

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 11, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1770

Cir. Ct. No. 2007CV845

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MICHAEL CHAMPAN,

PLAINTIFF-RESPONDENT,

V.

VILLAGE OF ELM GROVE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. The Village of Elm Grove has appealed from an order interpreting and enforcing an agreement (the Agreement) executed by the Village and the respondent, Michael Champan, in December 1994. The trial court determined that, as used in the Agreement, the phrase “entering retirement status”

was ambiguous. After an evidentiary hearing, the trial court held that, at age 54, Champan was entitled to the same health and dental benefits that would be paid for any other supervisory or managerial employee of the Elm Grove Police Department (EGPD) entering retirement status at that time for any reason, including leaving employment due to duty disability. We affirm the trial court's order.

¶2 The action arises from injuries suffered by Champan when his squad car was struck while he was on duty as an Elm Grove police lieutenant in 1993. Following his injuries, Champan was found to be permanently disabled and unable to return to work as an EGPD officer. At the time, the Village had no policy providing health or dental benefits to members of the EGPD who became disabled while on duty, nor any policy providing benefits to other employees who became unable to work because of disability. In addition, because Champan was in a supervisory and managerial position, his position was excluded from the collective bargaining agreement between the Village and the Elm Grove Professional Police Association.

¶3 In December 1994, the Village entered into the Agreement with Champan. The Agreement provided in material part:

- 6.1 EGPD will allow Champan and his dependent family members ... to participate in the health and dental benefit plans available to supervisory and managerial employees of the Village of Elm Grove Police Department. Participation in this regard means that the Village of Elm Grove shall pay the coverage charges for Champan and his dependent family members.
- 6.2 This commitment of the Village of Elm Grove shall be in effect until Champan reaches his 54th birthday or until he obtains any employment providing health and dental benefits which renders Champan and dependent

family members (as defined in 6.1 above) ineligible to continue as participants within the Village offered health and dental benefit plans for any reason whatsoever.

6.3 Champan's participation under the Village program shall be conditioned upon his payment of whatever coverage contribution or employee offset portion is paid by other regular full-time supervisory and managerial employees of the Village of Elm Grove Police Department for similar coverage.

6.4 ...

6.5 Provided Champan and his dependents are eligible to continue as participants in the health and dental benefit programs available to other full-time supervisory and managerial employees of EGPD after Champan reaches his 54th birthday, participation will be allowed provided that Champan pays for such benefits for which he is eligible in the same amount and manner as would be paid for similar benefits by any other supervisory and managerial employee of EGPD who would be entering retirement status at that time.

¶4 In April 2007, Champan turned 54 years old. A few months before his birthday, the Village notified him that, upon turning 54, he would be responsible for paying his health and dental insurance premiums and deductibles in their entirety. Champan subsequently commenced this action, seeking a declaration that, under the Agreement, the Village was required to pay his health and dental premiums and deductibles in the same manner as it paid for active employees until they reached the age of 65 or became eligible for Medicare.

¶5 Champan contended that he was entitled to such benefits under the Agreement because those were the benefits afforded supervisors currently employed by the EGPD. Specifically, Champan alleged that under the collective bargaining agreement between the Elm Grove Professional Police Association and the Village, any officer qualifying for duty disability under the guidelines of the Wisconsin Retirement System was entitled to continued coverage under the

Village health insurance plan until age 65 or Medicare eligibility, subject to the same premium payments required of active employees. Champan also alleged that supervisors in the EGPD were afforded the same or better benefits than those afforded police officers under the collective bargaining agreement.

¶6 The Village subsequently moved for summary judgment, contending that the phrase “entering retirement status” in § 6.5 of the Agreement was unambiguous and limited Champan at age 54 to the health and dental benefits afforded employees who retire, as opposed to EGPD employees who became duty disabled. Under the Village’s construction of the Agreement, Champan would be allowed to participate in the Village’s health insurance plan, but would have to pay the full cost of that insurance.

¶7 The trial court denied summary judgment, concluding that the phrase “entering retirement status at that time” was ambiguous. The Village argues on appeal that the trial court erred in determining that the phrase was ambiguous, and therefore erred in admitting testimony as to the meaning of the phrase “entering retirement status.”

¶8 “The ultimate aim of all contract interpretation is to ascertain the intent of the parties.” *Patti v. Western Mach. Co.*, 72 Wis. 2d 348, 351, 241 N.W.2d 158 (1976). If the terms of a contract are plain and unambiguous, we will construe it as it stands. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990).

¶9 Determining whether a contract is ambiguous presents a question of law that is reviewed de novo by this court. *Id.* A contract is ambiguous if its terms are reasonably or fairly susceptible to more than one construction. *Id.* When the language of a contract is ambiguous, then the court is not restricted to

the face of the instrument in ascertaining intent, but may consider extrinsic evidence. *Patti*, 72 Wis. 2d at 351.

