COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2380

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JOHN J.A. REUTER,

PLAINTIFF-APPELLANT,

V.

COVENANT HEALTHCARE SYSTEM, INC. AND COVENANT MEDICAL GROUP, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Reversed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. John J.A. Reuter appeals from the trial court order for summary judgment dismissing his claim against Covenant Healthcare System, Inc., and Covenant Medical Group, Inc. (collectively, "Covenant"). He argues

that the trial court erred: (1) in concluding that Covenant's motion to dismiss and his motion for summary judgment were reciprocal motions; (2) in looking outside his written agreement with Covenant to determine whether he was entitled to severance pay; and (3) in concluding that no material factual disputes precluded summary judgment. Because we conclude that the trial court erred in determining that there was no material factual dispute regarding whether Reuter was entitled to severance pay under the agreement, we reverse.[1]

¶2 Reuter worked as the administrator of Harwood Medical Associates, S.C., a physician group practice. When Harwood and another entity, WFSI-Milwaukee, formed a management services organization, Reuter was asked to become its chief operating officer. Concerned, however, that he would lose certain benefits he had enjoyed at Harwood, and that he would not become vested in the new organization's pension plan for five years, Reuter negotiated an agreement, summarized in the December 4, 1991 letter from John R. Neuberger, Vice President—Physician Development.[2] In relevant part, the letter stated:

> A severance agreement comprising 10% of your annualized salary and any bonuses for each year of employment … up to a maximum of 5 years of credit of service. As so designed, and assuming you remain an employee of the organization for 5 years, you will have earned a severance arrangement equalling 50% of your last year's salary and bonuses to be payable upon termination

[1] We note that the basis for this appeal was the trial court's review of a decision by the Department of Workforce Development. Curiously, however, the trial court decision makes no reference to either the department's decision or the standards governing its review. Further, the parties on appeal make no reference to the department's decision or to the degree of deference we should accord it. They brief this appeal solely on the basis of traditional summary judgment standards. Accordingly, we address this appeal in corresponding fashion.

[2] Neuberger was employed by WFSI-Milwaukee, and the agreement was between Reuter and WFSI-Milwaukee. During the period of Reuter's employment, WFSI-Milwaukee changed its name to Covenant Healthcare System, Inc. For convenience in this opinion, we will refer to the agreement as one between Reuter and Covenant.

> regardless of reason. *This arrangement is being provided in lieu of the fact that you will not be vested with the … Pension Plan until after 5 years of employment.* Should this employment … last less than 5 years, the severance arrangement will be equal to a 10% cumulative per year for the years of service rendered.

(Emphasis added.)

¶3 After being employed with Covenant for more than five years, Reuter left and sought severance pay under the agreement. Covenant refused his request, maintaining that the agreement provided for severance pay only if Reuter was terminated before becoming vested under Covenant's pension plan. Reuter, however, contending that the agreement was intended as an inducement to leave his previous employment, sued for $63,774, the severance pay to which he claims he and Covenant agreed.

¶4 The trial court concluded that the Reuter-Covenant agreement was ambiguous on the subject of Reuter's entitlement to severance pay. Then, viewing Covenant's motion to dismiss and Reuter's motion for summary judgment as reciprocal motions, the trial court concluded that because Reuter had worked for Covenant for more than five years, he had become vested in Covenant's pension plan and therefore was not entitled to severance pay. Accordingly, the trial court granted summary judgment to Covenant.[3] Reuter moved for reconsideration; the trial court denied his motion.

¶5 Reuter first argues that the trial court erred in viewing the motions as reciprocal ones seeking summary judgment and, therefore, in viewing his motion

[3] Because Covenant's motion to dismiss Reuter's complaint was accompanied by submissions outside the pleadings, the trial court informed the parties that it would treat the motion as one for summary judgment, and would allow them to supplement their filings. The parties did so, submitting affidavits, deposition transcripts, motions and briefs.

as a tacit stipulation to the factual basis on which the court could make its determination. Covenant responds, in effect, that Reuter should be held to the motion, which, after first asking the court to determine that "the agreement is not ambiguous as it pertains to [his] right to receive a severance pay," also requested "[i]n the event it is determined that the [agreement] contains ambiguity, [a] finding that there is no material issue of fact with respect to [his] rights to receive severance pay."

¶6 Covenant is incorrect. The record clearly establishes that Reuter *alternatively* argued: (1) that the agreement is unambiguous regarding his right to receive severance pay; (2) that the summary judgment submissions establish that any ambiguity should be resolved in his favor; and (3) that, at the very least, the submissions establish a material factual issue to be resolved at trial. As Reuter's attorney argued at the motion hearing, "If … we need some explanations, then nobody should get summary judgment here because … there probably are issues."

¶7 Thus, Reuter's argument that the trial court erred in viewing the parties' motions as reciprocal ones for summary judgment is academic. After all, Reuter's primary point is that he and Covenant differ on the meaning of their agreement regarding severance pay and that his interpretation of their agreement should prevail. Thus, the issue is not whether the trial court properly viewed the motions as reciprocal ones seeking summary judgment, but whether the trial court erred in concluding: (1) that the agreement was ambiguous; and (2) that its ambiguity resolved in Covenant's favor based on summary judgment submissions.

