Appeals Court Rules that Landowner Can Prevent Hazardous Waste from Being Disposed of in Well

The Michigan Court of Appeals has ruled that a trial court properly admitted oral evidence regarding the interpretation of a lease for a well for the disposal of waste materials by a chemical company and properly entered a judgment against the chemical company, voiding the existing lease agreement.

Michigan Chemical Corporation (Michigan Chemical), and later, its successor, Velsicol Chemical Corporation (Velsicol), operated a fifty-acre chemical manufacturing plant (the Plant) along the banks of the Pine River in St. Louis, Michigan from 1936 until September 1978. Chemicals produced at the Plant included polybrominated biphenyl (PBB).

Robert Crumbaugh (Crumbaugh) was employed by Michigan Chemical from 1936 until the mid-1940's, working in the boiler room. Starting in 1944, Crumbaugh owned and farmed a number of acres of land several miles from the Michigan Chemical site. Crumbaugh died in 1997, several months before his wife, Marcelle Crumbaugh (Mrs. Crumbaugh) brought the instant suit.

Until the mid-1960's, the Plant's wastewater discharges were pumped into the Pine River. At that time, Michigan Chemical drilled an underground injection well (Well 1) less than one mile from the Crumbaugh's home to dispose of wastewaters. In 1966, Michigan Chemical secured an easement from the Crumbaughs for an underground pipeline leading from the Plant to Well 1, which would cross their property. The easement granted Michigan Chemical:

> the right to lay, maintain, operate, replace, change and remove pipelines for the transportation of brine and other substances, together with such drips, valves, fittings, meters, and similar appurtenances as may be necessary or convenient to the operation of said lines . . . together with the right of ingress or egress for all purposes incident to said grant.
>
> The said Owner(s), their heirs and assigns, hereby agree that no building or buildings shall be erected on or over the said pipelines, but are otherwise to fully use and enjoy said premises except for the purpose hereinbefore granted to said Michigan Chemical Corporation who hereby agree [sic] to pay any damages which may arise to crops, fences, stock and land from the laying, maintaining, operating, and removing of said lines.
>
> The route to be taken by the pipelines is to be restricted to an area within 33 feet of the centerline of the County Road . . .Michigan

> Chemical Corporation agrees to bury and maintain said pipelines so as not to unduly interfere with the cultivation or drainage of said land.
>
> This agreement is binding to the heirs, representatives, successors and assigns of the respective parties hereto.

Substances were channeled through the pipeline to Well 1 from late 1966 until 1980.

By a lease agreement executed on September 22, 1971, Michigan Chemical leased from the Crumbaughs one acre of land for the purpose of drilling and operating a second disposal well (Well 2) along the existing pipeline. This lease agreement was drafted by Michigan Chemical and provided a lease term of 99 years beginning September 15, 1971, with a rental payment of $600.00 per year beginning September 15, 1971. It also provided numerous other details as to the use, termination and assignment of the lease.

The lease agreement was on letterhead of Michigan Chemical's Chicago, Illinois office, and was signed by the Crumbaughs and a vice-president and secretary of Michigan Chemical. Later testimony revealed that the Crumbaughs failed to read the lease agreement prior to signing.

Soon after the lease was executed, Michigan Chemical drilled and put into operation Well 2, approximately two hundred yards from the Crumbaugh's residence, at a depth of roughly 3,750 feet.

In approximately 1975, Michigan Chemical piped wastewaters containing trace amounts of PBB to Well 2.

The Plant was shut down in 1978, and was later demolished and the site remediated. Well 1 was capped and plugged in 1980. The Plant site was subsequently placed on the Environmental Protection Agency's (EPA) National Priority List (NPL), and in 1982, various federal and state agencies and Velsicol entered into a consent judgment regarding contamination at the main plant site. The Crumbaughs were not parties to the consent judgment.

The consent judgment required that Velsicol wall and cap the main plant site, install monitoring wells and a groundwater collection system, and maintain the water table elevation within the main plant site at no more than 724.13 feet. Accordingly, Velsicol built a soil bentonite containment wall encircling the fifty-acre perimeter of the plant site, filled with a mixture of soil, bentonite and water. A three-foot thick clay cap covered the site. These preparations were to prevent the leakage of hazardous substances. Additionally, an appendix to the consent judgment required Velsicol to immediately apply for a permit to

allow it to dispose of decontamination and contaminated water collected from the main plant site in Well 2. Another attachment to the consent judgment required Velsicol to coordinate the Well 2 activities with the landowner "upon and adjacent to whose lands the deep well is located."

From approximately 1982 to 1984, Velsicol pumped wastewaters from the plant site through the pipeline to Well 2, including leachate from a completely separate industrial disposal site that Velsicol had remediated.

In June 1984, the Crumbaughs received a letter from Velsicol's attorney stating that Velsicol would be installing spill control structures at the Well 2 site in accordance with the consent judgment, namely a "Truck Unloading Spill Containment Pad", which was installed in July 1984 while the well was still operational.

