STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA THOMAS, Plaintiff-Appellee,	UNPUBLISHED March 22, 2016
v	No. 328020 Kalkaska Circuit Court
VILLAGE OF KALKASKA, Defendant-Appellant.	LC No. 14-011693-CK

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

In this action for breach of contract, defendant Village of Kalkaska (the village) appeals as of right a judgment for plaintiff, entered after a jury trial. We affirm.

Plaintiff, a former village clerk and mayor, brought this action for health insurance coverage and Medicare premium reimbursement pursuant to a Letter of Intent and Understanding (the "Letter") that the parties executed on February 12, 1996. The Letter, which was signed by the village, plaintiff, and other village employees, purported to provide lifetime medical benefits for the named employees. According to provisions in the Letter, for the first three years after the named employee reached the age of 55, the village would provide a family hospitalization plan equivalent to a Blue Cross and Blue Shield Master Medical Policy, including a $2 prescription co-payment rider, as well as dental and eyeglass coverage. The Letter also provided for additional coverage described as

> lifetime hospitalization (as outlined above) covering both said above listed employees and their respective spouses. Said coverage shall specifically include reimbursement of said above listed employees for their payment of the Medicare monthly premium (deduction) they are required to make starting with their 65th birthday. Said employees shall be reimbursed at the end of each fiscal year of the Village, upon presentment by said employees to the Village of an itemized statement of premiums (deductions) paid.

The Letter further provided for surviving spouse benefits, and recited that at least a portion of the funds for this extended coverage would come from a trust fund established by the village and funded by employee wage concessions. Specifically, the Letter stated:

> It is further our understanding and intent that this extended coverage is being paid for through the operation of a trust and agency fund previously established and funded by wages and/or wage concessions of said above listed employees. Therefore, this letter of understanding and intent represents an agreement by and between the above listed employees and the Village and is not subject to future negotiations which could in any way operate to lesson [sic] or decrease the coverage being herein provided for.

Plaintiff received health benefits after her retirement in 2010 until August 19, 2014. The benefits following the first three years of plaintiff's retirement were paid through the operation of the trust fund. According to plaintiff, the funds used to operate the trust fund were "intermingled" with other village funds when plaintiff was maintaining the funds, and the village admits that it sometimes reimbursed the trust fund out of the village's general fund. However, in early 2014, the village maintained that because the monies currently in the trust fund were insufficient to continue to provide coverage, it would no longer be able to continue to provide it. The village subsequently adopted a resolution terminating plaintiff's health coverage.

Plaintiff thereafter filed this action for breach of contract. Both parties filed motions for summary disposition, each advancing their own interpretation of the Letter agreement. The trial court determined that the Letter was ambiguous and denied both motions. Following a jury trial, the jury returned a special verdict in which it found that the village breached the Letter agreement, and it awarded plaintiff both present and future damages.

The village first argues on appeal that the Letter unambiguously limited its obligation to fund retiree health insurance or provide Medicare premium reimbursement to the three-year period following a named employee's retirement, and therefore, the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). "[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). This Court likewise reviews de novo whether contractual terms are ambiguous. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

With respect to the well-established principles governing the analysis of a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), observed:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record,

> giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). A contract requires mutual assent or a meeting of the minds on all the essential terms of an agreement. *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties[;] [t]o this rule all others are subordinate." *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). In light of this, "[i]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965) (citations omitted); see also *Frankenmuth Mut Ins Co v Masters,* 460 Mich 105, 111; 595 NW2d 832 (1999). However, a court will not create ambiguity where the terms of the contract are clear. *Frankenmuth Mut*, 460 Mich at 111.

In *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010), our Supreme Court noted that contracts are subject to the parol evidence rule, which precludes the use of extrinsic evidence when interpreting unambiguous contractual language, that ambiguous contracts open the door to the admission of extrinsic evidence to establish the actual intent of the parties, and that an ambiguity can be either patent or latent. The Court further elaborated:

> This Court has held that extrinsic evidence may not be used to identify a patent ambiguity because a patent ambiguity appears from the face of the document. However, extrinsic evidence may be used to show that a latent ambiguity exists. . . . A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the " 'necessity for interpretation or a choice among two or more possible meanings.' " To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue. [*Id.* at 667-668 (citations omitted).]

Contract language is patently ambiguous "[w]here the contract language is unclear or susceptible to multiple meanings[.]" *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996); see also *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992) ("A patent ambiguity exists if an uncertainty concerning the

meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language."). If two provisions within a contract irreconcilably conflict, the contract is ambiguous, and "courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447(2003) (citation omitted).

We hold that the trial court did not err in finding the Letter to be patently ambiguous. The village relies on the following paragraph in support of its claim that it was free to discontinue medical payments and reimbursements if the trust fund became insolvent:

> It is further our understanding and intent that this extended coverage *is being paid for* through the operation of a trust and agency fund previously established and funded by wages and/or wage concessions of said above listed employees. Therefore, this letter of understanding and intent represents an agreement by and between the above listed employees and the Village and *is not subject to future negotiations which could in any way operate to lesson* [sic] *or decrease the coverage being herein provided for*. [Emphasis added.]

Contrary to the village's assertion on appeal, there is no language in the Letter stating that later years of benefits and premiums are "to be" paid in the future with trust fund monies, much less paid exclusively with them. To the contrary, the use of the qualifier "is being" instead of the phrase "shall be," which is found in other portions of the Letter, could reasonably be construed as setting out only the present funding source of the trust fund from which the reimbursements and hospitalization coverage will come. The provision does not explicitly state what is to occur should the trust fund contain insufficient funds to provide the reimbursements, nor does it explicitly state that coverage would then cease. Indeed, this provision contains an explicit prohibition against negotiations "which could in any way operate to lesson [sic] or decrease the coverage being herein provided for." This language supports a finding that the parties intended that this coverage would exist for the life of the employees, without regard to whether the trust fund is solvent. At the least, it creates an ambiguity about this intent.

Also, although the provision specifically refers to a trust fund, the Letter itself provides no guidance as to how it is and will be operated, and by whom. This reference to another document or agreement supports a finding that this portion of the Letter is patently ambiguous in that it cannot be understood without reviewing the terms of the other document or agreement in order to understand this portion of the Letter. For example, if one is limited to the language used in the face of the Letter itself, it is unclear whether the "what if" provision the parties are disputing is from the trust or the instant document. The phrase "wages/and or wage concessions" is also unclear, because it fails to set out the extent of the employee's portion of the bargain, which would presumably be set out elsewhere. In addition, other portions of the agreement specifically refer to documents outside the Letter to define the medical coverage, such as the first paragraph describing the initial three years of benefits that are to be provided "as outlined in labor negotiations #10 (dated 3-1-91)." Moreover, the Letter contains no merger clause or exclusivity clause from which to conclude that it represents the whole of the parties' bargain. See, e.g., *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 504; 579 NW2d 411 (1998) (the existence of a merger clause makes it unreasonable for a party to rely on

earlier representations not included in the agreement). The fact that provisions of the Letter cannot be understood by referencing only the Letter itself further supports the trial court's finding that the Letter was patently ambiguous.

Moreover, the village's argument in support of its position on appeal ignores the remainder of the Letter. In particular, the village disregards the clear intent that, at least with respect to plaintiff's spouse, the village would furnish and pay for comparable insurance upon plaintiff's death. Specifically, the agreement provided:

> It is further our understanding that upon the death of any above listed employee; said deceased employees spouse can no longer receive coverage under this type of insurance policy. Upon the occurrence of such a contingency, the Village *shall obtain a new insurance policy* for said spouse, which shall contain as many of the same benefits as the above described insurance policy, as can be purchased in the commercial insurance market. *The premiums for this new insurance policy and the Medicare monthly premium (deduction) shall be paid for by the Village for the lifetime of the surviving spouse*. [Emphasis added.]

Similar mandatory language is contained in the provision addressing extended coverage for the employees, which stated:

> After said three (3) years of coverage shall cease, said above listed employees *shall receive lifetime hospitalization* (as outlined above) covering both said above listed employees and their respective spouses. Said coverage *shall specifically include reimbursement* of said above listed employees for their payment of the Medicare monthly premium (deduction) they are required to make starting with their 65th birthday. Said employees *shall be reimbursed* at the end of each fiscal year of the Village, upon presentment by said employees to the Village of an itemized statement of premiums (deductions) paid. [Emphasis added.]

When viewed as a whole, considering the clear indication that the employees and their spouses shall be covered, the fact that the parties evidenced an intent that they could not negotiate anything that would "operate to lesson [sic] or decrease the coverage being herein provided for," and the absence of a specific term governing what would occur should the trust fund fail to contain the funds necessary to effectuate the clear intent that lifetime benefits be paid, we agree with the trial court that the Letter agreement is at least patently ambiguous.

"It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp*, 468 Mich at 469. Because the trial court properly found that the contract was ambiguous, it did not err in denying the village's motion for summary disposition and having a jury decide the issue.

The village's related argument that it fully performed its obligations under the agreement by paying for the initial three years of benefits must also be rejected because it is premised on the village's position that the Letter is unambiguous. The village correctly notes that an entity is not

liable for breach of contract upon full performance; in fact, substantial performance is sufficient in Michigan. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 619; 600 NW2d 66 (1999); *P & M Constr Co, Inc v Hammond Ventures, Inc*, 3 Mich App 306, 315; 142 NW2d 468 (1966). However, the village's claim that it fully performed its obligations under the Letter agreement is based on its own interpretation of what it contends is unambiguous language, an argument we have rejected. Moreover, the meaning of the agreement was properly submitted to a jury, and the jury determined that the village breached the terms of the agreement. Notably, the village does not challenge any of the evidence offered at trial to rebut the village's interpretation, or the jury's finding that the village breached what the jury found to be the terms of the agreement. Therefore, the village is not entitled to relief on this ground.

The village also argues that the trial court erred in denying its motion for remittitur. The village argues that remittitur was warranted because the jury failed to properly reduce the award of future damages to present value in accordance with M Civ JI 53.03. We disagree. The grant or denial of a motion for remittitur is reviewed for an abuse of discretion. *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 546; 854 NW2d 152 (2014). MCR 2.611(E)(1) provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

In determining whether remittitur is appropriate, the proper consideration is whether the jury award was supported by the evidence, "based on objective criteria relating to the actual conduct of the trial or the evidence presented." *Landin*, 305 Mich App at 546. Our Supreme Court has stated that the following factors can also be appropriate considerations when objectively viewed:

> [W]hether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; . . . whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; . . . [and] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. [*Palenkas v Beaumont Hosp*, 432 Mich 527, 532-533, 443 NW2d 354 (1989); see also MCR 2.611(A)(1)(c).]

Contrary to the village's contention, the fact that the jury awarded an equal amount of damages for years 2016 through 2027 does not establish that it ignored the trial court's instructions, or plaintiff's counsel's request, to reduce any future damages award. Rather, after reviewing the evidence presented concerning the amount of medical premiums and other expenses that plaintiff paid in 2014, the increase to those expenses in 2015, and plaintiff's explanation of how she calculated her requested future damages, based on raw amounts reduced to present value, we agree with the trial court that it is likely that the jury heeded the jury instruction and simply divided the amount it wished to award, as reduced to present value, into equal amounts. We further note that the requested amount took into account the reduced life

expectancy for plaintiff's spouse. The village has not shown that the trial court abused its discretion when it denied the motion for remittitur.

Affirmed. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens