

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CITY OF STEUBENVILLE, OHIO,	)	
	)	CASE NO. 07 JE 51
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.

APPEARANCES:

For Plaintiff-Appellant:

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For Defendant-Appellee:

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JUDGES:

Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: September 25, 2008

VUKOVICH, J.

{¶1} Plaintiff-appellant City of Steubenville appeals the decision of the Jefferson County Common Pleas Court entering judgment in favor of defendant-appellee Jefferson County after a trial to the court. This case concerns the City's imposition of a water rate increase and the County's contention that the rate increase was impermissible under the water purchase agreement between the two entities. We had previously affirmed a decision finding that the rate increase could not be imposed to cover the costs of capital improvements, but we remanded for a determination of whether any of the rate increase was due to a demonstrable increase in the costs of performance other than capital improvements [which will hereinafter be shortened to "costs of performance"]. The City raises two alternative arguments on appeal based upon what it sees as the trial court's two alternative holdings. First, the City contends that the court erred in determining that it failed to meet its burden of showing that it incurred demonstrable increases in the costs of performance. Second, the City argues that the court erred in determining that the rate increase was enacted exclusively for funding capital improvements. For the following reason, the judgment of the trial court is affirmed.

#### STATEMENT OF THE CASE

{¶2} The parties entered into a water purchase agreement in 1981 whereby the City would supply water to the County for forty years at a rate of \$1.265 per thousand gallons. The contract allowed modification of the schedule of rates to the following extent: "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 [City's] system \* \* \*."

{¶3} In 1989, the City enacted an ordinance changing the water rate with increases each year until 1995 when the rate was \$1.782 per thousand gallons. The rate thereafter remained unchanged until the City made plans to upgrade its system. On November 7, 2000, the City enacted an ordinance changing the rate on a schedule providing increases for six years with a final rate of \$4.42 per thousand gallons. The County eventually refused to pay the increased rate.

{¶4} In September 2002, the City filed a complaint arguing that its plans to repair and upgrade the system did not constitute increased capitalization but was a mere increase in the costs of performance. The City sought past due water bills, and the County counterclaimed for the rate increase it paid in 2001. The County argued that the rate increase violated the water purchase agreement because the increase was due to capital improvements and that even demonstrable increases in the costs of performance cannot be passed on to the County if they are based on increased capitalization of the City's water system.

{¶5} On November 22, 2004, the trial court granted summary judgment in favor of the County. On appeal, this court affirmed the decision in part, holding that the costs of increased capitalization include more than just an expansion of the water capacity of the system. Rather, the costs of increased capitalization also include costs that increase the capital of the water system, such as the City's planned capital improvement project. Thus, any rate increase based upon costs involved in increasing the capital of the City's system was invalidated. *City of Steubenville v. Jefferson Cty.*, 7th Dist. No. 05JE23, 2005-Ohio-6596, ¶32.

{¶6} However, we also found that there remained 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 that did not include increased capitalization costs. *Id.* at ¶33. We remanded to ensure that the rate increase was based solely upon the costs of increased capitalization and, if it was not, to relieve the County from paying the increased rate. *Id.* at ¶34.

{¶7} The trial court heard the case on May 24, 2007. The City's only witness was its Finance Director. He stated that part of the revenue from the rate increase was used to balance a deficit and for increased operating expenses. (Tr. 35). He introduced a spreadsheet recently created by his office showing the Water Department's expenditures from 2000 through 2005. According to his spreadsheet, the City had \$2,177,424 in operating costs (other than increased capitalization) in 2000. The Finance Director stated that if costs stayed the same in the five years thereafter, the City should have only spent \$10,887,000 from 2001 through 2005. He

reasoned that since the City actually spent \$14,055,224 over the five years after the rate increase, its operating costs rose \$3,168,104 for that time span.

**{¶8}** Because he found the County used nearly 32% of the water during that time, he testified that the County's share of the increased operating costs is \$1,008,724. He was not familiar with a rate composite provided by his office and sent to the County in 2001, which listed the County as using only 27.5% of the water, rather than the 32% he attributed to them in the years after the rate increase. (Tr. 67).

**{¶9}** It was also noted that operating expenses went from \$2.177 million in 2000 to \$3.567 million in 2001, an increase of \$1.4 million; they then went down to \$2.768 in 2002 and \$2.419 in 2003. The Finance Director testified that the 2001 increase was due in main part to the need to move a water line in order to widen a street, which cost nearly \$820,000. (Tr. 44-46). Although this was labeled as a capital improvement distribution on his spreadsheet, he included it as a qualified cost of performance and explained it as a nomenclature issue. (Tr. 44). After disclosing that the system was one hundred years old, he still opined that the replacement pipe was not a capital improvement because it did not have a longer life than the old pipe. (Tr. 45).