¶8 Reuter argues that the sentence—"As so designed, and assuming that you remain an employee of the organization for 5 years, you will have earned a severance arrangement equalling 50% of your last year's salary and bonuses to be

payable upon termination regardless of reason."—unambiguously provides for the severance pay he seeks. He maintains that the next sentence—"This arrangement is being provided in lieu of the fact that you will not be vested with the … Pension Plan until after 5 years of employment."—contains general language that does not alter the terms of the more specific preceding sentence. The trial court, however, reading the sentences together, concluded that the agreement was ambiguous.

¶9 Whether contractual language is ambiguous presents an issue of law subject to *de novo* review. *See* ***Capital Invs., Inc. v. Whitehall Packing Co.***, 91 Wis. 2d 178, 189, 280 N.W.2d 254 (1979). Here, we conclude that the trial court correctly determined that the agreement was ambiguous. In particular, the "in lieu of" language leaves considerable uncertainty. BLACK'S LAW DICTIONARY 787 (6th ed. 1990) defines "in lieu of" as "[i]nstead of; in place of; in substitution of." But it is not uncommon to see "in lieu of" incorrectly used to mean "in light of."

¶10 If, in this agreement, the parties intended "in lieu of" to mean "instead of" or "in place of" or "in substitution of," the language arguably supports Covenant's position that the agreement only provided severance pay if Reuter worked less than five years. If, however, the parties intended "in lieu of" to mean "in light of," the language supports Reuter's position that severance pay was an employment incentive, over and above vested pension rights that would come after five years. In short, the agreement simply fails to clarify whether Reuter, if employed at Covenant for more than five years, would be entitled to severance pay in addition to the pension benefits vesting after five years.

¶11 Reuter acknowledges that the trial court, having concluded that the agreement was ambiguous, was entitled to proceed based on all the submissions. Reuter also acknowledges that, in meeting Covenant's motion for summary

judgment, he had the burden of proving his entitlement to the disputed severance pay. He contends, however, that the trial court erred by, in effect, assuming the jury's role and determining whether he had carried his burden. Reuter is correct.

¶12 Applying the well-known methodology that need not be repeated here, we review a trial court's grant of summary judgment *de novo*. *See* ***Kallas v. B&G Realty***, 169 Wis. 2d 412, 417, 485 N.W.2d 278 (Ct. App. 1992). "Summary judgment is appropriate when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law." ***Millen v. Thomas***, 201 Wis. 2d 675, 682, 550 N.W.2d 134 (Ct. App. 1996). We will reverse a trial court's grant of summary judgment where material factual matters are in dispute. *See* ***Markunas v. Sentry Ins. Co.***, 185 Wis. 2d 852, 856, 519 N.W.2d 688 (Ct. App. 1994).

¶13 Granting summary judgment, the trial court referred to the parties' submissions, noted evidence that could support their respective theories, and concluded that "[a] more reasonable interpretation of the [sentence containing the "in lieu of" language] taken as a whole … and the obvious explanation is that the severance payment was in place of the pension benefit and the plaintiff would be entitled to severance pay once he was vested in the pension plan."[4] But even the trial court's decision and, in particular, its summary of the depositions of Reuter and Thomas Feurig, WFCI-Milwaukee's president with whom Reuter negotiated the agreement, articulates a plausible basis for Reuter's theory and refers to an evidentiary basis plainly placing the central material issue in dispute.

[4] Apparently, either the trial court intended to say "and the plaintiff would *not* be entitled to severance pay once he was vested in the pension plan," or the court reporter erroneously transcribed the trial court's actual statement.

¶14 Covenant maintains that Reuter's trial counsel "failed to specify any factual dispute during the motion hearing beyond the insufficient (and factually unsupported) speculation that there 'probably' were fact disputes." Citing ***Fritz v. McGrath***, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988), in which this court stated that "[g]enerally, we do not consider arguments broadly stated but never specifically argued," Covenant maintains that Reuter "has never succinctly enunciated the purported factual dispute" and now is attempting "to create fact disputes for the first time on appeal." We disagree.

¶15 Perhaps if this were a subtle dispute, Covenant's premise might prevail. That is, if the material factual dispute were less obvious, Reuter might have had to pinpoint a material factual dispute in order to defeat summary judgment. Here, however, the factual question is apparent: What did the parties intend to provide in their agreement on the subject of severance pay after five years of employment?

¶16 Looking at both the agreement and the summary judgment submissions, each party offers plausible theories. For example, as Covenant points out, Reuter, formerly a certified public accountant, certainly could have drafted an agreement to clarify his entitlement to the severance pay he now seeks. But as Reuter points out, Covenant drafted the agreement and, if the agreement terminated his right to severance pay after five years, he failed to achieve what he thought he was accomplishing by negotiating the agreement. Clearly, a material factual issue exists and, therefore, the trial court erred in granting summary judgment.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).