STATE OF MICHIGAN

COURT OF APPEALS

KENNETH A. COSTELLA,

Plaintiff-Appellant,

v

TAYLOR POLICE & FIRE RETIREMENT SYSTEM and CITY OF TAYLOR,

Defendants-Appellees.

UNPUBLISHED
August 27, 2013

No. 310276
Wayne Circuit Court
LC No. 11-015152-AS

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

BORRELLO, J. (*dissenting*.)

I would affirm the trial court's decision in this matter for the reasons set forth in its opinion of March 26, 2012. I therefore respectfully dissent from the holding of the majority for the reasons set forth more fully below.

I concur with the statement of the facts as set forth by my colleagues in the majority. I would only add to their recitation of the facts that relevant to my decision in this matter, the employment contract at issue in this case has clauses entitled "TERM OF CONTRACT " and "COMPENSATION." It is under the heading "TERM OF CONTRACT" that the severance pay at issue here is discussed. Under the heading "COMPENSATION" there is no discussion of severance pay. However, I point this out merely for purposes of clarification as I agree with the finding of the majority that the severance pay received by plaintiff does not qualify as compensation.

I. PROPER STANDARD OF REVIEW.

As stated by the majority, this action began as a complaint for superintending control. Thus, as correctly stated by the trial court in its March 26, 2012 opinion, "[T]he review power of this Court when addressing an appeal such as this is not conterminous without the power of the circuit court were this matter to come before it filed under the original jurisdiction of the circuit court." Thus, the proper standard of review in this case is to determine, de novo, if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Thus, the trial court held, under *VanZandt v State Employees' Ret System*, 266 Mich App 579; 701 NW2d 214 (2005), its review was limited to a determination as to whether the decision by defendant retirement system was "not contrary to law, capricious, or a clear abuse of discretion, and is supported

by competent, material and substantial evidence on the whole record." *VanZandt*, 266 Mich App at 583. In *VanZandt*, this Court also stated that when reviewing an agency decision, "[i]f there is sufficient evidence, the circuit court may not substitute its judgment for that of the agency, even if the court might have reached a different result," quoting, *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). As properly stated by the trial court, "[t]he review power of this Court when addressing an appeal such as this is not coterminous without the power of the circuit court were this matter to come before it filed under the original jurisdiction of the circuit court." I concur with this statement of the trial court and find, for the reasons set forth more fully below, that the majority exceeded its proper scope of review by essentially substituting its judgment for that of defendant retirement system.

II. ANALYSIS.

As stated by the majority, the employment contract at issue does not state that plaintiff's severance pay should be used to calculate his final average compensation (FAC). Indeed the majority opines, and I concur, that the severance payment does not constitute compensation as that term is defined by any relevant Michigan statue or by defendant's retirement system. The majority correctly asserts that defendant retirement system clearly states that only compensation can be included in calculating an employee's FAC. Despite this finding, the majority holds that the trial court erred by not considering the intent of the parties prior to reaching its conclusion that defendant retirement system's ruling was not contrary to law, arbitrary, capricious, or constituted a clear abuse of discretion. The majority so asserts, despite its previous findings, that the employment contract is (a) not ambiguous relative to the issue of whether plaintiff was entitled to severance being included in his FAC; and (b) severance pay is not construed as compensation under any cited Michigan statute or defendant's retirement system.

To support its conclusion that the trial court erred as a matter of law by not considering the intent of the parties when reaching its decision, the majority relies on *Kuehn v Safeco Ins Co of America*, 140 Wis 2d 620, 626; 412 NW2d 126 (1987), for the legal conclusion that even when a contract is silent as to a specific definition of a term, the contract " . . . should be construed to give effect to the parties' true intent." I read the majority's reliance on *Kuehn* to hold that silence can be used to create an ambiguity, thereby allowing a reviewing court to look outside the four corners of the document and construe that parties' intent by use of extrinsic evidence. I respectfully disagree with the majority's interpretation of *Kuehn* as well as what I regard as their disregard for well established principles of contract law.

In *Kuehn*, the Court held that because there was no endorsement or explanation of underinsurance coverage attached to a motor vehicle insurance policy, the trial court was empowered to interpret that provision of the insurance contract. *Id.* at 623. The Court held that due to " . . . the absence of an endorsement defining 'underinsurance,' the policy is silent as to this feature." However, a critical prerequisite to the Court's finding that parol evidence was necessary to construe the intent of the parties was their finding that: "If a writing is only a partial integration of the parties' agreement, it is proper to consider parol evidence which establishes the full agreement as long as the parol evidence does not conflict with the part that has been integrated in writing." *Id.* at 624. There is nothing in the case before us that could lead me to conclude that we are faced with only a partial integration of the parties' agreement. There being

no issue presented relative to partial integration in this case, *Kuehn* is wholly inapplicable. Additionally, based on its misguided reliance on *Kuehn*, the majority erred in its consideration of extrinsic evidence to determine the intent of the parties to a contract which (a) by its own terms constituted the parties' entire agreement, and (b) contained no ambiguity as to whether severance pay should be factored into plaintiff's FAC calculation.

I also dissent because it is my opinion that the majority errs by conflating this Court's duty to "honor the intent of the parties", *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999), with this Court's long-standing duty to give words in a contract their plain and ordinary meaning and if the contract is unambiguous, enforce the contract as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). By failing to follow long prescribed legal principles, the majority's decision is tantamount to a re-write of the employment agreement. Simply put, the majority opinion inserts a contractual benefit where none existed. As stated throughout this dissent, based on past practices of the parties to this employment contract, including the alleged drafter of the employment contract, Riddle, had the parties intended to include severance pay in the calculation of plaintiff's FAC, they would or most assuredly could have specifically so stated. I disagree, in part, with the majority's opinion because their readiness to insert a contractual provision where none existed can only be accomplished through ignoring long standing legal principles which this Court is legally bound to follow.

III. CONCLUSIONS.

The issue presented by this appeal is simple: whether the trial court committed legal error by not properly applying the correct legal principles of review as stated by this Court in *VanZandt*. The trial court properly applied the correct legal standard of review, and did not, as alleged by the majority, commit any legal error. To the contrary, I find the trial court's ruling predicated on clear, concise findings of applicable legal principles, and would affirm its decision for the reasons set forth in its opinion. Hence, for the reasons stated herein, I respectfully dissent.

/s/ Stephen L. Borrello