STATE OF MICHIGAN

COURT OF APPEALS

DONALD R. LOOSE, CLARE T. BENNETT, DENNIS EDDOLLS, and LAWRENCE MCCOLL,

Plaintiffs-Appellees,

v

CITY OF DEARBORN HEIGHTS,

Defendant-Appellant.

UNPUBLISHED
November 29, 2012

Nos. 296368; 300964
Wayne Circuit Court
LC No. 06-629326-CL

HARMON AGAR, RALPH J. ALLEN, DENNIS C. ANDERSON, SARA ATKINS, RONALD H. BOURQUE, DONALD R. BROWN, JEROME CHISMAR, RAYMOND E. COLLINS, SALVATORE DIPRIMA, LOU G. DOLLIAN, RONALD M. DORAN, RONALD B. ELLIOTT, BENJAMIN G. FAUST, WAYNE FOBAR, ROBERT GAUTHIER, ROBERT P. GEHRINGER, RAYMOND J. GOSTOMSKI, CHARLES GRATTAFIORI, WILLIAM HAASE, KIETH C. HARDISON, CELIA R. HARTON, RICHARD A. HEIN, LOUISE M. HOPKINS, RAYMOND JOHNSON, JOSEPH Z. KOONS, RAYMOND W. KWIECINZKI, WILLIAM LOUDON, MARVIN E. MANNING, MARTIN MCCAULEY, GILCHRIST MCGUIRE, JOHN C. MCINTIRE, CLARE MEEK, WILLIAM R. MIODUCH, ROBERT C. MOELLER, JOHN PERETTO, MARILYN PILATE, BERLY E. RICHARDS, MARVIN E. RUBIN, JR., ROBERT SALEM, GERALD R. SALO, DANIEL SCHMIDT, KENNETH SCHROKA, DAVID SEIPENKO, KENNETH SHOWALTER, PAUL EDWIN SKINNER, REEVES O. SMITH, DAVID M. STEWART, WILLIAM E. STEWART, RICHARD SUCHYTA, HENRY TARNASKI, GORDON M. WARREN, BILLY JOE WOODS,

THEODORE J. ZAKRZEWSKI, and RICHARD S. ZIELINSKI,

Plaintiffs-Appellees,

v

CITY OF DEARBORN HEIGHTS,

Defendant-Appellant.

No. 299214
Wayne Circuit Court
LC No. 08-113746-CK

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

These consolidated appeals arise from actions filed by retired former employees of defendant, city of Dearborn Heights, to determine defendant's liability for their health-care costs and, in particular, Medicare Part B premiums beginning when plaintiffs reach age 65. In LC No. 06-629326-CL (the "2006 action"), which was brought by four plaintiffs, defendant appeals as of right in Docket No. 296368 from the trial court's judgment awarding money damages to the four plaintiffs and ordering that defendant "pay all of the premiums for the Plaintiffs' health and hospitalization insurance, including Medicare B, during their retirement." In that same case, defendant also appeals by leave granted in Docket No. 300964 from the trial court's order requiring it to "maintain the status quo and provide the same coverage" for the four plaintiffs pending its appeal. In LC No. 08-113746-CK (the "2008 action"), defendant appeals by leave granted in Docket No. 299214 from trial court's orders granting its motion for summary disposition with respect to the plaintiffs' claims for constitutional violations, but denying summary disposition under MCR 2.116(C)(10) with respect to the plaintiffs' breach of contract claims. In the 2006 action, we vacate the trial court's judgment and status quo order, and remand for entry of an order of summary disposition in favor of defendant. In the 2008 action, we reverse in part the trial court's order denying defendant's motion for summary disposition with respect to plaintiffs' breach of contract action, and we remand for further proceedings in that case.

I. BACKGROUND

Defendant was formed in 1963 from parts of Dearborn Township and the city of Inkster. *Loose v City of Dearborn Hts*, 24 Mich App 87, 88; 180 NW2d 105 (1970). In 1965, the federal Medicare program was established. *LeBlanc v State Farm Mut Ins Co*, 410 Mich 173, 198; 301 NW2d 775 (1981). The Medicare program has been modified over the years, such as by the addition of a voluntary prescription benefit program in Title XVIII, Part D, of the Social Security Act, 42 USC 1395w-101 *et seq*. See *Layzer v Leavitt*, 770 F Supp 2d 579, 581 (SD NY, 2011). In the early 1980s, the Medicare program included the following features:

> Medicare is a two-part program, each part distinct with regard to benefits, coverage, financing and administration. Part A of Medicare, known as the

