[Cite as *Steubenville v. Jefferson Cty.*, 2005-Ohio-6596.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CITY OF STEUBENVILLE, OHIO,	)	
	)	CASE NO. 05 JE 23
PLAINTIFF-APPELLANT,	)	
	)	
- VS. -	)	O P I N I O N
	)	
JEFFERSON COUNTY, OHIO,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 02CV370.

JUDGMENT: Affirmed in part; Reversed in part and Remanded.

APPEARANCES:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 5, 2005

VUKOVICH, J.

{¶1} Plaintiff-appellant City of Steubenville appeals the decision of the Jefferson County Common Pleas Court granting summary judgment in favor of defendant-appellee Jefferson County, Ohio. The main issue is whether costs of "increased capitalization" in a water purchase contract includes any capital improvements as argued by the county or only includes expansion of the water system as argued by the city. There is also the issue of whether there is any genuine issue of material fact as to whether the water rate increase was based solely upon increased capitalization as prohibited in the contract. For the following reasons, we hold that costs of increased capitalization refer to the costs of all capital improvements that increase the value of the water system, not merely ones that expand the water system. Thus, the county correctly argues any rate increase based upon the aspects of the capital improvements project that increased the value of the water system was impermissible. However, there remains a genuine issue of material fact as to whether any portion of the rate increase was based upon a demonstrable increase in the costs of performance other than increased capitalization. Therefore, the judgment of the trial court is affirmed in part, reversed in part and remanded.

STATEMENT OF FACTS

{¶2} The parties entered into a water purchase agreement in 1981 whereby the city agreed to supply the county with up to 2,000,000 gallons of water per day at a rate of $1.265 per gallon for forty years. The contract was a form water purchase agreement supplied by a division of the United States Department of Agriculture in their function of providing grants and loans for construction of water delivery systems such as the one provided to the county. The disputed clause in the agreement provides:

{¶3} "(Modification of Contract) That the provisions of this contract pertaining to the schedule of rates to be paid by the Purchaser for water delivery are subject to modification. Any increase or decrease in rate shall be based on a demonstrable increase or decrease in the costs of performance hereunder, but such costs shall not include increased capitalization of the Seller's system. * * * "

{¶4} It is unknown whether the rates were modified over the years. However, effective January 1, 2001, the city increased its rates in order to upgrade the water system and comply with various legal mandates. For instance, the city replaced an old pumping station, replaced transmission lines around the pump station, and planned to replace the old filtration or treatment plant. The county initially paid the increased rates but then gave notice that it would discontinue paying the increased portion of the water bills starting in 2002.

{¶5} On September 17, 2002, the city filed a complaint for declaratory judgment. They urged that their plans to build the new plants and install the new lines reflected an increase in the cost of performance under their contract to provide the county water and to meet various legal requirements. They opined that the repairs and upgrades are not "increased capitalization" under the contract because they do not increase the city's ability to produce or deliver more water. Thus, the city sought past due water bills representing the amount of the rate increase and a declaration that "increased capitalization" refers to a situation where the system is expanded in order to produce more water.

{¶6} The county answered and counterclaimed for the rate increases it paid in 2001. They urged that all costs associated with improvement of the system's infrastructure that in turn advance the capital of the city's water department are costs of "increased capitalization" and thus are not able to be passed on to them as rate increases.

{¶7} Both parties sought summary judgment. The city first stated that not all of the money collected from the rate increase goes toward capital improvements and that some of this money goes toward daily operating expenses. This was confirmed by affidavit of the city's finance director and his breakdown of the rate increase allocation. The city then reiterated its argument that not all capital improvements constitute "increased capitalization" under the contract. They urged that "increased capitalization" only occurs where a capital improvement project expands the system to produce or deliver more water or reflects an intent to gain more customers. The city submitted the affidavit of the city engineer stating that the current project does not expand the system's capacity.

{¶8} The county responded that even if the city's definition of "increased capitalization" is used, there is ample proof that the rate increase was enacted in order to fund projects that would expand the system's capacity. They submitted multiple city documents showing the motive for the studies and projects was to anticipate future growth. The county also argued that the city failed to establish that the rate increase is attributable to a demonstrable increase in the costs of performance. Rather, the county urged that the rate increase was clearly attributable to increased capitalization of the system, stating that a capital improvement project necessarily constitutes increased capitalization. The county submitted the affidavit of their sanitary engineer who stated that the rate increase was to pay for a capital improvement project and not for operational purposes.

{¶9} The city then countered with affidavits establishing that although their original motive for seeking studies may have been partly to anticipate future growth, they ended up building the pumping station at a capacity even less than the old station, with 6 million gallons per day as opposed to the old 10 million gallons per day and the originally planned 18 million gallons per day. They also demonstrated that the new treatment plant would have the same capacity as the old plant. They noted that they have not run any new lines out to the annexed areas and admitted that they could not increase rates to the county based upon this example of "increased capitalization."

