STATE OF MICHIGAN

COURT OF APPEALS

BAY PORT AQUACULTURE SYSTEMS, INC.,

Plaintiff/Counter Defendant-Appellant,

v

CONSUMERS ENERGY CO.,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
August 28, 2003

No. 239262
Ottawa Circuit Court
LC No. 01-038958-CE

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from an opinion and order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff operated a yellow perch fish farm on land leased by defendant. Pursuant to the lease, plaintiff used fresh lake water that was heated by defendant's J.H. Campbell plant in the process of cooling its equipment. Plaintiff drew the heated water from the plant's discharge channel. On November 9, 2000, a technician mistakenly left a valve open, which resulted in the release of 2,135 gallons of sodium hypochlorite into the discharge channel. This greatly exceeded the 60-gallon level allowed by permit. Within minutes, 330,000 of plaintiff's inventory of 400,000 perch, including the majority of its adult breeding stock, were killed. Plaintiff's business was effectively destroyed.

The lease in effect at the time of the incident provided in pertinent part:

> **Consumers shall, if reasonably possible, advise Bay Port in advance** of any scheduled shutdown of the generators at Consumers Campbell Plants and the duration of the shutdown, of any planned or known changes in the water temperature and the duration of such changes, **of the addition to the water of any chemical that may be harmful to fish, or of any known change in the**

> **chemical content of the water supplied and the duration of such change.** ***Consumers shall not be responsible for changes in water quality*** or variations in water temperature or for changes in the volume of water discharged from its Campbell Plants. (Emphasis added).

Plaintiff argues that the trial court erred in holding that the term "water quality" was unambiguous. Because "quality" can be defined to mean "a distinctive inherent feature," plaintiff argues that the term "water quality" is ambiguous and that it was only intended to refer to the "inherent properties or natural condition of the lake water." Plaintiff points out that it is the absence of sodium hypochlorite that is inherent in water. Further, plaintiff argues that if "water quality" is interpreted "to include the addition of toxic chemicals to the water, then the duty to warn is illusory" because there would be no consequence for its breach. Plaintiff also asserts that since the parties unambiguously provided for a duty to warn of a chemical spill in the sentence preceding the "water quality" sentence, it would make no sense for the parties to use a different term in the next sentence if it was also intended to address a chemical spill.

Whether terms of a contract are ambiguous is a question of law that this Court reviews de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). A contract is ambiguous if its words may reasonably be understood in different ways. *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982). In *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), this Court stated:

> We must look for the intent of the parties in the words used in the instrument. This Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.

The parties' actual mental processes are irrelevant since the law presumes that the parties understand the import of the written contract and had the intention manifested by its terms. *Birchcrest Bldg Co v Plaskove*, 369 Mich 631, 637; 120 NW2d 819 (1963). Moreover, technical and strained constructions are to be avoided. *SCC Associates Limited Partnership v General Retirement System of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995).

The lease is not ambiguous. The term "water quality" was not limited in any way to mean the water being taken in from Lake Michigan or to refer to the inherent properties or natural condition of the water. In the context of the lease, the word "quality" means degree of excellence. The lease provided that defendant was not responsible for the degree of excellence of the water. That the word "quality" can also mean "distinctive, inherent feature" does not translate to mean that the contract could have meant that the parties were talking about inherent features of the water when they used the phrase "water quality." This would be a strained construction. Moreover, construing "water quality" to mean the overall condition of the water

does not render the duty to warn meaningless. The previous sentence required Consumers to notify plaintiff, if possible, of a chemical release into the water. It could fulfill this duty to advise and still not be held responsible for the release itself. Thus, this language does not render the prior sentence illusory.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad