3-16-2018

In re CSRBA Case No. 49576 Appellant's Reply Brief Dckt. 45418

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 45418-2017

IN RE: CSRBA CASE NO. 49576
SUBCASE NO: 91-7094

JEFFREY C. SHIPPY

Appellant,

v.

DOUGLAS McINTURFF and DARCY McINTURFF

Respondents.

JEFFREY C. SHIPPY'S REPLY BRIEF

Appeal from the Coeur d'Alene-Spokane River Basin Adjudication,
Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls;
Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

This appeal involves the question of ownership of a water right to grow wild rice on property now owned by Jeffrey C. Shippy's LLC (Cedar Creek Ranch, LLC). A license was issued in 1991 to St. Maries Wild Rice Growers, an unincorporated association, to divert water on Jeffrey C. Shippy's ("Shippy") land. The water right license specifically conditioned the water right as appurtenant to Shippy's land. R. 84, *see* License Condition No. 2. The undisputed evidence at trial was that the right was intended to be appurtenant to and remain with that land. This appeal challenges the court's unexplained failure to include that license condition in the partial decree. R. 226.

The competing claimants for this water right (91-7094) are Shippy and Douglas and Darcy McInturff ("McInturff"). The Department of Water Resources ("the Department" or "IDWR") investigated the competing claims and concluded that it lacked sufficient information to determine who owned the water right, so the IDWR Director recommended that the right be decreed in the name of both McInturff and Shippy. R. 56.

The Special Master initially recommended that the right be decreed to McInturff based on the assumption that there was a chain of title from St. Maries Wild Rice Growers to McInturff, based on the corporate dissolution statute. R.119-120. Upon the Motion to Alter or Amend, the Special Master withdrew any reliance on any proof of title transfer, and instead relied on a 2005 Notice of Change of Ownership filed by McInturff on Notice of Challenge to the district court. R. 162-164. The CSRBA court held that Shippy was bound by this Notice of Change of Ownership and had waived the right to even file his claim in the SRBA. R. 221-22. This appeal challenges the Court's decision that Shippy was bound and precluded by a Notice of Change of Ownership proceeding that he was not given notice of and was not privy to.

II. ATTORNEYS FEES

Shippy also requests an award of attorneys fees on appeal based on McInturffs' post hearing letter to Shippy, admitting that they did not intend to keep the water right and pursued the case out of spite. *Motion to Augment the Record*, Ex. A to Shippy Declaration.

III. RESPONSE TO ADDITIONAL ISSUES ON APPEAL

For the first time in this proceeding, McInturff seeks to inject a claim for damages on appeal. For a multitude of reasons, this claim lacks a factual basis and there is no legal authority to bring it before this Court on appeal.

IV. STATEMENT OF FACTS

McInturffs' Brief contains many statements that are not legally or factually correct and attempts to inject into the appeal many so called "facts" that do not appear in the record below. This Statement of Facts responds to the inaccuracies in McInturffs' Brief.

Contrary to McInturffs' claim, the record clearly discloses that it was St. Maries Wild Rice Growers that filed the Application for Permit – no Application was ever filed in the name of Al Bruner. R. 60. The water right was not appropriated by Al Bruner, as McInturff claims, but was appropriated by St. Maries Wild Rice Growers. The beneficial use exam application shows St. Maries Wild Rice Growers as the permit holder. R. 73. There is an assignment of a different permit from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc., in 1986 for a different water right on different land (92-7090).[1] R. 74. There is no such written assignment of this permit, 91-7094, to the Corporation. The license was issued in 1991 for 91-7094 to St. Maries Wild Rice Growers. R. 84. The license was not issued to Mr. Bruner, and, as McInturff admits, there was no protest to issuing the right in the name of St. Maries Wild Rice Growers by Mr.

[1] This right was ultimately decreed as 92-10502.

Bruner or anyone else. Moreover, the conditions of the license expressly require the water right to be appurtenant to Shippy's land. R. 84. No one protested that Condition either.