**{¶10}** The Finance Director admitted that increased costs of performance include costs to the City to produce and deliver water to the County under the contract. (Tr. 16). Yet, it was later disclosed that \$1.1 million in meter readings was included in his calculation of operating expenses over five years even though the County provided their own meter reading, billing and customer service. He also admitted that the cost of meters went from around \$14,000 in 2000 to nearly \$126,000 in 2001 and his spreadsheet charged the County for 32% of this increase even though the City did not provide meters to the county. (Tr. 48, 61).

**{¶11}** The County posited that it was irrelevant to the court whether the City subsequently ended up using some of the rate increase revenues for operating costs and whether the operating costs ended up rising after the rate increase. The Finance Director thus responded that the City likely had increased costs in the late 1990's as well. (Tr. 73). He stated that the City borrowed \$1.2 million to keep the water department going in 1998 and 1999. (Tr. 78). However, he then acknowledged that

the water rate study of the City's consultant showed that the Water Department's operating expenses in 1998 were below budget at \$2.38 million. (Tr. 78-79, 85). This water rate study also showed much more revenue than expenses for 1998. Also notable is the fact that expenses were \$200,000 less in 2000 (the year the rate increase was enacted) than they were in 1998.

{¶12} Finally, the Finance Director disclosed that at the time of City Council's consideration of the rate increase, he was concerned about whether the consultant's proposal would cover the current deficit and the increased operating expenses he believed they would incur in the future. (Tr. 30). Yet, he admitted that repayment of the operating loan was not included in the consultant's study. He acknowledged that the consultant had no interest in the current operations, the deficit or the increased costs when they formulated their rate proposals and stated that the proposal did not address the current need for a rate increase due to operating costs. (Tr. 31, 74, 88). Although he desired the consultant to incorporate operating losses in the study and make one large rate increase, "that did not happen." (Tr. 32). The Finance Director concluded that he did not voice the issue as overly critical since the consultant recommended placing the first couple years worth of revenue from the rate increase into a surplus fund to grow for use when the capital improvement project loan was needed; he opined that this would allow the department to use the money in that account for other purposes if necessary. (Tr. 32-33, 74). However, he acknowledged that he was not involved in decisions to determine or adopt the rates, and he could not actually say that the City enacted this rate increase with at least a partial purpose of providing for projected increased operating expenses. (Tr. 39).

{¶13} The City rested, and the County called to the stand the City's directing consultant on the rate increase and capital improvement project. This consultant identified the March 2000 water rate study he supervised. He pointed out that the stated purpose of the study was to recommend a fair rate structure that generates sufficient revenue to meet the *existing* operation and maintenance costs and to pay the debt on the capital improvement loan. (Tr. 102, 110). Although his report projected a three percent increase in operating costs, he believed this could be offset by the new designs which would require fewer employees. (Tr. 111). The consultant

also revealed that he was instructed by the City to consider the operating and maintenance costs as being *frozen* as the City wished to assure the public that they were not using the rate increase to raise employee pay and that they were only using it for the capital improvement project. (Tr. 102-103, 110). The language of the study confirmed that 1998 expenses for operating and maintenance were utilized to calculate the new rates but warned that rates may need to be adjusted to cover operating and maintenance expenses which may increase up to four percent annually due to inflation. (Exhibit C at 4, 7).

**{¶14}** The consultant reiterated that any projected increased costs of performance were not part of his study or any of his alternative rate increase recommendations. (Tr. 103). He also testified that the City accepted his proposed rates exactly as recommended in one of the alternative recommendations and disclosed that the recommendation adopted a proposed rate increase that was based only on capital improvements. (Tr. 103, 106). He explained that the Finance Director's belief that the surplus fund could be used to fund operations if necessary was not anticipated in the study as there would then be insufficient funds for the capital improvement project. (Tr. 114-115, 117).

**{¶15}** The County also presented the testimony of the County Sanitary Engineer, who did not take this position until March of 2001, four months after the rate increase went into effect. He testified that he immediately began negotiating with the City Manager over the water rates, and he was never told that part of the increase was the result of increased operating or maintenance costs. (Tr. 124, 128, 133). Rather, the City only expressed the capital improvement project as the reason for the new rates. (Tr. 127).

**{¶16}** The County Sanitary Engineer also explained that "demonstrable increase in costs of performance" is a standardized industry term in water contracts meaning that the parties to the contract conduct a yearly review to discuss and rationalize or dispute changes in operation or maintenance. (Tr. 136-137). The City did not conduct any review with the County concerning operating costs prior to enacting the rate increase at issue.

**{¶17}** The County Sanitary Engineer also emphasized the use of “hereunder” within the contractual phrase “demonstrable increase in the costs of performance hereunder” and opined that this excludes from a permissible rate increase any costs that were not costs of performing this contract. He then pointed out that distribution costs (such as meter reading, billing, collection or customer service) are not costs of performing the contract because the County provides these services to its own residents. (Tr. 138). When asked whether he expected the labor costs of the City’s Water Department to increase over the years, he noted that the labor costs of the County’s Water Department decreased from 2000 to 2007 due to a reduced labor force. (Tr. 161).

**{¶18}** The trial court then took the case under advisement, ordering proposed findings and conclusions to be submitted after completion of the trial transcript. On October 9, 2007, the trial court released its decision finding against the City and for the County. The court first announced that the rate increase in the November 7, 2000 ordinance was directly attributable to and enacted for the singular purpose of funding a capital improvement project and not for any increase in costs of operations or maintenance, noting that our remand asked the court to determine what the rate increase was “enacted as a result of” and what the enactment was “due to”.

**{¶19}** Thereafter, the trial court made three main conclusions of law. First, the court held that the City failed to meet its burden of proving that there were demonstrable increases in the costs of performance exclusive of capital costs. Second, the court announced that uncontroverted and indisputable facts show the rate increases enacted on November 7, 2000 were exclusively for funding the capital improvement projects and not due to a demonstrable increase in the costs of performance. Third, the court reasoned that merely because the City may have actually utilized revenues from the rate increase to fund operation and maintenance costs does not mean that the City enacted the rate increase *due to* a demonstrable increase in the costs of performance.

**{¶20}** Factually and more specifically, the court found that the City had instructed their consultant to only consider the increase needed to cover the costs of the planned capital improvement project and that the city expressed its desire to

assure its constituents that the increase was not enacted to increase salaries or benefits. The court opined that the consultant's recommendation was solely made to fund the capital improvement costs and that recommendation was adopted in its entirety by the City. The court also stated that the contract disallowed increases that would represent a duplication of costs already incurred by the County in its operation of its water delivery system such as distribution, billing, meter reading and customer service.

{¶21} According to the court's findings, the City's Finance Director knew that the intent of the ordinance was to fund only the capital improvement project. The court found that the Finance Director was not familiar with important aspects of the water system. The court also stated that the Finance Director was not familiar with the rate analysis that was prepared by his own office near the time of the rate increase and pointed out that this analysis differed significantly with the report his staff generated six years after the increase. The court thus declared that the current report was unreliable and to be afforded little or no weight. The City filed timely notice of appeal from the trial court's judgment.

#### GENERAL LAW

{¶22} We are generally presented with issues falling under two distinct areas of law: the interpretation of certain contractual language and the evaluation of the manifest weight of the evidence. In the field of contract interpretation, clear and unambiguous contractual language is applied without consideration of extrinsic evidence, and such plain language is reviewed de novo. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638. If a contract is reasonably susceptible to more than one meaning, then it is ambiguous and extrinsic evidence of reasonableness or intent can be employed. *Id.* Words and phrases are given their common and ordinary meanings absent specific contractual definitions. *City of Steubenville v. Jefferson Cty.*, 7th Dist. No. 05JE23, 2005-Ohio-6596, ¶20, citing *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 212 (unless manifest absurdity would result or an alternative meaning is clearly demonstrated in the contract).

{¶23} In reviewing a trial court's weighing of competing evidence and credibility determinations, we are guided by a presumption that the trial court's factual findings



are correct. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24. This is due in part to the fact that the trial court occupies the best position from which to view the witnesses and observe their demeanor, voice inflection, gestures, eye movements, etc. *Id.* We cannot reverse a civil judgment merely because we hold a different opinion on the weight of the evidence presented to the trial court and the credibility of the witnesses. *Id.* Unlike criminal appeals, where we can reweigh the evidence, civil appeals require more deference to the trial court and affirmance of those judgments supported by some competent and credible evidence. *Id.* at ¶26. Thus, civil judgments supported by some competent and credible evidence cannot be reversed on appeal as being contrary to the manifest weight of the evidence. *Id.* at ¶24, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280.

#### ASSIGNMENT OF ERROR NUMBER ONE

{¶24} The City's first assignment of error provides:

{¶25} "THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFF FAILED TO MEET ITS BURDEN OF ESTABLISHING BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF INCURRED DEMONSTRABLE INCREASES IN THE COST OF PERFORMANCE."

