COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP1789 **Cir. Ct. No. 2003CV1582**

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

SHELDON VIELIE,

PLAINTIFF-APPELLANT,

V.

AURORA PHARMACY, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Sheldon Vielie appeals from a summary judgment in favor of Aurora Pharmacy, Inc. Vielie contends that the circuit court erred when it determined that Vielie did not hold two enforceable bonus compensation contracts with Aurora. In so holding, the circuit court applied the doctrine of mistake, drawing on public policy attributed to our supreme court's decision in ***Batteries Plus, LLC v. Mohr***, 2001 WI 80, 244 Wis. 2d 559, 628 N.W.2d 364. We conclude that the circuit court correctly granted summary judgment, but we employ different reasoning.

FACTS

¶2 The relevant facts are undisputed. Vielie worked part time for Aurora for a number of years before accepting a full-time position as a pharmacist on October 29, 2001. At that time, Aurora offered a bonus program pursuant to a document entitled "EMPLOYMENT AGREEMENT – PHARMACIST." The parties signed the employment agreement on November 1, 2001 (November agreement). It stated in relevant part:

> **COMPENSATION**.
>
> ….
>
> B. Payments. In addition to base compensation, Employer will pay the following amounts to Employee as follows (subject to repayment as specified)
>
> Within 20 days of commencement of employment with the Employer, the sum of $4,000.00;
>
> Provided Employee works for Employer continuously through the date six months after the start of employment, the sum of $2,000.00;
>
> Provided Employee works for Employer continuously through the date one year after start of employment, the sum of $2,000.00.

> C. In the event Employee does not remain continuously employed by Employer for a reason other than Employee's death or permanent and total disability through the date twenty-four months after any such payment is made, Employee shall be obligated to repay Employer within 30 days of termination a prorated portion of each such payment made determined by multiplying by a fraction with a numerator of (24 minus the number of full calendar months worked for Employer from the date of each payment) and a denominator of 24. Repayments shall bear interest at the rate of ten percent per annum until paid.

Aurora paid Vielie a $4,000 bonus on December 7, 2001.

¶3 In February 2002, Aurora promoted Vielie to chief pharmacist. Aurora sent a letter (the February agreement) to Vielie, which included the following relevant language:

> Pursuant to the arrangement, if you remain employed continuously for a two year period and devote all of your professional time and attention as a Chief Pharmacist on a full time basis … Aurora will pay you the sum as follows:
>
> > Within 25 days of commencement of signed document by both parties, the sum of $5,000.00;
> >
> > Provided you work for Aurora continuously through the date six months after the signing of the document, the sum of $2,500.00;
> >
> > Provided you work for Aurora continuously through the date one year after signing of the document, the sum of $2,500.00.

Vielie signed the agreement on February 14, and Aurora signed it on February 20, 2002. Pursuant to the terms of the February agreement, Aurora paid Vielie $5,000 on March 1, 2002, and $2,500 on September 13, 2002; therefore, between December 7, 2001, and September 13, 2002, Aurora paid Vielie a total of $11,500 in bonus compensation. Aurora made no other bonus payments to Vielie.

¶4 Vielie filed suit against Aurora contending that he was entitled to an additional $6,500 pursuant to the bonus provisions of the November agreement and the February agreement.[1] Aurora submits that it has already overpaid Vielie and nothing more is due. The circuit court agreed that Aurora owes no additional bonus compensation to Vielie. Vielie appeals.

DISCUSSION

¶5 When reviewing a summary judgment, we perform the same function as the trial court and review the matter de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment must be affirmed where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2003-04). If a determination of law will conclude the case, summary judgment should be granted. ***Northwest Eng'g Credit Union v. Jahn***, 120 Wis. 2d 185, 187, 353 N.W.2d 67 (Ct. App. 1984).

