COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3332

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

JAMES C. THOMSON,

PLAINTIFF-APPELLANT,

V.

UNITED WATER SERVICES MILWAUKEE, LLC, AND UNITED WATER RESOURCES, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. James C. Thomson appeals from the grant of summary judgment awarded to United Water Services Milwaukee, LLC, and United Water Resources, Inc. (collectively, UW), dismissing his breach of contract action. Thomson contends that the circuit court erred in granting summary

judgment where genuine issues of material fact remained in dispute and in denying his motion to compel discovery. Thomson claims that material issues of fact exist as to whether: (1) he was either a party or third-party beneficiary to a contract between Milwaukee Metropolitan Sewerage District (MMSD) and UW; (2) he was laid off in violation of the contract; and (3) he was dismissed from his employment as part of an overall workforce downsizing. We conclude that the circuit court prematurely granted summary judgment because discovery was necessary to determine whether UW laid off Thomson in violation of the contract. Further, the trial court should have granted Thomson's motion to compel discovery to permit Thomson an opportunity to prove his contentions.

I. BACKGROUND.

¶2 On May 21, 1990, Thomson was hired by MMSD. In 1998, part of MMSD's business was privatized when United Water Services Milwaukee, LLC, a subsidiary of United Water Resources, Inc., took over certain MMSD operations. The transfer of operations was governed by a number of contractual agreements.

¶3 One of the contracts MMSD entered into with UW required UW to agree to continue the employment of non-represented employees. Specifically, the contract stated that UW would not "layoff" former MMSD employees for a ten-year period from the commencement of business operations.

¶4 Slightly more than a year later, on February 10, 1999, UW offered early retirement to Thomson. He declined to accept and was subsequently offered early retirement again in July of 1999 and March of 2000. Finally, UW terminated Thomson on March 29, 2000. Thomson then commenced the present breach of contract action on April 12, 2000.

¶5 After filing his lawsuit, Thomson served the defendants with written interrogatories and document requests. Specifically, Thomson requested all information related to UW's optimum staffing considerations, employee attrition schedule and staff reduction expectations. The defendants refused to produce the requested documents claiming they were irrelevant to the contract dispute. Thomson filed a motion to compel discovery while UW moved for summary judgment. The circuit court denied Thomson's motion to compel discovery and granted UW's motion for summary judgment.

II. ANALYSIS.

¶6 This appeal involves issues decided pursuant to summary judgment as well as the circuit court's decision to deny Thomson's motion to compel discovery. Our review of the circuit court's decision to grant summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). However, a decision to grant or deny a motion to compel discovery is within the trial court's discretion. ***Franzen v. Children's Hosp.***, 169 Wis. 2d 366, 376, 485 N.W.2d 603 (Ct. App. 1992).

¶7 Summary judgment must be granted if the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT. RULE 802.08(2). Our methodology is the same as the circuit court's. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). We must first determine whether the complaint states a claim. ***Green Spring Farms***, 136 Wis. 2d at 315. If the plaintiff has stated a claim and the pleadings show the existence of factual issues, then we must examine whether the moving party has presented a defense that would defeat the claim. ***Preloznik***, 113 Wis. 2d at 116. If the defendant has

made a prima facie case for summary judgment, the court examines the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file to determine whether a genuine issue exists as to any material fact, or whether reasonable conflicting inferences may be drawn from undisputed facts, therefore requiring a trial. ***Green Spring Farms***, 136 Wis. 2d at 315.

¶8 The present dispute centers on the contract between MMSD and UW protecting former MMSD employees from being laid off within ten years of UW's initial date of operation. Thomson claims that: (1) he was a party to the contract rather than a third-party beneficiary, and (2) even if he is only a third-party beneficiary, his rights as such were violated when he was laid off.

¶9 In its simplest sense, a "contract" is "[a]n agreement between two or more *parties* creating obligations that are enforceable or otherwise recognizable at law." BLACK'S LAW DICTIONARY 318 (7th ed. 1999) (emphasis added). Offer, acceptance and consideration are the cornerstones of an enforceable contract. ***N.B.Z., Inc. v. Pilarski***, 185 Wis. 2d 827, 837, 520 N.W.2d 93 (Ct. App. 1994). A contract exists only if "[t]he minds of *the parties* … meet on essential terms." ***Messner Manor Assocs. v. Wisc. Hous. and Econ. Dev. Auth.***, 204 Wis. 2d 492, 498, 555 N.W.2d 156 (Ct. App. 1996) (emphasis added).

