12-6-1983

Broyles v. Ft. Lyon Canal Co.

SUPREME COURT, STATE OF COLORADO

Case No. 83SA351

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, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, and ROBERT JESSE, Division Engineer for Water Division No. 2,

Objectors-Appellees.

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I. STATEMENT OF THE ISSUE

Whether the water court erred in interpreting the Colorado Supreme Court's decision directing "replaced wells" to be abandoned as requiring that such wells be abandoned and sealed in conformance with the rules and regulations of the Colorado Division of Water Resources.

II. STATEMENT OF THE CASE

This case involves an appeal by Applicant-Appellant Broyles ("Broyles") of an order entered by the District Court, Water Division No. 2, requiring Broyles to abandon and plug certain wells in accordance with the requirements of the Colorado Division of Water Resources. The water court's ruling was entered after a hearing on motions by Objectors-Appellees Fort Lyon Canal Company ("Fort Lyon") and Southeastern Colorado Water Conservancy District ("District") for an order requiring the wells to be plugged. The water court's judgment and this appeal of that decision are based entirely upon the Colorado Supreme Court's decision in Broyles v. Fort Lyon Canal Company, 638 P.2d 244 (Colo. 1981), No. 80SA328 (Vol. 1, pp. 91-107) (hereinafter "Broyles"), which affirmed the water court's denial and dismissal of Broyles' application to make absolute four conditional water priorities and required abandonment of four of Broyles' wells.

The pertinent facts regarding the four conditional water rights may be collectively summarized since they all involve the same legal issue. Broyles filed an application for a decree to make absolute the four conditional priorities which had been decreed in 1975 in Case No. W-2695. Broyles based his "development" of the conditional water rights on the allegation he had diverted water conditionally decreed to certain replacement wells through the original "replaced" wells. The original application stated that certain permits were issued as replacements for earlier permits, that wells drilled under those replacement permits produced specified quantities of water, and that absolute awards were entered for those amounts. Broyles also obtained conditional decrees for water to be produced from the wells drilled under the replacement permits. Rather than abandoning and plugging the replaced wells, Broyles obtained permits from the State Engineer to use three of the replaced wells and an additional well as alternate points of diversion for the new wells drilled under the replacement permits. Broyles never obtained a decreed right to use the three replaced wells or the new well as alternate points of diversion for the rights decreed to the replacement wells. Broyles did apply for a decree to make his conditional priorities absolute on the basis that the alternate point of diversion wells produced the water conditionally decreed to the replacement wells.

Broyles' application was challenged by Fort Lyon on the basis that a conditional priority decreed to a replacement well cannot be diverted through an original and supposedly replaced well without benefit of a court decree changing the point of diversion of the conditional water right. The water judge agreed with Fort Lyon's position, and held that the 1975 decree in Case No. W-2695 was res judicata regarding the fact that the four original wells had been replaced by replacement wells drilled under the replacement well permits. The water judge therefore granted, in part, Fort Lyon's Motion for Partial Summary Judgment by denying and dismissing Broyles' application to make absolute the conditional water rights decreed to Broyles' Well Nos. 2-5.

Broyles appealed the water court's entry of summary judgment to the Colorado Supreme Court. This Court affirmed the trial court's ruling and ordered the abandonment of the wells. Broyles, supra, at 249 (Vol. 1, p. 102). Broyles refused to abandon his wells after this Court declared he was obligated to do so. Instead, Broyles has continued to utilize those wells to the prejudice of the rights of other water users.

