STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM ROCHELEAU, Plaintiff-Appellee,	UNPUBLISHED October 29, 1999
v	No. 208701 Dickinson Circuit Court
CITY OF IRON MOUNTAIN, Defendant-Appellant.	LC No. 96-009307 CK

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

In 1995, plaintiff retired from the Iron Mountain Fire Department following approximately twenty-seven years of service, including six years as fire chief. Shortly before retirement, he negotiated and modified his retirement benefits, and this dispute arose over the proper calculation of those benefits. Defendant appeals as of right from a judgment in favor of plaintiff. We affirm.

I

Before his retirement, plaintiff's compensation package was determined by defendant's city council, subject to the Michigan Fire Fighters and Police Officers Retirement Act, MCL 38.551 *et seq.*; MSA 5.3375(1) *et seq.* (Act 345). His retirement pension benefit was defined as 2.5% of his final average compensation [FAC] times years of service to a maximum of 25 years, plus 1% for each year in excess of 25 years of credited services. In 1994, plaintiff sought to improve his pension benefit. After negotiations, defendant's council enacted a resolution on December 19, 1994 that offered plaintiff the option of either (1) reducing his recent salary increase in exchange for a pension benefit increase of 2.8 percent of FAC multiplied by years of service to a maximum of twenty-five years; or (2) keeping his salary increase, with no change to the pension benefit. The resolution provided in pertinent part:

> THEREFORE BE IT RESOLVED, that the Negotiations/Compensation Committee recommends to the full City Council that the Police Chief and Fire Chief be given their choice between; (1) a pension benefit increase equal to their respective departments, with the cost to the Police Chief of 3.25% and the cost to the Fire Chief of 2.35% to be deducted from the July 1, 1994 salary increase, or, (2) the full salary increase granted to

other administrative employees effective July 1, 1994. The Police Chief and Fire Chief are to notify the City Manager of their choice within 30 days from the adoption of this resolution.

Before accepting either option, plaintiff contacted defendant's city manager to clarify the terms as set forth in the resolution. In a letter dated December 20, 1994, plaintiff asked if the 2.8 percent option entitled him to an additional one percent for years in excess of twenty-five years of service, and whether he would be entitled to purchase military service credit (MSC)[1]:

> The recent resolution by the council (12-19-94) raises more questions than it answers.
>
> I am assuming that "equal to their respective departments" means the yearly percentage will be raised from 2.5 to 2.8 x years of service to 25 years.
>
> I have already been assured that I am entitled to the 1% per year over 25 years, and that I will be able to purchase my military time if I so wish. . . .
>
> I am also requesting that the above agreements be committed to writing and signed so that I may be certain of my benefits prior to my retirement. I do not want any misunderstandings from this point on.

The city manager's written response dated December 21, 1994, provided in pertinent part:

> In response to your request for clarification of pension benefit issues, I offer the following:
>
> 1. The pension benefit available to you based on City Council authorization is 2.8% of average final compensation times years of service to a maximum of 25 years. The retirement option under which you are currently covered provides 2.5% of average final compensation times years of service to a maximum of 25 years plus 1.0% for each year in excess of 25 years. The 1.0% benefit of service in excess of 25 years <u>does not apply</u> to the 2.8% option authorized by the City Council.
>
> 2. Military service credit is regulated by the enclosed City Council policy. . . .
>
> Please advise if you require further clarification or assistance. If you wish to obtain an estimate of your pension benefit, please contact Carol Bartolameolli.

The local MSC policy, adopted by the city council in April 1991, allowed certain employees to purchase up to four years MSC, so long as they were at least fifty years old and had at least twenty-five years of continuous service at the time of retirement, and provided in pertinent part:

> Full-time employees eligible to retire under the MERS or Act 345 Pension Programs of the City of Iron Mountain hired before April 1, 1991 are also eligible to purchase

> military service credit toward their retirement benefit according to statutory provisions governing the MERS and Act 345 pension systems.

At the time plaintiff was considering his retirement options, he was qualified to purchase up to four years of MSC. In a letter dated January 16, 1995, plaintiff notified defendant that he accepted "the pension increase proposed by the Council in December 19, 1994."

In a letter dated May 3, 1995 plaintiff advised defendant's chief financial officer that he intended to purchase four years' MSC at the time of his anticipated July 1995 retirement. He was informed that the purchase was subject to city council approval and that the matter would be placed on the city council agenda. Bartolameolli, the account clerk charged with obtaining the MSC purchase price, testified that she specifically asked defendant's chief financial officer if plaintiff was allowed to purchase MSC beyond twenty-five years of service, and was told that the purchase was meant to enhance plaintiff's pension.

The city council passed a motion to approve the purchase without discussion or opposition. Plaintiff ultimately paid defendant $7,901.48 for the approved MSC, increasing his monthly pension benefits by approximately sixteen percent. He was notified later, however, that he was not entitled to purchase MSC, and defendant refunded the MSC purchase price, less the alleged pension overpayments. This breach of contract action followed.

II

Defendant first claims that the trial court should have granted its motion for summary disposition because there were no genuine issues of material fact with respect to whether the parties' contract was ambiguous. We disagree. The grant or denial of a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).]

Whether contractual language is ambiguous is a question of law, and where such language is clear, its meaning is a question of law. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 447-448, 571 NW2d 548 (1997). However, where contract language is susceptible to two or more reasonable interpretations, its interpretation is a question of fact, precluding summary disposition. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997).