> "hospital coverage" is incorporated into the existing social security structure, and is designed to assist in the payment of services for inpatient hospital care, skilled nursing care and certain home health care. To be eligible for Part A benefits, an individual must be aged 65 or older, and must meet conditions for cash social security benefits. Most persons aged 65 or older automatically qualify for Part A benefits. Part A coverage is wholly financed through universal and mandatory contributions from employers, employees, and self-employed people, and thus entails no monthly premium on behalf of a qualifying participant. . . .
>
> Participation in Part B of the Medicare program, termed the "medical coverage" or the "physician coverage" is voluntary, and is open to any individual aged 65 or older, except nonresident aliens. In contrast with Part A coverage, some individuals must apply for Part B coverage to be eligible for it. Moreover, delay in applying for Part B coverage results in a 10% increase in the amount of monthly premium for each year of delay. Once enrolled in Part B, an individual may cease participation either by filing a written notice, or by failing to pay the premium. Former Part B participants are permitted to re-enroll only once, and at a higher premium. Part B of Medicare pays 80% of reasonable charges in excess of a moderate deductible for physicians' services, out-patient hospital services, home health visits, out-patient physical therapy and speech pathology services, ambulance services, some chiropractic services, and other physician-prescribed health and medical services. Financing of Part B is accomplished through an exaction of monthly premiums of a uniform amount from enrollees and, at a minimum, matching contributions from the federal general appropriations fund. Premiums, paid either by direct payment or by automatic deduction from the participant's social security benefit check, can be increased only if there has been a general increase in social security cash benefits during the previous year. [*LeBlanc*, 410 Mich at 198-199.]

The plaintiffs in these consolidated appeals include police officers, police supervisors, firefighters, and a former police chief, Donald Loose. The plaintiffs retired from their employment with defendant at various times beginning in the early 1980s. The police officers, police supervisors, and firefighters were covered by separate collective bargaining agreements (CBAs) for periods that generally had a duration of three or four years. Each CBA contained provisions addressing health-care benefits for active employees and retirees. Loose's health-care benefits were established pursuant to a letter of understanding, which provided for his benefits as a retiree to include "[h]ospitalization coverage pursuant to other Police-Fire Collective Bargaining Agreements."

Loose retired in 1982. He was one of four plaintiffs who filed a class action against defendant in 2006 based on defendant's failure to pay for their Medicare Part B premiums. The other three plaintiffs in the 2006 action retired in 1985 from their positions as a police lieutenant (Clare T. Bennett), a police officer (Dennis Eddolls), and a firefighter (Lawrence McColl). None of these plaintiffs disputed that defendant provided and paid for insurance coverage to supplement the coverage that was provided to them under the Medicare program. Plaintiffs sought money damages relief and a declaratory judgment or writ of mandamus to compel defendant to pay for all insurance premiums, including Medicare Part B premiums, necessary to

establish coverage equivalent to the level of benefits for retirees contained in the CBAs applicable to their respective positions. They alleged that defendant violated vested contract rights and constitutional protections by not paying all of the premiums and, in particular, the Medicare Part B premiums that would, when considered with the supplemental coverage, establish the level of coverage contained in the CBAs.

The trial court denied plaintiffs' motion for certification as a class action, but allowed the plaintiffs to proceed with their individual claims. The court initially granted relief in favor of defendant by determining that the statute of limitations applicable to contract claims precluded plaintiffs from suing defendant for any "coverage decision" made more than six years before the date the complaint was filed. In 2008, the parties filed cross-motions for summary disposition with respect to the substance of plaintiffs' constitutional and breach of contract claims. Defendant also claimed that the doctrine of laches should bar each plaintiff's claim. The trial court granted summary disposition in favor of defendant with respect to plaintiffs' constitutional claims. It initially denied the parties' cross-motions for summary disposition with respect to the breach of contract claims, but determined on reconsideration that the applicable CBAs entitled plaintiffs to vested health-care benefits that included payment of the Medicare Part B premiums. Pursuant to a judgment entered on January 15, 2010, plaintiffs were awarded money damages and defendant was ordered to "pay all of the premiums for the Plaintiffs' health and hospitalization insurance, including Medicare B, during their retirement." Defendant appeals that determination as of right, and appeals by leave granted the trial court's subsequent order requiring it to preserve the status quo pending this appeal.