¶6 We will reverse a decision granting summary judgment if either (1) the trial court incorrectly decided legal issues, or (2) material facts are in dispute. ***Deminsky v. Arlington Plastics Mach.***, 2001 WI App 287, ¶9, 249 Wis. 2d 441, 638 N.W.2d 331, *aff'd*, 2003 WI 15, 259 Wis. 2d 587, 657 N.W.2d 411. When both parties move for summary judgment and neither argues that factual disputes bar the other's motion, the practical effect is that the facts are

[1] Vielie contends that Aurora owes him the two additional payments of $2,000 under the November agreement and the final $2,500 under the February agreement.

stipulated and only issues of law remain.[2] ***Lucas v. Godfrey***, 161 Wis. 2d 51, 57, 467 N.W.2d 180 (Ct. App. 1991).

¶7 Here, we first determine whether both the November and February agreements constitute valid contracts. If so, we must determine whether the February bonus plan adds to, modifies, or supersedes the November bonus plan. Where the material facts are not in dispute, the existence and interpretation of a contract become questions of law which we decide de novo. ***Piaskoski & Assocs. v. Ricciardi***, 2004 WI App 152, ¶7, 275 Wis. 2d 650, 686 N.W.2d 675, *review denied*, 2004 WI 138, 276 Wis. 2d 27, 689 N.W.2d 55 (WI Sept. 16, 2004) (No. 2003AP9).

¶8 A contract requires an offer, acceptance, and consideration. ***Id.*** Offer and acceptance exist when both parties express assent, and consideration exists if the parties demonstrate an intent to be bound by the contract. ***Id.*** Vielie argues that two separate, equally valid contracts exist. Aurora does not dispute that two agreements, November and February, exist. Likewise, the circuit court held that "[t]here's no dispute about what the amounts of the two bonuses were that were described in these two contracts." We agree and conclude that both the November and February agreements were valid contracts. We turn then to the issue of whether the February bonus plan modified or superseded the November bonus plan or whether it stood as a separate and independently enforceable contract.

[2] Neither party claims that there are disputed material facts and both submit that the matter is appropriate for summary judgment disposition.

¶9 Vielie argues that the February agreement should be enforced as a separate bonus plan payable in addition to the $8,000 bonus described in the November agreement. He asserts that the language of the agreements is unambiguous and rests his argument largely on two facts. First, the November agreement provides for bonus compensation if Vielie "works for [Aurora] continuously" through the specified term of employment. Vielie points out that the November agreement "contains no language to indicate that Aurora is relieved of this obligation if Vielie were to assume another position in the company." Second, Vielie notes that the February agreement contains no language to indicate it superseded or otherwise modified the November agreement. He concludes that "straightforward contract principles" support his claim for the bonus payments under both agreements.

¶10 Aurora counters that Vielie has no viable claim because the February agreement was a mistake and constituted a violation of Aurora's policy against multiple bonus plans. Pursuant to Aurora's retention bonus policy, Vielie was entitled to a total bonus of $9,875 for the staff and chief pharmacist positions he held.[3] In the alternative, Aurora argues that the November agreement gave Aurora the right to terminate Vielie's employment and the bonus compensation plan without cause upon two weeks' notice. "Thus, even under the February 2002 Agreement, logic would dictate that once Vielie was placed on notice of Aurora's mistake [in offering a second bonus] (which can be viewed as a *de facto*

[3] Aurora calculates the bonus as follows: Vielie is entitled to a bonus of up to $8,000 for twenty-four months of continuous employment as a staff pharmacist; a chief pharmacist may receive a bonus of up to $10,000 for twenty-four months of continuous employment; therefore, Vielie is entitled to a prorated portion of the additional $2,000 for that part of the original twenty-four month term he served as a chief pharmacist. Aurora states that it has overpaid Vielie by $1,625, but it is willing to forego any repayment and "call it even."

termination of the [November] Agreement), he could not claim he was entitled to more money." Aurora asks us to affirm the circuit court's conclusion that summary judgment in its favor was proper.