For the next approximately twelve years Well 2 lay dormant. No maintenance or inspection of the pipeline between the plant site and Well 2 was performed after the mid 1980's. In the early 1990's, the water table level at the plant site began to rise above the level permitted by the consent judgment. By then, regulatory requirements for disposal wells had changed, and Well 2 did not meet these new requirements. Even though Velsicol was apparently aware of Well 2's non-compliance, it failed to explore alternative means of disposal until 1994, when it received a letter from the EPA reprimanding it for allowing the water table to exceed the required level, and urging it to seek alternative disposal methods.

In May 1996, Velsicol met with the Crumbaughs to advise them that it intended to reactivate the well, to which the Crumbaughs objected. A contractor began work on the well, and, subsequently, Mrs. Crumbaugh filed a complaint seeking to have the lease declared void in April 1997.

Mrs. Crumbaugh's first amended complaint alleged that Velsicol's facility was demolished and declared an EPA superfund site by virtue of PBB contamination, that the clay liner sealing the site had become permeable, that groundwater had leached into the superfund site, and that Velsicol intended to truck the leachate to the well on Mrs. Crumbaugh's property. The complaint also alleged that the original lease agreement provided that the substances for disposal in Well 2 be piped, not trucked, to the well, and that representations were made to the Crumbaughs that Well 2 would only be used to dispose of a naturally occurring substance, brine. Additionally, the complaint alleged that Velsicol intended to erect structures on the Crumbaugh property that were not specifically permitted by the lease agreement. Mrs. Crumbaugh

requested relief from the court on the basis that defendant's activities and proposed use of the well would result in irreparable harm by: 1) impeding the use and operation of farm equipment; 2) blocking the road and restricting access to Mrs. Crumbaugh's home; 3) damaging field tile; 4) causing loss of acreage, and; 5) impairing the ability of Mrs. Crumbaugh and her successors or assigns to encumber the premises by mortgage, among other things.

Attached to Mrs. Crumbaugh's original complaint was an affidavit of C.W. Dunbar (Dunbar), which stated that he was an employee of Michigan Chemical in 1971, and that he had requested permission from Crumbaugh to drill a well for the purpose of disposing of brine, and that the brine would be transported to Well 2 by pipeline only, and that the only purpose contemplated for Well 2 was for the disposal of brine.

Velsicol's answer denied that the original lease prohibited it from trucking in the waste or excess water to Well 2, even though it was generally agreed that the water would be transported by pipeline. Additionally, Velsicol claimed that its use of Well 2 would not cause the impediments that Mrs. Crumbaugh claimed, and counter-claimed that Mrs. Crumbaugh and her relatives were attempting to interfere with Velsicol's construction, even though it was permitted under the terms of the lease agreement.

In May 1997, the trial court granted Mrs. Crumbaugh's request for a preliminary injunction, and, following a bench trial in March and April of 1998, permanently enjoined Velsicol from disposing of any substance in Well 2, voided the original lease agreement, and ordered that Velsicol vacate the leased property within eighteen months. Velsicol appealed.

Upon appeal, Velsicol argued that the main discrepancy was whether the original lease limited Velsicol to the disposal of brine only, or allowed it to dispose of other substances at its discretion. Velsicol believed that the lease was clear on that question, and that the trial court erred in allowing parol evidence (oral evidence as opposed to written evidence) on that issue.

Mrs. Crumbaugh argued that the trial court properly admitted the parol evidence, believing that it was necessary to determine whether the lease agreement fully incorporated the parties' agreement. Mrs. Crumbaugh also argued that the parol evidence was necessary to explain technical or trade terms in the lease agreement which would otherwise be susceptible to more than one definition. She used as an

example the term “items” in the phrase stating the lessee “may thereafter pipe into said disposal well such items for disposal as the Lessee shall determine from time to time.”

The appeals court found that, although parol evidence is not admissible to vary or change a contract that is clear and unambiguous, it may be admissible to prove the existence of an ambiguity in a contract and to clarify the meaning of an unclear contract. The appeals court quoted *Raska v. Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982), stating that “a contract is ambiguous if ‘its words may reasonably be understood in different ways.’” The trial court noted that an ambiguity existed regarding the intended use of the well, and found that Velsicol’s proposed use was inconsistent with the lease as intended by both parties. The appeals court agreed with the trial court that parol evidence could be considered regarding the question of whether the lease agreement as written represented the complete agreement of the parties. Additionally, the appeals court found that, after receiving the affidavit and testimony of Dunbar, the trial court did not abuse its discretion in concluding that the written lease did not fully incorporate the parties’ agreement.

The appeals court also agreed with the trial court’s finding that additional ambiguity existed regarding the portion of the lease stating the defendant “may” pipe materials into Well 2, because the language could be interpreted as having more than one meaning. The phrase could be interpreted to mean that the lease granted Velsicol access to the well by pipeline or other mode, or that Velsicol was permitted only one method of access to the disposal well, through the pipeline. Similarly, as argued by Mrs. Crumbaugh, the word “items” in the phrase “may thereafter pipe into said disposal well such items for disposal as the Lessee shall determine from time to time,” was subject to more than one interpretation.

Therefore, the appeals court rejected Velsicol’s argument that the trial court erred in allowing parol evidence at trial, and affirmed the trial court’s ruling vacating the lease agreement.

Crumbaugh v. Velsicol Chemical Corp., No. 212295 (MI Ct. App. 2000)

S. Lee Johnson