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Farmers Reservoir & Irrigation Co. v. Consolidated Mutual Water Co., No. 00SA229 (Colo. Oct. 15, 2001)

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erred in automatically precluding evidence of lost future profits in determining the applicable restoration costs. The court considered several options to determine damages in a tort action. Ultimately, the court found the means of measuring damages flexible, and one that would vary with the particular circumstances of each case. Accordingly, the court remanded the case back to the trial court, not to require consideration of lost future profits, but because the trial court could not automatically preclude review of lost future profits.

The court also reviewed the trial court's grant of summary judgment to Chowchilla on Santa Barbara's negligence claim. In reversing the summary judgment decision, the court cited the trial court's failure to give a sufficient statement of reasons for granting the motion. The Code of Civil Procedure required the trial court to specify the reasons for its determination in a written or oral order, and to specifically refer to the applicable supporting and opposing evidence. Here, although the trial court identified contradictions between the declarations prepared for the motion and the testimony given in disposition, it failed to give written or oral documentation. Therefore, the court reversed the trial court's grant of summary judgment pertaining to the negligence claim.

Christine Ellison

COLORADO

Farmers Reservoir & Irrigation Co. v. Consolidated Mutual Water Co., No. 00SA229 (Colo. Oct. 15, 2001) (holding historic consumptive use determinations non-reviewable under the retained jurisdiction provision unless the case comes on appeal).

Consolidated Mutual Water Co. ("Consolidated Mutual") originally diverted water for irrigation purposes, but in the 1960s they began using the water for domestic and municipal purposes. They did not apply for a change of use application until 1991. This was Priority 12 water transferred from the Lee, Stewart & Eskins Ditch ("LSE Ditch").

In the 1960s, the Water Court allocated 287 acre-feet annually to Golden from the LSE Ditch. In 1993 proceedings before the Water Court, Golden relied on its expert Gary Thompson. He testified that Consolidated Mutual received 124 acre-feet annually from the LSE Ditch and an additional 302 acre-feet annually from the LSE junior rights. The Water Court adopted the expert's calculations. No one appealed the decision. Farmers Reservoir & Irrigation Co. ("Farmers") brought a second suit claiming that Golden consumed more water than allowed. The Water Court held and the Colorado Supreme Court agreed that claim preclusion prohibited volumetric limits of the 1960s change decrees. Finally, Farmers Reservoir filed petitions requesting the Water Court extend or invoke the period of retained

jurisdiction.

The Colorado Supreme Court in reviewing the Water Court's decision, looked to Colo. Rev. Stat. § 37-92-304(6) and determined that the General Assembly intended to preclude review of consumptive use determinations of the Water Court except through an appeal, and further intended the retained jurisdiction provision to address only injurious effects resulting from placing the change of water rights or augmentation plan into operation. The General assembly did not intend the retained jurisdiction provision to re-determine water court historic use determinations.

This court looked to legislative history to determine the General Assembly's intent. First, they looked to changes of water rights and augmentation plans, and determined the retained jurisdiction provision only applies to the Water Court's role in predicting future injurious effect and the measures to prevent injury, not to their fact-finding role for historic uses. Next, the court looked at the 1969 Act and its amendments. Initially, the Act allowed, but did not require the water judge to include a two-year period for reconsideration. The 1977 amendment required a retained jurisdiction provision, but allowed the water judge to determine its length. The 1981 amendment extended the mandatory inclusion to retained jurisdiction. Because the legislative history of the two amendments pointed to potential conflicts and ambiguity, the court looked to legislative hearings for further clarification. Based on these hearings, it was clear that the period of retained jurisdiction did not apply to historic consumptive use because evidentiary resolution was possible. The court then looked to case precedent and concluded that it was consistent with their construction of Colo. Rev. Stat. § 37-92-304(6). Finally, the court looked to the burdens of establishing non-injury and injury. The court held that initially the persons seeking reconsideration bear the burden of proving injury, and then the burden shifts to the decree holder to prove non-injury.

The court determined that because Consolidated Mutual did apply for a change in use, did subject itself to volumetric limitations and did obtain a final judgment, the Water Court did not abuse its discretion in determining the amount of Priority 12 water allocated to Consolidated Mutual. Since no appeal was taken, the judgment cannot be reviewed because the General Assembly did not create a context for reviewing the adjudicated merits of consumptive use determinations the Water Court established. Farmers also contested Golden's allocation. However, the court found the allocation to Golden non-reviewable because no one had appealed the decision. In the future, the Water Court must give effect to the methodology it used, based on the expert's testimony, to determine changes to the LSE Ditch based upon injury-producing effects in order to prevent an owner from enlarging its share of historic consumptive use.

Staci A. McComb