Fort Lyon, later joined by the District, filed a Motion for an Order to Plug the Wells in the water court on January 15, 1982. After a hearing on the motions held on July 1, 1983, the water court ordered the wells abandoned and

plugged in conformance with the Supreme Court's decision. The day before the hearing on the motions, Broyles filed an Application for Change of Water Right in the water court requesting that the three replaced wells and the new well be decreed as alternate and supplemental points of diversion for the rights decreed to the replacement wells (Vol. 1, pp. 112-33). The water judge concluded that the mere filing of an application did not deprive the water court of jurisdiction to interpret the Supreme Court's decision requiring abandonment of the old replaced wells upon completion of new replacement wells since, in the court's words, "we are far from a decree having been issued." (Vol. 2, p. 2). On July 13, 1983, the water court entered its order requiring Broyles to abandon and plug the four wells in accordance with the requirements of Section 5, Rules and Regulations of the State of Colorado, Division of Water Resources, State Board of Engineers, Water Well and Pump Installation Contractors. It is this order which Broyles seeks to have reversed in this appeal.

III. SUMMARY OF ARGUMENT

The water court's order that Broyles abandon and plug the replaced wells was required by the Colorado Supreme Court's ruling on the first appeal in this case obligating Broyles to abandon those replaced wells and by the statutes

and regulations controlling abandonment of water wells. In that first appeal, this Court affirmed the water court's decision that Broyles was required to abandon the replaced wells. The Court's reference to the possible future use of the old abandoned wells was made only to point out that the doctrine of res judicata did not necessarily preclude such future use if a decree was obtained recognizing the replaced wells as alternate points of diversion. The Court stated that the res judicata question was not dispositive of the issue and instead based its ruling upon the absence of a judicial decree recognizing the replaced wells as points of diversion. The Court, in ruling that the future use of those well locations pursuant to a judicial decree was not precluded by the 1975 decree, did not confer upon Broyles a right to keep the old replaced wells open absent a decree. The Court expressly ruled that Broyles was under an obligation to abandon the replaced wells. The applicable statutes and regulations of the Colorado Division of Water Resources make it clear that the sealing of water wells is part of the abandonment procedure required by law. This Court's decision on that first appeal when read in conjunction with the statutes and regulations governing abandonment of water wells makes it clear that the water court's order to abandon and plug the wells was required by law.

IV. ARGUMENT

A. THE SUPREME COURT'S REFERENCE TO THE POSSIBLE FUTURE USE OF THE REPLACED WELLS WAS MADE TO CLARIFY THAT THE DOCTRINE OF RES JUDICATA DOES NOT PRECLUDE SUCH USE PURSUANT TO A SUBSEQUENT JUDICIAL DECREE, NOT TO IMPLY THAT BROYLES HAD ANY RIGHT TO KEEP THE WELLS OPEN ABSENT SUCH A DECREE.

Broyles bases his assertion that the replaced wells cannot be ordered plugged primarily on the language in Part I.A. of the Supreme Court's decision referring to the possible future use of the replaced wells. Broyles twice quotes that portion of the opinion which states:

> It does not necessarily follow, however, that the old abandoned wells could never be used in the future as alternate points of diversion for the water rights decreed to wells number 2 to 5. Rather, the abandonment simply places those well locations on a par with all other possible alternate points of diversion.

Brief for Appellant, pp. 3, 6, quoting Broyles, supra, at 249. (Vol. 1, p. 102). Broyles interprets the above-quoted language to imply that the Court intended the replaced wells to remain open and available for use absent such a decree. This interpretation of the Court's decision is incorrect.

Part I.A. of the Court's opinion deals with the effect of the 1975 decree on the replaced wells. The Court concluded that the 1975 decree, taken together with the statutory definition of "replacement well," imposed upon Broyles the obligation to abandon the replaced well upon completion of the replacement wells. Broyles, supra, at 249

(Vol. 1, p. 102). The Court, however, stated that it did not regard the res judicata question, upon which the parties focused their attention, as dispositive of the issue of Broyles' right to subsequent use of the replaced wells as alternate points of diversion for the rights decreed to the replacement wells. Broyles, supra, at 247 (Vol. 1, p. 98). The Court pointed out that the 1975 decree was res judicata only with regard to Broyles' right, subsequent to the decree of water rights to the replacement wells, to continue use of the replaced wells pursuant to their original permits. Broyles, supra, at 247 n. 5 (Vol. 1, p. 98 n. 5). The Court concluded that the doctrine of res judicata does not necessarily preclude Broyles' later use of those wells pursuant to a subsequent alternate point of diversion decree. Broyles, supra, at 247 n. 5 (Vol. 1, p. 98 n. 5). The Court determined that a new decree would be independent of the earlier use of the replaced wells and would not be barred by, or inconsistent with, the effect of the 1975 decree. Broyles, supra, at 247 n. 5 (Vol. 1, p. 98 n. 5).

