2-8-1984

# Broyles v. Ft. Lyon Canal Co.

SUPREME COURT, STATE OF COLORADO

Case No. 83SA456

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Appeal from the District Court, Water Division No. 2,
Hon. John R. Tracey, Judge.

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# REPLY BRIEF OF APPLICANT-APPELLANT BROYLES

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JAKE O. BROYLES,

Applicant-Appellant,

v.

THE FORT LYON CANAL COMPANY and SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT,

Objectors-Appellees,

ROBERT JESSE, Division Engineer for Water Division No. 2, and JERIS A. DANIELSON, State Engineer, Colorado Division of Natural Resources,

Appellees.

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## SUMMARY OF THE ARGUMENT

REPLY TO RETROACTIVE EFFECT OF DE BEQUE:

Ft. Lyon and Southeastern each claim that De Beque should govern this case even though it was announced after this transaction arose. Both claim it should be retroactive so that the present water judge could reverse the decision of the former water judge. The argument of neither party embraces the correct rule of law - the so called "modern trend" to make judicial decisions prospective.

This Court has discussed the concept in Ground Water Commission v. Shanks, 658 P2d 847 (Colo., 1983) and made the rule of another water case prospective.

Even in De Beque, the Court refused to give retroactive application to a statute that might have sustained the position of applicant.

REPLY TO APPLICABILITY OF DE BEQUE to this case:

De Beque holds that, given a different set of facts, an applicant is entitled to a judicial hearing before cancellation of his conditional water rights. Broyles contends that this case is different fron De Beque. De Beque involved a statute where the test was "conditions beyond his control" as specified in 37-92-601, and where the notice requirements of 37-92-305 (7) were not applicable. Here, the test is proof of mistake, inadvertence, surprise or excusable neglect as specified in C.R.C.P. 60 (b).

Despite two different rules or tests, Southeastern and Ft. Lyon insist that here the test applicable is one formed in a statute that is clearly not applicable in the case at bar.

## ARGUMENT

REPLY TO ARGUMENT OF SOUTHEASTERN AND FORT LYON. ...RETROACTIVITY

It is interesting to note the different approaches taken by each Fort Lyon and Southeastern on the question of the retroactivity of the decision in Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980). Southeastern argues, page 12, in quoting only a portion of Section 233 of 20 AmJur 2d Courts, that the judicial overruling of a precedent has both prospective and retroactive effect; Fort Lyon, page 8, argues that whether a decision is to be retrospective in application will depend upon the purpose and effect of the rule announced therein, citing a criminal case for that authority-Ruark v. Peo., 158 Colo. 110, 114, 405 P.2d 751 (1965); that in the absence of express guidance by the higher Court, the lower Court may determine whether the decision should be applied prospectively or retrospectively, and then argues that the lower Court here relied on De Beque in finding that a retroactive application of the decision was permissible and that the Water Court was therefore free to rule that the Court was without jurisdiction (Fort Lyon Brief, pg. 10).

Broyles submits that neither Southeastern nor Fort Lyon is correct in its interpretation of the law, but that the law is as set forth in many annotations, foremost among which is the complete treatment found in 20 AmJur 2d Courts, §233, viz:

§233. Prospective or retroactive effect.

> A question which has been said to be an old and difficult one is whether the judicial overruling of a precedent has merely prospective, or also retroactive effect. The general rule in civil cases seems to be that unless the overruling decision declares that it shall have only prospective effect, which the court overruling its prior decision generally has the power to do, the judicial overruling of a precedent has both prospective and retroactive effect. A decision overruling a judicial precedent will be limited to prospective application where to give it retroactive effect would impose undue hardship on persons who have justifiably relied on the overruled precedent.
>
> A distinction has sometimes been made as to whether the overruled precedent was one of substantive law, in which case the overruling has been deemed to be retroactive in effect, or was one of procedural law, in which case the overruling has been deemed as merely prospective in effect.

of which Southeastern quotes only a part (Southeastern Brief, pg. 12)

The more recent approach to the question of prospectivity/retroactivity is for decisions to be effective from the date of the decision forward, e.g., Guaranty National Insurance Co. v. Ohio Casualty Insurance Co., 40 Colo.App. 494, 497, 580 P.2d 41, 44 (1978). The Court of Appeals there said that "... the recent trend has been to adopt a more moderate stance, such as declaring that a statute or regulation is without effect from the date of decision forward ..."

Each Brief cites several water cases from which it is argued that the decision in De Beque should be retroactively applied; the case of Ground Water Commission v. Shanks, Colo., 658 P.2d 847 (1983) is noteworthily absent. In this case, the

Court discussed the question of whether the decision in State ex rel Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981) should be retrospectively applied to the decrees formerly entered and concluded, for many reasons therein set forth, that it should not. See also, Pioneer Irrigation Districts v. Danielson, 658 P.2d 842 (Colo. 1983). Shanks, supra., adopts the modern view of the prospectiveity of judicial decisions. The question has been extensively discussed in annotations at 14L.Ed.2d 601, 10 ALR3rd 1371 and 22 L.Ed.2d 821.

Interestingly enough, both Fort Lyon and Southeastern overlook the fact that the Court, in De Beque, declared that the statute 37-92-305(7) would not have retroactive effect to sustain the position adopted by the applicant there; here, however, it is claimed that the decision should be declared to be retroactive to stifle the position of Broyles.

REPLY TO APPLICABILITY OF De BEQUE TO THIS CASE

Neither Brief really addresses the point raised by Broyles - that, as mentioned in De Beque, 37-92-305(7) is meaningless without a judicial hearing to see if the rights should be declared abandoned. The Court said:

> The 1975 amendment, adding Section 305(7) to the 1969 Act, required notice prior to cancellation or expiration of a conditional water right and again demonstrates the legislative recognition of the serious consequences that would befall the owner or user of a conditional water right who failed to obtain a diligence finding. De Beque's and the River District's argument that section 305(7)

> is meaningless, if, at the time of its enactment, a conditional water rights holder had no right to an evidentiary hearing prior to any judicial cancellation of such right, is not without merit under a different factual situation.

This is that case, despite the declaration of Southeastern that "Broyles has had more than his share of days in Court" (Brief, pg. 13), Broyles has never had an opportunity to be heard upon the reasons the permits to use the original wells were granted, to be heard upon the question of whether the water rights should be considered abandoned as contemplated in 37-92-305(7) and announced in De Beque, to be heard upon the issue of diligence and the making of an absolute right out of a conditional one -- all these having been summarily determined against him in three summary judgments or orders to that effect.

In the first Appeal (Broyles v. Ft. Lyon Canal, 638 P.2d 244 (Colo. 1981) we attempted to convince the Court that Article 90 was inapplicable to Article 92 cases -- thinking the position was in harmony with previous declarations of the Court, cited several cases for our position. The Court ruled otherwise; yet, the Court still continues to declare that "...The Management Act with the exception of Sections 37-90-136 through 139, relates solely to Designated Ground Water..." Pioneer Irrigation Districts of Yuma County v. Danielson, State Engineer, et al, 658 P.2d 842, 845 (Colo. 1983) -- ignoring its declaration in Broyles that 37-90-101(13) also is applicable to Broyles' Article 92 case.

We make this point solely to attempt to convince the Court that, when the facts upon which Broyles based his case were unfolding, there were entirely new statutes to work with, and these had never had the benefit of Court interpretation. The Broyles case, supra., was one of first impression on, we submit, a highly technical point -- but after the fact.

Now, again after the fact, insofar as Broyles is concerned, De Beque has come down and Southeastern and Fort Lyon insist that it should be strictly applied to this case in order to work a forfeiture despite the clear language in the case quoted above that makes it inapplicable here. De Beque interpreted a clause found in 37-92-601, viz: "... the applicant was prevented from filing by reason of conditions beyond his control. ..." Judge Statler interpreted CRCP 60(b) where the test is proof of mistake, inadvertence, surprise, or excusable neglect.

Fort Lyon and Southeastern mention several times that they had had no notice of the action of Judge Statler entered on April 17, 1979 that granted Broyles relief from the order cancelling the water rights. Neither had appeared in the original proceeding where the conditional rights were granted, where the notice pursuant to 37-92-305(7) was given, where the cancellation order was entered and rescinded. They had every opportunity, however, to object to the original application, but were apparently advised not to appear. They cannot say that they did not have notice of that proceeding.

They talk of the retroactive application of De Beque, of lack of notice, of the lack of jurisdiction, of the effect of the overruling of a previous rule, and Southeastern also claims attorney fees for a frivolous appeal. The writer can relate to all of these principles as they have been applied in the cases of Bohl v. Haney, 28 Colo.App. 55, 470 P.2d 603 (1970) which was expressly overruled in Columbia Saving and Loan Association v. Carpenter, 33 Colo.App. 360, 367, 521 P.2d 1299, 1303, and Bohl v. Haney, 671 P.2d 991 (Colo.App. 1983), (Cert. den. October 31, 1983) where the final rule was that the trial court had jurisdiction of the matter despite the fact that there were "... a great number of others ..." who should have had but received no notice of the proceeding.

After the record established in Bohl, where most of these points were decided against the position taken by Fort Lyon and Southeastern and given the fact that this and the previous Broyles cases involve cases of first impression on the interpretation of statutes, or the interpretation of the Court's prior decisions, it is submitted that neither Broyles nor the writer should be criticized for zealously pursuing the matter or accused of a frivolous appeal.

## CONCLUSION

It is respectfully submitted that the Order entered by the Honorable Water Judge on September 19, 1983 should be reversed and the application of Broyles be reinstated for further proceedings in the Water Court.

Respectfully submitted,

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CERTIFICATE OF MAILING

The undersigned does hereby certify that a true and complete copy of the attached BROYLES REPLY BRIEF was placed in the United States Mail Service, postage prepaid to the following:

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