{¶26} The City points out that the trial court agreed in its third conclusion of law that the City used some revenues from the rate increase to pay for operations and maintenance. The City then urges that the trial court's first conclusion of law was incorrect as the City did establish that it incurred increases in the costs of performance from 2000 through 2005 other than increased capitalization.

{¶27} The County responds that the Finance Director's testimony lacked credibility and that his report was properly given little weight by the trial court as it was contrived after the fact. The County notes that the City was not contractually permitted to bill it for costs that would be duplicative of those already incurred by the County in its operation of the water delivery to its residents (such as meter reading and customer service) and that the Finance Director failed to exclude such cost increases from his calculation of the numbers. (Tr. 136-138). The County points out that the City's attorney essentially admitted that this problem existed when the attorney explained that taking 32% of all increases was easier than figuring out which increases were

related to the County's water contract (and assumed that it likely balanced out because some increases were allegedly solely related to the County). (Tr. 62). The County complains about accounting methods and the inclusion of the cost of meters which were not provided to the County. (Tr. 53-61). The County also urges that the contract contemplated a mutual review of costs and expenses prior to a rate increase as demonstrable increase is an industry term denoting a periodic review to provide support for the claimed increase. (Tr. 136-137). The County concludes that the City either failed to prove that there were increased costs or failed to prove the *amount* of its increased costs due to credibility, reliability and relevancy issues.

**{¶28}** Considering our deferential review of the trial court's factual findings, the court's decision must be upheld if there is some competent, credible evidence supporting the trial court's decision. Concerning this assignment of error, multiple portions of the Finance Director's testimony were subject to rational disagreement, and some of his conclusions were legally erroneous. For instance, his opinion that a project costing \$820,000 and entailing a new and deeper water line due to the City's act of widening a road can be disregarded. Such project (which was even labeled a capital improvement in his spreadsheet) need not be considered an increased cost of performance under the contract other than increased capitalization. Moreover, one could reasonably disregard over half a million dollars in non-recurring claimed operating expenses in 2001 and 2002 due to the lack of explanation as to why the Finance Director attributed improvements made as a result of an EPA consent decree as non-capital improvements.

**{¶29}** Regardless of the legal issues raised regarding this assignment and regardless of the credibility issues concerning whether the City experienced increased costs and expenses in the years subsequent to the rate increase, the City mischaracterizes the trial court's conclusion. In its first conclusion of law, the court determined that the City did not prove to the court "that there were demonstrable increases in the costs of performance under the contract between the parties not including increased capitalization costs." Contrary to the City's contention, the court did not actually hold that the City did not incur increased expenses (other than capitalization) in the years after the rate increase. Rather, the court merely generically

commenced its conclusions by finding that the City failed to prove its entitlement to charge the County with the rate increase under the terms of their contract.

{¶30} The court's bare conclusion should not be read in isolation and must be read in conjunction with the factual findings and the remaining conclusions of law. In doing so, it is clear that the trial court's decision was based upon the holding that the City was required to establish that the rate increase was enacted *at least partially* for the purpose of a demonstrable increase in performance costs that did not include capital improvements and that the City failed to establish this by a preponderance of the evidence. The court found that where the City ended up spending the rate increase did not automatically establish the purpose of the increase at the time of the ordinance's enactment. The court repeatedly emphasized that it was not convinced that the City enacted the rate increase for any purpose other than to fund the capital improvement project. In reading the opinion as a whole, we conclude that the court was finding against the City not because its expenses did not actually increase in the last few years but because even if those increases were incurred and even if they were expected by some, they were not any part of the reason for the November 7, 2000 rate increase.

{¶31} Whether that decision was proper is the topic of the next assignment of error. Due to our resolution of the next assignment, this assignment could also be considered moot. In other words, if the City failed to prove that the rate increase was even partially "based on" a demonstrable increase in costs and the trial court properly determined that the rate increase was based solely on the capital improvement project, then it is irrelevant if the City incurred increased costs or not.

#### ASSIGNMENT OF ERROR NUMBER TWO

{¶32} The City's second assignment of error contends:

{¶33} "THE TRIAL COURT ERRED IN RULING THAT THE UNCONTROVERTED AND INDISPUTABLE FACTS IN THIS CASE SUPPORT THE LEGAL CONCLUSION THAT THE RATE INCREASES ENACTED BY PLAINTIFF ON 11-7-2000 WERE EXCLUSIVELY FOR THE FUNDING OF CAPITAL IMPROVEMENT PROJECTS AND NOT DUE TO A DEMONSTRABLE INCREASE IN THE COST OF PERFORMANCE."

{¶34} Here, the City argues that the projected future increases in costs and the intent of the City in enacting the rate increase were irrelevant under the contract. The City concludes that “based on a demonstrable increase” only obligates the City to prove an actual increase. The City alternatively posits that evidence established that the rate increase was enacted partially for the purpose of funding the anticipated three to four percent increase in operating expenses and points to the consultant’s projection of such increases due to salary adjustments.

{¶35} As the County responds, after-the-fact justifications for a rate increase are not permissible. By stating that any increase “shall be based on” a demonstrable increase in qualified performance costs, such condition must exist at the time of enactment in order for the rate increase to be valid. The contractual language necessarily means that the increased costs must be demonstrable prior to the rate increase, not that the City can later show increased costs actually occurred in a five-year period after the rate increase. Otherwise, the longer a suit takes to proceed through the courts, the more subsequently-created evidence the City can generate to support its prior enactment.

{¶36} In conclusion, the contract’s language that a rate increase “shall be based on” the provided standard is not ambiguous. Rather, it is plain and ordinary language that must be applied as written. See *Shifrin*, 64 Ohio St.3d at 638. Under this plain contractual language, the rate increase had to have been at least partially intended to cover increased qualified costs that were demonstrable at the time of enactment.<sup>1</sup> As such, the City’s argument (that their intent behind the rate increase is irrelevant) is without merit.

{¶37} We now address the City’s alternative argument that they did establish that part of the basis for the rate increase was to cover an anticipated increase in the costs of operations and maintenance. The City notes that the trial court cited the testimony of the rate increase consultant, who testified on direct that the increase was

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<sup>1</sup>Even if the contractual phrase, “shall be based on a demonstrable increase”, could possibly be considered ambiguous, the only reasonable interpretation is that the rate increase chargeable to the County had to be enacted at least in part for the purpose of covering increased operating and maintenance costs that do not include capitalization. This is consistent with our prior opinion and our instructions on remand which included language that the rate increase must be “based upon” or must have been “enacted due to” a demonstrable increase in qualified costs of performance. *Steubenville*, 7th Dist. No. 05JE23 at ¶1, 33-34.

only for the capital improvement project. (Tr. 102, 1-6). The City urges, however, that the court ignored the consultant's further statement on cross-examination that his study projected a three to four percent annual increase in operations and maintenance expenses. The City characterizes the consultant's testimony as supporting its position that they all assumed that additional revenue from the rate increase in the first few years could be used to fund rising operating and maintenance costs. (Tr. 109-117).

**{¶38}** The County responds that the trial court's decision finding that the rate increase was intended only for capital improvements is not contrary to the manifest weight of the evidence. The County notes how the City specifically wished to preclude public outcry over increasing salaries and benefits by ensuring the rate increase was solely for purposes of improving the capital of the system. The County proffers an estoppel argument on this basis. As will be outlined *infra*, we do not agree that the City is estopped due to its stated policy; rather, it is merely one factor to be considered by the trier of fact.

**{¶39}** In reviewing the facts considered by such trier of fact, we must initially point out that merely because the Finance Director testified that he anticipated being able to use banked revenues from the first two years of the rate increase to cover projected increases in operations does not mean that City Council intended this maneuver at the time of the enactment. In fact, the Finance Director testified that he voiced his concern over the limited nature of the rate increase to Council, but he did *not* testify that any Council member assured him that this taking of revenues (earmarked for loan defrayment costs of the capital improvement project) would occur. Nor did he testify as to City Council's expressed or actual intent. In addition, he did not substantially participate in the discussions concerning the rate increase and was not involved in the decision-making process.

**{¶40}** Furthermore, contrary to the City's suggestions, the consultant's testimony cannot be construed as stating that he proposed, or that he was aware, that the City was planning to use the first few years of revenue to pay for increased expenses. To the contrary, he specifically disputed that this was the intent of his study or that City Council voiced such option. Although the consultant pointed out the probability of increased expenses in the study, he expressly disclaimed that his rate

increase, which was wholly adopted by City Council, included increased operation or maintenance expenses in its calculation. Just as importantly, his testimony revealed that the City instructed him to consider the operating expenses as frozen as they promised the public that the rate increase was only to fund the capital improvement project and not to provide raises to employees.

{¶41} Consequently, some competent and credible evidence supported a finding that the water rate increase was enacted solely for the capital improvement project. See *Wilson*, 113 Ohio St.3d 382 at ¶24, 26. The trial court's decision on such matter was not contrary to the manifest weight of the evidence. As such, this assignment of error is overruled.

{¶42} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

DeGenaro, P.J., concurs.  
Donofrio, J., concurs.