{¶10} The county replied that it is the reason for the rate increase that is relevant, not the actual final parameters of the project. Regardless, the county again noted that "increased capitalization" is not ambiguous and that it includes all capital improvements, not just ones that expand the system.

{¶11} On November 22, 2004, a visiting judge granted summary judgment in favor of the county on the city's complaint and denied the city's motion for summary judgment. The counterclaim was set for trial, but eventually, the parties agreed on the amount of the overcharge as $782,000. The court journalized this agreement of May 10, 2005. The within appeal followed.

ASSIGNMENTS OF ERROR

{¶12} Appellant sets forth the following two assignments of error:

{¶13} "THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT"

{¶14} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT"

{¶15} Both assignments of error revolve around the city's contention that "increased capitalization" does not refer to all capital improvements but only means capital improvements that increase the capacity of the system. The city alleges that building new plants where old plants are in poor condition is a demonstrable increase in costs of performance as allowed for rate increases under the contract. They point to portions of the contract that require them to maintain the system and provide quality water and note that they must be able to pass these costs along. The city then states that since "increased capitalization" only refers to expansion and the rate increase is not used to fund any expansion, judgment should have been entered in their favor.

{¶16} The county responds to the latter argument by urging that merely because the city has not yet expanded does not mean that the city's expressed motive to meet future growth was not passed on to the county in the rate increase. The county also urges that "increased capitalization" is not distinguishable from capital improvement and that the contract contains no definition providing that only expansion projects are excluded from rate increases.

SUMMARY JUDGMENT

{¶17} Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show 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. Civ.R. 56(C). Summary judgment shall not be rendered unless it appears from the evidence or stipulation that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. Id.

{¶18} When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or

denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E). If the party does not so respond, summary judgment, if appropriate, shall be entered against the party. Id.

GENERAL CONTRACT INTERPRETATION

{¶19} A clear and unambiguous contract can be enforced as a matter of law through summary judgment, and its interpretation is thereafter reviewed de novo. See *Inland Refuse Transfer Co. v. Brown-Ferris Indus. of Ohio, Inc.* (1985), 15 Ohio St.3d 321, 322. If a contract is reasonably susceptible to more than one meaning, then it is ambiguous and extrinsic evidence can be used to determine the intent. See *Shifrin v. Forest City Enterprises, Inc.* (1992), 64 Ohio St.3d 635, 638. However, if the contract is not reasonably susceptible to more than one meaning, then extrinsic evidence is not permitted and the contract is enforced as written. See id.

{¶20} Words and phrases are given their plain and ordinary meaning absent specific contractual definitions. See, e.g., *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Bd. Commrs.*, 152 Ohio App.3d 95, 2003-Ohio-1227, ¶40 (7th Dist.); *Columbiana Cty. Bd. of Commrs. v. Nationwide Ins. Co.* (1998), 130 Ohio App.3d 8, 16 (7th Dist.). Thus, we are to look at the commonly understood meaning of the language actually employed. Id. Common words in a contract are given ordinary meaning unless this would result in a manifest absurdity or an alternative meaning is clearly demonstrated within the contract. *King. v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 212.

SPECIFIC CONTRACT LANGUAGE

{¶21} The contract provides in pertinent part:

{¶22} “Any increase or decrease in rate shall be based on a demonstrable increase or decrease in the costs of performance hereunder, but such costs shall not include increased capitalization of the Seller’s system.”

{¶23} First, the city argues that replacing an outdated plant with a new plant is a demonstrable increase in the costs of performance. This may be true; however, the sentence does not end there. Costs of performance and increased capitalization are not necessarily opposites under the terms of this contract.

{¶24} Rather, the contract clearly states that even if there is a demonstrable increase in the costs of performance, the rate cannot be increased if those costs of performance include costs of increased capitalization of the city's system. The use of the word "but" between the two clauses makes this conclusion irrefutable. Thus, the threshold issue here is the interpretation of "costs [of] increased capitalization" as used in the water purchase agreement.

{¶25} The city believes the phrase means expanding the system to produce or deliver more water than current capacity. Yet, this interpretation is based upon the city's view of fairness and not the plain language of the contract. True, meeting the long-term needs of a water system and meeting various federal, state and local regulations is costly. And, it would be preferable to be able to pass all costs of necessary repairs on to the consumers, including the county. However, the contract does not allow costs of performance that are costs of increased capitalization to be passed on the county regardless of the alleged necessity of the repairs. This is not to say that all costs of repairs are capital improvements since the value of the system's capital would not necessarily increase with every patched pipe. In any event, we are merely noting here that although being able to charge customers for necessary repairs or upgrades to comply with the law seems the fairest notion, fairness is not the issue here. This action was brought solely on interpretation of the contract; if there is plain language we must apply and enforce it. There were no allegations of unconscionability in this case. And, the city made no arguments that the contract was void due to competing constitutional or legislative dictates over the city's financial responsibility to the water district as many similar bodies around the country have successfully argued. Thus, we are forced to focus only on analyzing the contract's plain language.

