1-19-1984

ABBREVIATED CASE TITLE

SUPREME COURT, STATE OF COLORADO

Case No. 83SA456

Appeal from the District Court in and for Water Division No. 2, State of Colorado, Judge John R. Tracey, Water Judge, Trial Court Case No. 79CW73

ANSWER BRIEF FOR APPELLEE THE FORT LYON CANAL COMPANY

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.

LEFFERDINK & DAVIS
John J. Lefferdink (#324)
Post Office Box 110
Lamar, Colorado 81052
Telephone: (303) 336-7411

CALKINS, KRAMER, GRIMSHAW & HARRING
Wayne B. Schroeder, P.C. (#2447)
Bruce D. Bernard (#12166)
Suite 3800, One United Bank Center
1700 Lincoln Street
Denver, Colorado 80203
Telephone: (303) 839-3800

Attorneys for Objector-Appellee
The Fort Lyon Canal Company

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I. STATEMENT OF THE ISSUE

Did the water court err in dismissing an application for quadrennial finding of reasonable diligence which was not filed within the statutory time period?

II. STATEMENT OF THE CASE

A. Nature of the Case and Parties.

This is an appeal by Applicant-Appellant Jake O. Broyles ("Broyles") from an order entered by the District Court, Water Division No. 2, dismissing Broyles' application for a quadrennial finding of reasonable diligence. The water court's ruling was entered after a hearing on a motion by Objector-Appellee Southeastern Colorado Water Conservancy District ("District") for summary judgment. Other parties appearing at the hearing included Objector-Appellee The Fort Lyon Canal Company ("Fort Lyon"), the State Engineer, and the Division Engineer.

B. Course of Proceedings.

Broyles obtained a decree in the District Court for Water Division No. 2 on February 14, 1975, which awarded Broyles absolute and conditional rights to five wells located in Bent County, Colorado (Case No. W-2695) (Vol. 1, pp. 151-54). The decree required that Broyles file an application for quadrennial finding of reasonable diligence with the water clerk for Water Division No. 2 during the month of February, 1979, in order to maintain the condi-

tionally decreed water rights (Vol. 1, p. 151). On December 11, 1978, the water clerk for Water Division No. 2 mailed notice to both Broyles and his attorney of the approaching deadline for the diligence application, pursuant to C.R.S. § 37-92-305(7). Broyles failed to file an application for quadrennial finding of reasonable diligence during February, 1979, as required by the conditional decree, the Water Right Determination and Administration Act of 1969, and the December, 1978, statutory notice. On March 15, 1979, the water judge for Water Division No. 2 entered an order cancelling Broyles' conditional water rights (Vol. 1, p. 158).

On April 3, 1979, Broyles filed a motion for relief from the judgment cancelling the water rights, on the grounds of inadvertence, excusable neglect and incapacity (Vol. 1, p. 159). On April 17, 1979, the water judge granted the motion ex parte and entered an order setting aside the order of cancellation and allowing Broyles until May 10, 1979, to file a diligence application (Vol. 1, p. 164).

On May 9, 1979, Broyles filed an application to make absolute a conditional water right and for quadrennial finding of reasonable diligence (Case No. 79CW73) (Vol. 1, pp. 8-34). The District and Fort Lyon filed timely statements of opposition to Broyles' application (Vol. 1, pp. 35-40, 41-45). On May 5, 1980, the District filed a motion for summary judgment urging that the court lacked jurisdiction for several reasons. The water court held a

hearing on September 13, 1983, and after taking the matter under advisement, granted the motion on the grounds that the court lacked jurisdiction over the application since it had not been filed within the statutorily required time period (Vol. 1, p. 116-22). On September 29, 1983, Broyles filed a notice of appeal from the order dismissing his application.

III. SUMMARY OF ARGUMENT

The time limitation for filing applications for quadrennial findings of reasonable diligence is jurisdictional. The statute setting forth requirements for quadrennial filings of diligence was in effect when the conditional decree was entered and during all subsequent proceedings involving that decree. Jurisdictional challenges may be brought at any time based on this Court's most current interpretation of statutory requirements. This Court's decision in Town of De Beque v. Enewold merely clarified existing law; the statute was not retroactively applied. The trial court correctly interpreted this Court's De Beque decision to require strict adherence to the statutory requirement that diligence applications be filed within four years. There is no provision for tolling the period due to the assertion that one is unable to manage his affairs. The water court correctly ruled that it had no jurisdiction to consider the diligence application filed after the statutory

period, and its order dismissing Broyles' application should be affirmed by this Court.

IV. ARGUMENT

A. THE WATER COURT HAD JURISDICTION TO ENTER THE ORDER DISMISSING THE APPLICATION.

Broyles contends that the water court did not have jurisdiction to order dismissal of his application. Opening Brief, pp. 5-6. Broyles asserts that since Judge Statler had previously ruled that Broyles could file the application after the statutory period, Judge Tracey was precluded from ruling that the water court was without jurisdiction to consider the late application. Judge Statler resigned as water judge while this case was pending, and Judge Tracey was later appointed as water judge.

Judge Tracey was not bound by the court's earlier order. In 1967, the General Assembly repealed the statutory prohibition against judges in multiple-judge districts vacating or modifying judgments and orders rendered by another judge of the same court. House Bill No. 1264, Colo. Sess. Laws, p. 461, § 23, repealing C.R.S. 1963, § 37-4-17. In Sunshine v. Robinson, 168 Colo. 409, 414-15, 451 P.2d 757, 760 (1969), this Court stated that the intent of the legislature in repealing the statute was to permit final determination of matters previously presided over by a different judge. The Court therein held that a judge was allowed to

correct an error of another judge no longer on the bench. Sunshine, 168 Colo. at 415, 451 P.2d at 760; cf. Jouflas v. Wyatt, 646 P.2d 946, 947 (Colo. App. 1982) (supporting the conclusion that a judge may enter an order setting aside an earlier order entered by a different judge from the same judicial district where the second judge's ruling is supported by the facts). See generally Rice v. Van Why, 49 Colo. 7, 15, 111 P.599, 602 (1910) (stating that "every order made in the progress of a cause may be rescinded or modified upon a proper case for such relief being made out," and that "the fact that a different judge was sitting worked no limitation upon the power and authority of the court"). Even prior to the repeal of the statute, this Court had allowed a judge to enter an order of dismissal notwithstanding the existence of an earlier order denying the motion to dismiss entered by a different judge for the same district. Denver Electric & Neon Service Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 533-35, 354 P.2d 618, 621-22 (1960).

Judge Tracey had jurisdiction to rule on the District's motion for summary judgment based on lack of jurisdiction. Broyles' application for absolute rights and for quadrennial finding of reasonable diligence was properly before the water court as a "water matter" within the meaning of C.R.S. § 37-92-203(1). Rule 56 of the Colorado Rules of Civil Procedure (C.R.C.P.) states that the defendant may "at any time" move for summary judgment, see Welp v. Crews, 149

Colo. 109, 114, 368 P.2d 426, 428 (1962), and C.R.C.P., Rule 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." See Larrick v. District Court, 177 Colo. 237, 241, 493 P.2d 647, 649 (1972); Peaker v. Southeastern Colorado Water Conservancy District, 174 Colo. 210, 213, 483 P.2d 232, 233 (1971).

The fact that Judge Statler had earlier ruled that Broyles could file his application after the statutory period did not affect Judge Tracey's authority to rule on the jurisdictional issue presented by the District's motion for summary judgment. In Sanchez v. Straight Creek Constructors, 41 Colo. App. 19, 21, 580 P.2d 827, 829 (1978), the court held that although the court had twice previously entered orders denying motions to dismiss for lack of jurisdiction, the Court was free to again determine whether it had subject matter jurisdiction. Courts always have jurisdiction to determine subject matter jurisdiction and are not bound by their earlier orders. In Stonewall Estates v. CF&I Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979), this Court affirmed Judge Statler's ruling setting aside and vacating a prior decree of the water court on the basis that such decree was entered without jurisdiction. The Court ruled that a decree entered without jurisdiction is void and may be set aside by the same court at any time. Stonewall, 197 Colo. at

259, 592 P.2d at 1320. Accord Olmstead v. District Court, 157 Colo. 326, 330, 403 P.2d 442, 444 (1965) (An order granting relief from a judgment entered without jurisdiction is a nullity and must be vacated.); Bosworth Data Services, Inc. v. Gloss, 41 Colo. App. 530, 532, 587 P.2d 1201, 1203 (1978) (The issue of subject matter jurisdiction may be raised at any time and the court is not bound by its prior order entered without jurisdiction.).

In Town of De Beque v. Enewold, 197 Colo. 110, 606 P.2d 48 (1980), this Court ruled that the statutory time limit for filing applications for quadrennial findings of reasonable diligence was in effect a statute of limitations. De Beque, 199 Colo. at 117, 606 P.2d at 53. Motions for summary judgment may be based on the expiration of statutes of limitations. See Maer v. Tuttoilmondo, 31 Colo. App. 248, 251, 502 P.2d 427, 428 (1972). It is thus clear that the water court had jurisdiction to enter its order granting the District's motion for summary judgment based on lack of subject matter jurisdiction.

B. THE WATER COURT'S RULING DID NOT INVOLVE RETROACTIVE APPLICATION OF THE LAW WHICH WAS THE BASIS FOR THE DISMISSAL.

Broyles contends that the water court's reliance on this Court's decision in De Beque, in interpreting the statute requiring quadrennial diligence filings, was an impermissible retroactive application of that decision. Opening Brief, pp. 4-5. The water court was free to look to

this Court's decision for guidance in interpreting the law which was in effect during all proceedings on Broyles' decree.

There is no constitutional prohibition against retrospective application of a court's decision, and whether a decision is to be retrospective in application will depend upon the purpose and effect of the rule announced therein. Ruark v. People, 158 Colo. 110, 114, 405 P.2d 751, 753 (1965), cert denied, 384 U.S. 1019 (1966). In the absence of express guidance by the court as to whether a decision is to be given retrospective effect, the lower court may determine whether the decision should be so applied. Guaranty National Insurance Company v. Ohio Casualty Insurance Company, 40 Colo. App. 494, 497, 580 P.2d 41, 43 (1978), reversed on other grounds, 197 Colo. 264, 592 P.2d 397 (1979).

Where a decision does not announce any new law, but simply clarifies existing law, it may be retrospectively applied. Stevens v. Wilson, 534 F.2d 867, 872 (10th Cir. 1976). When a higher court sets guidelines for the application of existing law, lower courts are free to apply such decisions retrospectively. See Cokley v. People of State of Colorado, 310 F. Supp. 1403, 1406 (D. Colo. 1969); Zoske v. People, 625 P.2d 1024, 1025 (Colo. 1981). In Rocky Mountain Power Co. v. Colorado River Water Conservation District, 646 P.2d 383, 388-89 (Colo. 1982), this Court ruled that the water court was permitted to rely on Colorado River

District v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P.2d 566, (1979), in making its decision regarding conditional water right decrees which had gone to a master's hearing prior to the Vidler decision. The Court found the water court's reliance on Vidler permissible since Vidler did not establish any new law, but simply interpreted the requirements of the Water Right Determination and Administration Act of 1969. Rocky Mountain Power, 646 P.2d at 388-89.

The policy against retroactive application of new statutes and case decisions announcing new law is based upon the basic notion of preventing unfair surprise by ensuring adequate notice of statutory requirements. Broyles cannot complain that he was unaware of the law requiring quadrennial diligence filings. The statute requiring quadrennial diligence findings was in effect when Broyles' decree was entered and during all subsequent proceedings involving the decree. C.R.S. § 37-92-301(4). Broyles' decree entered in 1975 in Case No. W-2695 explicitly stated:

> That as to any conditional right awarded hereunder, the owners thereof, if they desire to maintain the same, shall file an application for quadrennial finding of reasonable diligence with the Water Clerk of this Court during the month of February 1979 . . . .

(Vol. 1, p. 154). The notice provided Broyles and his attorney pursuant to C.R.S. § 37-92-305(7) expressly stated that Broyles' conditional rights would be cancelled unless he filed his application for quadrennial diligence during

February 1979 (Vol. 1, p. 155). The water court's reliance on this Court's De Beque decision for guidance in interpreting the quadrennial diligence requirement did not involve an impermissible retroactive application of new law. The water court was free to rule on the District's jurisdictional challenge based on this Court's guidance as set forth in De Beque.

C. THE WATER COURT CORRECTLY INTERPRETED THIS COURT'S DECISION IN DE BEQUE TO REQUIRE STRICT STATUTORY COMPLIANCE.

Broyles asserts that the water court incorrectly applied De Beque to the facts before the court on the motion for summary judgment to dismiss his application. Opening Brief, pp. 6-7. This Court's decision in De Beque was sufficiently broad to guide the water court's application of the statute requiring quadrennial diligence findings to the facts before the court on Broyles' application. In De Beque, the Court affirmed the trial court's ruling that:

> The language of . . . [the] statute with respect to the effect of failure to file an application for a finding of reasonable diligence within the prescribed time is clear and unequivocal: ". . . said conditional water right shall be considered abandoned." C.R.S. (1973) § 37-92-301(4).
>
> Taken together with the definition of abandonment of a conditional water right as found in C.R.S. (1973) § 37-92-103, it is equally clear that an abandoned right is terminated. The intent of the legislature is clearly expressed: there is no room for interpretation. The statute must be held to mean what it clearly

> says . . . . Cancellation of the conditional right is the appropriate remedy.

De Beque, 199 Colo. at 116, 606 P.2d at 52.

This Court stated that C.R.S. § 37-92-301(4), requiring quadrennial diligence filings, "can be considered as a statute of limitations." De Beque, 199 Colo. at 117, 606 P.2d at 53. The Court made it clear that the requirement was jurisdictional and that: "[w]hile the result of this analysis of the pertinent legislative provisions may be . . . draconian and harsh, it is for the General Assembly and not the courts to remedy the situation . . . ." De Beque, 199 Colo. at 117, 606 P.2d at 52-53.

The Court has previously held that explicit statutory time limits require strict compliance. In Oxley v. Colorado River Water Conservation District, 182 Colo. 206, 210, 513 P.2d 1062, 1064-65 (1973), the Court ruled that the procedures established by state water statutes must be strictly followed and that where those statutes do not provide for extensions of the time limit for filing, the court has no jurisdiction to allow late filings. There is no dispute that Broyles failed to file his diligence application within the four-year statutory period. In Bunger v. Uncompahgre Valley Water Users Association, 192 Colo. 159, 164, 557 P.2d 389, 392 (1976), this Court stated that where the facts are "clear and undisputed" or are "so certain as not to be subject to dispute," a water court holding pro-

ceedings under the Water Right Determination and Administration Act of 1969 may "determine the issue strictly as a matter of law" and properly enter a summary judgment under C.R.C.P., Rule 56. It is not disputed that Broyles failed to meet the four-year statutory deadline. The water court was without jurisdiction to enter the order allowing a late filing and Judge Tracey properly entered the order of summary judgment dismissing the application for lack of jurisdiction.

The Court's decision in De Beque was broad and unequivocal to the effect that diligence applications must be filed within the statutorily prescribed period. The fact that Broyles missed the deadline by a shorter period of time than the applicants in De Beque does not render this Court's interpretation of the statute inapplicable. The water court's earlier order allowing Broyles to file his diligence application after the statutorily prescribed period is of no importance in view of this Court's ruling that the statutory requirement is jurisdictional.

D. BROYLES WAS UNDER NO INCAPACITY WHICH WOULD TOLL THE STATUTORY TIME PERIOD FOR FILING HIS DILIGENCE APPLICATION.

Broyles argues that the four year time period set forth in C.R.S. § 37-92-301(4) should have been tolled since he was "unable to manage his affairs." Opening Brief, p. 7. The statute governing pending proceedings states that the time for showing reasonable diligence under existing conditional decrees "shall be tolled during any period in which

the water judge finds the applicant was prevented from filing by reason of conditions beyond his control." C.R.S. § 37-92-601. The water court concluded that there was no finding that Broyles was prevented by circumstances beyond his control from filing within the prescribed time period, but rather that he had failed to file due to inadvertence and excusable neglect (Vol. 1, p. 120). In upholding the trial court's entry of an order of summary judgment cancelling conditional rights in De Beque, this Court stated that the allegation of inadvertence in failing to meet the filing requirements was irrelevant. De Beque, 199 Colo. at 120, 606 P.2d at 55. The water court correctly interpreted this Court's decision in De Beque to require C.R.S. § 37-92-301(4) to be interpreted "very strictly," providing relief only where there is a clear showing of circumstances beyond applicant's control causing the failure to file within the statutory period (Vol. 1, p. 120).

