SUPREME COURT, STATE OF COLORADO

Case No. 95SC13

JUN 26 1995

SUPREME COURT OF COLORADO
BY BARFORD CLERK

OPENING BRIEF OF *AMICUS CURIAE* CITY OF NORTHGLENN, COLORADO AND COLORADO MUNICIPAL LEAGUE

CITY AND COUNTY OF DENVER, acting by and through its BOARD OF WATER COMMISSIONERS, a/k/a CITY AND COUNTY OF DENVER WATER DEPARTMENT,

Petitioner,

v.

TROY ORLANDO GALLEGOS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS
Case No. 93CA1031
Opinion by Judge Ruland
Metzger and Roy, JJ., concur

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STATEMENT OF THE ISSUE

Whether the Court of Appeals erred by broadening the definition of "public water facility," as set forth in the Colorado Governmental Immunity Act, to include private property.

STATEMENT OF THE CASE

The *amicus* parties adopt by this reference the statement of the case contained in the Opening Brief of Petitioner City and County of Denver, acting by and through its Board of Water Commissioners ("Denver Water").

SUMMARY OF ARGUMENT

The Court of Appeals holding in this case that the term "public water facility" as used in the Colorado Governmental Immunity Act (the "Act") includes privately owned facilities connected to a publicly owned water system, is genuinely unprecedented. It is inconsistent with the legislative history of the Act and with the accepted rules of statutory construction. Moreover, as is discussed below, this decision, if left in place, will, as a practical matter, impose liability on municipal and quasi-municipal water providers for damage and injury occasioned by a wide range of privately owned facilities over which such public entities have only limited control. This shift of responsibility from the private landowner to the taxpayers as a whole is not warranted by either the letter or the spirit of the Act. The Court of Appeals erred in concluding that private property can constitute public water facilities, and its decision must be reversed.

ARGUMENT

The Court of Appeals in this case held that a privately owned water meter pit was a "public water facility" as to which the immunity from liability afforded by the Act was waived by operation of Colo. Rev. Stat. § 24-10-106(1) which provides:

> [S]overeign immunity is waived by a public entity in an action for injuries resulting from:
>
> . . . .
>
> (f) The operation and maintenance of any public water facility . . . by such public entity.

Thus, the outcome of this case turns on the Court of Appeals' rather startling conclusion that private property can be a "public water facility."

This brief will first address the legislative history of the Act, which sheds some light on the legislative intent behind the use of the term "public water facility." It will then discuss the practical implications of the Court of Appeals' decision, which are potentially devastating to public entities providing water and sewer service. Finally, this brief will apply the legislative history and settled rules of statutory construction to the term "public water facility" which inevitably leads to the conclusion that that phrase was never intended to encompass private property.

1. Legislative History.

The doctrine of sovereign or governmental immunity has its roots in early English common law.[1] The doctrine was first recognized in Colorado in the 1893 decision Board of County Commissioners v. Bish, 18 Colo. 474, 33 P. 184 (1893).

Early on, the Colorado courts became uncomfortable with the concept of absolute governmental immunity from tort in all instances. Various forms of legal contrivance were adopted to avoid the application of the immunity doctrine as to certain activities of government. The most commonly applied of these legal fictions was the distinction between governmental and proprietary acts, with immunity pertaining for governmental activities but not for proprietary functions. See discussion in Phillips, The Colorado Governmental Immunity Act, 8 Colorado Lawyer 2358, 2359-2360 (1979).

By the late 1960s, it had become apparent that the case-by-case determination of liability based on the rather subjective determination of whether an act was governmental or proprietary, or discretionary as opposed to ministerial, was unworkable. Anticipating that the Colorado Supreme Court would shortly abolish the doctrine, the General Assembly in 1967 adopted House Joint Resolution 1023 directing the Legislative Council to appoint a committee to conduct "a study of the problem of governmental civil

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[1]For a discussion of the evolution of the doctrine of sovereign immunity, see Comment, The Colorado Governmental Immunity Act: A Prescription for Regression, 49 Denver L. J. 567 (1973).

immunity with a view toward developing comprehensive legislation to define and limit the areas of immunity and to provide procedures for compensation to those affected and to balance the public and private interests involved." House Joint Resolution 1023.

The committee was duly appointed and, on September 23, 1968, submitted its report to the General Assembly, Research Publication No. 134 (November, 1968) (the "Report"), which included a draft of a "Recommended Bill to Provide for Governmental Immunity and Liability in Colorado."

The Report, and particularly the draft legislation prepared by the committee, were the genesis of the Act. When, in 1971, this Court abolished the doctrine of sovereign immunity and invited the General Assembly to respond,[2] the legislature adopted the committee's draft legislation with only minor modifications.

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[2]In Evans v. Board of County Commissioners, 174 Colo. 97, 482 P.2d 968 (1971), and two companion cases, this Court abolished the doctrine of sovereign immunity effective June 30, 1972, stating:

> If the General Assembly wishes to restore sovereign immunity and governmental immunity in whole or in part, it has the authority to do so. . . . If the legislative arm of our government does not completely restore these immunities, then undoubtedly it will wish to place limitations upon the actions that may be brought against the state and its subdivisions. This, too, it has full authority to accomplish.

174 Colo. at 105, 482 P.2d at 972, n. 16. See also Note, The Colorado Governmental Immunity Act: A Judicial Challenge and a Legislative Response, 44 U. Colo. L. Rev. 449 (1972).

Among the provisions adopted virtually verbatim from the committee's draft was the waiver of immunity for injuries resulting from the operation of any "public water facility." The Report was apparently the first use of that phrase in Colorado law.

The Report explains that the committee's recommendation on this point was an attempt to codify the common law governmental/ proprietary distinction.

> Water, sewer, trash, and other proprietary activities. The committee determined that the doctrine of immunity should not apply to those activities which are determined to be proprietary in nature and that the liability of an entity when engaged in these functions should be determined as if it were a private corporation or individual. These functions include but are not limited to the following: water, sewer, trash and waste disposal, electric and gas utilities, swimming pools, etc.

Report at 141.

While the available legislative history does not define the term "public water facility," it does provide guidance as to the legislative intent. One of the committee's primary goals was to clearly and unequivocally specify those activities for which a public entity might be liable, so as to limit the uncertainty which had prevailed under the common law of sovereign immunity.

> The committee recommends favorable consideration of the "Colorado Governmental Immunity Act" included in this report. The general plan of the act is to reaffirm governmental immunity to suit and then proceed to carve out specific exceptions thereto. The committee felt that this approach would eliminate possible confusion by restating existing law in Colorado while opening up new areas of specific governmental responsibility as deemed appropriate by the committee to satisfy the demands of justice in a changing society.

> The committee found that this approach would be the easiest to draft and would result in a clear, concise bill. In addition, this approach allows the most flexibility for future change. Most important, however, is that this approach provides a better basis upon which the financial burden of liability can be evaluated in terms of the potential cost of such liability. If the limits of potential liability are known, public entities may plan accordingly, may budget for their potential liabilities, and may obtain realistically priced insurance, for the risk is more clearly defined and lends itself to more accurate assessment, which should result in lower premiums for the coverage had.

Report at xvii (emphasis added).

The Committee's intention was ultimately set forth in the Act's declaration of policy:

> 24-10-102. Declaration of Policy . . .
>
> It is further recognized that the state, its political subdivisions, and the public employees of such public entities, by virtue of the services and functions provided, the powers exercised, and the consequences of unlimited liability to the governmental process, should be liable for their actions and those of their agents only to such an extent and subject to such conditions as are provided by this article. The general assembly also recognizes the desirability of including within one article all the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in actions which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant and that the distinction for liability purposes between governmental and proprietary functions should be abolished.

Thus, the legislative intent of the Act was to: (i) provide certainty as to those activities for which immunity was waived; and (ii) specify that, as to those activities for which immunity did not pertain, "liability should be determined as if [the public entity] were a private corporation."

Neither of these intentions is served by the decision of the Court of Appeals.

Far from fostering certainty as to the line of demarcation between immunity and liability, the Court of Appeals' ruling blurs the distinction to the point of invisibility. Quite simply, if private property may be considered a "public water facility" for immunity purposes, public entities can never be certain where their liability ends. This uncertainty, as the committee noted, inevitably results in an inability on the part of public water providers to "budget for their potential liabilities, and . . . obtain realistically priced insurance." Far from furthering the goal that the risk be "more clearly defined," the decision of the Court of Appeals creates a risk which is indefinite and open-ended, extending as it does to property not even owned by the public entity.

Moreover, the Court of Appeals' decision is not in keeping with the legislative intent that, where immunity is waived, liability is determined as if the public entity were a private corporation or individual. Certainly a private individual is not responsible for injuries on his neighbor's property. Nor should Denver Water be liable for injuries sustained on private property.

In construing a statute, a court's primary task is to give effect to the intent of the General Assembly. Bertrand v. Board of County Commissioners, 872 P.2d 223, 228 (Colo. 1994); Farmers Group v. Williams, 805 P.2d 419, 422 (Colo. 1991); People v. Terry, 791

P.2d 374, 376 (Colo. 1990). One of the tools used in ascertaining legislative intent is the legislative history of the statute. Colo. Rev. Stat. § 2-4-203(1)(c). The stated legislative intent behind the adoption of the Act was to define as clearly as possible the line between immunity and liability. The Court of Appeals' decision, blurring the distinction between private property and public water facilities -- between immunity and liability -- frustrates rather than gives effect to the legislative intent. It must be reversed.

2. Practical Impact of the Decision.

The ruling of the Court of Appeals that a privately owned water meter pit was a "public water facility" for purposes of the Act was premised on: (i) the dictionary definition of the term "facility"; (ii) the fact that Denver Water regulated the installation, specifications and location of water meters; and (iii) the conclusion that "it is apparent that operation of defendant's water system necessarily requires a metering system for recording water usage in order to charge and collect sums owed by customers for that usage."

The practical difficulty with the Court's reasoning is that it renders public entities operating water or sewer systems potentially liable for injuries resulting from any privately owned "facility" which is appurtenant to the public water or sewer system including: service lines, plumbing, spigots, toilets, shower

heads, meters, sprinkler systems, and even water heaters. An analysis of each of the Court of Appeals' three premises will demonstrate this point.

The Court first reasoned that a water meter is a "facility," applying the definition of that term contained in Webster's Third New International Dictionary, quoted with approval in Longbottom v. State Board of Community Colleges & Occupational Education, 872 P.2d 1253 (Colo. App. 1993). The Court was, of course, correct that a water meter is a "facility." The issue is, however, whether it is a "public water facility."

Moreover, the definition employed by the Court was as follows:

> [S]omething that promotes the ease of any . . . operation, transaction, or course of conduct . . . something (as . . . plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end.

(Emphasis in original.)

By this definition, every private water and sewer line, every plumbing fixture, every faucet, every sprinkler head is a "facility," since they all "perform some particular function."

The Court of Appeals' second premise in support of its conclusion that a privately owned water meter pit was a "public water facility" was that Denver Water regulated the location, specifications and location of such meters. Again, this premise is applicable to virtually all privately owned residential and commercial plumbing lines, pipes and fixtures.

Northglenn and the vast bulk of the Colorado Municipal League's members have adopted the Uniform Plumbing Code published by the International Association of Plumbing and Mechanical Officials (the "UPC").[3] The UPC comprehensively regulates all aspects of water and sewer plumbing. It defines its scope as follows:

> (a) The provisions of this Code shall apply to the erection, installation, alteration, repair, relocation, replacement, addition to, use or maintenance of plumbing systems within this jurisdiction.

U.P.C. § 10.3(a). The UPC, in over two hundred pages of detailed regulations, governs water and sewer facilities literally from A ("abandoned grease interceptors") to Z ("zinc alloy die cast components").

If, as the Court of Appeals seemingly holds, regulation of a "facility" is sufficient to make it a "public water facility," it naturally follows that all private water and sewer plumbing components are "public water facilities" given the comprehensive regulation of the UPC. It is for precisely this reason that Northglenn and the Colorado Municipal League have asked leave to participate in this case.

The final premise upon which the Court of Appeals relied is its conclusion that Denver Water's "distribution system necessarily requires a metering system." The implication is that any

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[3]The UPC is revised by the International Association of Plumbing and Mechanical Officials approximately every three years. Most Colorado municipalities have adopted the 1991 edition or the recently published 1994 edition.

"facility" necessary to the provision of water is a "public water facility." Again, the Court's brush paints too broadly. All privately owned water and sewer fixtures are necessary for the operation of the water and sewer system. What is a water system without showers, spigots, faucets and internal water lines? What is a sewer system without toilets, plumbing and outfall lines? Virtually every component of the system is necessary to its usefulness and effectiveness and thus, according to the Court of Appeals' reasoning, every component is a "public water facility."

This is the trap into which the blurring of the distinction between private and public facilities leads. There is no principled distinction between a privately owned water meter pit and any other privately owned water or sewer pipe or fixture. If the decision of the Court of Appeals is affirmed, municipalities in Colorado will be faced with the unhappy choice of either abandoning any regulation of plumbing installations or accepting the risk of liability for injuries occasioned by any privately owned water or sewer component. It is respectfully suggested that the social cost of abandoning public regulation of private plumbing installations -- health hazards, shoddy workmanship, and increased injuries -- far outweighs the value of imposing liability on public entities for injuries occasioned on private property.

3. Rules of Statutory Construction.

Curiously, the Court of Appeals engaged in no construction or interpretation of the phrase "public water facility" as used in the Act. Instead, it simply concluded that the privately owned water meter was a "public water facility."

The Court's disinclination to engage in any statutory construction may be the result of an unstated determination that the phrase "public water facility" is clear and unambiguous. When statutory language is clear and unambiguous, it is applied as written without resort to the interpretive rules of statutory construction. General Electric Co. v. Niemet, 866 P.2d 1361, 1364 (Colo. 1994); Sigman v. Seafood Ltd. Partnership, 817 P.2d 527, 530 (Colo. 1991).

Northglenn and the Colorado Municipal League would tend to agree that the phrase "public water facility" is unambiguous. It would seem to clearly and unequivocally exclude private water facilities such as the privately owned water meter pit.

> [6] In interpreting a statute, our primary task is to ascertain and give effect to the intent of the legislature. People v. Davis, 794 P.2d 159, 180 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); People v. Terry, 791 P.2d 374, 376 (Colo. 1990). To determine legislative intent, we begin with the language of the statute itself and interpret statutory terms in accordance with their commonly accepted meanings. Thiret v. Kautzky, 792 P.2d 801, 806 (Colo. 1990); People v. District Court, 713 P.2d 918, 921 (Colo. 1986).

Whimbush v. People, 869 P.2d 1245, 1249 (Colo. 1994). See also Colo. Rev. Stat. § 2-4-101 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage").

Applying the "commonly accepted meanings" of the words forming the phrase "public water facility," it is apparent that it cannot encompass privately owned facilities such as the water meter pit at issue. Employing, as did the Court of Appeals, the dictionary definition of the adjective "public," we find that one common definition is "not private." See e.g. The New Merriam-Webster Dictionary, 587. Thus, the commonly accepted meaning of that word would seem to exclude private property such as the meter pit.

"Forced, subtle, strained or unusual interpretation should never be resorted to where the language is plain, its meaning is clear, and no absurdity is involved." Harding v. Industrial Commission, 183 Colo. 52, 515 P.2d 95, 98 (1973). See also Boulder County Board of Equalization v. M.D.C. Construction Co., 830 P.2d 975, 980 (Colo. 1992); Farmers Group, Inc. v. Williams, 805 P.2d 419, 422 (Colo. 1991). Construing the term "public water facility" to mean privately owned water facilities is precisely the type of forced, subtle, strained or unusual interpretation to be avoided.

Even assuming that the phrase "public water facility" is ambiguous, it cannot, under settled Colorado law, be construed to include private property.

First, if the language of a statute is ambiguous, a court may consider its legislative history to ascertain the legislature's intent. Colo. Rev. Stat. § 2-4-203(1)(c); Charnes v. Boom, 766 P.2d 665, 667 (Colo. 1988); City of Ouray v. Olin, 761 P.2d 784, 788 (Colo. 1988). The legislative history of the Act, as discussed above, is entirely inconsistent with the Court of Appeals' blurring of the line between immunity and liability.

Second, in construing a statute a court must, where possible, give meaning and effect to each of its words. See Colo. Rev. Stat. § 2-4-201(1)(b). See also Charlton v. Kimata, 815 P.2d 946, 949 (Colo. 1991); City of Craig v. Hammat, 809 P.2d 1034, 1037 (Colo. App. 1990); Colorado Board of Medical Examiners v. Raemer, 794 P.2d 1075, 1077 (Colo. App. 1990). The conclusion of the Court of Appeals that the phrase "public water facility" includes private facilities ignores and fails to give meaning or effect to the adjective "public." It is not to be presumed that the General Assembly used this word idly. The word "public" was used deliberately and must be applied. Doing so compels the conclusion that private water facilities are not public water facilities.

Finally, in construing a statute, it is presumed that the public interest is favored over any private interest. Colo. Rev. Stat. § 2-4-201(1)(c). Farmers Group, Inc. v. Williams, supra, at 422. Here, the practical implications of extending the liability of public entities to injuries occurring on private property, as discussed above, clearly disserve the public interest.

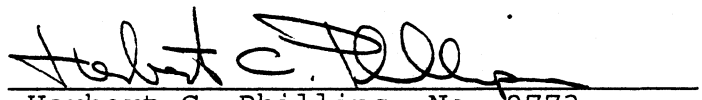
Applying the plain and ordinary meaning of the phrase "public water facility" to the facts at hand, it is clear that that term cannot be applied to a privately owned water meter pit. Even assuming the phrase is ambiguous, it cannot be construed to encompass private property. The Court of Appeals erred in ruling otherwise.

CONCLUSION

The decision of the Court of Appeals that a privately owned water meter pit is a "public water facility" flies in the face of the plain language of the Act, its legislative history and the settled rules of statutory construction. It has profoundly negative practical effects never contemplated by the legislature. Denver Water is immune from liability under the Act and reversal is required.

DATED this 26th day of June, 1995.

HAYES, PHILLIPS, MALONEY & HADDOCK, P.C.

By: 

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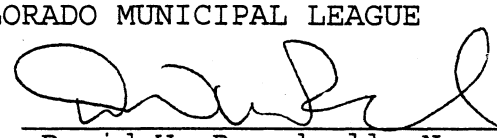
By: 

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the _____ day of June, 1995, a true and correct copy of the within **OPENING BRIEF OF *AMICUS CURIAE* CITY OF NORTHGLENN, COLORADO AND COLORADO MUNICIPAL LEAGUE** was served on the following by depositing same in the U.S. Mail, postage prepaid, addressed as follows:

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