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I. ASSIGNMENTS OF ERROR; ISSUES PRESENTED

- A. The appellants assign error to the trial courts court decision that the contract terms defining “Days of Lost Opportunity” are not ambiguous and the DNR correctly calculated the refund due International Shellfish.
- B. Did the trial court err by granting summary judgment to the defendants when it decided that the contract in defining the term “Days of Lost Opportunity” is not ambiguous and therefore not subject to contract interpretation?

II. STATEMENT OF THE CASE

This case concerns the interpretation of the contract for harvesting of Geoduck between Washington State Department of Natural Resources, Aquatic Resources Division (“DNR”) and International Shellfish, a Washington Limited Liability Company (“International Shellfish”) and the intent of the parties regarding “days of lost opportunity” noted in Section 11(d) of their contract. (CP 13) The contract does not specifically define “days of lost opportunity” and this is the central dispute between the parties.

International Shellfish entered into a Geoduck Harvesting Agreement that allocated 33 days of Geoduck harvesting to Point Beals South and 15 days for Wyckoff North. (CP 60-81) When Point Beals South was shut down for

harvesting because of PSP, the DNR allowed harvesting on Wyckoff North. See Chevalier's Declaration, Ex. 5. (CP 84). Chevalier in his declaration claims "Days of Lost Opportunity" are defined (as days that you were not physically on tract). (CP 84) Not physically on tract is not the same as prohibited harvesting.

In Chevalier's Declaration, Exhibit 3 provides a list of lost opportunity days as calculated by the DNR. (CP 82) For the ten contracts awarded during this bid process, all contracts were for 48 harvest days. See Chevalier Declaration. (CP 82). If it is true that a "lost opportunity day" is only one when harvesting is prohibited then each of the companies listed should have the same number of lost opportunity days. (CP 82) Each Company awarded a Harvesting Agreement at the same time started with the same number of 48 harvest days. See McRae Declaration. (CP 103-104) The foot note on the exhibit 3 to Chevalier declaration does list quotas # 7, 13, 17, and 18 were refunded for January 5, 2009 because they did not have recalled pounds. (CP 82) See McRae Declaration. (CP 104) This would explain a difference of one more lost opportunity day for these four quotas. However, the number of lost opportunity days varies from a high of 24 for Quota #7 and a low of 16 for Quota #13. Both of these quotas are ones listed in the footnote. Therefore

these two quotas should have the same number of lost opportunity days. But, they do not.

DNR states the calculation for the days a company harvested on Wyckoff above the allocated 15 days were used to reduce the lost opportunity days on Point Beals South. (CP 84) This presents an issue of material fact. For example, on Exhibit 5 to Chevalier declaration the DNR makes a point that International Shellfish harvested 5 days more than the 15 days allocated. (CP 57). International Shellfish understood the days on Wyckoff were optional and would not count against its lost opportunity days on Point Beals South. Because of the quality of the harvest at Wyckoff, International Shellfish would have been financially in a better position to not harvest the additional 5 days.

If the number of lost opportunity days is truly calculated based on days when harvesting is prohibited, as the DNR suggests, then the number of days for each quota should be the same, except for the footnotes on Exhibit 3 to Chevalier declaration which provides an explanation of only a one day difference. (CP 82)

The DNR has not calculated the lost opportunity days for each company based on days when harvesting is prohibited.

III. ARGUMENT

A. The Applicable Standard of Review Is De Novo

Appellate review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v.*

Allstate Ins. Co. 146 Wash .2d 291, 300, 45 P.3d 1068 (2002)

B. Calculation for Refund for Days of Lost Opportunity is Subject to Contract Interpretation.

Summary judgment is not appropriate when there is a genuine issue of material fact. *Harley v. State*, 103 Wn.2d 768, 774 (1985). A material fact is a fact upon which the outcome of the litigation depends. *Jacobson v. State*, 89 Wn.2d 104, 108 (1977). Facts and reasonable inferences are construed in light most favorable to the nonmoving party. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 205, 985 P.2d 400 (1999). Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. *Smith v. Safeco Inc. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

The refund amount paid to International Shellfish for the “lost opportunity days” is an issue of material fact. The DNR has not calculated the lost opportunity days for each company based on days when harvesting is

prohibited. International Shellfish disputes the Geoduck Harvesting Agreement limits the DNR to refunds for days for which harvesting is prohibited.

C. Determination of the Intent of the term “Lost Opportunity Days” Requires the Court to Interpret the Contract.

Contract Interpretation shall be done applying the “context rule” articulated in *Berg v. Hudesman*, 115 Wash.2d 657, 801 P.2d 222 (1990). In *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) the Washington Supreme Court embraced the law as set forth in the Restatement 2d. Of Contracts §212 and §214(c) and adopted the context rule for the interpretation of contracts. According to *Berg*, "the cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." 115 Wn.2d at 663 quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 162 (1964-1965). The *Berg* Court held that "extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." 115 Wn.2d at 667.

Likewise, here, International Shellfish intended to be able to harvest for the full 33 days on South Point Beals. As stated in the contract, Section

11(d), International Shellfish intended to obtain a refund for the days not harvested based on closed tracts, here due to PSP. DNR argues that International Shellfish should only be refunded for the days not worked at all. Logically, a company would not forfeit a calculated refund of approximately \$3,500.00 per day of closure to work on another tract that paid less. Hence, the entire circumstances of the contract must be weighed before the court to determine the parties' intent as a material issue of fact exists as to the parties' intent concerning the calculation of the appropriate refund amount.

More importantly, the *Berg* Court concluded “in discerning the parties' intent, subsequent conduct of the contracting parties may be of aid, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract.” *Id.* at 668 (emphasis added). Likewise, here, the subsequent conduct of the parties and the reasonableness of the respective interpretations of the parties may be of aid in determining the parties' intent. Again, International Shellfish would not work for less on another tract (Wyckoff) if it meant the prohibited days to be refunded (\$3,500/day) would be reduced. International Shellfish only worked on the extra days provided at Wyckoff because the state prohibited harvesting at South Point Beals. The intention of the parties differed based on the actions

and interpretations of the written contract. If the DNR intended to refund only for days that a company didn't work under any circumstance, it changed the terms of the contract, or at least its intent to refund for prohibited days. As a matter of law, the Court must investigate the reasonableness of the parties' respective interpretations of the written contract and the subsequent actions of the parties to properly ascertain the parties' intent.

As set forth in both *Berg*, the law in Washington is clear. Extrinsic evidence regarding the circumstances under which the contract is made is not only helpful but also admissible to show the true intent of the contracting parties. Additionally, the true intent of the parties may be discerned from the subsequent conduct of the contracting parties. In relationship to an integrated contract, as long as the evidence does not contradict or attempt to add terms to the contract, the evidence is admissible.

Further, in addition to circumstances surrounding this contract and evidence of intent which resolve the ambiguity, contract language is to be interpreted most strongly against the party who drafted the contract. *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966); *Neiffer v. Flaming*, 17 Wn. App. 443, 447, 563 P.2d 1300 (1977); Rest. (2nd) Contracts §206 (1981). Interpreting the contract language against the DNR

and the subsequent actions of the parties resolves the ambiguity with Days of Lost Opportunity to be refunded for the days Point Seals was “prohibited” by DNR.

International Shellfish asks the court to reverse the decision of the trial court that the contract terms related to the “Lost Opportunity Days Opportunity” is not ambiguous and remand the matter for further proceedings requiring the trial court to engage in interpreting the contract based on the ambiguity of its meaning and intent.

IV. CONCLUSION

Appellant asks that the court reverse the decision of the trial court and remand the matter for further proceedings.

RESPECTFULLY Submitted this 10th Day of February, 2011



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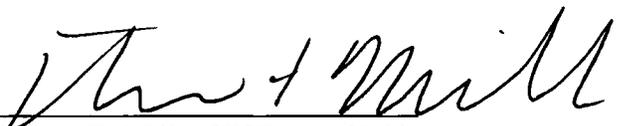
CERTIFICATE OF MAILING

I certify that on the 10th day of February, 2011, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the Appellant's Opening Brief to the individuals and parties at the addresses listed below:

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