We disagree with defendant's contention that the pension plan offered to and accepted by

plaintiff was clear on its face. While plaintiff accepted "the pension increase proposed by the Council on December 19, 1994," the effect of this increase on plaintiff's ability to enhance his pension benefits by purchasing MSC was unclear. In this regard, we note that MSC is an optional pension benefit that governing bodies may authorize over the basic mandatory plan, *Vohs v Madison Heights*, 100 Mich App 163, 166; 299 NW2d 41 (1980), and that defendant's city manager's written response dated December 21, 1994 referred to the MSC policy as regulated by a separate city council policy. Because MSC was not expressly addressed within the city council resolution adopted December 19, 1994, it was reasonable to presume that either (1) the resolution placed an absolute cap on years of service, regardless of the origin of those years; or (2) the resolution applied only to plaintiff's employment with defendant, and was separate and distinct from the statutory and municipal provisions regulating the purchase of MSC. Here, the trial court properly denied defendant's motion for summary disposition because the contract, on its face, was subject to two reasonable interpretations.

III

Defendant next contends that the court should have granted its motion for judgment notwithstanding the verdict (JNOV) based on the absence of evidence on which reasonable minds could differ with respect to whether the parties had an enforceable contract entitling plaintiff to enhance his retirement beyond twenty-five years by purchasing four years of MSC. We disagree. This Court reviews the grant or denial of a JNOV motion pursuant to MCR 2.610 de novo. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 672; 591 NW2d 438 (1998). A trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury. *Id*. The testimony and all legitimate inferences that may be drawn therefrom are viewed in the light most favorable to the nonmoving party. *Id.* For the same reasons summary disposition was properly denied, there was sufficient evidence on the record from which the jury could conclude that the parties had an enforceable contract. Therefore, the court properly denied defendant's motion for JNOV.

IV

Defendant next contends that it was entitled to a new trial pursuant to MCR 2.611 because the trial court failed to allow the jury to consider whether plaintiff should receive a one-percent enhancement for MSC, rather than assuming the MSC would be calculated using 2.8 percent. We disagree. This issue requires a mixed standard of review. A trial court's decision regarding the grant or denial of a new trial should not be reversed absent a palpable abuse of discretion. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). However, because the trial court's decision was based on its interpretation of the contract as a matter of law, that interpretation should be reviewed de novo. *Brucker, supra* at 448.

The jury verdict form did not require the jury to determine whether the contract allowed plaintiff to purchase the MSC for one-percent multiplier or a 2.8 percent multiplier. In denying defendant's motion for a new trial, the trial court held that adding the option of choosing one percent or 2.8 percent would have risked an inconsistent verdict, and that the jury could not have found that a contract existed

and still found that the contract provided for the purchase of MSC to be at one percent. The trial court's refusal to allow the jury to consider between those alternate calculations indicated its legal conclusion that if a valid contract existed, it allowed plaintiff to purchase MSC at 2.8 percent.

Whether contractual language is ambiguous is a question of law, and where such language is clear, its meaning is a question of law. *Brucker, supra* at 447-448. The evidence at trial indicated that defendant intended to eliminate the one-percent multiplier when it offered plaintiff the 2.8 percent option. Plaintiff agreed to take the increased pension benefit of 2.8 percent rather than maintain the 2.5-plus-one-percent option. The court, therefore, did not err when it decided, as a matter of law, that the contract terms were unambiguous and that they did not include a one-percent multiplier for any purpose. Because the court correctly found that the contract, if it existed, required the use of the 2.8-percent multiplier for MSC, there were no grounds on which to grant a new trial. The court properly denied defendant's motion.

V

Defendant finally contends that it is entitled to a new trial because the trial court failed to give requested jury instructions. A trial court's decisions with regard to jury instructions are reviewed for an abuse of discretion. *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 103; 574 NW2d 36 (1997). We review jury instructions in their entirety and should not be extracted piecemeal. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990). So long as the parties' theories and the applicable law were presented to the jury adequately and fairly, reversal is not warranted. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

We disagree with defendant's contention that the trial court abused its discretion when it declined to give the following special jury instruction with respect to the parties' contract:

> Where one writing refers to another, the intention of the parties is to be gathered from the two writings construed together. However the fact that an agreement between the parties mentions another agreement between one of them and a third person, does not necessitate the two agreements being read together if they were not intended to be and where each stands on its own basis and is capable of being construed and enforced independently. A reference in a contract to another writing for a particular purpose makes that writing a part of the contract only for the purpose specified.

We also disagree with defendant's contention that the trial court abused its discretion when it gave an instruction that limited mutual mistake to the formation of a contract "in regard to the military service credit" in contrast to defendant's proposed instruction that applied mutual mistake to the formation of a "contract."

During opening argument, defense counsel stated, "We agree on a lot of things. We disagree only as to whether or not [plaintiff] was entitled to purchase his military service credit, and how that fits with the new plan that he was offered shortly before he retired." Defense counsel did not contend that the MSC should be calculated using the one-percent multiplier. Rather, defendant's case was based on

its defense that no contract was formed and that the one-percent multiplier was completely eliminated. Based upon our review of the record, we conclude that reversal is not warranted because the jury instructions, as given, adequately presented the jury

with the parties' theories and the applicable law.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski

[1] MCL 38.556(1)(g); MSA 5.3375(6)(1)(g) provides in pertinent part:

> A municipality by a 3/5 vote of its governing body or by a majority vote of the qualified electors may provide service credit for not more than 6 years of active military service to the United States government to a member who is employed subsequent to this military service upon payment to the retirement system of 5% of the member's full-time or equated full-time compensation for the fiscal year in which payment is made multiplied by the years of service that the member elects to purchase up to the maximum.