The 1984 Articles of Incorporation of St. Maries Wild Rice, Inc., list Jeffrey Baker and Steven Bruner as directors and incorporators. R. 68-69. Mr. Baker testified that St. Maries Wild Rice Growers "became" St. Maries Wild Rice, Inc. Tr. 8/3/2016, p. 127, l. 25. There are no formal transfer documents from the Association to the Corporation other than the assignment and a different permit. R. 74.

McInturff attempts to impugn Mr. Baker's testimony, claiming that there are no documents supporting his testimony. McInturff is wrong. His testimony is supported by the language of the License Condition No. 2 and by the documents submitted at trial, making it clear that the landowners would not grant a long-term lease. Tr. 8/3/2016, p. 129 l. 10-p. 134, l. 22 (Exs. 5-2, 5-3 and 5-4).

McInturff relies on the 2005 Notice of Change of Ownership that McInturff filed, claiming he obtained ownership from Al Bruner. McInturff provides no evidence that water right 91-7094 was ever transferred to Al Bruner from the Association or the Corporation. Thus, there is no evidence that Al Bruner ever held title to this water right. McInturff cites no evidence of any written transfer of the right from the holder of record, St. Maries Wild Rice Growers, to Al Bruner so he could transfer it to anyone else.

Section IV.A. of McInturffs' Brief speculates about the relationship between Mr. Baker and Mr. Bruner. He says that Bruner was the President of the Corporation in 1984. In fact, Mr. Baker was the President. Tr. 8/3/2016, p. 128, ll. 1-5; *see also* R. 83 (Annual Report for 1987 listing Jeffrey Baker as President). McInturff asserts, without proof in the record, that Al Bruner was the sole shareholder, owner and operator of the company. McInturff then claims that Al

Bruner could dispose of the Corporation's assets, and that it is reasonable to assume that the water right passed to Al Bruner based on nothing but speculation.

McInturff claims, without any evidence, that Al Bruner did all the development of the water right and the business by himself without anyone's help even though the record clearly shows that the water permit and license was issued to St. Maries Wild Rice Growers, which included Jeffrey Baker. *Id.*

On the other hand, there is no dispute that this Association filed an Application for Permit No. 91-7094 to divert water onto property owned by Aaron and Jeanne Robinson to grow wild rice. Tr. 8/3/2016, p. 17, ll. 5-22. There is no dispute that there was no long-term lease of the land. The evidence at trial demonstrated that several efforts were made by St. Maries Wild Rice Growers to induce the owners of the land (Robinsons) into signing a long-term lease. However, the Robinsons were unwilling to sign any lease. Tr. 8/3/2016, pp. 128-33.

There is no dispute that in 1991, a water right license was issued to St. Maries Wild Rice Growers for 1.4 cfs. The place of use was described as ten (10) acres in T46N, R01W, Section 7, and sixty (60) acres in T46N, R01W, Section 18. This land was owned by Robinson and is now owned by Shippy. Tr. 8/3/2016, p. 11, ll. 5-9. The license contained an express condition providing that "this water right is appurtenant to the described place of use." Tr. 8/3/2016, p. 62, ll. 13-20. This condition was included in addition to the description of the place of use. McInturff ignores this requirement of the license.

There is no record showing that St. Maries Wild Rice Growers became St. Maries Wild Rice, Inc., nor was there ever an assignment of permit or change of ownership from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc. R. 159. McInturff admitted there was no transfer. Tr. 7/18/17, p. 21, ll. 13-18; p. 23, l. 24-p. 24, l. 5.

At the time of the transaction between Bruner and McInturff there was no dispute that the license for water right 91-7094 was held by the Association, St. Maries Wild Rice Growers, not Bruner. R. 159. There is no evidence in the record that there was ever any transfer of the permit or license from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc., or to Mr. Bruner. *Id.* On appeal, McInturff can point to no evidence that either St. Maries Wild Rice Growers or St. Maries Wild Rice, Inc., ever transferred ownership of the permit to Bruner. He admitted before the district court that there was no such transfer. Tr. 7/18/2017, p. 21, ll. 13-18; p. 23, l. 24-p. 24, l. 5.

