STATE OF MICHIGAN

COURT OF APPEALS

FRATERNAL ORDER OF POLICE, MONTCALM COUNTY LODGE NO. 149 and its MONTCALM COUNTY SHERIFF DEPARTMENT DIVISION, and RODNEY SATTLER,

Plaintiffs-Appellants,

v

MONTCALM COUNTY BOARD OF COMMISSIONERS and SHERIFF OF MONTCALM COUNTY,

Defendants-Appellees.

UNPUBLISHED
May 14, 1996

No. 173306
LC No. 90-663 CL

Before: Hoekstra, P.J., and MacKenzie and Sawyer, JJ.

PER CURIAM.

Plaintiffs appeal as of right from orders granting summary disposition for defendants pursuant to MCR 2.116(C)(7) and (10). We affirm in part and reverse in part.

This case arises out of the parties' negotiation of a new labor contract to replace a contract that expired on December 31, 1989. The union wished to improve its disability retirement plan by eliminating a requirement that a claimant be eligible for social security disability benefits. The expired collective bargaining agreement provided:

> Section 13.5. Retirement The present retirement plan for employees of the Department shall be continued. *The summary of present plan provisions evaluated by Gabriel, Roeder, Smith & Company, on July 1, 1985, is set forth in Appendix* C. Effective July 1, 1989, the current pension plan shall be amended to provide:
>
> A. Normal retirement at age 60 with ten (10) years' credited service.

B. Normal retirement at age 55 with twenty-five (25) years' credited service.

C. Two (2%) percent for all years of credited service.

D. Employee contributions remain at five (5%) percent gross compensation. [Emphasis added.]

Appendix C provided in relevant part:

Disability Retirement:

Eligibility. 10 years or more of service and under age 60. *Must be eligible for disability under Social Security.* [Emphasis added.]

The social security disability requirement was also included in the County of Montcalm Pension Plan, separate from the parties' collective bargaining agreement. Section 3.7 of that plan provided in relevant part:

> An Employee who becomes disabled while in the employ of the Employer shall be eligible to retire and receive a disability pension determined in accordance with section 5.3 if as of the date of such retirement (i) he has completed at least 10 years of Employment, (ii) he has not attained the date he would first be eligible to retire and receive a normal pension, and (iii) *he is eligible to receive disability benefits under Title II of the Federal Social Security Act*. [Emphasis added.]

Negotiations concerning the new collective bargaining agreement were conducted primarily by Dan Hankins for plaintiff union and Jack Clary for defendant employer. Both had distinctly different versions of the events that transpired during the negotiation process.

According to Hankins, on December 15, 1989, and again on December 22, 1989, the two sides discussed benefits, but reached no agreement. At a March 5, 1990, private meeting, he and Clary discussed the disability plan at length, and Clary agreed to help convert the plan to one similar to Kent County's. Hankins then sought an actuarial statement from Gabriel, Roeder, Smith & Company in a letter informing the actuary that the union wanted to delete the existing social security disability requirement for persons claiming a disability retirement. Hankins testified that he sent a copy of the letter to Clary and to a county administrator. Gabriel, Roeder prepared the requested actuarial statement costing the disability retirement benefit without the social security eligibility condition. On March 12, Hankins sent a copy of that statement to Clary; Clary did not respond. Hankins indicated that at an April 5 session, Clary insisted on a .12 percent administrative fee for the disability plan, in addition to the .38 percent cost of the revised plan. Hankins claimed that he agreed to the .50 percent total cost because the membership wanted the improved disability retirement package to badly. According to Hankins, the negotiations concluded on April 5, 1990. Clary then drafted the settlement agreement, the union members ratified the contract, and the county approved it.

Clary also testified that the union's interest in eliminating the social security disability requirement was discussed at the December 15, 1989 meeting. However, according to Clary, he immediately rejected any change. Clary claimed he never altered his position on this issue throughout the negotiations. Clary's understanding was that the union sought an improvement in the disability retirement package, but without any change in the social security disability requirement. He testified that the county rejected Hankins' March 12 letter proposing the elimination of the social security requirement in the disability plan.

The new collective bargaining agreement provided:

> Section 13.5. Retirement. The present retirement plan for employees of the Department shall be continued. *The summary of the present plan provisions evaluated by Gabriel, Roeder, Smith & Company, on July 1, 1985, are set forth in Appendix C.* Effective July 1, 1989, the current pension plan shall be amended to provide:
>
> A. Normal retirement at age 60 with ten (10) years' credited service.
>
> B. Normal retirement at age 55 with twenty-five (25) years' credited service.
>
> C. Two (2%) percent for all years of credited service.
>
> D. Employee contributions remain at five (5%) percent gross compensation.
>
> E. As soon as it can be administratively accomplished, following ratification of this Agreement by the commission, the disability retirement benefits will be modified and computed same as normal retirement with additional service credited from date of disability to date of employee's sixtieth (60^{th}) birthday for an eligible employee. Eligibility requires ten (10) or more years of service and under age sixty (60). When the disability retirement benefits provision becomes operative, employee contributions shall be at five and one-half (5.5%) percent of gross compensation. [Emphasis added.]

Appendix C of the new collective bargaining agreement provided:

> Disability Retirement:
>
> Eligibility. 10 or more years of service under age 60.

The social security requirement in § 3.7 of the county pension plan, quoted above, remained unchanged.

In July, 1990, Hankins discovered that, while Appendix C eliminated the social security disability requirement, the new collective bargaining agreement did not include a provision requiring the elimination of the requirement in the county pension plan. Subsequently, plaintiff Sattler, a deputy sheriff whose employment was terminated because of work-related injuries, filed for disability retirement under

the new contract. The county denied his request because he had not provided proof that he satisfied the social security disability requirement contained in § 3.7 of the county pension plan. This lawsuit followed.

Plaintiffs alleged that defendants breached the collective bargaining agreement by failing to abide by the disability pension eligibility criteria set forth in Appendix C of the new contract, and by failing to amend the pension plan's § 3.7 to eliminate the social security disability requirement as the parties had agreed during negotiations. Defendants contended that a change in the social security disability requirement had never been agreed upon. Plaintiffs also alleged that defendants were grossly negligent and engaged in tortious conduct in denying disability retirement benefits to Sattler. Defendants contended that these claims were barred by governmental immunity. The trial court ultimately granted summary disposition for defendants on all counts.

On appeal, plaintiffs claim that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) on their breach of contract claims. A motion for summary disposition pursuant to MCR 2.116(C)(10) permits consideration of the pleadings, affidavits, depositions, admissions, and other documentary evidence. *People v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The court must resolve all doubt in favor of the nonmoving party and then determine whether a record could be developed that would result in an issue upon which reasonable minds could differ. *Farm Bureau Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991). The court may not make findings of fact or weigh credibility when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of material fact exists to warrant trial. *Id*. Applying this standard, we conclude that summary disposition was inappropriate for three reasons.

First, the court improperly engaged in fact finding. Plaintiffs asserted that the contract negotiations resulted in eliminating the social security disability requirement, while defendants contended that the negotiations did not result in deleting the social security disability requirement. The court made lengthy findings of fact that determined what occurred during those contract negotiations. Such findings were beyond the scope of a motion for summary disposition. *Id*.

Second, when the truth of a material factual assertion depends on credibility, then a genuine issue of material fact exists, and the court may not grant summary disposition. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988). In this case, however, the court appears to have made its decision based upon its perception that Clary was a credible witness, while Hankins was not. Although a trial judge is entitled to deference in determining the credibility of witnesses at trial, it is error for a court to consider credibility during a hearing on a motion for summary disposition. *Id*. Thus, to the extent that the court made its decision based upon the credibility of witnesses, it erred. *Id*.

Third, when deciding a summary disposition motion on a breach of contract claim, if the terms are ambiguous, then factual development is required to determine the parties' intent and summary disposition is inappropriate. *Michaels v Amway Corp*, 206 Mich App 644, 649; 522 NW2d 703 (1994). If a contract can reasonably be interpreted in more than one way, then that contract is ambiguous. *Id*.

In this case, the parties' respective positions sharply focus on the genuine issue of material fact concerning whether the social security disability requirement is a valid criterion that a candidate must satisfy before becoming eligible for a disability retirement pension. Defendants correctly assert that the plain language of § 13.5 of the collective bargaining agreement does not require them to amend the pension plan to eliminate the social security disability requirement found in § 3.7. However, plaintiffs are also correct that § 13.5 explicitly sets out two requirements for eligibility and neither of those two stated requirements insist that a candidate must satisfy the social security disability requirement found in § 3.7 of the pension plan.

The contract is ambiguous because the interpretations of plaintiffs and defendants concerning the collective bargaining agreement are both reasonable interpretations of the contract's plain language. *Id*. Therefore, the court erred when it determined that the contract was unambiguous. *Id*. The court's decision to grant summary disposition pursuant to MCR 2.116(C)(10) on the breach of contract claims contained in Counts I through III of plaintiffs' complaint is reversed.

Summary disposition of the remaining two counts of plaintiffs' complaint pursuant to MCR 2.116(C)(7) was proper, however. Those claims -- for gross negligence and tortious conduct -- sounded in tort. Defendants are highest-level officials, see *Meadows v Detroit*, 164 Mich App 418, 426-427; 418 NW2d 100 (1987), and MCL 46.1 *et seq.*; MSA 5.321 *et seq.*, who were acting within the scope of their authority under MCL 423.215; MSA 17.455(15) when they entered into the new collective bargaining agreement. They are thus entitled to absolute immunity from tort liability under MCL 691.1407(5); MSA 3.996(107)(5). The trial court did not err in dismissing Counts IV and V of plaintiffs' complaint.

Affirmed in part and reversed in part.

/s/ Joel P. Hoekstra
/s/ Barbara B. MacKenzie
/s/ David H. Sawyer