STATE OF MICHIGAN

COURT OF APPEALS

KEVIN LOFTIS, NICK KRIZMANICH, RICHARD ROBELL, ANDREW POTTER, KURT SKARJUNE and CLIFFORD PICKETT,

Plaintiffs-Appellees,

v

CITY OF OAK PARK and JAMES D. HOCK,

Defendants-Appellants.

UNPUBLISHED
July 24, 2012

No. 304064
Oakland Circuit Court
LC No. 2006-078022-CK

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendants City of Oak Park and James D. Hock appeal as of right a judgment entered after a bench trial in favor of plaintiffs Kevin Loftis, Nick Krizmanich, Richard Robell, Andrew Potter, Kurt Skarjune, and Clifford Pickett. We affirm.

I. BACKGROUND

Plaintiffs were public safety officers for Oak Park. Plaintiffs Krizmanich, Skarjune, Robell, Loftis, and Pickett retired before January 1, 2006, while plaintiff Potter retired on June 30, 2006. Pursuant to the 2001 to 2006 collective bargaining agreement (CBA) effective at the time of plaintiffs' retirements, plaintiffs were entitled to healthcare coverage during their employment. Specifically, Article 24.1:A provides, in the relevant part:

> The City shall provide each employee and his immediate family with Blue Cross/Blue Shield Master Medical including catastrophic coverage with the transfer of psychiatric inpatient and outpatient care from the basic service to the Master Medical option subject to co-pays and deductibles. Hospitalization coverage shall be maintained with the following changes; Employees choosing to remain with the existing plan at no additional cost to the employee may do so by joining the Blue Cross/Blue Shiled PPO. Employees wishing to remain in the existing plan without joining the PPO will be subject to an increase in deductibles to $100/$200, with co-pays on x-rays to be the same as current. Additional riders of RM (routine mammography) and RPS (routine Pap smear) will be included.

* * *

> The City will also provide a prescription rider in addition to the other coverage. Such rider will provide for ten dollars ($10.00) deductible for each prescription and is to be subject to the rules and regulations and procedures of the Michigan Hospital Service – Michigan Medical Service. Effective 1/1/06 the co-pay shall increase to $10.00 generic/ $20 specific. Effective when all other Employee unions and non-union employees receive $15 generic/ $30 specific, this will also apply to the union.

Additionally, the 2001 to 2006 CBA provided that the same level of healthcare coverage would be available to employees who retired while the 2001 to 2006 CBA was still in effect. Article 24.4:D provides:

> Hospital, Medical, Surgical, Dental, Optical and *Prescription rider coverage will be made available to all retirees*, their spouse and any eligible dependents, *at the same level of coverage that was provided at the time of their separation of employment with the City, with cost to be paid by the City*. Spousal coverage is only for that individual that the retiree is married to at the time of their retirement. If a retiree and/or spouse become eligible for Medicare, they must participate in the Medicare program, and pay for all of its associated costs. The City will provide supplemental coverage to Medicare to the same level that was provided prior to Medicare participation. Any survivor receiving a pension who receives health coverage from their employer or through a new spouse, must participate in those health care programs as primary coverage and the City health care shall be supplemental, as long as they continue to receive a City pension. [Emphasis added.]

But, on May 17, 2006, defendants sent a letter to plaintiffs informing them that their medical and prescription coverage would be changing. Specifically, the letter stated that because of increasing costs in employer sponsored healthcare premiums, plaintiffs would have $10 physician office visit co-pay instead of the master medical plan that required 20 percent co-pay after meeting the annual deductible. Additionally, prescription co-pays would be increasing from $10 to $15 generic and $30 specific, with a mail order prescription service that would allow for a 90 day prescription supply to be filled for one co-pay.