The 2008 action was filed by various plaintiffs who retired between 1982 and 2004 under CBAs governing police officers, police supervisors, and firefighters employed by defendant. As with the 2006 action, the plaintiffs pleaded various contract and constitutional claims based on defendant's failure to pay for Medicare Part B premiums, and moved for certification of the action as a class action. The judge assigned to the 2008 action partially granted the motion for class certification. Although police supervisors who retired after July 1, 1987, were required to proceed with their claims as individual actions, the action was certified as a class action for (1) police supervisors who retired through July 1, 1987, and their spouses, (2) police officers who retired through June 30, 2000, and their spouses, and (3) firefighters who retired through June 30, 2000, and their spouses.

In 2009, the parties filed cross-motions for summary disposition with respect to the substance of plaintiffs' constitutional and breach of contract claims against defendant. In June 2010, the trial court granted summary disposition in favor of defendant with respect to plaintiffs' constitutional claims, but determined that genuine issues of material fact existed precluded a grant of summary disposition to any of the parties with respect to the breach of contract claims. Defendant now appeals by leave granted from that decision.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). To the extent that our review requires consideration of the trial court's subject-matter jurisdiction or interpretation of a court order, our review is also de novo. *Pontiac Food Ctr v Dep't of Community Health*, 282 Mich App 331,

335; 766 NW2d 42 (2008); *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008).

The proper interpretation of a contract and the legal effect of a contractual provision are questions of law that we also review de novo. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012). The initial question whether contract language is ambiguous is a question of law, and thus is reviewed de novo. *Butler v Wayne Co*, 289 Mich App 664, 671; 798 NW2d 37 (2010). If contract language is clear and unambiguous, its meaning is determined as a matter of law. *Id.*

III. DOCKET NO. 296368 (2006 ACTION)

Defendant challenges the trial court's decision granting summary disposition in favor of plaintiffs with respect to their breach of contract claims. Defendant argues that the CBAs unambiguously do not require it to pay for Medicare Part B premiums and establish no vested right to health-care benefits. Alternatively, defendant argues that its past practices establish that it has no obligation to pay for Medicare Part B premiums, and it further argues that laches preclude plaintiffs from prevailing on their claims.

Because the trial court's decision was based on its consideration of evidence outside the pleadings, we review the decision under the standards applicable to a motion brought pursuant to MCR 2.116(C)(10). *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Such a motion should be granted where the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id.* at 425.

Each plaintiff in the 2006 action, with the exception of Loose, was represented by a union that negotiated a CBA applicable to his position. Retirees are neither employees nor union members. *Butler*, 289 Mich App at 672. But under established contract principles, vested retirement rights may not be altered without the retiree's consent. *Id.* at 672. In general, parties to a CBA may reach an agreement on what constitutes a vested right. *AFSCME Council 25 v Wayne Co*, 290 Mich App 348, 352; 810 NW2d 53 (2010), citing *Ottawa Co v Jaklinski*, 423 Mich 1, 24-25; 377 NW2d 668 (1985) (opinion by WILLIAMS, C.J.) They may expressly agree to extend any substantive or procedural rights beyond the term of a contract. *Id.*

But before a question of vesting arises, it must be determined whether a contract right exists under an express provision of the CBA or based on past practices. *Butler*, 289 Mich App at 672. The doctrine of past practices provides a means for creating a term of employment through mutual acceptance by parties to a CBA. *Id.* at 675. The appropriate standard of proof for amending the CBA by past practices depends on whether the express terms of the CBA are ambiguous or silent with respect to the term. *Id.* at 675-677. Therefore, we first address defendant's argument that the express terms of the CBAs unambiguously do not require it to pay

for Medicare Part B premiums or, more specifically, to reimburse plaintiffs for the premiums that they pay for Medicare Part B coverage.

Where an action is based on contract, summary disposition is appropriate under MCR 2.116(C)(10) if the contract language is unambiguous because factual development is unnecessary to determine the parties' intent. *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991). A contract is ambiguous where two provisions irreconcilably conflict with each other or a term is equally susceptible to more than one meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). "This Court examines contractual language and gives the words their plain and ordinary meanings." *Id.* The contract must be construed as a whole, with all of its parts harmonized as much as possible. *Smith v Smith*, 292 Mich App 699, 702; ___ NW2d ___ (2011). A specific contractual provision generally controls over a related but more general provision. *DeFrain*, 491 Mich at 368 n 22.