The Court based its affirmance of the water court's decision primarily upon the absence of a judicial decree recognizing the replaced wells as alternate points of diversion for the respective replacement wells, rather than on the doctrine of res judicata. Broyles, supra, at 247 (Vol. 1, p. 98). See Section IV.B., infra pp. 11-15. The Court's

reference to possible future use of the old abandoned wells was made to point out that the doctrine of res judicata did not preclude such use pursuant to a judical decree, not to indicate that Broyles had any right to keep the wells open absent such a decree.

Under Broyles' interpretation of this Court's opinion, replaced wells could never be ordered abandoned and sealed because of the possibility that, subsequent thereto, a new decree could be obtained recognizing the replaced wells as points of diversion. If adopted, Broyles' rationale would create a new class of wells which could not legally be used, but which would remain open indefinitely due to the possibility that a decree granting the right to use such wells might eventually be obtained. For example, the well replaced by Well No. 5 (the replaced well drilled under Permit No. 2906-F), which Broyles presently has no plans to use, would be allowed to remain in place, unsealed indefinitely since Broyles might eventually obtain a decree to use the well. The applicable statutes and regulations do not allow wells which cannot be legally operated to remain free from the procedures for abandonment and sealing. See Section IV.C., infra pp. 15-20.

In his Brief, Broyles takes exception to the water judge's emphasis on the Supreme Court's use of the term "well locations." The water judge pointed to the Supreme Court's

use of the term "well locations" as an indication that the Court did not necessarily contemplate the future use of the "actual abandoned wells in place as constructed." We believe that the water judge was correct in concluding that this Court did not intend that the wells remain physically available "in place as constructed" for future use. We believe that this Court contemplated those wells being abandoned and sealed but remaining subject to becoming points of diversion pursuant to a judicial decree just as any other potential point of diversion. The Court in stating that "the abandonment simply places those well locations on a par with all other possible points of diversion," was indicating that after abandonment the old well sites were legally equivalent to any potential point of diversion. The Court was pointing out that the doctrine of res judicata did not preclude those old well sites from being used in the future pursuant to a new decree. The Court in stating that these abandoned well sites were "on a par with other possible points of diversion" was certainly not indicating that the wells were to remain unsealed and available for use. The Court was addressing their legal availability as points of diversion and was not concerned with physical difficulties or costs of utilizing those abandoned sites as future points of diversion.

Broyles argues that the Supreme Court's use of the terms "old abandoned wells," "old wells," and "replaced

wells" indicates that the Court intended the wells to remain open and available for use as opposed to becoming merely "well locations," i.e., sites of the abandoned and sealed wells. Brief for Appellant, p. 7. There is no inconsistency in the use of these terms. The Court, in referring to "well locations," was simply utilizing a term synonymous with "abandoned well sites" and basically interchangeable with the terms "old abandoned wells," "old wells," and "replaced wells." Broyles' interpretation of the Supreme Court's opinion results from his failure to understand that the term "abandon" means more than refraining from use of a well, but rather implicates a process which is subject to strict regulation including plugging requirements. See Section IV.C., infra pp. 15-20, and the statutes and regulations cited therein. The Court clearly stated that the old or replaced wells were to be abandoned and, as stated by the trial judge, when the Supreme Court says "abandoned, they mean abandoned and must have taken into consideration the abandonment regulations promulgated by the Division of Water Resources . . ." (Vol. 2, p. 3). The trial judge correctly concluded that the wells should not remain "in place as constructed," but should be abandoned and sealed as required by those regulations. The replaced wells once abandoned and plugged as required by law will become mere "well locations" which will be "on a par with other possible alternative

points of diversion," rather than wells which are allowed to remain in place as constructed indefinitely due to the possibility that they might eventually be decreed as points of diversion.

The Supreme Court's decision is clear and the trial court's interpretation of that decision was correct. The trial court emphasized the Supreme Court's terminology due to its failure to observe that the Court's reference to the possible future use of the old abandoned wells was made in the context of rejecting the application of res judicata to subsequent judicial decrees. Had the trial court recognized that this reference related to the legal availability of the replaced wells as points of diversion and not to their physical availability as functional wells, it would not have found it necessary to scrutinize the Court's terminology in order to determine its intent. Despite this confusion, the trial court correctly concluded that the Supreme Court's clear mandate that the wells be abandoned meant just that, and not that the wells were to be exempted from abandonment regulations.

B. THE SUPREME COURT EXPRESSLY PLACED AN OBLIGATION ON BROYLES TO ABANDON THE REPLACED WELLS UNTIL SUCH TIME AS BROYLES OBTAINED A DECREE FOR A CHANGE OF WATER RIGHTS, AND BROYLES HAS NOT OBTAINED SUCH A DECREE.

The Supreme Court expressly stated that the "law recognized that . . . the old wells must be abandoned upon

completion of the new." Broyles, supra, at 249, citing C.R.S. ¶ 37-90-103(13) (Vol. 1, p. 102). The Court concluded that the 1975 decree, taken together with the statutory definition of "replacement well," imposed upon Broyles "the obligation to abandon the replaced wells upon completion of the replacement wells." Broyles, supra, at 249 (Vol. 1, p. 102). The Court indicated that while res judicata did not necessarily operate to preclude the future use of the old abandoned wells as alternate points of diversion, the wells could not be so used until Broyles was able to "obtain a decree for a change of water right which establishes the old wells as alternate points of diversion." Broyles, supra, at 249 (Vol. 1, p. 102-03). The Court concluded that it was "the failure to obtain such a decree which [was] fatal to Broyles' position on this appeal." Broyles, supra, at 249-50 (Vol. 1, p. 103). The Court did not confer upon Broyles any right to keep the old replaced wells open absent a decreed right to use the wells. To the contrary, the Court expressly stated that Broyles was under an obligation to abandon the replaced wells. In his Brief, Broyles acknowledges that the Supreme Court imposed upon him "the obligation to abandon the 'replaced' wells upon completion of the 'replacement wells,'" yet he refuses to abandon those wells in accord with the requirements of the Colorado Division of Water Resources.

Broyles implies that his filing of an application for a change of water rights the day before the water court's hearing on the motions to plug the wells gave him the right to continue using the replaced wells. Brief for Appellant, p. 3. The trial court correctly concluded that Broyles' application for a change of water right had no effect on the Supreme Court's decision requiring abandonment since "we are far from a decree having been issued." (Vol. 1, p. 2). This is especially true given the fact that the conditional rights decreed to Broyles' replacement wells which are the subject of his change of water rights application have now been cancelled by the water court due to Broyles' failure to file applications for reasonable diligence within the period required by C.R.S. § 37-92-301(4). Order of District Court, Water Division No. 2, September 19, 1983 (Case No. 79CW73). In addition, the permits for the replaced wells upon which the change of water rights application is based were issued in violation of C.R.S. § 37-90-103(1), which limits alternate point of diversion wells to the "present appropriation" of the original well. The present appropriation is that portion of the decreed rights which have been put to beneficial use. C.R.S. § 37-92-103(3). See also, City of Westminster v. Church, 167 Colo. 1, 15, 445 P.2d 52, 58-59 (1968) (substantiating that a change of point of diversion is strictly limited to extent of former actual usage). Even if Broyles'

permit applications were valid when issued, the permits may have expired due to Broyles' failure to file signed statements of beneficial use pursuant to C.R.S. § 37-90-138(3)(a). Broyles is further than ever from obtaining the change of water right decree which the Supreme Court ruled he must obtain before he is entitled to use the replaced wells.

The Supreme Court's express mandate that Broyles must abandon the replaced wells stands until and unless Broyles is able to "obtain" a decree for a change of water right which establishes the old wells as alternate points of diversion. Broyles acknowledges in his Brief that "[t]he Supreme Court held that . . . the 'old abandoned wells' may in the future be used as alternate points if a decree for change were first obtained which established them as alternate points." Brief for Appellant, p. 4 (emphasis added). Broyles' application for a change of water rights does not give him any basis for continuing to refuse to abandon the replaced wells.

In his Brief, Broyles takes the position that "Fort Lyon interprets the [Supreme Court's] decision in the same manner that Broyles argues for," since Fort Lyon's motion was "limited to" requesting the court to order the wells plugged "until such time as the applicant obtains 'a decree for a change of water right which establishes the old wells as alternate points of diversion.'" Brief for Appellant, p. 5, quoting Fort Lyon's Motion for Order to Plug Well which

quotes Broyles, supra, at 249 (Vol. 1, p. 103). To conclude that Fort Lyon interprets the Supreme Court's decision as does Broyles, i.e., not to require abandoning and plugging of the replaced wells, is curious in view of the motion being entitled "Motion for Order to Plug Well." The language used in Fort Lyon's motion merely requests that the trial court enforce the Supreme Court's mandate that the wells be abandoned and plugged until a decree is obtained. The position taken by Fort Lyon in its Motion for Order to Plug Well is identical to that taken by this Court, i.e., that the replaced wells must be abandoned and plugged, but that the wells may be reopened if Broyles eventually obtains a change of water right decree to use the old wells as alternate points of diversion.

C. THE APPLICABLE STATUTES AND REGULATIONS OF THE COLORADO DIVISION OF WATER RESOURCES REQUIRE THE SEALING OF WATER WELLS AS PART OF THE ABANDONMENT PROCEDURE.

Broyles' assertion that the trial court misinterpreted the Supreme Court's ruling is based on the premise that the Supreme Court, in mandating that Broyles abandon the replaced wells, did not intend that Broyles plug those wells. Broyles finds support for his assertion in the fact that the word "plugged" is not used in the decision and that the word "plug" is used only in the context of discussing the statements of opposition filed by Fort Lyon and the District. Brief for Appellant, p. 5, citing Broyles, supra, at 246

(Vol. 1, p. 96). We believe that this Court, in ruling that the replaced wells must be abandoned, intended that the wells be abandoned in accord with applicable statutes and regulations and did not intend to exempt them from plugging requirements by not specifically stating that they must be plugged.

The Court used the term "abandoned" due to its reference to the definition of "[r]eplacement well" in C.R.S. § 37-90-103(13), as the source of the requirement that the wells be abandoned. The Court was aware of the statutory and regulatory requirements regarding abandonment. The Court referred to the Objectors' contention that Broyles was required to "plug and abandon" the replaced wells. Broyles, supra, at 246 (Vol. 1, p. 96). In addition, the record contained explicit reference to the Section 5 Abandonment Regulations, Rules and Regulations of the State Board of Examiners of Water Well and Pump Installation Contractors, Colorado Division of Water Resources (hereinafter "Board Rules") (Vol. 1, pp. 162-74), which specify the required procedures for sealing wells as part of the abandonment procedure. District's Memorandum in Support of Motion for Summary Judgment, p. 10 (Vol. 1, p. 70). Courts are deemed to have knowledge of the contents of the record on review. See Hereford v. Benton, 80 P. 499, 500, 20 Colo. App. 500,

504 (1905). The trial court was correct in stating at the hearing on the motions to plug the wells:

> So that when they say abandoned, they mean abandoned and must have taken into consideration the abandonment regulations promulgated by the Division of Water Resources, State Board of Engineers, water well and pump installation contractors.

(Vol. 2, p. 3.) The Court was aware of the plugging requirement and did not intend to exempt Broyles from the statutory and regulatory requirements by not expressly stating that the wells had to be abandoned in accord with those requirements.

The applicable statutes and regulations make it clear that the term "abandonment" means more than merely refraining from operating a well, but rather is a term of art under the statutes and regulations setting forth the procedure for closing and sealing wells. The legislature has declared that "the proper . . . abandonment of water wells . . . is essential for the protection of the public health." C.R.S. § 37-91-101. The State Board of Examiners of Water Well and Pump Installation Contractors ("Board") is given the authority over the abandonment of water wells, including the responsibility to adopt such rules "as may be necessary" to ensure the proper abandonment of water wells. C.R.S. § 37-91-104(1)(b)&(c). The legislature expressly mandates that "no water well shall be . . . abandoned . . . contrary to the provisions of [the statutes governing water

well contractors] and applicable rules of the board . . . ." C.R.S. § 37-91-109.

The rules and regulations of the Board state that: "These rules and regulations provide minimum standards for . . . abandonment of water wells . . . ." Board Rules, § 1(1) (Vol. 1, p. 165). The rules require that "[w]ater well . . . abandonment . . . shall be performed only by or under the supervision of a person having a valid license" issued by the Board and that within sixty days after abandoning a well "the contractor shall submit the necessary reports of work" to the State Engineer. Board Rules § 3(2)&(4) (Vol. 1, pp. 167-68). Section 5 of the rules, which sets forth the abandonment regulations of the Board, states that sealing of wells is required in order to prevent contamination of groundwater aquifers. Board Rules § 5(1) (Vol. 1, p. 170). The specific regulation relating to Broyles' wells requires that the replaced wells "be abandoned by" being filled with sand or gravel and by being capped with five feet of concrete or steel. Board Rules, § 5(2)(b) (Vol. 1, pp. 170-71). The State Engineer's permit application forms now require that, for replacement wells, the plans for plugging the old well be specifically set forth in the application form.

It is apparent from the language of the Board's rules that "abandonment" refers to more than just refraining

from operating a well. Abandonment includes the filling and sealing of the well by or under the supervision of a licensed contractor who must submit reports to the State Engineer that the required work has been carried out. There is no merit in Broyles' contention that this Court, in mandating the "abandonment" of the replaced wells, did not intend that the wells be plugged.

Broyles argues that the practical effect of the trial court's decision is to require Broyles to "destroy" the three old wells. Brief for Appellant, p. 8. He further contends that "if" alternate points of diversion are eventually decreed, he would have the expense of re-drilling the wells at the same locations and that "[s]urely it was not the intent of the Supreme Court to require such unnecessary expenses." Brief for Appellant, p. 8. We believe that this Court only intended that Broyles comply with the law and was not concerned with the possible savings which Broyles might eventually realize through continued violation of the applicable statutes and regulations. Should Broyles ever obtain the right to use the replaced wells, the costs of re-drilling would be attributable to statutory and regulatory requirements designed to protect the public health by the prevention of the contamination of groundwater aquifers. C.R.S. § 37-91-101; Board Rules, § 5(1) (Vol. 1, p. 170). Broyles' argument is with the State Legislature and the Board, not

with this Court which is merely enforcing the law as written. Broyles has taken advantage of C.R.S. §§ 37-92-302 and 37-92-103(13), allowing the use of replacement wells, but continues to ignore the requirement of C.R.S. § 37-90-103(13) that replaced wells be abandoned. Broyles should have been prepared to comply with the statutory and regulatory requirements regarding replacement and abandonment of wells if he wished to take advantage of the statute allowing replacement wells.

V. CONCLUSION

For the foregoing reasons, Appellee Fort Lyon Canal Company requests that this Court affirm the order of the District Court for Water Division No. 2 requiring Appellant Broyles to plug the replaced wells in accord with the regulations of the Colorado Division of Water Resources.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December 1983, a true and correct copy of the foregoing Answer Brief for Appellee The Fort Lyon Canal Company was served upon the following by placing the same in the United States mail, first class postage prepaid and addressed as follows:

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