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Vaughn v. People ex rel. Simpson, 135 P.3d 721 (Colo. 2006)

Michelle Young

Vaughn v. People *ex rel.* Simpson, 135 P.3d 721 (Colo. 2006) (holding that an owner of ground water rights who authorized pumping of his well in violation of a valid order of the diversion engineer was a "person who diverts ground water" pursuant to Colo. Rev. Stat. § 37-92-503, and that the State presented sufficient evidence to support imposing liability on the owner).

Michael Vaughn ("Vaughn") appealed a judgment of the Colorado District Court Water Division No. 1 ("water court"), which assessed a monetary penalty against him for diverting water in violation of a valid order of the division engineer. The two primary issues before the Colorado Supreme Court were: (1) whether the statute at issue could be interpreted to impose liability only on the individual who personally turned on the well pump; and (2) whether the State presented sufficient evidence to support the water court's finding that Vaughn diverted or authorized diversion of ground water in violation of the engineer's order.

Pursuant to Colo. Rev. Stat. § 37-92-503, the state and division engineers filed a complaint against Vaughn alleging violations of the division engineer's order to discontinue diverting water from a permitted well that Vaughn owned. At trial, the State presented direct evidence of the following: the division engineer posted the order according to statutory requirements; Vaughn received notification in the mail; and, following the order to discontinue, a person (or persons) pumped over six million gallons of water from Vaughn's well. However, the State only presented circumstantial evidence regarding the particular persons who operated the well and how those persons ultimately used the water. In his defense, Vaughn argued that the statute imposed liability only on the person who actually operated the well in violation of the order, and the State therefore failed to present sufficient evidence that either he or someone acting as his agent actually operated the pump.

The Colorado Supreme Court began with an analysis of the statutory construction and legislative intent of Colo. Rev. Stat. § 37-92-503 to determine whether an owner or user of water rights could be found vicariously liable for the conduct of others within the meaning of the statute. Subsection (6)(a) of the statute provided that "[a]ny person who diverts ground water contrary to a valid order of the state engineer or division engineer...shall forfeit and pay a sum not to exceed five hundred dollars for each day such violation continues." The court found that "person" and "divert" acquired particular significance beyond their common use through their definition in the Water Right Determination and Administration Act of 1969. Unless indicated otherwise, "person" referred to an individual or a public or private legal entity, including partnerships, corporations, municipalities, the state, or even nations. The statute defined "divert" as the relocation of water by means of a structure or device. Taken together in the context of a

larger regulatory scheme and the legislative intent to prevent persons from using wells in violation of discontinuance orders, the court found that § 37-92-503 demanded an interpretation that included liability for the acts of others. The court did not examine the outer limits of this rule regarding liability for others' acts; rather, the court restricted its holding to a ruling that the statute imposed liability on an owner to whom the division engineer issued a discontinuance order and whose well continued to be used with his authorization.

The court concluded with a brief analysis of the State's evidence at trial including the volume of water removed from the well, the success of Vaughn's alfalfa crop the year in which the water use was discontinued, and the improbability that an intruder would remove over six million gallons of water from Vaughn's well without him having noticed. Based on this evidence and Vaughn's admission that he delegated the farming and irrigation of the crop to his father and his children, the court found that the water court correctly concluded that Vaughn was a person who diverted water within the meaning of the statute. Therefore, the court affirmed the judgment of the water court.

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In re Water Rights of Elk Dance Colorado, LLC, 139 P.3d 660 (Colo. 2006) (holding that the doctrine of issue preclusion bars a homeowners' association from re-litigating the ownership of disputed water rights previously litigated in district court; and prevents the homeowners association from collaterally attacking the district court's subject matter jurisdiction because it did not raise a jurisdictional challenge either at trial or on direct appeal).

Members of a homeowners' association ("HOA") appealed Colorado Water Court, District Number 5, orders dismissing their petitions to set aside decrees granting Elk Dance Colorado ("Elk Dance") authority to amend certain features of a previously decreed water augmentation plan. The water court held that a previous Summit County District Court decision, determining Elk Dance owned the disputed water rights, collaterally estopped the HOA from asserting ownership. The Colorado Supreme Court affirmed the water court's decision, holding that the Colorado doctrine of issue preclusion barred the HOA from claiming it owned the disputed water rights and prevented a collateral attack on the district court's subject matter jurisdiction.

The water law issues and the parties in this case derived from a series of transactions commencing in 1980, when a real estate development group ("Development Company") acquired 6000 acres of land in Summit County and obtained a decree for a water augmentation plan providing for 175 acre feet of water per year ("Original Decree"). Shortly thereafter, the initial group of residential lot owners formed a homeowners association ("HOA"). In 1989, the Development Com-