Broyles incorrectly cites Browne v. Smith, 119 Colo. 469, 205 P.2d 239 (1949), for the proposition that in order to toll a statute of limitations "it is not necessary to show insanity, and that if one is unable to manage his affairs, the statute should be tolled." Opening Brief, p. 7. Broyles finds support for this statement in the Court's use of Webster's definition that "insanity . . . implies mental disorder resulting in inability to manage one's affairs." Browne, 119 Colo. at 472, 205 P.2d at 241. The Court in

Browne the Court found that in order for the applicable statute of limitations to be tolled, the person had to be shown to be insane, although it was not necessary that he be "adjudicated insane", since "[i]nsanity . . . frequently exists before a judicial determination of that fact has been had." Browne, 119 Colo. at 471, 205 P.2d at 240-41. The Court did not hold, as Broyles asserts, that statutes of limitations are tolled where one is merely "unable to manage his affairs." The Court found the promissory note payee insane using the statutory definition that an "insane person" included "any person so insane and distracted in his mind as to endanger his own person or property." Browne, 119 Colo. at 472, 205 P.2d at 241.

Broyles next cites Klamm Shell v. Berg, 165 Colo. 540, 441 P.2d 10 (1968), for the rule that courts do not strictly apply statutes of limitations where to do so would violate equitable concepts. Opening Brief, p. 7. Klamm Shell involved an assault and battery by a defendant which rendered the lady plaintiff mentally incapacitated. Klamm Shell, 165 Colo. at 542, 441 P.2d at 12. The Court refrained from strictly applying the applicable statute of limitations, which only allowed tolling where the plaintiff was mentally incompetent at the time the action accrued, and allowed the "subsequent disability" caused by defendant's intentional tort to toll the statute. Klamm Shell, 165 Colo. at 546, 441 P.2d at 12.

Broyles' high blood sugar, personal stress due to financial difficulties, personal business trips, minor surgery, and personal discomfort which allegedly "interfered with his ability to attend to his business" do not warrant equitable relief from the statute of limitations. The trial court correctly concluded that these problems were not circumstances beyond Broyles' control which prevented him from filing his diligence application within the statutory period (Vol. 1, pp. 160-61). The water court was thus within its discretion in not relieving Broyles from the operation of the statute. The record does not reflect on abuse of that discretion.

V. CONCLUSION

For the foregoing reasons, Appellee The Fort Lyon Canal Company requests that this Court affirm the order of the District Court for Water Division No. 2 granting the District's motion for summary judgment cancelling Broyles' conditional water rights and dismissing Broyles' application for lack of jurisdiction.

LEFFERDINK & DAVIS
John J. Lefferdink (#324)
Post Office Box 110
Lamar, Colorado 81052
Telephone: (303) 336-7411

CALKINS, KRAMER, GRIMSHAW & HARRING

Wayne B. Schroeder, P.C. (#2447)
Bruce D. Bernard (#12166)
Suite 3800, One United Bank Center
1700 Lincoln Street
Denver, Colorado 80203
Telephone: (303) 839-3800

Attorneys for Objector-Appellee
The Fort Lyon Canal Company

CERTIFICATE OF SERVICE

I do hereby certify that on this 9th day of January, 1984, a true and correct copy of the foregoing ANSWER BRIEF FOR APPELLEE THE FORT LYON CANAL COMPANY was served upon the following by placing same in the United States mail, first-class postage prepaid and addressed as follows:

Mr. Kevin B. Pratt
1600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202

Mr. Carl M. Shinn
P.O. Box 390
Lamar, Colorado 81052

Ms. Paula C. Phillips
Assistant Attorney General
Natural Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203