¶10 Privity of contract is the relationship that exists between the parties to a contract. ***City of La Crosse v. Schubert***, 72 Wis. 2d 38, 41, 240 N.W.2d 124 (1976), *overruled on other grounds by* ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis.2d 395, 573 N.W.2d 842 (1998). A "party" is defined as "[o]ne who takes part in a transaction." BLACK'S LAW DICTIONARY 1144 (7th ed. 1999). Therefore, privity to a contract implies "a connection, mutuality of will, and

interaction" between those who take part in the transaction. *See* ***Wrenshall State Bank v. Shutt***, 202 Wis. 281, 283, 232 N.W. 530 (1930).

¶11 Here, Thomson is not a party to the contract. The following three individuals signed the contract in question: (1) Donald J. Voith, the chairman of MMSD; (2) David R. Sherman, the president of UW; and (3) Michael McCabe, legal counsel for MMSD. These individuals, not Thomson, negotiated the essential terms and executed the document as representatives of their respective companies. Thus, we conclude Thomson is not a party to the contract because he is not in privity with UW.

¶12 Generally, a contract is not binding on persons who are not in privity to it. ***Prinsen v. Russos***, 194 Wis. 142, 145, 215 N.W. 905 (1927). However, a third party may recover upon a contract if "the contract indicates an intention to secure some benefit to him." ***Peters v. Peters Auto Sales***, 37 Wis. 2d 346, 351, 155 N.W.2d 85 (1967) (citations omitted). In ***State Dept. of Pub. Welfare v. Schmidt***, 255 Wis. 452, 39 N.W.2d 392 (1949), the supreme court stated: "[T]o entitle the third person to recover upon a contract made between other parties, there must not only be an intent to secure some benefit to such third person, but the contract must have been entered into directly and primarily for his benefit." ***Id.*** at 455 (citation omitted).

¶13 The "no layoff" provision in the present contract clearly indicates an intention to secure employment security and benefits for former non-represented MMSD employees such as Thomson.[1] The provision states:

[1] It is undisputed that Thomson was a non-represented employee.

> [UW] agrees to offer continued employment to [MMSD] non-represented employees who transfer from [MMSD] employment to employment with [UW] pursuant to the Agreement for Operations and Maintenance Services between [UW] and [MMSD] (with no break in continuity of employment), not to lay any such employees off for the ten-year period following the commencement date of the Agreement….

Additionally, the remaining provisions of this agreement deal exclusively with other rights, benefits and terms of employment regarding former MMSD employees.

¶14 We are satisfied that MMSD and UW entered into this contract directly and primarily for the benefit of former MMSD employees like Thomson. Indeed, UW concedes that he is a third-party beneficiary. Accordingly, we conclude that Thomson is a third-party beneficiary entitled to recovery under the contract. *See* ***Journal/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 706, 456 N.W.2d 359 (1990) (holding that public had standing to sue to enforce provisions of contract between city and festival promoter which incorporated the open meetings law).

¶15 Next, in order to decide whether Thomson was laid off in violation of the contract, we must first determine the intent of the parties regarding the definition of a "layoff." We will not create a legal obligation or legal duty that was unknown to both parties and not in contemplation of either party when the contract was made. *See* ***Goossen v. Estate of Standaert***, 189 Wis. 2d 237, 246, 525 N.W.2d 314 (Ct. App. 1994). Therefore, for a term to be part of a contract, the term must have been contemplated by the parties and the parties must have had a meeting of the minds as to its meaning. ***Id.***

¶16 In an affidavit submitted to the circuit court, MMSD's legal counsel, who negotiated, drafted, and signed the contract on behalf of MMSD, stated:

> During the negotiations … MMSD proposed and [UW] agreed that, as a condition of the takeover, [UW] would not "layoff" any existing MMSD employees…. The parties intended the term "layoff" to mean that [UW] may not arbitrarily terminate an individual's employment if, for example, they are doing so for the purpose [of] eliminating that employee's employment position with [UW].
>
> If someone is hired to replace a terminated individual, then the person terminated would not be considered to have been laid off under the terms of the Agreement.

The vice president of UW, who also participated in the negotiation and drafting of the contract, averred: "If someone is hired to replace a terminated individual, then the person terminated would not be considered to have been laid off…."

¶17 When a right has been created by a contract, "the third party claiming the benefit of the contract takes the right subject to all the terms and conditions of the contract creating the right." ***Jones v. Poole***, 217 Wis. 2d 116, 121, 579 N.W.2d 739 (Ct. App. 1998). Therefore, Thomson is bound by the intentions of the contracting parties, and our primary goal is to determine and give effect to the parties' intention. *See* ***Wisc. Label Corp. v. Northbrook Prop. & Cas. Ins.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276.