¶10 In support of its argument that “entering retirement status” is unambiguous, the Village argues that, when the Agreement was executed in 1994, defined benefits existed only for active employees and retired employees. While active employees received subsidized health and dental benefits, retired employees could participate in the health plan, but were required to bear the entire cost of doing so. The Village argues that, by custom and usage, the term “retirement” as used in § 6.5 therefore denominated only age-related, voluntary retirement because that was the only type of retirement that was recognized by the Village in 1994, and for which an unsubsidized health benefit was provided. Because duty disabled employees had no defined benefits at that time, the Village argues that the parties could only have intended that, when Champan reached age 54, he would be entitled to continue in the health plan in the manner afforded other employees who had voluntarily retired for age-related reasons. It argues that no other reasonable interpretation of § 6.5 of the Agreement is possible.

¶11 We conclude that the trial court correctly determined that the meaning of the phrase “entering retirement status at that time” was ambiguous. “The trial court’s task was not to set forth an abstract, general definition of the word ‘retirement,’ but to ascertain the intention of the parties when they used this word in this agreement.” *Id.* at 355. The Agreement does not explain or define “retirement status” in any way. As such, it could mean anything from voluntary or mandatory age-related retirement, unilateral voluntary retirement, or forced termination of employment due to duty disability or other causes. *Cf. id.* at 352. Moreover, § 6.5 provides that, at age 54, Champan could participate in health and dental benefit programs provided that he paid in the same amount and manner as

paid by other supervisory or managerial employees of EGPD who would be “entering retirement status *at that time.*” (emphasis added). Section 6.5 therefore did not unambiguously limit Champan, at age 54, to the same benefits available to employees who retired voluntarily without a duty disability.

¶12 When the terms of a contract are ambiguous, the sense in which the parties intended the words to be used is a question of fact. *Id.* at 353. The trial court therefore properly resorted to extrinsic evidence to determine the meaning of the Agreement, *id.* at 352, including permitting testimony as to the parties’ intent in entering the Agreement, *see Conrad Milwaukee Corp. v. Wasilewski*, 30 Wis. 2d 481, 488, 141 N.W.2d 240 (1966).

¶13 On review of a factual determination made by the trial court without a jury, this court will not reverse the trial court’s findings unless they are clearly erroneous. *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983); WIS. STAT. § 805.17(2) (2007-08).¹ In addition, “[i]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact. The reason for such deference is the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976) (footnote omitted).

¶14 Testimony at the evidentiary hearing indicated that the Agreement was drafted on behalf of the Village by its attorney, Hector de la Mora, who

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

inserted the phrase “entering retirement status” into the Agreement. After drafting the Agreement, Attorney de la Mora sent a copy of it to Attorney Gary Kuphall, a personal injury lawyer who was representing Champan in an action against the driver of the vehicle that struck Champan’s squad car. Attorney Kuphall testified that he understood the Agreement to mean that the Village would guarantee paying health and dental premiums for Champan until he was 54 and, at that time, Champan would receive whatever benefits were provided to duty disabled EGPD officers, if any. However, because he was not directly representing Champan in the negotiation of the Agreement and had only limited input in suggesting revisions after the Agreement was initially drafted by Attorney de la Mora, Attorney Kuphall told Champan to talk to Attorney de la Mora or the Village for clarification.

¶15 Champan testified that he and his wife went to Attorney de la Mora’s office to sign the Agreement on December 23, 1994. He testified that they were sent to a conference room to review the Agreement. Champan testified that after reviewing the Agreement, he asked Attorney de la Mora to clarify the meaning of “retirement status” in § 6.5 of the Agreement. Champan testified that he was “going out” on a duty disability, and wanted to clarify that “retirement status” included duty disability.

¶16 Champan testified that in response to his inquiry, Attorney de la Mora assured him that “retirement status” included duty disability. He testified that Attorney de la Mora told him that the Agreement was written about him and that duty disability was his retirement status, so duty disability retirement was included in the phrase “entering retirement status.” Champan testified that Attorney de la Mora told him that because “retirement status” included duty disability, duty disability did not have to be expressly stated in writing.

¶17 Champan testified that he therefore understood that when he reached age 54, he would be entitled to whatever benefits were in place for duty disabled officers. He testified that without this clarification, he would not have signed the Agreement because it did not specifically refer to duty disability. Champan's testimony was corroborated by his wife.²

¶18 Attorney de la Mora also testified at the evidentiary hearing. Although he indicated that he did not remember the signing of the Agreement, he testified that his understanding of the purpose of § 6.5 of the Agreement was “[t]o basically provide language that at a certain point in time that he would be eligible for benefits that may be available to any other supervisory or managerial employee of Elm Grove who would be entering retirement status at that time, whatever those benefits would be.” Attorney de la Mora testified that since there was no provision for benefits to be provided to disabled supervisory or managerial employees at the time of Champan's departure in 1994, “this left open the possibility that should that be provided at a later point in time, he would gain the benefit of that.”