After receiving this letter, plaintiffs filed a complaint, alleging that their prescription co-pay could not be increased because they were entitled to the same level of healthcare coverage provided for within the 2001 to 2006 CBA. After plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10) was denied by the trial court, a bench trial ensued. At trial, plaintiffs argued that the same level of coverage under the terms of 2001 to 2006 CBA meant that their prescription co-pay could not be increased. Defendants argued that the same level of coverage referred to the overall coverage provided in the hospital, medical, surgical, dental, optical, and prescription riders, and that, therefore, an assessment of all healthcare benefits needed to be included in determining whether the same level of coverage was being provided. After the bench trial, the trial court issued an opinion and order finding that defendants breached the 2001 to 2006 CBA by increasing the prescription co-pay:

> The terms of the contract are clear and unambiguous. The City is required to maintain the same coverage for the retirees during the course of there [sic] respective retirement. Defendants argue the second provision [Article 24.4:A.4.] does not include "retirees." Defendants' argue the healthcare coverage must be provided at the "same level" which permits one element (e.g., preventive coverage) and another element (e.g., prescription coverage), as long as the total out-of-pocket costs are approximately the same. However, this assertion is without merit. The interpretation urged by Plaintiffs is more accurate and gives meaning to each word and clause within the agreement.
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> The Court is "required to read contracts as a whole, giving harmonious effect, if possible, to each word and phrase." *Royal* [*Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 719; 706 NW2d 426 (2005)], citing *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n[] 11[; 664 NW2d 776] (2003). Further, the testimony of Plaintiff Loftis regarding the statement made by Defendant Hock (that the Plaintiffs would have the same prescription coverage if they retired as was being discussed) is credible and persuasive. Hock indicated he had primary responsibility for negotiating the contract, and the statement made to Loftis reflects the understanding of both parties. This admission by Defendant Hock, made during the scope of his employment with Defendant City of Oak Park, reflects not only his understanding of the terms of the contract but also the terms as written. Therefore, this Court finds in favor of Plaintiffs and grants the judgment in the requested amount of $1,141.05.
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> Plaintiffs request in this claim [declaratory relief] a determination that the decision of Defendants "to unilaterally implement new terms and conditions of the contract upon the Plaintiffs without negotiation" was prohibited under the terms of the contract. For the reasons set forth above, the Court finds the contractual language prohibited the modification of the prescription coverage. Thus, Plaintiffs are entitled to such declaratory relief and the Court hereby grants same.

The trial court filed an order of judgment granting plaintiffs damages in the amount of $1,322.01 and finding that plaintiffs were entitled to the same level of prescription coverage that was in place at the time of their respective retirements. The trial court denied defendants' motion for a new trial, and defendants now appeal as of right to this Court.

II. ANALYSIS

A. CONTRACT INTERPRETATION

Defendants argue that the trial court misinterpreted the meaning of "same level" within the 2001 to 2006 CBA. Following a bench trial, we review a trial court's findings of fact for clear error and its conclusions of law de novo. *Butler v Wayne Co*, 289 Mich App 664, 671; 798

NW2d 37 (2010). Additionally this Court reviews issues of contract interpretation de novo. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 526; 791 NW2d 724 (2010).

"The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). A contract should be read in its entirety to give meaning to all the terms within the contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003); *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). If the contract term is unambiguous, its meaning is clear and must be enforced as written. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010); *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664-665; 770 NW2d 902 (2009).

A review of the language within the 2001 to 2006 CBA reveals that it is plain and unambiguous. The contract provides that hospital, medical, surgical, dental, optical, and prescription rider coverage will be available to all retirees "*at the same level of coverage* that was provided at the time of their separation of employment with the City." (Emphasis added.) When determining the plain and ordinary meaning of undefined words within a contract, a dictionary may be consulted. *Pontiac Sch Dist v Pontiac Ed Ass'n*, 295 Mich App 147, 153; 811 NW2d 64 (2012) (citation omitted). "Same" is defined as: "identical with what is about to be or has just been mentioned[;]" "agreeing in kind, amount, etc.[;]" "unchanged in character, condition, etc." *Random House Webster's College Dictionary* (2001). "Level" is defined as: "equal, as in height, condition, status, or advancement[;]" "even, equable, or uniform[.]" *Random House Webster's College Dictionary* (2001). Applying the plain meaning definition of "same level" we conclude that defendants must provide plaintiffs with healthcare coverage that is identical and equal to the coverage plaintiffs had under the 2001 to 2006 CBA. Under the contract, defendants agreed to provide six riders of healthcare coverage: hospital, medical, surgical, dental, optical, and prescription. Consequently, pursuant to the 2001 to 2006 CBA, plaintiffs are entitled to healthcare coverage under each rider category that is identical and equal to that which was received at the time of their respective retirements. Although defendants argue that the "same level" means equality formed from an assessment of the overall healthcare coverage across all six rider categories, this interpretation is contrary to the plain meaning of the contract. The contract specifically states that each rider coverage for hospital, medical, surgical, dental, optical, and prescription will be available to plaintiffs at the same level. It does not provide that defendants may decrease benefits in one rider category as long as they also increase benefits in another rider category. Such an interpretation would not permit identical and equal healthcare coverage to plaintiffs.

Defendants' assertion that in reading the whole 2001 to 2006 CBA plaintiffs agreed to accept the prescription benefits change when the active union employees had their prescription benefits changed is also contrary to the express terms of the contract. Article 24.1:A.4 provides that the $10 prescription co-pay would be increasing to $10 generic and $20 specific effective January 1, 2006, for union employees, and that once all other union and non-union employees began paying $15 generic / $30 specific, the union would as well. But, this provision does not govern retirees. Instead, it is Article 24.4:D that governs the healthcare coverage available to retirees: "Hospital, Medical, Surgical, Dental, Optical and Prescription rider coverage will be made available to all retirees . . . at the same level of coverage that was provided *at the time of*

their separation of employment with the City, with cost to be paid by the City."[1] (Emphasis added.) Consequently, the 2001 to 2006 CBA expressly states that the City will provide retirees with the same healthcare coverage they had as of the date of their respective retirements, not what current city employees receive. Moreover, Article 24.4:D expressly provides that the City will pay for any additional costs associated with providing retirees with this same level of healthcare coverage.

The terms of the 2001 to 2006 CBA are clear and unambiguous. Plaintiffs Krizmanich, Skarjune, Robell, Loftis, and Pickett retired before January 1, 2006. These plaintiffs are entitled to the identical and equal prescription rider coverage of $10 prescription co-pay. Plaintiff Potter retired on June 30, 2006, and therefore, is entitled to the identical and equal prescription rider coverage of $10 generic and $20 specific prescription co-pay.

B. EXTRINSIC EVIDENCE

Defendants also argue that it was error for the trial court to consider extrinsic evidence in interpreting the 2001 to 2006 CBA. Defendants did not object to the admission of this evidence before the trial court, and so, it is unpreserved for appellate review. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). Usually, this Court does not review an issue not decided by the trial court. *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). But, "[w]hether extrinsic evidence should be used in contract interpretation is a question of law that this Court reviews de novo." *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005). Because this issue presents a question of law and all the facts necessary for resolution are present, we will consider this issue. *Candelaria*, 236 Mich App at 83. Whether a contract is ambiguous is an issue of contract interpretation, which this Court reviews de novo. *Holland*, 287 Mich App at 526. If a contract is unambiguous, its meaning is a question of law; however, if the contract is ambiguous, its interpretation becomes a question of fact. *Butler*, 289 Mich App at 671-672.

