Great Basin Water Network v. State Eng'r
126 Nev. Adv. Op. No. 20 (June 17, 2010)[1]

ADMINISTRATIVE LAW – WATER RIGHTS

Summary

A 2003 amendment to section 533.370[2] of the Nevada Revised Statutes, empowered the State Engineer to postpone taking action on water appropriation applications "[for] municipal use," where disputants filed applications within one year prior to the amendment.

Disposition/ Outcome

The Court held that the Nevada Legislature intended to limit retroactive application of the 2003 amendment to not more than one year prior to its adoption. Therefore, water rights applications filed in 1989 were not bound by the 2003 amendment, and the State Engineer violated his duty[3] by failing to rule on the 1989 applications within one-year after the final date for filing a protest, and then ruling on applications well beyond the one-year statutory limitation without first properly postponing action.

Factual and Procedural History

In 1989, the Las Vegas Valley Water Department (LVVWD) filed approximately 146 applications with the State Engineer to appropriate public water from groundwater sources throughout Nevada. After publication of statutory notice, the State Engineer received over 830 protests to the notice.

Between 1991 and 2002, the Southern Nevada Water Authority (SNWA)[4] withdrew some of the1989 applications,[5] and the State Engineer held hearings and issued rulings on several other 1989 applications. In October 2005, the State Engineer sent a certified mail notification to roughly 300 people, notifying them of a prehearing conference in January 2006 to discuss thirty-four of the remaining 1989 applications. Hundreds of the certified mailings were returned (undelivered) and the State Engineer did not attempt to resend the returned mailings.

At the January 2006 prehearing conference, some attendees requested that the State Engineer re-notice SNWA applications and reopen the protest period due to the 16-year lapse between the filing of the applications and the hearings on the applications. In March 2006, the State Engineer denied the request to re-notice the applications and scheduled a September 2006 hearing. In July 2006, appellants filed a petition with the State Engineer, requesting, in part, that the State Engineer re-notice SNWA's remaining applications from 1989 and reopen the protest period. The State Engineer summarily denied the petition.

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[1] By Jason VanMeetren.

[2] NEV. REV. STAT. § 533.370(2) requires the State Engineer to approve or reject all water rights applications within one year after the final date for filing a protest, subject to two exceptions. The 2003 amendment added a third exception by which the State Engineer can postpone taking action on water rights applications past one year from the close of filing. The 2003 amendment, at issue herein, states: "[t]he State Engineer may: [p]ostpone action if the purpose for which the application was made is municipal use." *Id.*§ 533.370(2)(b) (2007).

[3] *Id.* § 533.370(2)states in relevant part: "the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest."

[4] The successor to LVVWD regarding the water rights applications.

[5] In 1991, the state formed the Southern Nevada Water Authority (SNWA), which acquired LVVWD's rights to the 1989 groundwater application.

In August 2006, fifty-four appellants filed a petition for judicial review with the district court, seeking review of the State Engineer's order denying the request to re-notice SNWA's applications. In May 2007, the district court denied the petition for judicial review. The district court relied on the 2003 legislative amendment to NRS 533.370(2).and determined that the State Engineer did not abuse his discretion in denying the request Appellants timely filed an appeal of the district court's May 2007 denial of the August 2006 petition for judicial review.

Discussion

Appellants argued that the State Engineer violated his statutory duty because he did not rule on SNWA's 1989 applications within one year after the final date for filing a protest and that the district court erred in failing to address this argument when it was raised below.

Before 2003, NRS 533.370(2) required the State Engineer take action on all applications within one year of the close of the protest period unless the State Engineer received written authorization to postpone action by the applicant and any protestants to the application or unless studies of water supplies or court actions were pending.[6] In 2003, the Legislature amended NRS 533.370(2) and added an additional exception, granting the State Engineer the authority to postpone action on applications submitted for "municipal use."[7] Of the three exceptions available to the State Engineer, the Court held that only the 2003 exception applied to the 1989 applications, which were submitted for municipal use. Still at issue, however, was whether the Legislature intended retroactive application of the 2003 amendment to NRS 533.370(2) to applications submitted in 1989.

In 2003, the Legislature specified that the 2003 amendment applied to (1) "each application . . . made on or after July 1, 2003; and (2) each such application that is <u>pending</u> with the office of the State Engineer on July 1, 2003."[8] Because the 1989 applications were not filed on or after July 1, 2003, they must have been "pending" to qualify for retroactive application. The Court held that the Legislature intended that "pending" applications be limited to applications filed not more than one year before the 2003 amendment for four reasons.

First, the Legislature's inclusion of a timeline for approval evinced legislative intent that applications not linger for years. Second, the absence of any plain language in the 2003 amendment suggesting retroactive application suggests that the language mandating action within one year controls. Third, full retroactive application would deprive at least eleven appellants—who were original protestants of the 1989 application—their due process rights.[9] Finally, full retroactive application to every groundwater application ever filed would produce absurd results.

Conclusion

The 2003 amendment to NRS 533.370(2) does not apply retroactively to application submitted more than one year prior to the 2003 amendment. Accordingly, the State Engineer violated his statutory duty by ruling on applications well beyond the one-year statutory limitation without first properly postponing action. The applications lapsed and were not "pending." Therefore, the district court erred in denying appellants' petition for judicial review. On remand,

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[6] NEV. REV. STAT. § 533.370(2)(a), (c) (2007).
[7] 2003 Nev. Stat. 2980-81. NEV. REV. STAT. § 533.370(2)(b) (2007).
[8] 2003 Nev. Stat. 2989 (emphasis added by the Court).
[9] *See* Logan v. Zimmerman Brush Co., 445 U.S. 422, 428-29 (1982).

the Court ordered the district court to, in turn, remand the matter to the State Engineer with orders to re-notice and reopen the protest period.

Cite as: Buckwalter v. Dist. Ct.

126 Nev. Adv. Op. No. 21

June 24, 2010

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 55133

KEVIN RAY BUCKWALTER, M.D.; AND KEVIN RAY BUCKWALTER, M.D., LTD.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DOUGLAS HERNDON, DISTRICT JUDGE,

Respondents,

and

DONALD L. BAILE, INDIVIDUALLY AS SPOUSE AND HEIR, AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF BARBARA ANN BAILE, DECEASED; AND DEBRA BAILE, INDIVIDUALLY AS DAUGHTER,

Real Parties in Interest.

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss a medical malpractice action.

Petition denied.

John H. Cotton & Associates, Ltd., and John H. Cotton and Paul J. Hofmann, Las Vegas, for Petitioners.

White & Wetherall, LLP, and Peter C. Wetherall, Las Vegas, for Real Parties in Interest.

BEFORE HARDESTY, DOUGLAS AND PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This original writ proceeding asks us to decide whether a medical expert's declaration under penalty of perjury as provided in NRS 53.045 can satisfy the affidavit requirement stated in NRS 41A.071. We agree with the district court that it can and therefore deny writ relief.

I.

This is a medical malpractice action. The plaintiffs supported their complaint with the expert proof NRS 41A.071 requires but did so by declaration rather than affidavit. The defendants moved to dismiss on the grounds that NRS 41A.071 requires an "affidavit" and says nothing about declarations. The plaintiffs countered that under NRS 53.045, a declaration can do anything an affidavit can so long as the declarant subscribes to the statement that, "I declare under penalty of perjury that the foregoing is true and correct," which theirs did.

The district court denied the motion to dismiss. This petition for a writ of prohibition or mandamus followed. Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss but we may do so where, as here, the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law. Smith v. District Court, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997).

II.

This proceeding requires us to interpret two statutes: NRS 41A.071 and NRS 53.045. The former requires dismissal of any medical malpractice action "filed without an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice." NRS 41A.071. The latter provides that

> [a]ny matter whose existence or truth may be established by an affidavit . . . may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form: . . . "I declare under penalty of perjury that the foregoing is true and correct."

NRS 53.045.

An affidavit is a written statement "sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary 66 (9th ed. 2009). A declaration under NRS 53.045 is not sworn, but instead is dated and signed under penalty of perjury. Petitioners contend that because NRS 41A.071 expressly requires an affidavit, the complaint must be dismissed. We disagree.

Statutes must be construed together so as to avoid rendering any portion of a statute immaterial or superfluous. Albios v. Horizon Communities, Inc., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). NRS 41A.071 imposes an affidavit requirement, which NRS 53.045 permits a litigant to meet either by sworn affidavit or unsworn declaration made under penalty of perjury. See State, Dep't Mtr. Veh. v. Bremer, 113 Nev. 805, 813, 942 P.2d 145, 150 (1997) (concluding that a declaration under NRS 53.045 met the affidavit requirement of the breathalyzer statute, even though the statute's language required an affidavit). To hold otherwise would make NRS 53.045 meaningless because it would require every statute imposing an affidavit requirement to state when a declaration may be used instead of an affidavit. Interpreting the two statutes so as to give meaning to both, we conclude that a declaration that complies with NRS 53.045 can fulfill NRS 41A.071's affidavit requirement.

Because the district court properly refused dismissal, we deny the petition for extraordinary writ relief.

HARDESTY and DOUGLAS, JJ., concur.