There is no dispute that Aaron and Jeanne Robinson deeded, over time, their entire interest in the real property, which is the same property as the place of use of the water right, to their son, Jeffrey Shippy. In 2010, Jeffrey Shippy deeded his interests in the property to Cedar Creek Ranch, LLC, of which he is the managing member. R. 136-143. Thus, the current owner of the property to which this water right is appurtenant is Cedar Creek Ranch, LLC. Tr. 8/3/2016, p. 14, l. 12.

V. ARGUMENT

A. McInturffs are Bound to Follow the Rules of this Court.

As parties who participate in legal proceedings before this Court, McInturff must follow the Court's rules. In this case, it means that McInturffs are not free to make statements or rely on facts that are not clearly set forth in the record of the proceedings below. Nor are they free to raise new claims before this Court. They may not present pleadings for improper purposes, unnecessary delay or to increase the cost of litigation.

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As this Court has held:

> Pro se litigants are not entitled to special consideration or leniency because they represent themselves. To the contrary, it is well-established that courts will apply the same standards and rules whether or not a party is represented by an attorney and that pro se litigants must follow the same rules, including the rules of procedure.

Bettwieser v. New York Irr. Dist., 154 Idaho 317, 322, 297 P.3d 1134 (2013) (citations omitted).

B. McInturffs Cannot Raise Their New Damages Claim in this Appeal.

Page 3 of McInturffs' Brief contends that McInturffs are entitled to damages for lost income. This issue was not raised before the district court. Nor was there a cross appeal filed. I.A.R. 15. This Court has been abundantly clear that arguments raised for the first time on appeal will not be considered by the Court. *Watkins Co. v. Estate of Storms*, 161 Idaho 683, 685, 390 P.3d 409, 411 (2017); *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 812, 252 P.3d 71, 93 (2012).

Moreover, even if the Court, or the district court, could adjudicate such a claim, there is nothing in the record to support McInturffs' claims of damages and no reason to believe McInturff could not obtain a new water right for different land. There is no suggestion that the St. Maries River is fully appropriated. In fact, McInturff claims it is not. *McInturff Brief*, p. 10. Nor is there any evidence that McInturff even tried to get another water right, move this right or grow wild rice anywhere else. This is a frivolous claim and should not be considered by this Court.

C. McInturffs Never Acquired Title to Water Right 91-7094.

The facts on this point are clear and undisputed. The license was acquired in the name of St. Maries Wild Rice Growers, but it never transferred the water right license to any other person

or entity. R. 115. Mr. McInturff admits that is true. Tr. 7/18/17, p. 21, ll. 13-18; p. 23, l. 24-p. 24, l. 5. If St. Maries Wild Rice Growers did not transfer title, how did McInturff acquire title?

McInturff argues that it was "reasonable to assume" that Mr. Bruner acquired the license under the corporate dissolution statute. *McInturff Brief*, p. 7. Yet, Idaho Code § 30-1-1405(2)(a) specifically provides that a corporate dissolution does not transfer title of the corporation's property. McInturff never explains how corporate dissolution of St. Maries Wild Rice, Inc., transferred title to Bruner or McInturff.

A water right is real property, Idaho Code § 55-101(1), and must be transferred by a writing. Idaho Code § 55-601; *Gard v. Thompson*, 21 Idaho 485, 496, 123 P. 497, 502 (1912). The Statute of Frauds also requires a writing. Idaho Code § 9-503. *Joyce Livestock*, requires a separate writing to convey the water rights apart from the land. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007). McInturff has no response. The district court did not address this critical point. Without a writing transferring this water right to Bruner, Bruner had no legal right to transfer the water right to McInturff. McInturff did not acquire the water right 91-7094.