¶19 In 1998, the Elm Grove Professional Police Association and the Village adopted a provision in the Association's collective bargaining agreement to provide that any officer who qualified for duty disability under the guidelines of the Wisconsin Retirement System was entitled to continue coverage under the Village health insurance plan until age 65, subject to the same premium payments

² Both Champan and his wife indicated that they remembered the conversation particularly well because they were upset by Attorney de la Mora's comment that he did not know why the Village was treating Champan differently than it would treat a librarian.

as active employees. This provision remained in effect when Champan turned 54 in April 2007.

¶20 Based on the testimony of the Champans and Attorney de la Mora, the trial court found as fact that the phrase “entering retirement status” in § 6.5 included EGPD managerial and supervisory employees whose employment ends because of duty disability, as well as employees who retire for other reasons. It found that, under § 6.5, Champan was entitled to the same benefits as those afforded a supervisory or managerial employee of the EGPD who retired or left employment based on duty disability in April 2007.

¶21 The trial court was entitled to find that the Champans were credible. In conjunction with Attorney de la Mora’s testimony and the language of the Agreement, its finding that the parties intended to afford Champan, at age 54, the same benefits as those afforded any other supervisory or managerial employee of the EGPD who retired on duty disability in April 2007 is not clearly erroneous.

¶22 In challenging the trial court’s findings as to the meaning of § 6.5, the Village argues that the evidence regarding Attorney de la Mora’s statements to the Champans at the time they executed the Agreement should not have been considered by the trial court because Attorney de la Mora had no authority to bind the Village to an interpretation of the Agreement that was different than what the Village intended. We reject this argument because the testimony clearly indicated that Attorney de la Mora was authorized to draft the Agreement on behalf of the Village. In addition, as noted by the trial court, he was the only representative of the Village present when the Champans came to his office to execute the Agreement. A few days after the Champans signed the Agreement, the Village president signed the Agreement on behalf of the Village.

¶23 The Village was thus bound by the Agreement, including § 6.5. The phrase “entering retirement status” in § 6.5 was ambiguous, and construing it to include retiring as duty disabled constituted a reasonable construction supported by the testimony at the evidentiary hearing and the language of the Agreement itself. In addition, the trial court’s construction of the phrase was consistent with well-established law providing that any ambiguities in a contract must be construed against its drafter.³ See *Hunzinger Const. Co. v. Granite Resources Corp.*, 196 Wis. 2d 327, 339, 538 N.W.2d 804 (Ct. App. 1995).

¶24 In affirming the trial court’s order, we also reject the Village’s argument that the trial court’s construction of § 6.5 renders the Agreement void for indefiniteness. Vagueness or indefiniteness concerning an essential term of a contract prevents the creation of an enforceable contract because a contract must be definite as to the parties’ basic commitments and obligations. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996). However, a contract is not indefinite merely because some of its provisions are ambiguous. See *id.*

³ In arguing that its intent was different than that expressed by Attorney de la Mora, the Village relies on the testimony of Neil Palmer, who was the Village president at the time of the hearing and was chairman of the Administrative and Personnel Committee in 1994, which recommended to the Village Board that it approve the Agreement. However, Palmer did not participate in the actual drafting of the Agreement, nor did his committee insert the language contained in § 6.5 or meet with Attorney de la Mora respecting the drafting of the Agreement. Palmer had no discussions about the Agreement with Champan, Attorney Kuphall, or Attorney de la Mora. Except for Attorney de la Mora, no other witness for the Village had first-hand knowledge concerning the drafting and execution of the Agreement. Because Attorney de la Mora was responsible for drafting the Agreement and only he and the Champan had firsthand knowledge of the discussions that occurred when the Agreement was executed by the Champan, the trial court reasonably gave greatest weight to their testimony.

¶25 The Village contends that, under the construction proposed by Champan and adopted by the trial court, the Agreement was indefinite and unenforceable because the Village's obligation was dependent on unknown, future events. We disagree. The Agreement obligated the Village to provide Champan, at age 54, with the same health and dental benefits provided to other supervisory and managerial employees of the EGPD who retired based on duty disability. While the precise nature and terms of the benefits to which managerial and supervisory employees of the EGPD would be entitled in April 2007 was unknown in 1994, the Village's obligation to provide Champan with those benefits was clear and definite.

¶26 Similarly, we reject the Village's argument that the trial court's construction of § 6.5 renders the clause surplusage. The Village contends that the trial court's ruling makes the phrase "entering retirement status" surplusage because, if the parties did not intend to change Champan's benefits when he reached age 54, there was no need to include § 6.5.

¶27 As set forth above, the purpose of § 6.5 was to afford Champan, at age 54, the same benefits that the Village then provided to other managerial or supervisory employees of the EGPD. If the Village had no obligation to pay health and dental benefits for other managerial or supervisory employees of the EGPD who retired on duty disability in April 2007, then the Village's obligation to pay for benefits for Champan would have ended. If, as occurred, the Village was required to pay health benefits for other managerial or supervisory employees of the EGPD entering retirement status on duty disability in April 2007, then the Village was required to provide the same benefits to Champan. The provision was therefore clearly not surplusage.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