{¶26} Although the city revealed that this is a form contract used throughout the United States for water purchases, they cite no cases on the subject in their brief. At the trial level, they cited an Ohio appellate case out of the Sixth District. Although that case involved the same form contract, there is nothing on point or relevant about the holding or even the dicta in that case. See *Village of Plymouth v. City of Willard*

(1988), 47 Ohio App.3d 46. Because they failed to research the issue, we shall not delve too far into the persuasive authority of other states.

{¶27} In doing our own research, we noticed that the contractual language costs of increased capitalization is often presupposed to mean all capital improvements. See, e.g., *Butler Cty. Bd. of Cmmrs. v. City of Hamilton* (2001), 145 Ohio App.3d 454, 475, 478 (concluding that the court need not address the city's argument about improper allocations to "capital improvements"); *Utilities Bd. of City of Tuskegee v. Town of Notasulga* (Ala. Sup. 1988), 530 So.2d 228, 229 (agreeing that cost to build a municipal complex is not includable in the rate increase); *Board of Waterworks of the City of Baxter v. Smith Utility Dist.* (Tenn. App. 1987), Smith County App. No. 86-324-II (considering the use of funds to pay for plant deficiencies that resulted in an increased capital obligation to fit within the excluded contractual phrase); *City of Grafton v. Southwestern Water Dist.* (Mar. 11, 1983), Public Serv. Comm. of W.Va. 82-588-W-MA (believing the phrase means "all capital costs of the municipal water authority"); *City of Strong v. Rural Water Dist. No. 1* (1981), 6 Kan. App.2d 859, 862, 636 P.2d 192, 194 (equating the phrase with merely "capitalization costs"). We say "presupposed" because the issue of the phrase's definition was not always specifically before those deciding bodies. But, they often mentioned the meaning of the phrase in passing or assumed its meaning as such.

{¶28} Employing our own analysis, we first point out that nowhere does the contract single out expansion or capacity as the key factors. The costs of "increased capitalization" is not a defined phrase in the contract. Thus, we refer to the common and ordinary meanings of the terms within the phrase.

{¶29} Most basically, "capitalization" merely means the act or process of capitalizing. Mirriam-Webster's Collegiate Dictionary (10th Ed. 2000) 169. Capitalizing means converting into capital. Id. And "capital" means assets that add to the long-term net worth of a corporation, accumulated assets used for production of profits, or improvements. Id. at 168; Black's Law Dictionary (6th Ed. Abr. 1983) 143. "Increase" means enlarge, multiply, augment or enhance. Mirriam-Webster's at 588.

{¶30} It appears that the city's interpretation stems from use of the word "increased" before the word "capitalization." They must believe that since increase

means enlarge, then there is no increased capitalization unless the water system is enlarged to a greater capacity. However, there is no reference to increased *capacity* of the system. Increase refers to capitalization. Capital increases or enlarges when one expends money on infrastructure and replaces old plants with new plants.

{¶31} "Increase has a broad range, since it pertains to greatness in quality, physical dimensions, rate, as of productivity, degree, or intensity." The American Heritage Dictionary (2d Ed. 1985) 653. The contract in no way limits the definition of increase to that of physical dimensions or physical capacity for production or delivery. It is unreasonable to say that the existing capital must be made physically larger in order to fall under the meaning of the phrase. This would not be the plain, common or ordinary meaning associated with the words or the phrase.

{¶32} Rather, costs of "increased capitalization" plainly means costs associated with the act of increasing the value of capital in the system. Capital improvement projects would entail costs that increase the system's capital. The city concedes that the acts performed in their improvement project were capital improvements. Thus, the city's interpretation of the contract is erroneous. As such, any rate increase based upon costs involved in increasing the capital of the system was impermissible. Summary judgment is thus upheld in relevant part.

DEMONSTRABLE INCREASE IN COSTS OF PERFORMANCE, OTHER THAN CAPITAL IMPROVEMENTS

{¶33} There remains a question as to whether all of the rate increase was enacted as a result of the costs of increased capitalization or whether some of the rate increase was actually enacted due to a demonstrable increase in the costs of performance not including increased capitalization costs. An affidavit of the city finance director stated that the funds were not wholly used on the capital improvement project but were partly used to fund daily operations. In fact, he stated that $2.5 million in rate increases were used in daily operations. Thus, there is a genuine issue of material fact as to whether the city incurred some demonstrable increase in the cost of performance besides the increased capitalization costs of the capital improvements project.

{¶34} Thus, this portion of the case must be remanded to determine what portion of the rate increase was based on a demonstrable increase in the cost of

performance (not including costs of increased capitalization) and what portion was based upon the costs of increased capitalization. Any part of the rate increase based upon a demonstrable increase in the cost of performance (not including costs of increased capitalization as defined above) could be maintained under the terms of the contract.

{¶35} For the foregoing reasons, the judgment of the trial court is affirmed in part, reversed in part and remanded.

Waite, J., concurs.
DeGenaro, J., concurs.