

STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY  
CIVIL DIVISION

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**THOMAS A. GAUTHIER, et al**

and

a class of persons similarly situated,

Plaintiffs,

-vs-

Case No. 99-CV-003572

**JOURNAL/SENTINEL, INC., et al,**

Defendants.

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**DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

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**BACKGROUND**

This case arises out of the Journal Communications, Inc.'s (JCI) company wide reorganization. On January 23, 1995, Journal Communications offered a severance pay package to hundreds of employees. The severance agreement, which was titled a Voluntary Termination Incentive Package for Full Time Employees, was drafted by defendant employer Journal/Sentinel, Inc. (JSI) and was presented to the plaintiffs on a take it or leave it basis. Some of the plaintiffs signed an Agreement and Release which contained the January 23, 1995 memo (incorporated by reference) and which described their severance pay, as that term is defined by Wisconsin law. Defendant JSI and Journal Communications, Inc., unilaterally imposed the severance terms contained in the January

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23, 1995 memo, as the terms of severance for the other plaintiffs who were involuntarily terminated in 1995.

Essentially, the severance agreement required all employees to sell back their employee owned stock within some time period following their termination. The length of time within which the employee had to sell back his or her stock increased in direct proportion to the length of time the employee had owned the stocks. For example, a terminated employee who had owned stocks for 5 to 10 years had to sell back his or her shares within 2 years, while an employee who had owned the stocks for 20 plus years had up to 5 years to sell back.

In September of 1996, Journal Sentinel, Inc., and JESTA Trustees (JESTA is the trust by which employees can invest in the company by purchasing Trust Units under carefully circumscribed rights and duties of both the Trustees and the unit holders) proposed and approved a provision whereby the JESTA Trust was to be amended to increase the price of the trust units 50% over a period of 5 years in addition to the normal price increase caused by increase in profits. Subsequently, the defendants took the position that the plaintiffs were required to sell a percentage of their units of beneficial interest over a time period directly related to their designated years of ownership. For example, in the case of a plaintiff who had owned his stock for 20+ years, the employee was forced to sell one fifth of his beneficial units in each year for five years, rather than being able to hold and sell the total number of units at the end of 5 years.

Plaintiffs filed a complaint alleging (1) Breach of contract against JESTA, JCI, and JSI; (2) Breach of fiduciary duties against JESTA and Trustees; (3)

Conversions/Fraudulent Transfers against the JESTA, Trustees, JCI and JSI; and (4) a Wage claim per Wis. Stats. Sec. 109 (sic) against the JESTA Trustees, JCI and JSI.

On August 16, 1999, "JESTA" was dismissed as a party and all claims against Journal Communications, Inc., were dismissed. The Court also granted defendants' motion to dismiss the conversion/fraudulent transfer claim. On December 15, 1999, the Court granted plaintiffs' motion to certify a plaintiff class.

Plaintiffs have now moved for Summary Judgment ordering that the defendant Journal/Sentinel, Inc., is liable on its January 23, 1995, Voluntary Termination Incentive Package for Full Time Employees as to all terminated employees who received it during the company reorganization whether or not those employees signed the Agreement and Release which incorporated the Package.

The plaintiffs are moving that the Court order that the January 23, 1995, Voluntary Termination Incentive Package be enforced to read the contract terms "can sell within" an applicable number of years means that the plaintiffs can sell their units of stock at any time during the applicable period of years.

Defendants oppose plaintiffs' motion and move for Summary Judgment ordering that the claims of the plaintiffs who signed the voluntary termination package and those who did not sign but were involuntarily terminated be dismissed.

#### ANALYSIS

The Agreement and Release signed by those who were voluntarily terminated incorporates the Voluntary Termination Incentive Package offered as of January 24, 1995. The Voluntary Termination Incentive Package provides:

For full time employees under 55 years of age . . . Stock  
 Sale: ability to sell stock under following schedule:  
 can sell within Length of ownership  
 2 years 5-10 years  
 3 years 10+-15 years  
 4 years 15+-20 years  
 5 years 20+ years. . .

For full time employees 55 years of age and over . . .

Stock Sale: Can sell stock within (10) year period if  
 employee is at least 55 years of age with ten (10) years of  
 credited service. If less than 10 years of credited service,  
 follow under age 55 stock sale schedule.

