp*, 207 Mich App 504, 510; 525 NW2d 905 (1994) (statute of frauds does not apply where, as here, there is a possibility that the terms of an oral agreement can be completed within a year); *City of Auburn v Brown*, 60 Mich App 258, 263-265; 230 NW2d 385 (1975) (describing contracts implied in fact with regard to municipalities).

These factual issues preclude summary disposition on Gatewood's promissory estoppel claim. See *Ardt*, 233 Mich App at 692-693.

The factual issues do not, however, pertain to plaintiffs Smith or Solomon. Neither Smith nor Solomon presented sufficient evidence to create a question of fact concerning a promise to provide a certain level of retirement medical benefits. At best, the evidentiary references with regard to Smith and Solomon provided a general assurance of HMO coverage, which, according to the record, is still available to them. The trial court thus correctly granted summary disposition in favor of defendant on the promissory estoppel claims of Smith and Solomon.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Riordan

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JANSEN, J. (*concurring in part and dissenting in part*).

Although I agree with the majority's conclusions regarding Gatewood and Solomon, I disagree with the majority's conclusion regarding Smith. Under Michigan law governing retiree benefits, it is clear that Smith's right to lifetime retirement medical benefits vested upon his retirement. The only question remaining is whether they vested at a particular level, and to that end I find persuasive federal precedent with analogous facts holding that vested retirement medical benefits are subject to reasonable modification. Because it is unclear from the record whether Smith's new benefit plan is a reasonable modification of his original benefit plan, I would reverse the trial court's grant of summary disposition regarding Smith, and remand for further findings regarding whether the modification of Smith's retirement medical benefits was reasonable.

The core issue in Smith's case is whether an employer may unilaterally modify a retiree's health care benefits provided for in a collective bargaining agreement (CBA), and if so, by how much.[1] "Though not binding on this Court, federal precedent is generally considered highly

[1] Although there are few examples in Michigan case law dealing with retiree benefits issues generally, and none dealing squarely with the issue presented here, this Court dealt with an issue similar to the one here in *Butler v Wayne County*, 289 Mich App 664; 798 NW2d 37 (2010). Nonetheless, *Butler* alone does not resolve this case. There, the defendant employer appealed the trial court's order holding that the retiree plaintiffs were entitled to a flat-rate premium structure for their life insurance on the basis of a vested right created by the past practice of the parties. *Id*. at 666. This Court reversed, holding that there was no express contractual right

persuasive when it addresses analogous issues."[2] To that end, I find *Reese v CNH America, LLC*[3] highly persuasive, as it presents a factual situation analogous to Smith's, and a solution that is both logical and consistent with Michigan law. In *Reese*, the plaintiff retirees had retired under a collective bargaining agreement.[4] There, as here, the CBA stated that the employer would pay for the retirees' medical benefits, but did not specify what level of medical benefits to which the retirees were entitled.[5] The retirees filed suit, seeking, inter alia, "a declaration that they were entitled to lifetime health-care benefits."[6] Judge Sutton, writing for a panel of the Sixth Circuit Court of Appeals, explained that the disposition of the case turned on two questions: "Did [the defendant] in the . . . CBA agree to provide health-care benefits to retirees and their spouses for life? And, if so, does the scope of this promise permit [the defendant] to alter these benefits in the future?"[7]

The basic legal framework regarding the vesting of rights under a CBA applied by *Reese* mirrors the framework Michigan courts have adopted. The *Reese* court held that:

> When the health plan stems from a CBA . . . we apply ordinary principles of contract interpretation to determine whether benefits have vested . . . and to the extent we put a thumb on the scales in this setting, it favors vesting. Although we do not apply a legal presumption that benefits vest and although we require plaintiffs to bear the burden of proving that vesting has occurred, we apply an inference that it is unlikely that [health care benefits] would be left to the contingencies of future negotiations so long as we can find either explicit contractual language or extrinsic evidence indicating an intent to vest benefits.[8]

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under the CBA for a flat-rate premium structure, nor did the doctrine of past practices entitle the plaintiffs to one. *Id*. at 672-684. This case, by contrast, addresses the effect of an attempt to modify rights granted under the express contractual provisions of the CBA. In this respect, to the extent *Butler* is instructive in resolving this case, it is helpful only insofar as it lays out certain rules of construction regarding parties' and beneficiaries' rights under CBAs.

[2] *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360; 597 NW2d 250 (1999).

[3] 574 F 3d 315 (CA 6, 2009).

[4] *Id*. at 318.

[5] *Id*. at 318 ("The CBA does not spell out what 'Medical' benefits are included; it just says that '[e]ligibility for specific coverage [will be] based on each plan's eligibility requirements.').

[6] *Id*. at 319.

[7] *Id.* at 321.

[8] *Id*. (citations and quotations omitted).

Similarly, under Michigan law, "[a]bsent explicit contractual language to the contrary, a retiree's contractual rights [under a CBA] vest, if at all, at the time of retirement."[9]

The *Reese* court ultimately concluded that the retirees had a vested right to lifetime health care benefits, but determined that the scope and level of those benefits may be subject to *reasonable* modification from the level that existed at the time the retirees retired.[10] In reaching this conclusion, the court noted, among other things, that much of the federal case law addressing the issue of benefit vesting under CBAs arose in the context of pension plans. The court explained that pension benefits (which are unalterable after they vest) are distinguishable from health care benefits (which the court ultimately concluded may be subject to reasonable alteration after they vest).

> The value of a pension benefit . . . is clear cut—a matter of concrete dollars and cents, fairly measurable as a matter of principal or income stream before retirement, at retirement or after retirement. Vested health-care benefits are another matter. Employers do not send their active or retired employees a monthly account itemizing the value of their health-care benefits. [11]

The court went on to note that health care plans are different from pension benefits in that health care plans "invariably change over time, if not from year to year," and it was therefore unreasonable to expect that the same level of benefits be maintained over the life of the retirees.[12] In short, the *Reese* court held that the CBA at issue there "established a right to lifetime healthcare benefits" but that "[n]othing in the text of the [CBA] said that health care coverage would be fixed and irreducible into perpetuity for all employees who retired under it."[13] Having concluded that the defendant "cannot terminate all health-care benefits to retirees, but it may *reasonably* alter them,"[14] the court remanded to the district court to "decide how and in

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[9] *Butler*, 289 Mich App at 676. See also *Bender v Newell Window Furnishings, Inc*., 681 F 3d 253, 264 (CA 6, 2012) (where contract was silent as to duration of retiree medical benefits, those benefits must continue indefinitely and without cost).

[10] *Reese*, 574 F 3d at 327 ("'Plaintiffs are entitled to vested lifetime retiree health care benefits,' [the district court] concluded, 'as provided for in the labor agreements in effect at the time of their or their deceased spouses' retirement.' To the extent this ruling indicates that the retirees have a vested right to receive health care benefits for life, it is consistent with [precedent]. But to the extent it suggests that these benefits must be maintained precisely at the level provided for in the . . . CBA, it is not supported by the . . . CBA, extrinsic evidence provided by the parties or common sense. CNH, in short, cannot terminate all health-care benefits for retirees, but it may *reasonably* alter them."(emphasis added)).

[11] *Id*. at 324.

[12] *Id*.

[13] *Id*. at 325.

[14] *Id*. at 327 (emphasis added).

what circumstances [the defendant] may alter such benefits—and to decide whether it is a matter amenable to judgment as a matter of law or not."[15]

Here, the majority reasons that the Township has fulfilled its obligation under the contract because the contract merely requires that the Township provide HMO coverage, and does not specify what level of coverage is required. Therefore, the majority concludes that the Township has fulfilled its obligation under the contract by providing Smith with *some* level of coverage, even if that level of coverage is *de minimus*. I respectfully disagree. The CBA here states, in relevant part:

> Health Maintenance Organization Coverage will be made available to all retirees and their dependants, with such costs being paid for by the Township and only during the life of the retiree.

As this Court has held, "absent explicit contractual language to the contrary, a retiree's contractual rights [under a CBA] vest, if at all, at the time of retirement."[16] Smith's right to lifetime health coverage therefore vested at the time he retired, as the CBA does not contain language to the contrary. Accordingly, under *Reese*, although the level of benefits to which Smith was entitled may be altered to a different level in the future, that alteration must be reasonable.[17]

The Township unilaterally terminated Smith's original health care benefit plan and replaced it with a Blue Cross/Blue Shield (BCN4) plan. Smith asserts, and the majority acknowledges, that the level of coverage Smith receives under the BCN4 plan provides him with no more benefit than that to which he is already entitled under medicare—in essence, according to Smith, his actual benefit under the BCN4 plan is nil.[18] However, it is unclear from the record what benefit level Smith received under his original health care plan, and how it differs in terms of coverage from the BCN4 plan. The parties, both below and on appeal, emphasize the relative *cost* of the two plans (both to the Township and to the plaintiffs), but say little about what level of *benefit* Smith receives under the BCN4 plan compared to the original plan.[19] Absent this comparison, I cannot conclude whether the BCN4 plan amounts to a reasonable alteration of

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[15] *Id*.

[16] *Butler*, 289 Mich App at 676.

[17] *Reese*, 574 F 3d at 327.

[18] I acknowledge that retirees covered by the same CBA as Smith who are under 65 may get some benefit from the new plan, as they would not be covered under medicare. However, the same issue arises for those retirees, namely, whether the level of coverage provided them under the new plan is reasonable relative to the old plan.

[19] This is not to say that costs are irrelevant—indeed, one factor that may affect the reasonableness of the modification here is the fact that the Township pays nothing for the BCN4 plan. At oral argument, the Township admitted that the BCN4 plan cost it nothing; apparently, the cost of providing the BCN4 plan is covered using federal subsidies.

Smith's original benefits. The trial court purported to rely on *Reese* when granting the Township's motion for summary disposition, but provided no explanation regarding why the level of benefits Smith receives under the BCN4 plan is reasonable relative to the level of benefits he received under his original plan.[20] Therefore, I would reverse the trial court's grant of summary disposition with regard to Smith, and remand for further findings about whether the modification that occurred here was reasonable.

/s/ Kathleen Jansen

[20] Nor was the Township itself even aware of what level of benefit the BCN4 plan provided. When asked at oral argument whether the BCN4 plan provided Smith with a benefit level beyond what he is already entitled to under Medicare, counsel for the township indicated that he was "not sure." Nor does the Township's appellate brief, or lower court filings, indicate with any specificity what level of benefit the BCN4 plan provided relative to the prior plan. This is more evidence that remand to determine the reasonableness of the modification is necessary.