Addressing first the 1983-1986 CBA for police supervisors that was applicable to plaintiff Bennett's position when he retired in 1985, the CBA is silent regarding whether defendant must pay for a retiree's Medicare Part B premiums in its insurance provisions. But Article XXIV provides, in pertinent part:

> Section 3. Michigan Blue Cross and Blue Shield or equivalent hospitalization and medical insurance, M.V.F.-1 coverage together with no cost rider coverage shall be continued for all employees at not less than the existing levels and benefits of coverage, and all premiums for such insurance coverage shall be paid by the City.
>
> * * *
>
> Section 7. The City shall provide the same hospitalization for a police officer who retires under Public Act 345 as such officer had at the time of that officer's retirement, which includes his spouse and dependents.
>
> The City shall not be required to cover the retiree who is covered under such other hospitalization plan which is equivalent or better or becomes covered while being covered under the City retiree plan . . . .
>
> * * *
>
> Section 10. The Employer shall have no obligations to duplicate any benefit an employee receives *under any other policy or with any other employer* notwithstanding the circumstances of eligibility, amount of duration of benefit, and it shall be the obligation of the employee to inform the Employer of any and all insurance coverage enjoyed by said employee other than coverage provided by the Employer herein a party.
>
> * * *

> Section 15. Upon becoming eligible for medicare benefits, benefits for any retiree or person covered through or because of such retiree will continue to be subject to coordination of benefits. If such retiree or other person fails to enroll for medicare, benefits will be paid as though such retiree or other person had enrolled. [Emphasis added.]

We hold that the trial court erred in concluding that defendant's obligation to pay for "Michigan Blue Cross and Blue Shield or equivalent hospitalization and medical insurance, M.V.F.-1 coverage," as set forth in § 3, establishes that defendant must pay for plaintiff Bennett's Medicare Part B premiums. Although § 7 entitles a retiree to the same health-care benefits that he or she had at the time of retirement, § 3 only addresses coverage provided by defendant. Medicare Part B coverage depends on an eligible retiree's enrollment in the Medicare program, and the nonduplication of coverage provision in § 10 applies to a benefit under "any other policy or with any other employer notwithstanding the circumstances of eligibility." The disjunctive word "or" used in this provision between "any other policy" and "with any other employer" indicates a choice between two alternatives. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). Considered as whole, § 10 provides a clear indication that defendant is not required to duplicate a benefit received by an employee as part of voluntary Medicare Part B coverage.

In addition, § 15 plainly provides for Medicare to be subject to a coordination of benefits, regardless of whether an eligible retiree actually obtains Medicare. A coordination of benefits clause has the effect of requiring an employer to pay benefits only to the extent of the difference between the full amount of allowable benefits and the payments made toward such benefits under another plan. *John Morrell & Co v United Food & Commercial Workers Int'l Union*, 825 F Supp 1440, 1452 (D SD, 1993), aff'd 37 F3d 1302 (CA 8, 1994). Construing the insurance provisions as a whole and harmonizing each part as much as possible, the only reasonable conclusion is that defendant is not required to pay for a retiree's Medicare Part B premiums under the terms of 1983-1986 CBA applicable to plaintiff Bennett. As a whole, the 1983-1986 CBA does not treat Medicare Part B as an integral part of defendant's obligation to provide insurance coverage, but rather a benefit received by the retiree that is subject to a coordination of benefits. Therefore, under the express terms of the 1983-1986 CBA, defendant has no contractual duty to reimburse a retiree for Medicare Part B premiums.

While the 1983-1986 CBA for police officers applicable to plaintiff Eddolls is structured differently than the 1983-1986 CBA for police supervisors, it contains the same substantive provisions, except that the nonduplication provision preceding the health-care provisions in Article A-11 is limited to an employment situation:

> The Employer shall have no obligation to duplicate any benefit any employee receives *under any other policy with any other employer* notwithstanding the circumstances of eligibility, amount or duration of benefit, and it shall be the obligation of the employee to inform the Employer of any and all insurance coverage enjoyed by said employee other than provided by the Employer herein a party. [Emphasis added.]

Article A-11 itself subjects Medicare to a coordination of benefits in § 7 in the same manner as the coordination of benefits provision in the 1983-1986 CBA for police supervisors. The 1983-1986 CBA for firefighters applicable to plaintiff McColl contains the same substantive provisions as the 1983-1986 CBA for police officers. Because both CBAs treat Medicare as being subject to a coordination of benefits and Medicare is not a benefit provided to the retiree by defendant, the trial court erred in construing these CBAs as requiring defendant to pay for the Medicare Part B premiums. The unambiguous terms of the CBAs establish that defendant had no contractual duty to pay for those premiums.

With respect to plaintiff Loose, the parties agree that the applicable CBA under his letter of understanding with defendant is the CBA for police supervisors for the period 1980-1983. According to the submitted evidence, this CBA does not contain the coordination of benefits provision for Medicare that is contained in the 1983-1986 CBA. Nonetheless, considering that Medicare Part B is a voluntary program that Loose does not receive from defendant and that Article XIV, § 10, of the 1980-1983 CBA provides that defendant "shall have no obligations to duplicate any benefit an employee receives under any other policy . . . notwithstanding the circumstance of eligibility," we reach the same conclusion. Because the express language of the 1980-1983 CBA is unambiguous and does not entitle plaintiff Loose to have defendant pay for Medicare Part B premiums, defendant, rather than plaintiff Loose, was entitled to summary disposition under MCR 2.116(C)(10) with respect to this contract issue.

In sum, we hold that defendant, rather than plaintiffs, were entitled to summary disposition under MCR 2.116(C)(10) because the express terms of the applicable CBAs are not ambiguous and they do not require defendant to pay for Medicare Part B premiums. Accordingly, the burden rested with plaintiffs to establish that their respective unions had a meeting of the minds with defendant, at the time of their respective retirements between 1982 and 1985, that defendant would nonetheless pay Medicare Part B premiums. Plaintiffs were required to show that this practice was so widely acknowledged and mutually accepted that it amended the CBAs. *Butler*, 289 Mich App at 677. Because it is undisputed that this practice did not occur, plaintiffs' claim that defendant breached the CBAs cannot succeed.

Lastly, because there is no factual support for plaintiffs' claim that it had a contractual right to have defendant pay for their Medicare Part B premiums, it is unnecessary to address defendant's argument concerning whether the right was vested for a lifetime or whether any changes could be made without violating the CBAs. Similarly, we decline to address as moot defendant's argument based on its defense of laches. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Because there is no factual support for plaintiffs' breach of contract claims in the 2006 action, we vacate the trial court's judgment and remand for entry of an order of summary disposition in favor of defendant.

III. DOCKET NO. 300964 (2006 ACTION)

After defendant filed its claim of appeal from the trial court's judgment in the 2006 action, the trial court entered an order providing that "[d]efendant must maintain the status quo and provide the same insurance coverage, and in the same manner, that was provided to the [p]laintiffs at the time of the judgment from which the [d]efendant appealed was entered."

Defendant argues that the trial court did not have jurisdiction to enter this order while the appeal in Docket No. 296368 was pending.

"Jurisdiction is a court's power to act and its authority to hear and decide a case. If a court lacks subject-matter jurisdiction, its acts and proceedings are invalid." *City of Riverview v Sibley Limestone,* 270 Mich App 627, 636; 716 NW2d 615 (2006) (citations omitted). In this case, the trial court determined that it had jurisdiction to order defendant to preserve the status quo because it had intended to do so at the time that it granted defendant's earlier motion for a stay pending an appeal of the judgment in the 2006 action. We conclude that the trial court erred in determining that its authority over stays provided with jurisdiction to enter the status quo order.

Court rules are construed using the same rules applicable to the construction of statutes. *In re Leete Estate,* 290 Mich App 647, 655; 803 NW2d 889 (2010). In construing a statute, "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002).

MCR 7.208 governs the authority of the trial court after a claim of appeal is filed with this Court. Subject to certain exceptions, the trial court may not set aside or amend the judgment appealed after the claim of appeal is filed. MCR 7.208(A); see also *Lemmen v Lemmen,* 481 Mich 164, 166; 749 NW2d 255 (2008), and *Wilson v Gen Motors Cop,* 183 Mich App 21, 41; 454 NW2d 405 (1990). MCR 7.209 governs a stay on appeal. See MCR 2.614(D). Under MCR 7.209(A)(1), "an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders."

A stay essentially leaves the order or judgment without effect. See *People v Swafford,* 483 Mich 1, 6-7 n 5; 762 NW2d 902 (2009). Absent a stay, a party must comply with the order of judgment pending the appeal, even if it believes that the order or judgment is incorrect. See *In re Contempt of Dudzinski,* 257 Mich App 96, 112; 667 NW2d 68 (2003). As applied to the trial court's judgment in the 2006 action, the trial court's grant of the stay meant that defendant was free to continue its practice of not paying Medicare Part B premiums to plaintiffs because the order that "Defendants [sic] pay all of the premiums for the Plaintiffs' health and hospitalization insurance, including Medicare B, during their retirement" had no effect. In addition, plaintiffs could not enforce the particular monetary relief that they were awarded as part of the judgment.