In addition to incorporating the Voluntary Termination Incentive Package, the Agreement and Release also provided that the "Employee has not been induced to enter this Agreement by any representations outside this agreement of any kind by J/S, its employees, or agents" and that the "Employee has made an independent investigation of any material facts and does not rely on any statement or representation of J/S in entering into this Agreement." One of the issues raised in this case is whether the above quoted language is integrating language. However, if there are no other oral or written agreements between the parties, it is irrelevant whether the Agreement and Release is integrating. In this case, neither party contends that there are other oral or written agreements. (Defendants want the court to consider their intentions when entering into the Agreement and Release—that the plaintiffs would have to sell back a pro rata portion of their stock each year. Defendants also want the court to consider outside evidence that the plaintiffs knew that this is what the defendants intended and the plaintiffs' subsequent actions in conformance therewith.) Rather, defendants contend that the intent of the parties when entering into the Agreement and Release should control the outcome in this case. (Defendants also contend that this court must look outside the Voluntary

Termination Incentive Package to determine the meaning of the stock sell back provision.) In contending that the intent of the parties controls, defendants cite General Cas. Co. v. Hills, 209 Wis. 2d 167, 174 (1967). Although the contract in General Cas. Co., was an insurance contract, the court applied principles of contract construction stating “the primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties.” Id. If a contract is unambiguous, the best way to ascertain and carry out the intentions of the parties is to look to the plain language of the contract. The contract in this case is unambiguous. The language of the Voluntary Termination Incentive Package, incorporated into the Agreement and Release, provides that plaintiffs have X amount of years to sell back their stock shares.

Defendants argue that even if the language of the Voluntary Termination Incentive Package is unambiguous on its face, it is extrinsically ambiguous. Under an exception to the parol evidence rule, parol testimony can be admitted to explain latent ambiguity in a written agreement. Marshall & Ilsley Bank, 62 Wis. 2d 768, 777 (1974). “Under this exception [, however,] parol testimony is admitted to resolve an existing ambiguity, not to create one.” Id. “Where there is no ambiguity in the contract, either in a literal sense, or when applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters . . . .” Id. In this case, there is no ambiguity, either in a literal sense or when applied. Defendants create the “ambiguity” by trying to admit parol evidence to show that they intended (and plaintiffs knew this and also intended) the stock sell back to be pro rata. The Supreme Court of Wisconsin, in Schlusser v. Allis-Chalmers Corp., 86 Wis. 2d 226, 235-36 (1978), held that “[t]he subjective perception of the employee is not material because there is no ambiguity in the terms of the contract which

would make appropriate the consideration by the fact finder of extrinsic evidence bearing on the parties' intent." The language of the Voluntary Termination Incentive Package, incorporated into the Agreement and Release, provides that plaintiffs have X amount of years to sell back their stock shares.

Therefore, the only remaining issue is whether the involuntarily terminated employees have a cause of action for breach of contract. Defendants argue that the involuntarily terminated employees have no cause of action for breach of contract because plaintiffs did not give any consideration for the sell back benefit, the benefit was a gift. Plaintiffs respond contending that the consideration for the contract was their agreement to sell back the stock shares *sooner* than they would have had to under JESTA. Plaintiffs, in their reply brief, contend that under JESTA they had 10 years to sell back their shares. Therefore, this issue was not fully briefed. This Court does not, however, have to rely on this argument to find that there was consideration for the sell back benefit. Plaintiffs also argued, and this court finds, the sell back benefit was incorporated into the "General Settlement Agreement" and for consideration of the General Settlement Agreement each employee executed an Individual Agreement and Release. Therefore, there was consideration for the sell back benefit and the involuntarily terminated employees have a cause of action for breach of contract.

**THEREFORE, IT IS HEREBY ORDERED THAT:**

1. Defendants' Motion for Summary Judgment dismissing the claims of both the voluntarily and involuntarily terminated members of plaintiff class is  
**DENIED.**

2. Plaintiffs' Motion for Summary Judgment is GRANTED, and the Court orders:

- a. Defendant Journal/Sentinel, Inc., is liable on its unilateral contract published in the January 23, 1995, Voluntary Termination Incentive Package for Full Time Employees, as to all terminated employees who received it during the reorganization;
- b. Defendant Journal/Sentinel, Inc., is liable on its bilateral contract with all terminated employees who signed the Agreement & Release incorporating the January 23, 1995, Voluntary Termination Incentive Package for Full Time Employees;
- c. The January 23, 1995, Voluntary Termination Incentive Package for Full Time Employees is interpreted to read that the contract terms "can sell within" an applicable number of years means that the plaintiffs are entitled to receive as severance pay the right to sell back their beneficial units of stock at any time during the period applicable to years of credited service.

Dated at Milwaukee, Wisconsin, this 10<sup>th</sup> day of April 1999.

BY THE COURT:

**/S/ HON. THOMAS P. DONEGAN**

Honorable Thomas P. Donegan  
Circuit Court Judge  
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