D. McInturffs' Unilateral Notice of Change of Ownership did not Vest Title in McInturff.

McInturff filed a Notice of Change of Ownership in 2005, years after purportedly acquiring the right from Bruner. McInturff attached no evidence that Bruner got title from St. Maries Wild Rice Growers, the record title holder. No notice of the change was given to the landowners where the right was appurtenant, or to anyone else. Notice was not published. McInturff makes no effort to explain how Shippy or his parents could be bound or would even have a reason to know about McInturffs' filing. McInturff merely argues that he filled out a form at the Department and that is good enough.

McInturff seems perfectly content with a holding that Shippy is bound by McInturffs' unilateral paperwork when Shippy had no opportunity to participate and of which he had no notice of any kind. McInturff would undoubtedly be less than content if the shoe was on the other foot. More importantly, this Court should hold that neither a water right holder nor the Department can deprive a claimant of his claim of interest in a writing without adequate notice. Importantly, the district court held that Shippy was not entitled to any notice. R. 222.

This procedure sanctioned by the district court deprived Shippy of his opportunity to be heard "at a meaningful time and in a meaningful manner." *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998).

Nor has McInturff explained how Shippy had a "full and fair opportunity" to litigate the issue in the Notice of Change proceedings. *See Rodriguez v. Dept. of Corrections*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001).

The district court erred in precluding Shippy from challenging McInturffs' claim of ownership. Ownership of a water right is the proper subject of the CSRBA proceedings. There is no question that McInturff never acquired legal title to the water right and the Notice of Change process does not deprive Shippy of his day in court, especially when there was no notice to Shippy of McInturffs' efforts.

E. McInturffs' Claim should have been Dismissed for Pursuing this Action in Bad Faith and Out of Spite.

What is quite astonishing in this case came in the form of McInturffs' letter to Shippy after oral argument before the district court. That letter explained that McInturffs' did not intend to keep the existing water right but to give it to Shippy. Instead, once Shippy hired a lawyer McInturffs' decided to "simply take delight in the outpouring of cash this little battle must be causing you." *Motion to Augment the Record*, Ex. A to Shippy Declaration. When Shippy

provided the letter to the court, McInturff responded that the letter was "intended to be spiteful." R. 208.

On appeal, McInturffs argue that they have not "brought" or "pursued" an action. *McInturff Brief*, p. 9. Not true. McInturff "brought" a claim for a water right in the CSRBA. They never intended to keep that right, but continued to "pursue" their claim of right just to see Shippy continue to spend money. *Motion to Augment the Record*, Ex. A to Shippy Declaration. Compounding their failure to adhere to the legal rules, McInturff then inappropriately refers to "mediation" efforts. I.R.C.P. 37.1(k) provides that mediations are confidential and subject to Rules 408 and 507 of the Idaho Rules of Evidence. It is highly inappropriate to attempt to include alleged "mediation" or "settlement" discussions in McInturffs' Brief. These references should be stricken or disregarded. Shippy will not respond in kind.

While anyone can defend his or her property, taking this kind of action with such an admittedly improper motive – to run up fees when they had no intent to keep the property – is sanctionable conduct that should not be countenanced by this Court.

F. The District Court Erred when it Failed to Include the Conditions on the License as Conditions on the Partial Decree.

McInturff does not dispute that license contained a condition requiring that "this water right is appurtenant to the described place of use." R. 84. The partial decree did not include this appurtenance requirement. R. 226. Neither the district court nor the Special Master explained why the partial decree failed to include those provisions. On appeal, McInturff does not address this issue or attempt to support that failure to include the appurtenance condition. Failure to address an issue on appeal signifies that McInturff has no basis to oppose this requested relief. The license's appurtenance condition is important and cannot be ignored or excised from the right. It was error to omit it from the partial decree.

G. Title to the Water Right Vested in Shippy as a Result of Transferring the Water Right by Deed with Appurtenances.

The ownership issue involves Shippy's objection to McInturffs' claim and Shippy's own claim. As demonstrated above, McInturff does not have title to the water right as there is no writing sufficient for St. Maries Wild Rice Growers to transfer any of its interest in the license. Since McInturff has no title to this right, who does? St. Maries Wild Rice, Inc., was dissolved. St. Maries Wild Rice Growers also dissolved when Baker and Bruner disassociated. *Costa v. Borges*, 145 Idaho 353, 357, 179 P.3d 316, 320 (2008). As noted in Shippy's opening brief, we believe that the only viable option here is to recognize the intent of St. Maries Wild Rice Growers and decree the right to the landowner. St. Maries Wild Rice Growers is not claiming ownership, nor could it, so there is no conflict with the licensee awarding this right to Shippy. Jeffrey Baker believed that the appurtenance requirement meant that the right would remain with Robinson, as the landowner. Tr. 8/3/2016, pp. 137-38. So did Mr. Shippy. Tr. 8/3/2016, p. 117, ll. 15-16.

Title to the property was passed to Mr. Shippy from his parents over time from 1993 to 1999. R. 135-143. There is no exception in the deeds excluding transfer of the appurtenant water right. McInturff argues that since the deeds did not mention water rights, water rights did not pass with the deeds. McInturff is wrong. As an appurtenance to the land, the water rights passed by virtue of the deeds to Mr. Shippy from the Robinsons, as a matter of law. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007); *Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984); *Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015).

McInturff is also wrong when he claims that a water right can be initiated in trespass. Whether that is true in other states is beside the point. In Idaho, a water right cannot be initiated by a trespass. *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1165, 1170 (1974).

McInturff next argues that *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930) allows a water right to exist independently from the land. As an abstract matter, that is true. This water right is different. It is expressly conditioned as being appurtenant to a specific parcel of land – Shippy's. A water right "is not necessarily appurtenant to the land on which it was used." *Id.* at 746 (emphasis added). That is not true here by virtue of the license. No one – not Bruner or anyone else – objected to that express condition. Hence, *First Security Bank* is inapt.

Each case turns on its own facts. Here, St. Maries Wild Rice Growers obtained a water right on Robinson's property with the intent that the right be appurtenant to Robinson's property. It was not to be held "in gross" but specific to that property. The requirement that the water right remain appurtenant to the land passed to Shippy by virtue of the deeds. Given these unique circumstances, the only legitimate claim to title to water right 91-7094 rests with Shippy, particularly as St. Maries Wild Rice Growers has not asserted any claim to this right.

VI. ATTORNEYS FEES ON APPEAL

Shippy requests an award of attorneys fees on appeal under I.A.R. 11.2. The basis for this request is McInturffs' admission that this proceeding has been drug out for no reason other than forcing Shippy to incur fees, *Motion to Augment the Record*, Ex. A to Shippy Declaration, and McInturffs' admission of their spiteful motive. *See Haight v. Idaho Department of Transportation*, Docket No. 44863 (January 9, 2018); *Akers v. Martinson*, 160 Idaho 286, 289,

371 P.3d 340, 343 (2016) (improper purpose); *Bettwieser v. New York Irr. Dist.*, 154 Idaho 317, 330, 297 P.3d 1134, 1147 (2013).

VII. CONCLUSION

McInturffs' claims to this water right should be disallowed. The partial decree should be amended to include all the license conditions, including the appurtenance condition, and the right should be decreed in the name of Jeffrey C. Shippy.

DATED this 16th day of March, 2018.

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker
Attorneys for Jeffrey C. Shippy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of March, 2018, I served true and correct copies of the foregoing **JEFFREY C. SHIPPY'S REPLY BRIEF** upon the following by the method indicated:

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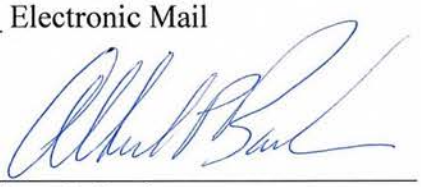

Albert P. Barker