1989

Cornish Town v. Evan O. Koller : Reply Brief

Utah Supreme Court

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

CORNISH TOWN, a Utah municipal corporation,

Plaintiff/Respondent. Case No. 890020

v.

EVAN O. KOLLER and MARLENE B. KOLLER, husband and wife,

Defendants/Appellants.

REPLY BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT OF THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CACHE COUNTY, STATE OF UTAH
The Honorable VeNoy Christoffersen presiding

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STATEMENT OF FACTS

The parties have stated the facts in their respective briefs which are not refuted nor contested. The facts are chronological as follows:

1. The Town of Cornish filed its complaint in 1979. The issue was to determine the ownership of the water in the Pearson Springs. The issue of location or relocation of the deeded 3/4 inch service or connection tap was not raised in Complaint.

2. The trial was held on February, 1983. The issue of location or relocation of the deeded 3/4 inch service or connection tap was not raised at trial.

3. The decision of the trial court was entered orally on February 18, 1983 and in formal written findings and Judgment in April, 1984. The trial court entered its findings of fact that the location of the existing 3/4 inch service tap or connection met the requirements of the grant in deed as to the 3/4 inch service tap and delivery of water to the Koller residence. (Findings of Fact, paragraphs 5 and 6, Conclusions of Law, paragraph 5) The Court made findings that pursuant to the deed the Town had installed a 3/4 inch service tap and that the town was to deliver the water from a diversion from the Town's water line to a 3/4 inch tap at the home. (Tr. of Oral Decision pp. 7-8)

4. The Appeal was filed in 1984 to appeal the determination of the Koller rights to 1/5th of the spring water and the right to the delivery of water for culinary purposes from a 3/4 inch service tap. Respondent did not raise the issue of location or relocation of the 3/4 inch service tap or connection on appeal.

5. The Supreme Court rendered a decision on July 20, 1988 as to all issues on appeal based upon the findings of fact. The Court reversed in part and remanded for entry of Judgment consistent with the decision.

6. The trial court and the Supreme Court accepted as fact that the 3/4 inch service tap or connection was in place and that no issue as to its relocation was raised and therefore made findings consistent with that existing fact.

7. The Town of Cornish first raised the issue of the relocation of the 3/4 inch service tap at the Hearing to Enter Judgment after Appeal on November 15, 1988, and the Court entered its order on December 5, 1988, allowing relocation of the tap at the whim of the town.

APPELLANTS' NARRATIVE

The owners of a portion of the water known as the Pearson Springs deeded a portion of their water to the Town of Cornish and a portion of the water was reserved along with a

right to supply water to their home for domestic purposes through a 3/4 inch tap. We do not know what the parties said during this transaction but we do know the content of their written agreement in the form of a deed and we do know what was constructed by those parties and approved by them since the location and size of water diversion system has remained the same to this day.

In 1979, the Town of Cornish decided that they wanted all of the water from the Pearson Springs and filed its Complaint against the Kollers. The District Court rendered a decision which was appealed to the Utah Supreme Court, and the Supreme Court enforced the rights of the deed as a division of the Pearson Springs between the Town of Cornish and the successors to the original grantees.

In 1988, after decision by the Utah Supreme Court, the District Court decided that it could rewrite its findings of fact allowing the town at its whim to relocate the 3/4 inch tap providing water for domestic purposes. The Supreme Court had held that the deed of the parties was the contract of the parties and the division of water in place was the evidence of the contract. The town decided that since it lost the case in the Supreme Court, it now wanted the right to reconstruct the division of water through a junction or connection by removing that which was constructed by the original parties to the deed and by placing

that junction or tap at the source of the Pearson Springs rather than the junction or connection at the source of diversion to the home. The district court concurred and entered its order rewriting the findings of fact and therefore rewriting the contract of the original parties, allowing the Town to now relocate that junction for delivery of water wherever the Town desired.

ISSUE

1. WHETHER THE TRIAL COURT MAY REWRITE THE PRIOR FINDINGS OF FACT AND JUDGMENT TO NEGATE THE FORCE AND EFFECT OF THE SUPREME COURT DECISION.

ARGUMENT

The issue of the location of a 3/4 inch service tap, whether it be a tap at the source of the water or at the distribution point to the home, was never raised in the original proceeding. The Court made its findings as an existing fact that was never challenged. It was a written finding of the trial court and was therefore a factual finding relied upon by the trial court and the Supreme Court in reaching final decision. The trial court has either rewritten its previous Findings of Fact or has now accepted a new issue upon which it has taken no new evidence, on which there has been no new testimony given, and as to which there has been no issue raised until after the appeal. This Court has faced that same concern in Combe v.

Warren's Family Drive-Inns, Inc., 680 P.2d 733 at 736 (Utah, 1984) "The trial court is not privileged to determine matters outside the issues of the case, and if [it] does, [its] findings will have no force and effect." This Court did not have before it in the original complaint nor in the original proceedings the claimed issue of where the 3/4 inch tap recorded in the deed and constructed by the parties to the deed should be placed. The district court assumed the responsibility of restructuring the water rights of the deed and reconstructing that which had been in place by authorizing the relocation of the tap at the water source rather than at the distribution point to the home. A trial court has no authority to try any issues after appeal other than those directed by the mandate of the Appeal's Court or any that were necessary to reach decision on mandated issues which had not already been decided. When the case was remanded for a specific purpose, any proceeding inconsistent therewith are error. Potter v. Gilkey, 570 P.2d 449 (Wyo., 1972); Jordan v. Jordan, 643 P.2d 1008 (Ariz., 1982); Sanders v. Gregory, 652 P.2d 25 (Wyo., 1982).

The course of action should have been to leave the findings of fact as determined on appeal or to begin a new trial of the facts for a new issue raised. The judgment of the trial court being in part reversed and remanded stands in the lower

court precisely as it did before a trial was held in the first place. Hidden Meadows Redevelopment Co. v. Mills, 590 P.2d 1244 (Utah, 1979).

The Supreme Court upheld the deed granting water rights as follows:

> "Grantors reserve the right to use the water for human drinking and stock watering purposes. This use to be confined to a water flow through a 3/4 inch tap, and Grantee agrees to pipe the said water to the home of Lars Pearson for culinary and domestic purposes. All water to be measured through a culinary water meter."

After the deed was granted and received, those involved fulfilled the requirements of the deed by building a water line to the city reservoir. In the middle of that line, they constructed a junction or diversion and a water delivery line to the Pearson property and at the Pearson home they installed a 3/4 inch tap.

The Town of Cornish was forced by decision of the Supreme Court to acknowledge and grant those water rights to the Kollers. (Cornish v. Koller, 758 P.2d 919 (Utah, 1988)). The Town on petition to the Court on November 15, 1988 asked the court to rule that the court's prior findings as to the 3/4 inch tap could be changed to allow relocation of the tap anywhere the town wanted and that the location of the tap was discretionary with the town.

"However, as long as Cornish provides the water through a 3/4 inch tap from the Pearson Spring, that complies with the deed, regardless of where the tap is located in relation to the residence." Paragraph 5 of Amended Findings of Fact entered December 15, 1988.

ISSUES OF FACT WHICH WERE NEVER TRIED AFTER APPEAL

1. Does the location of the present service connection in the town's delivery line flowing to a 3/4 inch tap at the Koller property meet the requirements of the deed?

2. Does the deed require the Town to deliver water to the Koller home?

3. Will the proposed 3/4 inch service connection in the Town's delivery line meet the requirements of the deed if the service tap is relocated at the Town's whim and Koller is then required to deliver the water to the home?

4. Is the Town's water system a community or public water system under definition of the State Public Drinking Water Regulations?

5. Is the town required to comply with the State Public Drinking Water regulation in delivering water to the Koller home?

6. Does the locating of the 3/4 inch service tap at the source rather than at the home meet the requirements of the deed and of the State Public Drinking Water Regulations?

7. Does the present service tap or connection meet State Regulations?

Decisions of the Court must be based upon determinations of law and facts. The instant case is a factual interpretation of what was intended by the deed, what was constructed and what will happen to that delivery system if the town can change the location of tap and line at its whim. Yet the court has failed to accept any evidence as to these facts before entering its Findings.

The Amended Judgment of the Court entered December 15, 1988 made no reference to its Finding of Fact paragraph 5 except that in paragraph 11 of the Judgment, reference is made to installing "a tap being defined as a 3/4 inch inside diameter service connection into a water main or distribution line." That reference was made an effort to define the deeded "a 3/4 inch tap." The deed makes no reference that the 3/4 inch tap is the service connection into a water main. The 3/4 inch tap in the deed is the delivery tap to the Koller home on the user end of the delivery line.

The Judgment and Findings entered by the court are contradictory. Even the town of Cornish in preparing these two final pleadings did not use the same facts as to what the 3/4 inch tap was and where the 3/4 inch tap should be placed and how that delivery of water would be made to the Koller home.

If the water line were constructed in today's world, one would look to the State of Utah Public Drinking Water Regulations and determine if the town's water line is a distribution system requiring minimum pipe size of 2 inches and minimum pressure for delivery of 20 pounds per square inch, and that service taps or delivery taps must not jeopardize the quality of the system's water and a court must find that the present water lines do or do not comply with those regulations or are not required to comply with those regulations.

Respondent's argument in its brief is based entirely on a concern for issues that were not raised on appeal and the right of the trial court to resolve those issues after an appeal decision. The issue raised by respondent as to the location of the 3/4 inch service tap was never raised in plaintiff's complaint. The first time the issue is raised by the Town is in motion to enter the judgment after appeal decision. That action is inappropriate. After a decision on appeal, the trial court can only

take such proceedings as conform to the judgment. Geissel v. Galbraith, 769 P.2d 1294 (Nev., 1989).

Finally, respondent claims substantially changed circumstances which would allow the trial court to modify its prior order relying upon some equitable relief or unfair result arising from the decision on appeal and Rule 60B, U.R.C.P. There is no change in circumstances as to the 3/4 inch tap described in the deed. The 3/4 inch tap existed at the time of the Complaint. The town did not seek a determination during trial that it had the right to relocate the 3/4 inch tap or service connection. Now the issue is claimed to create some burden upon which plaintiff needs equitable relief because of some unfair result. Nothing has changed from the day the case began.

The "law of the case" doctrine makes the decision of the trial court the law of the case on all issues unless there are essential facts or issues that are changed or evidence substantially changes. Dancing Sunshine Lounge v. Industrial Commission, 720 P.2d 81 (Ariz., 1986).

CONCLUSION

Appellants have a right to their water and it should be provided at the location the original parties determined met their agreement when the grant in deed was executed and delivered. Any other finding must require the trial court to take

evidence and testimony to determine a new issue raised after appeal.

Respectfully submitted this 28th day of September 1989.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellants to Jody K. Burnett and Jerry D. Fenn, Snow, Christensen & Martineau, Attorneys for Plaintiff/Respondent, 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84145, this 28th day of September, 1989.

M. Byron Fisher

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