ROBERT E. DICKENSON, APPELLANT, *v.* THE STATE OF NEVADA, NEVADA DEPARTMENT OF WILDLIFE, RESPONDENT.

No. 24917

July 26, 1994 877 P.2d 1059

Appeal from an order of the district court granting a permanent injunction to the State. Seventh Judicial District Court, White Pine County; Merlyn H. Hoyt, Judge.

State Department of Wildlife filed action to prevent landowner from removing water from reservoir whenever its level fell below minimum expressed in agreement between Department and landowner. The district court granted permanent injunction in favor of Department. Landowner appealed. The supreme court held that agreement permitted drawing of water from reservoir for stock water purposes at discretion of landowner and without seeking permission from state, even if such use caused level of reservoir to fall below agreed upon minimum.

Reversed and remanded with instructions.

[Rehearing denied October 25, 1994]

ROSE, C. J., dissented in part.

Vargas & Bartlett and Debra B. Robinson, Reno, for Appellant.

Frankie Sue Del Papa, Attorney General, and *C. Wayne Howle,* Deputy Attorney General, Carson City, for Respondent.

1. CONTRACTS.
   If contract is ambiguous, then it will be construed against drafter.
2. JUDGMENT.
   If there is ambiguity in contract requiring extrinsic evidence to discern parties' intent, then summary judgment is improper, but words of contract must be taken in their usual and ordinary signification if no ambiguity exists.
3. CONTRACTS.
   Interpretation which results in fair and reasonable contract is preferable to one that results in harsh and unreasonable contract.
4. WATERS AND WATER COURSES.
   Agreement between state Department of Wildlife and landowner permitted drawing of water from reservoir for stock water purposes at discretion of landowner and without seeking permission from state, even if such use caused level of reservoir to fall below minimum provided in agreement. Provision for minimum level in reservoir was expressly subject to stock water rights, and another provision recognized that landowner held stock water rights.

OPINION

Per Curiam:

FACTS

In January 1981, appellant Robert E. Dickenson ("Dickenson") and respondent the State of Nevada, Nevada Department of Wildlife ("the State") signed an agreement which allowed the State to enlarge the Illipah Reservoir located on Illipah Creek. Both the creek and the reservoir are located on Dickenson's land. The State intended to enlarge the reservoir for fishing and public recreation purposes while continuing to provide irrigation water for Dickenson's land.

The agreement, which is the subject of this appeal, acknowledged that Dickenson owned all outstanding water rights on Illipah Creek, except for "certain existing stock water rights," which belong to two other ranchers. The agreement also acknowledged that the State wanted the reservation of a 160 acre-foot minimum pool for purposes of public fishing and recreation.

The agreement went on to provide that Dickenson would have access to the outlet works (valves) of the dam. The State agreed to install a device to indicate when the water in the minimum pool fell below the 160 acre-foot minimum level. No drawdown was permitted below the minimum level "except as hereinafter provided, and except when mutually agreed otherwise in writing between Owners . . . and the Department." Dickenson was permitted to manage the water in the reservoir at his discretion, "excepting the water below the 160 [acre-feet] volume marking device." Emergency drawdown was only permitted by mutual agreement.

The agreement provided that storage rights contemplated by the agreement were subject to the referenced stock water rights "which shall be satisfied from the 160 acre-foot pool if there is not sufficient creek flow and/or water storage above said 160 acre-foot pool to satisfy said right." Finally, the agreement provided that Dickenson may graze cattle in the vicinity of the reservoir "without interference and may use the reservoir for stock water."

The parties signed the agreement on January 9, 1981. Thereafter, the State constructed the reservoir. In addition, the State established a fishery in the reservoir by planting rainbow trout in the spring and fall of each year.

In September 1991, the State filed a complaint, a motion for a preliminary injunction and a motion for a temporary restraining order against Dickenson. The State alleged that Dickenson had,

on several occasions the previous year, opened the valve of the dam without its consent, releasing water to flood his stock ponds several miles downstream. This release caused the level of the minimum pool to drop sixteen inches below the minimum level. The State claimed that Dickenson's actions of removing water significantly and adversely affected the fish in the reservoir.

The district court granted a temporary restraining order and enjoined Dickenson from removing any water from the reservoir without the permission of the State when the water was below the minimum 160 acre-foot level. Later, after holding a hearing, the district court issued a temporary injunction that enjoined Dickenson from removing water from the reservoir and provided for a lock on the valve.

Dickenson filed an answer, asserting that his water rights were senior to the State's storage rights and therefore could be satisfied from the minimum pool. For this reason, he claimed that he had not breached the agreement by drawing stock water from the minimum pool.