Ambiguity within a contract term is either patent or latent. A patent ambiguity is "one apparent upon the face of the [contract] . . . ." *Hall v Equitable Life Assurance Society of the United States*, 295 Mich 404, 409; 295 NW2d 204 (1940) (quotations and citation omitted). Thus, a contract is patently ambiguous if, after the court has engaged in giving effect to the language of the contract, two provisions irreconcilably conflict or a term is susceptible to more than one meaning. *Klapp*, 468 Mich at 467; *Holland*, 287 Mich App at 527. A latent ambiguity "'arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe.'" *Shay*, 487 Mich at 671-672, quoting *Hall*, 295 Mich at 409. Thus, although parol evidence is not admissible to prove a patent ambiguity because it appears on the face of the document, *Shay*, 487 Mich at 667, when a court is determining if a latent ambiguity exists, "extrinsic evidence is admissible to prove the existence of the ambiguity, and, if a latent ambiguity is proven to exist, extrinsic evidence may then be used as an aid in the construction of the contract[,]" *City of*

[1] The increases within Article 24.1:A.4 would also not apply to these plaintiffs because the increases occurred after the date of their separation from employment.

Grosse Pointe Park v Mich Muni Liability & Prop Pool, 473 Mich 188, 201; 702 NW2d 106 (2005) (opinion by CAVANAGH, J.). Therefore, extrinsic evidence may be used "not to add or detract from the writing, but merely to ascertain what the meaning of the parties is." *Klapp*, 468 Mich at 470 (quotations and citation omitted); see *Shay*, 487 Mich at 660 ("[I]f the language of a contract is ambiguous, courts may consider extrinsic evidence to determine the intent of the parties.") (footnote omitted). However, an unambiguous contract provision must be enforced as written, without consideration of extrinsic evidence. *Shay*, 487 Mich at 667.

As previously discussed, the contract provides that hospital, medical, surgical, dental, optical, and prescription rider coverage will be available to all retirees "*at the same level of coverage* that was provided at the time of their separation of employment with the City." (Emphasis added.) This contract language does not reveal a patent ambiguity. The phrase "same level" does not create an irreconcilable conflict and it is not susceptible to more than one meaning. Additionally, in looking at the extrinsic evidence presented, there is also not a latent ambiguity. The phrase "same level" clearly applies to the healthcare coverage provided for within the contract. Here, although the trial court determined that the term same level was clear and unambiguous, it nonetheless considered extrinsic evidence as additional support for its ruling regarding the contract terms. Because the contract terms are clear and unambiguous, extrinsic evidence regarding the meaning of the contract cannot be consulted. *Shay*, 487 Mich at 667. Thus, it was error for the trial court to consult extrinsic evidence as additional support in determining the meaning of the contract term, but as previously concluded, the trial court reached the correct result through application of the plain language of the contract. See *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009) (this Court will not reverse where the trial court reached the correct result, even if it employed the wrong reasoning).

C. MITIGATION OF DAMAGES

Defendants argue that the trial court did not consider plaintiffs' failure to mitigate damages. A trial court's determination of damages at a bench trial is reviewed for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995). "Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). "'Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.'" *Id.* at 263-264, quoting *Shiffer v Bd of Ed of Gibraltar Sch Dist*, 393 Mich 190, 197; 224 NW2d 255 (1974). In other words, "[i]n both contract and tort actions, the injured party must make every reasonable effort to minimize damages suffered." *Williams v American Title Ins Co*, 83 Mich App 686, 697; 269 NW2d 481 (1978). "It is the burden of the defendant, however, to show that the plaintiff has not used every reasonable effort within his or her power to minimize damages." *Id.*; see *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994) ("At common law, while a plaintiff has a duty to mitigate his loss, it is the defendant who bears the burden of proving a failure to mitigate[.]").

Essentially, defendants argue that plaintiffs failed to take full advantage of the mail order prescription plan provided with the new $15 generic and $30 specific prescription coverage.

However, we cannot conclude that reasonable efforts to minimize damages include plaintiffs' participation in an optional mail order prescription plan. Defendants also contend that the presumably lower office visit out-of-pocket expenses should be offset against any damage award. But, defendants failed to present any evidence that the lower office visit co-pay combined with higher prescription co-pays actually resulted in lower out-of-pocket expenses to plaintiffs, as compared to the out-of-pockets expenses plaintiffs incurred under their original healthcare coverage. The trial court did not clearly err in awarding damages.

Affirmed.

Plaintiffs may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello