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City of Thornton, Acting By and Through Utilities Bd. v. Farmers Reservoir & Irr. Co.

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No. 27462

Florence Tach

VS.

Respondents-Appellees.

Honorable Roscoe Pile,
Judge

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STATEMENT OF THE ISSUES

The agreed issues to be determined on this appeal are delineated in the "Report of Pre-Argument Conference" approved by the Court on the 22nd day of March, 1977. Additional issues on which there was no unanimous opinion with regard to their disposition are referred to in the Report and may be addressed by one or more of the parties.

Respondents-Appellees, Ehler and Keil (Respondent Nos. 310 and 324, hereinafter referred to as "Respondents Ehler and Keil") will not address themselves to all issues, as arguments in most cases have been adequately covered by counsel for other Respondents.

These Respondents will limit their brief comments to those matters they feel are particularly pertinent to the decision of the Court in this case.

STATEMENT OF THE CASE

Respondents Ehler and Keil adopt the Statement of the Case appearing in the brief of the Farmers Reservoir and Irrigation Company.

SUMMARY OF THE ARGUMENT

Respondents Ehler and Keil adopt the SUMMARY OF ARGUMENT set forth in the brief of Farmers Reservoir and Irrigation Company and will present brief argument only upon the following:

1. Sections 38-6-201, et seq., CRS 1973, as amended, apply to all Respondents herein joined after the effective

date of the 1975 Condemnation Act.

2. The City of Thornton failed to comply with the "failure to agree" provision of 38-1-102, CRS 1973, both as to the Farmers Reservoir and Irrigation Company and the shareholders thereof.

ARGUMENT

1. Sections 38-6-201, et seq., CRS 1973, as amended, apply to all Respondents herein joined after the effective date of the 1975 Condemnation Act.

The City of Thornton in its brief (pages 34-38), argues that the 1975 Condemnation Act if applied in this case would be prohibited retroactive legislation. Although divided into several parts, its argument is premised on the fact that the instant case was pending on the effective date of the 1975 Condemnation Act and that the joinder of additional parties relates back to the initiation of this action.

Each shareholder affected by this case has an individualized interest and, as such, is uniquely affected by the attempted condemnation of the City of Thornton of water rights herein involved. In Jacobucci vs. District Court in and for the County of Jefferson, _____ Colo. _____, 541 P2d 667 (Colo. 1975), this Court stated:

"...[e]ach shareholder stands in a different position from the others and is likely to be affected differently by the condemnation action. Their ability to protect those individualized interests would surely be impaired if this action were allowed to proceed in their absence."

This unique interest of each shareholder was the basis upon which this Court determined them to be indispensable parties in the attempted condemnation of the water rights involved herein by the City of Thornton. This being so, each affected

shareholder became a "party interested" within the context of CRS 38-1-102, 1973, as amended, and it became incumbent upon Thornton to negotiate with each such shareholder, taking into account his individual position as recognized by this Court. The fact that Thornton chose to go to this Court in Jacobucci, supra, on the premise that these shareholders were not necessary parties is evidence that Thornton had undertaken no negotiations at all with these shareholders prior to the decision in Jacobucci, supra. This fact is admitted by Thornton in its brief (page 17), wherein it indicates that a letter was sent to each shareholder in the Standley Lake Division on October 22, 1975, offering to purchase the shareholder's stock for \$3,920.00 per share. The sending of this letter by Thornton would have only one purpose, and that would be as an attempt to comply with the "failure to agree" provision of CRS 38-1-102, 1973, as amended. The record indicates no other communication between Thornton and any shareholder.

It is, therefore, clear that at the time of the effective date of the 1975 Condemnation Act, there had been no negotiations with shareholders by Thornton, no "failure to agree" and, therefore, Thornton's right to condemn against any shareholder had not yet accrued. The right having not arisen or accrued, there is no question of retroactive application since the passage of the 1974 Condemnation Act did not deprive Thornton of any accrued rights against any shareholder.

"[a] statute cannot be viewed as retroactive just because it operates on antecedent facts. Rather, the question is whether applying the statute to a particular controversy would deprive a party of accrued rights. For these purposes a right accrues only when litigation could first have been successfully maintained thereunder." (Emphasis added)
Rowe vs. Tucker, et al., No. 75-891, Colo. Ct. of Appeals, The Colorado Lawyer, March 1977, at pages 526-528.

2. The City of Thornton failed to comply with the "failure to agree" provision of 38-1-102, CRS 1973, both as to the Farmers Reservoir and Irrigation Company and the shareholders thereof.

This Court's determination in Jacobucci, supra, that each shareholder's interest was "individualized," placed a burden upon Thornton to deal with each shareholder accordingly. In satisfaction of this burden, Thornton sent one letter to shareholders in October of 1975 (Thornton's Brief, Page 17) advising all shareholders that they were offering to purchase the shareholders' stock for \$3,920.00 per share, and as recited in Thornton's Brief (Page 17), this figure of \$3,920.00 per share was the "per share portion of the \$9,300,000.00 purchase price previously offered to FRICO." This universal offer to all shareholders of the per share portion of Thornton's appraisal is hardly consistent with this Court's determination that each shareholder stands in a different position from others with regard to the effect of the condemnation on, "the productivity and value of their lands, as well as the assurance of their livelihoods..." Jacobucci, supra, Page 675.

Thornton stands before this Court without recognizing any individualized interests of the separate shareholders of the Company, and in satisfaction of the procedural requirements, bases their right to file this condemnation action on a similar letter mailed to all shareholders offering them all \$3,920.00 per share for their "individualized interests." The Court expected more from Thornton, for it stated at Page

675 of Jacobucci, supra:

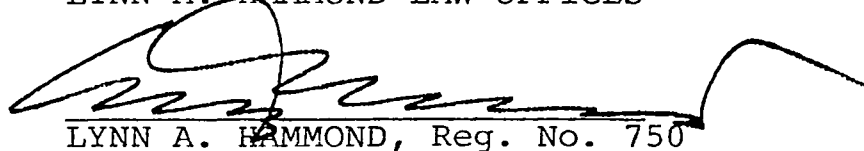
"Provided the City of Thornton establishes by competent evidence a failure to agree upon the compensation to be paid for the rights sought to be taken, the joinder of these shareholders will not deprive the District Court of Jurisdiction."

CONCLUSION

For the reasons herein stated and the additional arguments of counsel for other Appellees, the decision of the District Court in and for the County of Jefferson relating to the dismissal of this action against the City of Thornton should be affirmed and that such other issues as this Court may consider be resolved favorably to the position of Appellees herein and, specifically, that the 1975 Condemnation Act be deemed constitutional, applicable to the City of Thornton, as herein argued not legislatively invalid to the instant case and not be deemed invalid retroactive legislation. Further, that the City of Thornton did not comply with the requirements of the "failure to agree" provisions of CRS 38-1-102, either as to Farmers Reservoir and Irrigation Company or the shareholders thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 1977, the foregoing BRIEF FOR APPELLEES, HERMAN EHLE and META L. KEIL, was served on all other parties to this action by mailing two copies to their respective counsel at the addresses below:

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