In May 1993, both parties moved for summary judgment. The court granted summary judgment for the State, holding that the agreement was clear on its face in granting the State a minimum pool which Dickenson may use only with the State's consent. The court also held that Dickenson had violated the agreement by releasing water without the State's permission, and that there was a distinct risk that he may do so again, thus causing irreparable harm to the wildlife and recreation resources. Accordingly, the court permanently enjoined Dickenson from removing water from the minimum pool without the State's consent whenever the water level in the minimum pool fell below the 160 acre-foot level.

Dickenson appeals, arguing that the district court erred in its interpretation of the agreement by holding that the agreement abrogated his superior right to draw stock water from the minimum pool. We agree and reverse the district court's decision.

DISCUSSION

The parties agree that the facts in this case are not in dispute. This court has held that in the event the parties do not dispute the facts, the question of the interpretation of a contract is a question of law. Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992). In such situations, this court will review the district court's findings de novo as a question of law. *Id.*

Dickenson contends that the intent of the agreement was to limit his use of the reservoir for irrigation, not stock water. He points out that none of the preliminary acknowledgements evi-

dence an intent that the terms of the agreement are meant to govern his stock water rights. He notes that the State interprets the stock water provision to apply only to other ranchers. However, he maintains that it would make no sense to interpret the contract to mean that water could be taken through the creek on his land to neighboring lands to water stock, but that he is precluded from using the reservoir for his own stock. Finally, he argues that nowhere does the agreement indicate that he intended to relinquish his stock water rights.

The State contends that there is no provision in the agreement for the unilateral use of the minimum pool. According to the State, all references to water are generic and there is no distinction between stock water and irrigation water. Further, the State argues that it would be unreasonable to limit the use of the reservoir for irrigation water but not stock water.

[Headnotes 1-3]

This court has held that when a contract is ambiguous, it will be construed against the drafter. Williams v. Waldman, 108 Nev. 466, 473, 836 P.2d 614, 619 (1992). If there is an ambiguity requiring extrinsic evidence to discern the parties' intent, summary judgment is improper. Mullis v. Nevada National Bank, 98 Nev. 510, 513, 654 P.2d 533, 535 (1982). However, if no ambiguity exists, the words of the contract must be taken in their usual and ordinary signification. Parsons Drilling, Inc. v. Polar Resources, 98 Nev. 374, 376, 649 P.2d 1360, 1362 (1982). An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract. Sterling v. Goodman, 102 Nev. 218, 220, 719 P.2d 1262, 1263 (1986).

[Headnote 4]

Taking the provisions of the contract in order, it becomes clear that the earlier provisions are modified by the later provisions. Paragraph five provides that drawdown below the minimum level is prohibited "*except as hereinafter provided,* and except when mutually agreed otherwise . . . ." (Emphasis added.) Paragraph seven complements this by providing that Dickenson may manage the reservoir at his discretion, "excepting the water below the 160 acre-foot volume marking device." In addition, paragraph eight allows drawdown for emergencies if both parties consent. Taken together, these provisions permit Dickenson to remove water at his discretion, provided the pool remains above the 160 acre-foot level. When the water drops below that level, he must seek the State's permission.

However, paragraph five contains the words "except as hereinafter provided." Paragraph eleven goes on to address stock water

and provides that "the above-described stock water rights" shall be satisfied from the pool "if there is not sufficient creekflow *and/or* water storage above said 160 acre-foot pool to satisfy said right." (Emphasis added.) A literal reading of this provision allows an owner of the stock water rights to draw stock water from the pool if the creek is dry even if the pool is below the minimum level. Paragraph fifteen also addresses stock water and provides that Dickenson "may use the reservoir for stock water." Accordingly, we conclude that these two provisions permit Dickenson to use the reservoir at his discretion for stock water when the creek is dry.

This interpretation is particularly applicable in light of the acknowledgment on page one which provides that "owners [Dickenson] own all outstanding water rights on Illipah Creek, *except for certain stock water rights*." (Emphasis added.) This acknowledgment appears to provide that Dickenson owns *some* stock water rights. Therefore, paragraph eleven, which refers to "the above-described stock water rights" would include Dickenson's stock water rights. The storage rights in paragraph eleven are then subject to Dickenson's stock water rights which are to be satisfied from the minimum pool.

The State asserts that "the only stock water rights mentioned in the agreement are those of downstream users who are not signatories to the agreement." This is obviously incorrect in light of paragraph fifteen which refers to Dickenson's right to use the reservoir for stock water.

We therefore hold that the agreement permits Dickenson to draw stock water from the minimum pool. Paragraph eleven, when construed against the State as the drafter, permits Dickenson to draw water whenever there is "not sufficient creek flow," even if the minimum pool is below the 160 acre-foot level. The words "and/or" make such a reading possible. Under this interpretation, the district court erred in enjoining Dickenson from drawing water from the minimum pool without the consent of the State when the pool falls below the 160 acre-foot minimum.

In conclusion, we hold that the proper interpretation of the contract permits Dickenson to draw water from the minimum pool for stock water purposes at his discretion. Accordingly, we reverse the decision of the district court and remand with instructions to enter judgment for Dickenson.

Rose, C. J., concurring in part and dissenting in part:

I agree with the majority's decision to the extent that it reverses the order of summary judgment in favor of the State. However, I would remand the case for trial so the parties can introduce extrinsic evidence to discern the parties' intent when entering the contract.

Summary judgment is appropriate when the record shows 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. Van Cleave v. Gamboni Constr. Co., 101 Nev. 524, 706 P.2d 845 (1985). Where a written contract is ambiguous and extrinsic evidence is required to discern the parties' intent, summary judgment is inappropriate. Mullis v. Nevada National Bank, 98 Nev. 513, 654 P.2d 536 (1982); *see also* Mobile Acres, Inc. v. Kurata, 508 P.2d 889 (Kan. 1973).

Although both parties contend that the contract is clear on its face and unambiguous, the contract is ambiguous. The contract is subject to two different but reasonable interpretations. A literal reading of paragraph 11, which points to the "*above* mentioned stock water rights," refers only to the stock water rights described in the second recital. The second recital describes the stock water rights of nonsignatory parties. The only mention of Dickenson's stock water rights comes in paragraph 15. Thus, one reasonable reading of the contract is that Dickenson may only exercise his stock water rights by grazing his cattle next to the reservoir when the reservoir falls below 160 acre-feet.[1]

The majority opinion provides a second reasonable reading of the contract. Namely, that paragraph 11, read in conjunction with paragraph 15 and the second recital, allows Dickenson to release water to fill his stock ponds even when the reservoir has fallen below 160 acre-feet. In light of these reasonable but different interpretations, I feel that extrinsic evidence is necessary to help discern the parties intentions. This is especially true since the interpretation of a written contract involves determining the thoughts that the users of the words intended to convey to each other. 3 Arthur L. Corbin, Corbin on Contracts § 543c (1960 & Supp. 1993).

Finally, the majority opinion recognizes that the contract at issue is ambiguous, then applies the maxim contra proferentum, and construes the document against the State. However, since the contract involves the public good, the majority could just as easily construe the contract in favor of the public interest. *See* County of Clark v. Bonanza No. 1., 96 Nev. 643, 615 P.2d 939 (1980). Although it appears that the parties agree that no extrinsic evidence is necessary to discern their intent,[2] equity requires more than the blind application of maxims of contract interpretation.

[1]The majority infers that it would be unreasonable to interpret the contract in a way that would allow Dickenson to release water to satisfy downstream users but not himself. This may be so, however, it is mere speculation without further evidence of the parties' intent.

[2]This is not surprising considering both parties argue that the document is clear on its face.

Based on the foregoing considerations, I would reverse and remand to allow the parties to introduce extrinsic evidence to discern their intent.

JACK MATTHEWS AND JACK MATTHEWS & COMPANY, APPELLANTS, *v.* PHYLLIS COLLMAN, RESPONDENT.

No. 22410

July 27, 1994 878 P.2d 971

Appeal from district court order awarding damages and attorney's fees in a dispute over a brokerage commission. Second Judicial District Court, Washoe County; Charles M. McGee, Judge.

Real estate broker who had been employed by real estate company under independent contractor agreement sought commission in sale of commercial property partially owned by owner of the real estate company. The district court entered judgment for broker on theory of accord and satisfaction, and company and owner appealed. The supreme court held that: (1) there was no accord and satisfaction because there was no meeting of the minds; (2) broker was acting as agent for owner, at least impliedly, and thus was entitled to reasonable value of her services; and (3) offer of judgment rule and statute do not preclude recovery of costs and attorney fees by offeror when ultimate judgment is not more favorable than offer of judgment rejected by offeree.

Reversed and remanded.

Jones, Jones, Close & Brown, and *Richard F. Holley,* Reno, for Appellants.

Mark H. Gunderson and *Eric Stovall,* Reno, for Respondent.

1. ACCORD AND SATISFACTION.
   There was no accord and satisfaction of claim by real estate broker against real estate company and its owner for commission on sale of property owned in part by company's owner, though broker sent company a letter on the matter rejecting offer by owner and requesting particular commission split, where there was no meeting of the minds as to whether future commission split as specified with all that was intended by broker or whether the split was in addition to commission on the instant transaction.
2. ACCORD AND SATISFACTION.
   Prerequisite for finding of accord and satisfaction is clearly established meeting of the minds.