¶11 The circuit court held that the February agreement was a mistake because it was contrary to Aurora's policy regarding bonus compensation. It further held that public policy allows an employer, "when policies are clearly stated and existing, to correct an error." We disagree. "A mere mistake on the part of one, in the absence of fraud on the part of the other, is not such to avoid a contract obligation." ***Gielow v. Napiorkowski***, 2003 WI App 249, ¶23, 268 Wis. 2d 673, 673 N.W.2d 351 (citation and emphasis omitted), *review denied*, 2004 WI 20, 269 Wis. 2d 200, 675 N.W.2d 806 (WI Feb. 24, 2004) (No. 2003AP50). There is no evidence in the record that Vielie committed fraud to procure the February agreement.[4] We conclude that the circuit court correctly granted summary judgment, but we apply a different analysis. If a trial court applied an incorrect legal standard, we still may affirm if the "facts of record applied to the proper legal standard support the trial court's conclusion." ***State v. Pittman***, 174 Wis. 2d 255, 268-69, 496 N.W.2d 74 (1993).

¶12 Here, there is no dispute that the November agreement reflects the parties' intent to enter into an employer/employee relationship whereby Vielie would serve as a full-time staff pharmacist and in return Aurora would pay him a salary plus the bonus compensation set forth in that agreement. Further, there is no dispute that in February 2002, Aurora sent Vielie a letter offering him a bonus

[4] Aurora employee John Gates testified that he knew of no improper conduct on the part of Vielie in connection with the February agreement.

plan in connection with his new role of chief pharmacist. Vielie signed the February agreement, and Aurora signed as well. In doing so, both parties adopted a new obligation toward the other.

¶13 Wisconsin law recognizes novation by substitution of obligations between the same parties. ***Navine v. Peltier***, 48 Wis. 2d 588, 594, 180 N.W.2d 613 (1970). Novation contemplates a substitution of a new contract for a previous one. ***State Med. Soc'y v. Associated Hosp. Serv., Inc.***, 23 Wis. 2d 482, 490, 128 N.W.2d 43 (1964). When considering whether novation occurred, two questions are presented: (1) do the facts show consent by the parties, and (2) was there sufficient consideration to support the new obligation. *See* ***Navine***, 48 Wis. 2d at 594.

¶14 Here, the record demonstrates that both Vielie and Aurora signed the February agreement. Neither contends that their signing was anything other than voluntary, and Aurora commenced performance under the February agreement by paying the first two bonus installments.

¶15 Furthermore, the February agreement was supported by consideration. Vielie, in his new position as chief pharmacist, took on more employee management responsibility. In return, Aurora increased Vielie's wages and offered an increased bonus associated with Vielie's continued employment. We conclude that novation by substitution of obligations occurred; the February bonus plan superseded the November bonus plan. It is not necessary that the parties never expressly called the February agreement a "substitution." *See* ***id.*** "[I]t may be implied from the facts and circumstances of the transaction and the conduct of the parties …." ***Id.*** at 594-95 (citation omitted).

¶16 We reverse the circuit court's holding that the doctrine of mistake absolves Aurora of its obligation to pay Vielie the bonus compensation promised by the February agreement. However, we affirm the circuit court's denial of summary judgment to Vielie. Vielie cannot stack the $10,000 bonus plan on top of the $8,000 bonus plan. We remand with directions for the circuit court to enter judgment in favor of Vielie in the amount of $2,500, which represents Aurora's final bonus payment to Vielie under the February bonus compensation agreement.[5]

CONCLUSION

¶17 We hold that because no issues of material fact exist and the matter can be decided by the application of existing legal principles, summary judgment is an appropriate vehicle for resolving this case. We conclude that the parties entered into a valid employment agreement and bonus compensation plan in November 2001, which was superseded by the bonus compensation plan described in the February 2002 agreement letter. Upon payment of the final $2,500 to Vielie, Aurora's obligation under the February 2002 bonus compensation plan will be discharged.

¶18 Costs are denied to both parties.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

[5] Normally, the amount of the judgment would be a determination for the circuit court; however, here the parties have stipulated to the bonus compensation promised by the February agreement and to the bonus payments already made by Aurora to Vielie. Consequently, the amount due Vielie under the agreement is not a disputed issue.