By comparison, a temporary injunction is typically a means for preserving the status quo of parties in an action until the merits are decided. See *Int'l Union, UAW v Mich,* 211 Mich App 20, 26; 535 NW2d 210 (1995). A trial court is authorized by MCR 2.614(C) to grant injunctive relief where an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction. This rule has been interpreted to mean that injunctions are not dissolved pending an appeal and may not be ignored. *City of Ann Arbor v Danish News Co,* 139 Mich App 218, 229-230; 361 NW2d 772 (1984).

In this case, the trial court's "status quo" order does not relate to any award of injunctive relief in the judgment. It simply preserves the status quo of plaintiffs' retirement health-care benefits pending the appeal. And while the trial court stated that it had intended to preserve the

status quo when ordering the stay, when ruling on plaintiffs' motion for a status quo order, courts speak through their judgments and decrees. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Because there is nothing in the record, let alone the trial court's order regarding the stay, to indicate that the court would preserve the status quo of plaintiffs' particular health-care benefits, the trial court lacked jurisdiction to enter the order requiring defendant to preserve the status quo. *Wilson*, 183 Mich App at 41. Accordingly, we vacate the status quo order.

IV. DOCKET NO. 299214 (2008 ACTION)

In the 2008 action, defendant challenges the trial court's determination that a genuine issue of material fact existed with respect to the breach of contract claims that were, in part, proceeding as a class action. Defendant argues that the trial court misconstrued the CBAs as requiring that it pay Medicare Part B premiums for retirees and, based thereon, applied an incorrect standard to determine that summary disposition was inappropriate on the issue whether past practices established that plaintiffs had a contractual right to have defendant pay those premiums.

As with the 2006 action, we review the trial court's summary disposition ruling under MCR 2.116(C)(10). With respect to CBAs applicable to police supervisors, we have considered the evidence regarding each of the CBAs applicable to the class consisting of police supervisors who retired through July 1, 1987, and for the individual plaintiffs who retired after July 1, 1987. The most recent CBA applicable to these plaintiffs is for the period 2001-2005.

For the same reasons set forth with respect to plaintiffs Loose and Bennett in the 2006 action, we conclude that the trial court erred in determining that defendant had an express contractual duty to pay for Medicare Part B premiums for class members whose retirements were subject to the 1980-1983 and 1983-1986 CBAs. The subsequent CBAs contain various changes to health-care benefits and the responsibility for premiums. The 1986-1989 CBA differs from the prior 1983-1986 CBA because it contains cost-containment provisions that vary based on the date of retirement. In particular, Article 23, § 3(h) provided:

> (1) Retiree health care benefit levels for future retirees retiring on or after July 1, 1987, shall be the same as then active employees.
>
> (2) In the unlikely event that a future DHPSA bargaining committee were to eliminate health insurance in its entirety and such elimination would leave persons then retired without any City provided health care insurance, the City agrees to maintain for those then retired persons the health care benefit level being received by such retirees immediately preceding and existence [sic] at the time of the elimination of health care for active bargaining unit employees. Such plan for retirees shall be at least a basic comprehensive medical surgical plan substantially equivalent to MVF-1. The City agrees that it will not submit this subsection to Act 312.

Nonetheless, considering that the 1986-1989 CBA continues to treat Medicare as being subject to a coordination of benefits and contains the nonduplication of benefits provision, it is clear that it should be construed in the same manner as the 1983-1986 CBA. We reach this same

conclusion with respect to subsequent CBAs applicable to police supervisors. The trial court's reliance on a provision added to the 2005-2009 CBA regarding the use of "Medicare/Medicaid complementary coverage" to determine "benefit level equivalence" for those retiring on or after July 1, 1987, was misplaced, because this CBA does not apply to any plaintiff or class member. In any event, we agree with defendant's argument that the complementary coverage provided for its retirees is not intended to include Medicare Part B coverage. In fact, the 2005-2009 CBA expressly provides that the retiree is responsible for any additional costs imposed by Medicare. Considering that the 2005-2009 CBA also continues to include the nonduplication provision and to treat Medicare as a coordination of benefits plan, we conclude that, even it was appropriate for the trial court to consider changes to the 2005-2009 CBA to construe prior CBAs, it erred as a matter of law in finding an unambiguous intent for defendant to pay for Medicare Part B premiums.