¶18 Based on the affidavits submitted by MMSD and UW, we conclude that the contracting parties intended "layoff" to mean the arbitrary termination of an individual's employment. According to the affidavits, an example of an arbitrary termination is the dismissal of an employee for the purpose of eliminating that employee's position. However, under this contract, an employee is not laid off if someone is hired to replace the terminated individual. This was the intent of the parties and, therefore, Thomson, as a third-party beneficiary to the

contract, is bound by the meaning intended by MMSD and UW. *See* ***Jones***, 217 Wis. 2d at 121. Absent an evidentiary submission to the contrary, we are bound by the uncontested affidavits submitted by the defendants. *See* ***Jefferson Gardens, Inc. v. Terzan***, 216 Wis. 230, 233, 257 N.W. 154 (1934) (where a party does not deny the allegations of an affidavit, the allegations are taken as true).

¶19 Even applying UW's definition, Thomson contends that he was laid off. After Thomson's termination, another employee, Mary Roe, filled his position. Thomson argues that he was laid off because no one was "hired" to fill his position as Roe was an intra-company transfer rather than a newly hired employee. In addition, Thomson alleges that his termination was part of an overall workforce downsizing by UW. Arguing that such a downsizing constitutes an "arbitrary termination," Thomson concludes that he was laid off.

¶20 As Thomson noted in argument before the circuit court:

> The defense is saying that layoff means strictly in a limited way the elimination of a position…. And while Mr. Thomson's position could have been filled by another individual, that doesn't mean that the termination of Mr. Thomson did not result in reduction of the work force…. And again we haven't been able to get the discovery documents that we have asked for….

Later, Thomson continued:

> Well, we don't know if it was the exact title, but it was represented by the defense that a woman was put into that position doing those tasks…. The defense is actually claiming that there was no one hired to replace Mr. Thomson but that somebody within the company was moved into his position.

Although UW admitted that Thomson's position was filled with an intra-company transfer, they argue that Thomson was not laid off because his position was filled.

We disagree. According to UW's own affidavits, an individual is not laid off if someone is "hired" to fill the position. However, "hired" is not synonymous with "filled," and, therefore, a question of fact remains.

¶21 In the present case, the summary judgment and discovery issues are inextricably intertwined. As the trial court stated:

> As to the motion to compel, whether or not that motion to compel should be heard or decided is really dependent on the [c]ourt's decision on the motion for summary judgment as to whether or not there are issues at fact or issues of fact which still need to be addressed.

We agree. If any genuine issues of fact remain at issue, then summary judgment is inappropriate. WIS. STAT. RULE 802.08(2). In addition, in order to explore whether factual issues exist, summary judgment should not be granted until "adequate time for discovery" has passed. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 666, 476 N.W.2d 593 (Ct. App. 1991) (citing ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)).

¶22 As previously stated, we review the circuit court's discovery rulings to determine whether the court erroneously exercised its discretion. ***Konle v. Page***, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996). A discretionary determination must be based on the facts in the record and supported by relevant law. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). "Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Id.*** We conclude that the trial court acted prematurely in granting summary judgment without permitting additional discovery.

¶23 Here, "the facts fail to support the [circuit] court's decision," *see* ***Oostburg State Bank v. United Sav. & Loan Ass'n.***, 130 Wis. 2d 4, 12, 386 N.W.2d 53 (1986), because there is little evidence in the circuit court's decision that it undertook a reasonable inquiry and examination of two key issues, *see* ***McCleary v. State***, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971). First, it remains unclear, whether under UW's own definition of "layoff" someone was actually "hired" to replace Thomson, *i.e.*, whether Roe was an intra-company transfer and whether such a transfer constituted a "hired" replacement. Second, both contracting parties admitted in their affidavits that, under the contract, termination to eliminate an employee's position is only one example of a "layoff." Another example of a "layoff" could be when an employee is terminated as part of an overall workforce downsizing, although the employee's position itself is not eliminated. This is Thomson's claim.

¶24 However, in its decision, the circuit court failed to address these issues. While it correctly concluded that the definition of "layoff" as agreed upon between MMSD and UW would control, the court never analyzed whether someone had been "hired" to replace Thomson. Additionally, Thomson's requests for discovery as to UW's overall attrition schedule and possible workforce downsizing is relevant. If Thomson were able to gather evidence showing that his termination was part of an overall downsizing and that no one was "hired" to replace him, then he could prevail in his contention that he was laid off in violation of the contract.

¶25 Summary judgment was inappropriate because discovery may lead to evidence bearing on the summary judgment issues. Although the circuit court's belief that additional discovery will not assist the appellants may ultimately be proven correct, such a conclusion was premature. It may be the case that after

discovery is completed, the evidence will clearly indicate that Roe was hired to replace Thomson and Thomson was not arbitrarily terminated as part of an overall workforce downsizing. However, until discovery on these issues is complete, reasonable conflicting inferences may be drawn as to whether Thomson was laid off, *i.e.*, arbitrarily terminated, in violation of the contract. Accordingly, we reverse and remand to allow Thomson to complete discovery on these issues.

By the Court.—Judgment reversed and cause remanded with directions.

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