

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 99-1663

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NORMAN W. JAHN,

PLAINTIFF-APPELLANT,

V.

CITY OF SHAWANO, DONALD A. JEFFRIES, KENNETH HAGEN, FREDERICK J. DAVEL, MYRON D. HEISTAD, DANIEL R. MAUEL, ROBERT F. SHANAHAN, JEFFREY J. HEFFERNON, HAROLD L. BURRACK, RANDALL E. WRIGHT, TIMOTHY J. SCHMID AND CHARLES DAILY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Shawano County:
ROBERT A. KENNEDY, SR., Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Police Chief Norman Jahn appeals an order enforcing a comprehensive settlement agreement that terminates a lawsuit and

several other disputes between Jahn, the City of Shawano and various individuals. He argues that the agreement is unenforceable because he lawfully rescinded it due to the City's failure to comply with some of its provisions. Because we conclude that the City's conduct provides no basis for rescinding the settlement agreement, we affirm the order.

¶2 Jahn's complaint alleges that the City and other defendants conspired to remove him from office and maliciously injure his reputation and tortiously interfered with his employment contract. The parties apparently anticipated counterclaims by one or more of the individual defendants. By agreement signed March 3, 1999, the parties reached the following settlement:

- (1) The City and its insurer would pay Jahn \$200,000 upon his resignation. Jahn was to inform the City by March 10, 1999, whether he wanted any of the payment to be deferred.
- (2) Jahn will resign upon completion of all settlement documents. "The parties anticipate completion no later than 3/13/99."
- (3) The City will pay for continuation of Jahn's family insurance for six months following his resignation.
- (4) All parties to this lawsuit shall sign mutual releases.
- (5) The parties will issue a joint press release, the terms to be agreed upon later.
- (6) The City and its employees shall give Jahn a neutral or positive job reference.
- (7) The agreement is subject to and contingent upon approval by the Shawano Common council.

¶3 On the day the agreement was reached, the city council approved the contract in closed session.¹ On March 11, 1999, the City presented proposed release documents that included two provisions outside the scope of the March 3 agreement: (1) a paragraph indicating that no city records or documents shall be removed from the police department and originals and copies of any records or documents shall be returned to the police department; and (2) Jahn would agree not to retaliate against any of the parties. The City's attorney also indicated by letter that one of the defendants, Randall Wright, would not sign the mutual release. The City proposed and offered an indemnification clause to Jahn instead of Wright's release. Jahn immediately rejected the proposed changes. Over the next several days, the parties continued to negotiate modification of the settlement agreement. Jahn indicated that Wright's refusal to sign a mutual release "would be a deal breaker." Jahn insisted on compliance with the initial agreement.

¶4 All of the defendants except Wright executed releases between April 11 and April 21, 1999. On April 12, the City filed a motion to enforce the settlement agreement. Wright's privately retained attorney submitted a letter dated April 16, stating that Wright did not oppose the motion to enforce the settlement agreement on the terms set forth in the motion. Jahn opposed the motion, arguing that he had the right to rescind the March 3 agreement because the defendants failed to live up to the settlement agreement. He characterizes his

¹ It appears that the language of the agreement was not before the council at the time it voted. The trial court questioned whether the approval was valid, and set a hearing date to take additional evidence on the council's procedure. The City presented evidence that the council reaffirmed its approval on May 5, 1999. The court found that the City approved the agreement, and concluded based on its own legal research that the March 3, vote was valid even if the written agreement was not before the council members at that time. Because that conclusion is not challenged on appeal, this court will not address issues relating to the court allowing additional evidence of the council's subsequent vote.

“deal breaker” language in his March 16 letter as a rescission, and urged the court not to enforce the terms of the City’s revised settlement offer to which Jahn never agreed.

¶5 On May 13, the trial court ordered that the March 3 agreement was binding as to all parties, including Wright. On July 7, Wright’s new attorney advised the court that Wright had signed the mutual release. Jahn’s counsel objected to the form of the releases and proposed his own form. The trial court ordered that Jahn’s release forms should be used. All of the defendants executed the new release forms which were filed with the court on September 10.

¶6 Most of Jahn’s arguments are based on the erroneous premise that the City breached the March 3 agreement by failing to timely perform. The agreement set no firm deadlines for the City to act. Contrary to Jahn’s argument, the City was not required to pay Jahn by March 10. Completion of all settlement documents was not required by March 13. The contract only indicated that the parties “anticipate” completion by that date.

¶7 The contract does not specify that time was of the essence. Therefore, the law implies a reasonable time for performance. *See Schneider v. Schneider*, 132 Wis. 2d 171, 174, 389 N.W.2d 835 (Ct. App. 1986). The City promptly approved the settlement agreement, offered to indemnify Jahn for any loss he might suffer as a result of Wright’s refusal to sign a release and, when Jahn refused that offer, commenced a legal action within thirty days that resulted in an order compelling Wright to comply with the agreement. Therefore, the City complied with the March 3 agreement within a reasonable time. Some of the delay in implementing the agreement resulted from Jahn’s attempt to rescind the agreement and his opposition to the City’s motion to compel compliance.

¶8 Jahn argues that he lawfully rescinded the contract on March 16, based on the City's inability to secure Wright's release. A contract may be rescinded when a party unjustifiably or persistently refuses to perform a material contract obligation or is so neglectful in the performance of the contract as to indicate an intention not to comply substantially with it. It is based on the attitude of the other party indicating repudiation. *See Shy v. Industrial Salvage Material*, 264 Wis. 118, 124-25, 58 N.W.2d 452 (1953). Nothing in the City's conduct can be reasonably construed as a repudiation of the March 3 agreement. When the City attempted to add additional language to the agreement and Jahn refused to accept that language, the City did not repudiate the agreement. Rather, it continued to attempt to satisfy Jahn by offering to indemnify him if Wright's lawsuit went forward and ultimately secured a court order requiring Wright to comply with the agreement. Because the City complied with the agreement within a reasonable time, Jahn has not established an unjustifiable or persistent refusal to perform a material contract obligation.

¶9 The trial court's order enforcing the agreement did not add any provisions to the March 3, agreement other than creating specific deadlines for the parties' actions. Jahn cannot complain that the trial court's order requires performance after Jahn "missed his window of opportunity" for securing alternate employment. Even if that were true, the absence of specific dates in the March 3 agreement is the cause of Jahn's problems. The trial court's decision supplying specific dates for performance does not constitute "ordering terms of a settlement agreement which neither party agreed to."

¶10 Finally, Jahn argues that the City negotiated in bad faith when it failed to inform him of other complaints that had been filed against him and that the City's negotiator at the March 3 meeting subsequently made statements that

showed that the City did not consider the March 3 agreement “a done deal.” Neither of these issues was adequately presented to the trial court, and the trial court did not rule on them. Therefore, they are not properly preserved for appeal. In addition, the record before this court does not establish any misrepresentation by the City regarding the pendency of other complaints and Jahn has cited no law placing a duty on the City’s negotiator to inform him of legal action that might be taken by individuals who are not parties to this lawsuit. The statements made by the City’s negotiator were not sufficiently specific to demonstrate that the City considered the March 3 agreement anything other than a “done deal.” In any event, the March 3 contract speaks for itself, and subsequent statements by the City’s negotiator are not relevant to this court’s construction of the unambiguous settlement agreement.

By the Court.—Order affirmed.

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