The CBAs applicable to the class actions for police officers and firefighters who retired through June 30, 2000, and their spouses, also contained various changes to health-care benefits and the responsibility for premiums during the relevant period. As with the 1980-1983 CBA for police supervisors, we find no record evidence that the 1980-1983 CBAs for police officers and firefighters contained the coordination of benefits provision for Medicare.

The1980-1983 CBA for police officers provides in Article A-11, § 4:

> The City shall provide the same hospitalization for a police officer who retires under Public Act 345 as he had at the time of his retirement, which includes his spouse and dependents.
>
> City shall not be required to cover the retiree who is covered under such other hospitalization plan which is equivalent or better or becomes covered while being covered under the City retiree plan, provided, however, the coverage shall continue and shall not be terminated if the City is reimbursed for such premiums within ninety (90) days after notifying the retiree of amount of premium due, and said retiree's coverage shall remain in full force and effect The City shall resume payments on behalf of the retiree when such other hospital plan coverage ceases.

The nonduplication provision in the prior article provides:

> The Employer shall have no obligation to duplicate any benefit any employee receives *under any other policy with any other employer* notwithstanding the circumstances of eligibility, amount or duration of benefit, and it shall be the obligation of the employee to inform the Employer of any and all insurance coverage enjoyed by said employee other than provided by the Employer herein a party. [Emphasis added.]

As discussed previously with respect to the 1983-1986 CBA for police officers that was at issue in the 2006 action, this nonduplication provision does not apply to Medicare, but rather is limited to employment circumstances. Absent evidence of any other applicable nonduplication provision or the express Medicare coordination-of-benefits provision, the material question for purposes of determining defendant's contractual duty to reimburse a retiree

for Medicare Part B premiums is whether it is enough that Article A-11, § 4, provides that defendant is not required to provide coverage when the retiree becomes covered by an equivalent or better hospitalization plan.

In this regard, we note that there is no claim in this case that Medicare Parts A and B alone would provide equivalent or better coverage for a retiree than the coverage provided under CBAs for plaintiffs. To the contrary, it is undisputed that defendant provides supplemental coverage for Medicare eligible retirees. Therefore, on its face, Article A-11, § 4, unambiguously does not provide a basis for defendant to refuse to provide coverage for a retiree who becomes covered by Medicare Parts A and B. But a latent ambiguity in a contract may arise from a collateral matter when contractual terms are applied or executed. *Shay v Aldrich*, 487 Mich 648, 667-668; 790 NW2d 629 (2010). Extrinsic evidence may be used to show the existence of a latent ambiguity, i.e., contract language that appears clear and ambiguous, but requires interpretation based on factors outside of the instrument. *Id.* Extrinsic evidence must support an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. *Id.* at 668.

Absent evidence of another applicable nonduplication provision for Medicare Part B or the coordination-of-benefits provision for Medicare contained in the 1983-1986 CBA for police officers, we conclude that Article A-11, § 4, is latently ambiguous because the evidence supports an argument that the parties intended to apply this provision in such a manner as to require that defendant only provide supplemental coverage where a retiree obtains less than equivalent coverage through a different hospitalization plan. Therefore, the trial court reached the wrong result in determining that Medicare Part B could not be considered part of "another hospitalization plan" that subjects retirees to the possible termination of coverage. Considering the particular language of the 1980-1983 CBA applicable to police officers that is available for our review, neither defendant nor any plaintiff or class members subject to the 1980-1983 CBA for police officers was entitled to judgment as a matter of law regarding whether there was an express contractual provision governing defendant's liability for Medicare Part B premiums. Summary disposition is inappropriate where factual development is necessary to determine the parties' intent. *SSC Assoc Ltd Partnership*, 192 Mich App at 363.

Because the substantive provisions of the 1980-1983 CBA for firefighters are the same as the 1980-1983 CBA for police officers, we also conclude that neither defendant nor any plaintiff or class members subject to the 1980-1983 CBA for firefighters were entitled to summary disposition regarding whether there was an express contractual provision governing defendant's liability for Medicare Part B premiums.

With respect to the 1983-1986 CBAs for police officers and firefighters, our resolution of these claims in the 2006 action is dispositive of this issue and, accordingly, the trial court erred in determining that defendant had an express contractual duty to pay for Medicare Part B premiums for plaintiffs and class members whose retirements were subject to the 1983-1986 CBAs.

With respect to subsequent CBAs for police officers and firefighters, the record evidence establishes that provisions regarding the complementary coverage for Medicare were added

during the time period applicable to the class action. The 1989-1992 CBA for police officers provided in Article 57, § 3(b):

> For a police officer who retires on or after July 1, 1990, hospitalization benefit levels shall be the same as then active employees. In determining benefit level equivalence, Medicare-Medicaid complementary coverage shall continue to be presumed to be a medicare eligible employees' [sic] retirement health program.

The 1989-1992 CBA for firefighters contained the following cost-containment provision:

> Retiree health care benefit levels for future retirees retiring on or after July 1, 1991 shall be the same as then active employees. The City agrees to maintain for the persons then retired at the time of any change in health care for active employees, a benefit level not less than a basic comprehensive medical surgical plan substantially equivalent to BC-BSM M.V.F.-1. In determining benefit level equivalence, Medicare-Medicaid complementary coverage shall continue to be presumed to be a medicare eligible employees' [sic] retirement health program.

But giving effect to the specific coordination of benefits provision applicable to Medicare that is also contained in all CBAs after the 1980-1983 CBAs for police officers and firefighters, the unambiguous language of the CBAs continues to establish that defendant had no obligation to pay for the Medicare Part B premiums.

In sum, with the exception of the parties' dispute regarding the 1980-1983 CBAs for police officers and firefighters, we conclude that the trial court erred in denying defendant's motion for summary disposition because the express terms of the various CBAs support defendant's position that it had no contractual duty to pay for a retiree's Medicare Part B premiums. The trial court reached the right result in denying summary disposition with respect to the 1980-1983 CBAs for police officers and firefighters because neither defendant nor any plaintiff or affected class member was entitled to summary disposition under MCR 2.116(C)(10).

Because the 1980-1983 CBAs for police officers and firefighters are ambiguous, the trial court also erred in evaluating defendant's claim that past practices amended these CBAs. Where a CBA is ambiguous or silent with respect to the subject of the past practice, there need only be a tacit agreement for the practice to continue. *Butler,* 289 Mich App at 676. The proof of mutual acceptance may arise by inferences drawn from the circumstances. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich 309, 328; 550 NW2d 228 (1996). It is sufficient that a party to the agreement knew or should have known of the alleged practice. *Id.*

Nonetheless, the past-practices doctrine may only be used to establish the existence of a contract right at the time of retirement. *Butler,* 289 Mich App 676. Although defendant presented evidence that it never paid for Medicare Part B premiums, the evidence was insufficient to support an inference that the bargaining parties knew or should have known that defendant would not pay for the Medicare Part B premiums at the time of any retirement subject to the 1980-1983 CBAs. Viewing the evidence in a light most favorable to plaintiffs, we therefore reject defendant's claim that it was entitled to judgment as a matter of law with respect to its theory that past practices amended the 1980-1983 CBAs. *Allison,* 481 Mich at 424-425.

For the reasons set forth with respect to 2006 action, however, we reverse the trial court's denial of its motion for summary disposition with respect to the claims of plaintiffs and class members based on the other CBAs. Because the express terms of those CBAs do not require that defendant pay a retiree's Medicare Part B premiums and it is undisputed that that this practice did not occur, plaintiffs' claim that defendant breached the CBAs cannot succeed. *Butler,* 289 Mich App at 677.

Lastly, we decline to consider defendant's argument concerning whether plaintiffs had vested health-care benefits. The question of vesting does not arise until it is determined that a contract right exists. *Butler,* 289 Mich App at 672. In this case, the trial court's decision regarding the class action does not indicate that it resolved the question of vesting. Rather, it found plaintiffs' argument that they had vested rights unpersuasive because a genuine issue of material fact existed with respect to whether past practices amended the CBAs. We affirm the trial court's decision with respect to the 1980-1983 CBAs for police officers and firefighters because it reached the right result. *Taylor v Laban,* 241 Mich App 449, 458; 616 NW2d 229 (2000). Because a genuine issue of material fact exists with respect to whether the plaintiffs or class members subject to these 1980-1983 CBAs had a contractual right to have defendant pay for Medicare Part B premiums, it would be premature to address whether the alleged rights were vested. Because the other CBAs do not provide factual support for plaintiffs' claim that they had a contractual right to have defendant pay for their Medicare Part B premiums, it is unnecessary to address defendant's argument regarding vested rights with respect to those CBAs.

In Docket Nos. 296368 and 300964, we vacate the judgment for plaintiffs and vacate the status quo order, and we remand for entry of summary dispostion in favor of defendant in the 2006 action. In Docket No. 299214, we partially reverse the trial court's orders regarding the parties' cross-motions for summary dispostion and remand for further proceedings consistent with this opinion in the 2008 action. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan