3-19-2004

City of Aurora v. Simpson (In re Water Rights of Park County Sportsmen's Ranch)

SUPREME COURT, STATE OF COLORADO 2 E. 14TH Avenue, 4th Floor Denver, CO 80203	
Appeal from District Court, Water Division 1 State of Colorado Case No. 96CW14 Honorable Jonathan W. Hays, Presiding	
Applicant-Appellant, Park County Sportsmen's Ranch, LLP, a limited liability partnership, **Objectors-Appellees,** State Engineer, Harold D. Simpson, P.E., and Division Engineer for Water Division No. 1, Colorado Water Conservation Board, Colorado Division of Wildlife, City of Thornton, City of Englewood, City of Denver, Park County, Center of Colorado Water Conservancy District, Elkhorn Ranch Home Owners Association, Upper South Platte Water Conservancy District, Board of Commissioners of County of Park, Park County Water Preservation Coalition, United States of America, Centennial Water and Sanitation District, Union Pacific Resources Company, the Frieda Wahl Trust, Steve Bargas, Kimberly Bargas, Frida Bargas, H.D. and Mary Catherine Coleman, James T. Benes, James T. Benes, Jr. and Cassandra L. Benes Trust, Tarryall Land and Cattle, LLC, Magness land Holdings, LLC, Estate of Bob Magness, Personal Representatives of the Estate of Bob Magness, Personal Representatives of the Estate of Bob Magness, Town of Fairplay, Jim Campbell, James Campbell, Ruth Battle, Indian Mountain Corporation, Jill E. Boice, Bob Burch, Robert W. Heckendorf, Michael and Vicki Lothrop, Richard A. Grenfell, David Wilson, Darrell Johns, David Johns, John Johns, Joseph G. & Joyce C. Minke, James E. Copanos, Central Colorado Cattlemen's Association, Gregory Snapp, Roy G. Doerr, Erik Taylor, Wildwood Recreational Village Assoc., Mark and Carol Carrington, Hansludwig Kommert and Stephen R. Cline.	▲ COURT USE ONLY ▲
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APPELLEES' ANSWER BRIEF ON ATTORNEY FEES ISSUES

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APPELLEES, Board of Commissioners of County of Park, Upper South Platte Water Conservancy District; Center of Colorado Water Conservancy District; Park County Water Preservation Coalition; H.D. and Mary Catherine Coleman; Centennial Water and Sanitation District; James T. Benes; James T. Benes, Jr. and Cassandra L. Benes Trust; Tarryall Land and Cattle, LLC; Town of Fairplay; Jim Campbell; and Indian Mountain Corporation (the "Opposers"), submit their Answer Brief on Attorney Fees. This Brief responds to the attorney fee arguments raised by the City of Aurora ("Aurora"), Kenneth J. Burke ("Burke"), Park County Sportsmen's Ranch, LLP ("PCSR") and the Amicus Curiae the Colorado Trial Lawyers Association ("CTLA").[1]

I. STATEMENT OF THE CASE.

Following the Water Judge's dismissal of PCSR's application, Opposers moved for attorney fees against Applicant, PCSR, pursuant to §13-17-102, 10 C.R.S. (2003) (the "attorney fees statute"). The Opposers, except for the Town of Fairplay, Jim Campbell and Indian Mountain Corporation, also moved for attorney fees against PCSR's attorney Burke. In addition, the Center of Colorado Water Conservancy District, Park County, Upper South Platte Water Conservancy District, Park County Water Preservation Coalition and H.D. and Mary Catherine Coleman moved for the joinder of Aurora asserting that Aurora, as PCSR's principal, was vicariously liable for any attorneys fees that may be awarded against Aurora's agent, PCSR. James T. Benes, James T. Benes, Jr., and Cassandra L. Benes

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[1] PCSR filed two Briefs, one on the merits, referred to as the "PCSR Merits Brief", and one addressing fees and costs issues, referred to as the "PCSR Attorney Fee Brief."

Trust and the Tarryall Land and Cattle, LLC., (the "Benes Opposers") also claimed attorney fees against Aurora.

The Water Judge granted Opposers' attorney fee motions finding that the case became groundless as of October 28, 1998, the date after which PCSR knew or should have known it could not prevail at trial. *Order Concerning Post-Trial Motions, 11/13/01 at 10, #1327 (the "Post-Trial Motions Order").* The Water Judge also found that PCSR's claims for salvaged evapotranspiration, precipitation and irrigation return flows naturally percolating into the South Park aquifers were frivolous from their inception. *Id., at 12.*[2] The Water Judge awarded fees against Burke pursuant to §13-17-102(2) 10 C.R.S. (2003). *Id.* Finally, the Water Judge concluded that Aurora, as PCSR's principal, was vicariously liable for the attorney fees awarded against PCSR as a result of PCSR's having litigated a frivolous and groundless application. *Id.*

II. STATEMENT OF FACTS.

The Water Judge's findings regarding the substantial flaws in PCSR's ground water model (the "Eastman Model"), and PCSR's and Burke's knowledge of those flaws, were central components of the Water Judge's findings that PCSR and Burke pursued a groundless application. *Post-Trial Motions Order at 8-11.* Following that finding, the Judge

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[2] Though the Water Judge found PCSR's claims to salvaged evapotranspiration, precipitation and irrigation return flows to be frivolous from the inception of the case, Park County and the Colemans were the only parties awarded fees under the frivolous finding. The total fees awarded to Park County and the Colemans for the frivolous finding were approximately $2,600.00. *Affidavit, # 1381, 12/24/01 at 4, ¶12.a; Coleman Ex. 11.* These were the amounts expended in defending against the frivolous claims prior to October 28, 1998. All other attorney fees awarded to Opposers were for the post-October 28, 1998 period pursuant to the Water Judge's groundlessness determination.

held extensive hearings to determine reasonable attorney fees. Accordingly, Opposers provide this Court with the following summary of facts and evidence related to the groundlessness finding and the attorney fee proceedings to supplement those contained in Opposers' Merits Brief, which are incorporated herein by reference.

A. The Groundlessness Finding

PCSR developed the Eastman Model to provide a "baseline ground water model for use in the determination of the effects of the SPCUP on surface water rights, wells, streams and the overall hydrologic regime of the South Park Basin and surrounding area." *Initial Ground Water Model Development Report ("Initial Model Report"), Ex. A-800 at 1.*

In furtherance of that objective, PCSR incorporated the Eastman Model results into the administrative equations presented in Exhibit Z to PCSR's Initial Proposed Decree (*02/01/99, #388, attached as App. H to PCSR's Merits Brief*) and in the operational terms of the augmentation plan. *Initial Surface and Ground Water Modeling Report (Second Model Report), Ex. A-700 at 59-63.*

The Eastman Model estimated stream depletions by differencing the results of the NOCUP (standing for "no conjunctive use project") and SPCUP (standing for the "South Park Conjunctive Use Project" predictive model) model runs. *8/16/00 at 109: 8-19.*

The Water Judge found that although PCSR abandoned reliance on the Eastman Model shortly before trial, *Dismissal Order at 2, note 1; Post-Trial Motions Order at 10*, the model was the only evidence presented at trial by PCSR that might have been capable of predicting stream depletions. *Dismissal Order at 6; Post-Trial Motions Order at 1-2.* The Water Judge found that the Eastman Model was deficient in many areas, most notably the inadequate calibration, the lack of proper sensitivity analyses, the anomalous model results

that Dr. Eastman could not explain, and the excessive residual errors between model produced water levels and measured water levels. *Dismissal Order at 5.* The Judge found that Dr. Eastman recognized the need for additional data, additional model calibration, the need to explain the anomalous results and the need to further evaluate the calibration target data before he could defend the model results at trial. *Id.* The Judge found that PCSR and Burke declined to follow Dr. Eastman's advice. *Id.*

In particular, in a memo dated Oct. 28, 1998 (the "*Eastman Memo*"), addressed to Ken Burke, who was also a partner in PCSR, Dr. Eastman recommended that:

1. The calibration target data should be re-evaluated because, in many cases, it was "suspect" and was "skewing the model statistics." This work was recommended to be done in October through December 1998. *Ex. P-526 ("Eastman Memo") at 1, 4-5.*

2. Dr. Eastman should perform sensitivity analyses of both the "steady state" (or calibration) model runs and the "predictive" (or SPCUP) model runs. *Id. at 8-9.*

3. Dr. Eastman advised PCSR that "[s]ensitivity analyses are the most intense part of the proposed additional modeling, and they are also important in the defense of the validity of the model." He recommended that these analyses be completed "over the next few months." *Id.*

After a meeting among Dr. Eastman, Burke and Jim Jehn, also a partner in PCSR and Dr. Eastman's employer, PCSR failed to authorize Dr. Eastman to do sensitivity analyses of the model, despite Dr. Eastman's recommendations and advice. *08/16/00 at 139:2-9.* Although PCSR later apparently authorized another consultant to do some limited sensitivity analyses, the work was done too late for admission at trial. *§ V.C.1 of Opposers' Merits Brief,* and *infra §IV.B.6. of this Brief; Order Re Costs and Attorney Fees Award*

("Attorney Fees Order") 05/01/00, 2nd Supp., #231, at 8 ("Although Aurora's experts eventually decided to put together a sensitivity analysis of the model, there was no representation by Applicant to the court or to the parties as of October 28, 1998 that it wanted to revise or do more work on the model"). In approximately January, 2000, Dr. Eastman finally began, but never completed, the re-evaluation of the calibration target data that he had recommended in October, 1998. *08/15/00 at 66:1-12; 109:16-25.*

The Water Judge also observed that many of the flaws in the model were reported to PCSR by the Opposers in their February, 1998 Technical Review Committee Report, *2/12/98, #283, Ex. P-521 (*the *"TRC Report"). Post-Trial Motions Order at 10; Opposers' Merits Brief at § III.B.3.* Despite the receipt of the information in the *Eastman Memo* less than ten days before, at the November 6, 1998 case management conference, PCSR represented that it was ready to proceed to trial. *Attorney Fees Order at 8; 11/06/98 at 27:12-15* (PCSR requesting an "expeditious trial"). Nor did PCSR disclose any potential flaws in the ground water model at the July 26, 1999 status conference concerning a continuance of the trial dates. *Attorney Fees Order at 8.* As the Water Judge concluded, at no point did PCSR make "any representation that it needed to do more work on the ground water model." *Id.*

Thus, the Water Judge concluded "[t]hat after the date of the *Eastman Memo* and in the absence of any steps to correct the flaws in the model, PCSR's pursuit of the application was groundless." *Post-Trial Motions Order at 10; see also, Attorney Fees Order at 8:* ("Following Dr. Eastman's October 28, 1998 letter to the Applicants, they could have petitioned the court for additional time to revise the model and provide the revisions to Opposers for comment and review. Such a request was never lodged with the court, and

Applicants chose to stand upon their flawed groundwater model.") Based on his findings of fact, the Water Judge determined that after October, 28, 1998, the date of the *Eastman Memo*, PCSR knew or should have known that it could not succeed at trial and awarded reasonable fees incurred after that date. *Post-Trial Motions Order at 11.*

B. Proceedings to Determine Reasonable Fees.

The Water Judge conducted five days of hearings to determine the amount of attorneys fees and costs to be awarded. *10/16/02 - 10/18/02; 12/16 - 12/17/02.* All Opposers' attorneys testified and were extensively cross-examined by the attorneys representing PCSR, Aurora, and by Burke. *Id.*

On May 1, 2003, the Court entered the *Attorney Fees Order*, which was corrected by Order dated July 30, 2003, 2nd Supp., #253. The Court awarded attorney fees against PCSR, Aurora and Burke.

In the *Attorney Fees Order*, the Water Judge made evidentiary findings related to each of the specific objections raised by PCSR, Burke and Aurora to the awarding of the claimed fees. *Attorney Fees Order at 4-9.* The Judge relied on the lodestar method (a reasonable hourly rate times a reasonable number of hours) to initially calculate a "base" amount for reasonable fees. *Id. at 3, 5.* The Court then reviewed in detail each of the statutory factors enumerated in §13-17-103 (1) to determine if that amount should be adjusted. *Id. at 4-5, 13-16.* The Water Judge utilized evidence from the five days of the attorney fees hearings, the 35 days of trial on the merits and his familiarity with this case over seven years when applying the statutory factors and to reach a final award. *Id. at 7.*

III. SUMMARY OF ARGUMENT.

The purpose for awarding attorney fees is to discourage the pursuit of groundless and frivolous cases, and to penalize those who do. It is also intended to reimburse those who suffer unnecessary expense as a result of needless litigation.

In this case, after 35 days of trial, PCSR failed to support most of its claims, including the most critical element - quantifying stream depletions in time, place and amount - with any credible evidence. On certain claims, PCSR failed to present any rational argument to support them. Opposers spent approximately $1.2 million in attorney fees after October 28, 1998, the date when both PCSR and Burke, knew or should have known, that their case was fundamentally flawed and could not be defended. The Water Judge ordered that PCSR, Burke, and PCSR's principal, the City of Aurora, reimburse the Opposers for these unnecessary fees.

The law commits the decision about whether to award attorney fees, and if so, the amount of the fees awarded, to the sound discretion of the trial judge. On appeal, heavy deference is given to the decision of the trial court because it is the one that heard the testimony and can assess the credibility and rationality of all the evidence and arguments presented.

In this case, the Water Judge considered all of the evidence and concluded that PCSR's case was partly frivolous from its inception, and entirely groundless after October 28, 1998. The record contains ample support for the Water Judge's decision to award these fees, and the Water Judge did not abuse his discretion in any respect when making the award.

No hearing on the question of attorney fee liability was held because none was requested. Indeed, no such hearing was needed because the extensive record of the 35 days of trial on the merits provided the Water Judge with a comprehensive basis for all of the findings made in the determination of attorney fee liability.

Although PCSR, Burke, and Aurora make a large number of individual allegations of error concerning the attorney fee award, none of them provide a legitimate basis for concluding that the Water Judge abused his discretion in making the award. To the contrary, the fee award is well supported by detailed findings of fact, it fulfills the intent and purpose of the attorney fees statute which is to reimburse the Opposers' for unnecessarily expended attorney fees and it is mandated by the principles of fundamental fairness and justice.

IV. ARGUMENT.

A. Purpose and Standard of Review for Attorney Fee Awards.

The award of attorney fees in civil litigation is an important sanction against an attorney or party who improperly prolongs litigation. *See In Re the Marriage of Aldrich,* 945 P.2d 1370, 1378 (Colo. 1997). The purpose of the attorney fees statute is to sanction continued pursuit of a claim after the party or its attorney knew or should have known they could not prevail. *See American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 380 (Colo. 1994) ("*AWDI*"). It also serves the remedial purpose of reimbursing those parties who have expended unnecessary attorney fees as a result. *See Aldrich, 945 P.2d at 1378.*

The decision whether to award attorney fees because a claim or defense was substantially groundless or substantially frivolous pursuant to §13-17-102 is within the

sound discretion of the trial court. *See §13-17-103; see also Lyons v. Teamsters Local Union No. 961, 903 P.2d 1214, 1221(Colo. App. 1995); Board of County Comm'rs v. Colorado Counties Cas. and Prop. Pool, 888 P.2d 352, 357 (Colo. App. 1994).* A claim is groundless if the allegations, while sufficient to survive a motion to dismiss, are not supported by any credible evidence at trial. *See Western United Realty v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984).* A claim is frivolous if the proponent can present no rational argument based on the evidence or the law to support it. *Id.* The determination of a reasonable fee is a question of fact which shall not be disturbed on review unless patently erroneous and unsupported by the evidence. *See Hartman v. Freedman*, 591 P.2d 1318, 1322 (Colo. 1979). The sufficiency, probative effect, and weight of the evidence, and the inferences and conclusions to be drawn therefrom, will not be disturbed unless so clearly erroneous as to find no support in the record. *Peterson v. Ground Water Commission, 579 P.2d 629, 634-5 (Colo. 1978).*

B. <u>The Water Judge's Groundlessness Findings Have Ample Support in the Record</u>.

Aurora asserts that the Water Judge's "ruling on groundlessness was predicated solely" on the Water Judge's misinterpretation of the *Eastman Memo. Aurora Brief at 14-16; Burke Brief at 28-29.* Aurora and Burke argue that Dr. Eastman never said that the model was "indefensible" if the recommended work was not done, that Dr. Eastman testified that the model was a reasonable tool to estimate depletions for project feasibility, and that other of PCSR's and Aurora's experts blessed the model. Thus, Aurora and Burke assert the Water Judge's findings that Dr. Eastman determined his model was indefensible has no support in the record. *Id.*

The results of the Eastman Model were the only evidence introduced at trial which purported to quantify stream depletions in time, place and amount as required by §37-92-305(8). §V.A.2.b of Opposers' Merits Brief. Thus, a valid and reliable Eastman Model was essential in order for PCSR to prove its case. *Dismissal Order at 2.* The Water Judge determined that the flaws in the Eastman Model were so serious and numerous as to render the model unreliable, *Dismissal Order at 6,* and it was PCSR's decision to proceed despite those known flaws which rendered the case groundless. *Attorney Fees Order at 8-9.*

1. The Water Judge's Groundlessness Finding is not "Predicated Solely" Upon the Eastman Memo.

Contrary to Aurora's and Burke's claims, the Water Judge's groundlessness finding was not "predicated solely upon the court's conclusion that Harvey Eastman, in his October 1998 draft memo, supposedly rendered an opinion that the ModFlow model was indefensible without further work." *Aurora Brief at 14.* Rather, as demonstrated below, the Water Judge's groundlessness findings were based upon careful consideration of all of the evidence heard during the nine weeks of trial. The *Eastman Memo* provided the Court with the date after which PCSR and Burke should have known that the Eastman Model, and thus its case, would necessarily fail; but the *Eastman Memo* was not the sole reason for the Court's liability finding. This is evident from examination of the *Dismissal Order*, the *Post-Trial Motions Order* and the *Attorney Fees Order.*

a. *The Dismissal Order*.

In the *Dismissal Order*, the Water Judge made his own detailed findings of fact regarding the inadequacies in the Eastman Model. The evidence in the record supporting

the Water Judge's findings are detailed at §V.B.1 of Opposers' Merits Brief which is incorporated by reference. As shown next, in the *Post-Trial Motions Order*, each of these findings contributed to the Water Judge's groundlessness determination.

b. *The Post-Trial Motions Order*.

In the *Post-Trial Motions Order*, the Water Judge reiterated and summarized his conclusions from the *Dismissal Order* regarding the Eastman Model as part of his analysis denying PCSR's C.R.C.P. 59 Motion. *Post-Trial Motions Order at 1-8.* The Water Judge then turned to Opposers' attorney fee claims. *Id. at 8-11.* The Judge summarized the claims made by Opposers, the legal standards to be applied in attorney fee proceedings and the facts in the record identified by Opposers that supported their claims. *Id.* Opposers claimed that PCSR knew or should have known the application was groundless after July 31, 1998, the date PCSR produced its *Second Model Report, Ex. A-700,* which purported to identify depletions from PCSR's proposed well pumping in amount, time and place. Opposers claimed PCSR knew, or reasonably should have known that the model would fail because: (1) the model was poorly calibrated and produced anomalous results; and (2) PCSR decided to stand on the model without making substantive improvements or conducting proper sensitivity analyses, despite Dr. Eastman's recommendations in the *Eastman Memo* and Opposers' February, 1998 *TRC Report. Id. at 10.*

The Water Judge agreed that PCSR's application was groundless, but found that the date upon which it became groundless was October 28, 1998, the date of the *Eastman Memo*, not July 31, 1998. The Judge found that "*...after the date of Dr. Eastman's memo, and in the absence of any steps to correct the flaws in the model, PCSR's pursuit of the application was groundless.*" *Id. at 10.* The Judge did not find the application was

groundless because of the *Eastman Memo*, but rather, that after the date of the *Memo*, PCSR's pursuit of the application became groundless because PCSR knew or should have known that it could not prevail at trial.

c. The *Attorney Fees Order*

The Water Judge made it very clear in the *Attorney Fees Order* that the groundlessness findings were premised on all of the evidence in the record regarding the substandard modeling, not just the *Eastman Memo*:

> The court determined that the application was groundless because the Applicant did not have a reliable groundwater model that provided evidence of the amount, timing and location of depletions, or the amount of replacement water that would be necessary to offset injurious depletions created by the pumping plan. The Applicant knew, or should have known, that its model was indefensible as of October 28, 1998. The fact that the Applicant later represented that it was prepared for trial, with no disclosure to the court that the model was insufficient, and with no request for an extension of time to rehabilitate it, warrants the award of fees from October 28, 1998, forward. *Id. at 8-9.* (Emphasis added)
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> In this situation, the court determined that the Application was groundless because Applicant could not provide sufficient evidence to support its claims. *Id., at 10.*

At the May 24, 2002 Status Conference, the Water Judge also stated the basis of the groundlessness ruling: "*And my ruling did not turn upon the legal propositions, only on my view, that the - both the MODFLOW and RIBSIM models did not yield reliable results.*" *05/24/02 at 27: 7-10.* (Emphasis added)

The evidence establishes that the Water Judge's groundlessness ruling was based upon the flaws in the model and PCSR's knowledge about those flaws, not solely upon the *Eastman Memo*. Absent an abuse of discretion, those findings may not be disturbed on appeal.

2. While the Word "Indefensible" Was Not Used in the *Eastman Memo*, the Court Correctly Determined That the Model Was Indefensible Without Additional Modifications.

Burke and Aurora argue that Dr. Eastman never stated that his model was not defensible if the work recommended in the *Eastman Memo* was not done, therefore, the Water Judge's conclusions are erroneous. *Burke Brief at 28; Aurora Brief at 14-15.* While Dr. Eastman may not have used the word "indefensible," reading the entire *Eastman Memo* together with the other evidence in the record, reveals that the Water Judge did not abuse his discretion in making this finding.

Dr. Eastman stated in the introduction that "[*T*]*he following analytical tasks and data input checks may be important to insure the validity of the modeling and to evaluate specific data in the model which may be important to the results.*" *Eastman Memo at 1.* This statement applied generally to the work Dr. Eastman recommended in Sections 1-6. *Id.*

Dr. Eastman recommended a systematic re-evaluation of many "suspect" calibration targets that were "skewing model statistics." *Id. at 4.* Dr. Eastman acknowledged that he began but never completed this work. *08/15/00 at 109: 16-25.*

Dr. Eastman recommended additional sensitivity analyses to both the calibration and predictive models, justifying his recommendation by stating: "*Sensitivity analyses are the most intense part of the proposed additional modeling, and they are also important in the defense of the validity of the modeling." Eastman Memo at 8-9.* The authoritative modeling references introduced into evidence, *Exhibits P-520 and P-566*, confirmed Dr. Eastman's recommendation that thorough sensitivity analyses of the predictive and calibrated models

were essential to having a defensible model.[3] Despite the recommendation, Dr. Eastman performed none. *8/16/00 at 139:2-9; 8/15/00 at 59: 16-18.*

Dr. Eastman also proposed additional studies of the South Park aquifers and adjacent materials. *Eastman Memo at 10* ("*These studies are meant to help improve our understanding of the aquifers, their interaction with streams, and the interaction between aquifers as across the Elkhorn Thrust Fault.*"). The time for these types of studies was while PCSR was constructing the model, not after trial during the retained jurisdiction phase of the case as proposed by PCSR in New Exhibit Z.[4]

The *Eastman Memo* supports the Water Judge's conclusion that the Eastman Model was "not defensible" at trial without the additional work recommended by Dr. Eastman.

Burke argues that the Court's reading of the *Eastman Memo* is contrary to its plain terms, citing a passage where Dr. Eastman predicted that certain of his proposed modifications "will have little or no effect on model results." *Burke Opening Brief at 29.* This statement expresses Dr. Eastman's sense of what the outcome of some of his recommended work would be, however, it does not negate Dr. Eastman's specific

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[3] *Ex. P-520 at 246* ("sensitivity analysis is an essential step in all modeling applications"); *Ex. P-566 at §§6.7, 6.7.1 and 6.7.2.*

[4] In Exhibit Z to PCSR's proposed decree, *Ex. A-1609,* PCSR proposed an extensive post-decree data gathering program, including a "Pilot Pumping and Recharge Test" designed "*To develop information on the ability of the recharge facilities to recharge water into the South Park Aquifer", Id. at Z-1, ¶ B.1.b*, and "*To develop site specific information on aquifer parameters, including transmissivity, hydraulic conductivity and specific yield." Id. at Z-1, ¶ B.1.c.* PCSR also proposed to conduct a post-decree "Alluvial Aquifer Water Level Monitoring" program designed "*To collect data that allows a characterization and statistical analysis of the Pre-Production alluvial water level setting and the stream/alluvial aquifer connection/disconnection." Id. at Z-5, ¶3.b.* Dr. Eastman recommended in the *Eastman Memo* that PCSR conduct these exact types of testing and analyses.

recommendations (1) that thorough sensitivity analyses should be conducted to allow defense of the validity of the model; (2) that the "suspect" calibration targets should be re-evaluated or (3) that additional data should be collected regarding the aquifers and their interaction with the overlying streams. Burke's focus on this statement ignores the other critical work which PCSR chose to not perform in addition to the sensitivity analyses, including the systematic re-evaluation of suspect targets and acquisition of additional data.

The Water Judge concluded in the *Dismissal Order* that "PCSR's expert and model designer, Dr. Harvey Eastman, recognized the need for additional data, *Eastman Memo at 10* ("Continued Data Collection and Evaluation"); the need for additional model calibration, *8/10/00 at 106: 24 -107: 10; 108: 10 -20*; the need for explanation of anomalous results, *Ex. P-525 ("differences make no sense");* and the need for further evaluation of the model target data, *(Eastman Memo at 5*), before he could "*defend the admissibility of the model results at trial.*" *Dismissal Order at 5, ¶6.* The Water Judge's findings were based upon all of the evidence in the record, including all of the evidence at trial, and not solely upon the *Eastman Memo* as alleged by Aurora and Burke.

3. *De Novo* Review of the *Eastman Memo* is Not Appropriate.

Aurora and Burke argue that this Court can interpret the *Eastman Memo de novo* because it is documentary evidence and because the document formed the sole basis of the Water Judge's groundlessness finding. *Aurora Brief at 15. Burke Brief at 28 -29.*

As demonstrated above, the Water Judge did not predicate the groundlessness findings solely upon his own reading of the *Eastman Memo.* As a result of this mistaken assumption, Aurora's and Burke's reliance upon *M.D.C./Wood, Inc. v. Mortimer, 866 P.2d 1380 (Colo. 1994)* as authority that (1) an appellate court may draw its own conclusions

concerning documentary evidence, and (2) this Court on appeal may review the *Eastman Memo* independently of the Water Judge's findings, is misplaced. *M.D.C./Wood* actually holds that an appellate court may draw its own conclusions concerning documentary evidence only when the trial court did not consider the credibility and demeanor of witnesses along with the documentary evidence. *See Id. at 1382-83.* Situations where the type of *de novo* review suggested by Aurora and Burke are appropriate include cases determined on stipulated facts, depositions and documentary evidence. *Id at 1382.* In this case, however, there was extensive testimonial evidence and the witnesses' credibility and demeanor were considered by the Water Judge. Therefore, his factual findings, including those concerning documentary evidence "are binding unless they are so clearly erroneous as not to find support in the record." *Id. at 1383.*

4. The Water Judge Properly Applied the ASTM Standards to Evaluate the Reliability of the Eastman Model.

Aurora and Burke argue that the Water Judge improperly interpreted and applied the ASTM standards to the Eastman Model. *Aurora Brief at 19. Burke Brief at 31-32.* They argue that the ASTM standards are merely guidelines, that the Water Judge erred in rigidly applying those standards to the Eastman Model, and that "[t]he Water Judge's approach in this case established unrealistically high standards for an applicants' modeling." *Burke Brief at 28.* As demonstrated below, there is solid support in the record for the Water Judge's utilization of these modeling standards.

First, these standards were the very references cited by Dr. Eastman in the *Initial Model Report* as sources which he consulted and relied upon for construction, development and calibration of the Eastman Model. *Ex. A-800 at 86.* They were the only objective

references introduced into evidence against which the Judge could evaluate the Eastman Model and the Water Judge concluded, in his role as the trier of fact, that these were the references by which the model should be measured.

Second, the weight to be given by a trial court to learned treatises introduced as substantive evidence, as was done with the ASTM and Anderson & Woessner treatises in this case, is committed to the trial judge's sound discretion. *C.R.E. 803 (18).* As the trier of fact, the Water Judge found the ASTM guidelines to be reliable and important evidence, particularly in light of Dr. Eastman's own reliance on them. Those determinations may not be disturbed on appeal absent a clear abuse of discretion or unless clearly erroneous and unsupported by the record. *See, M.D.C./Wood, 866 P.2d at 1384; Peterson v. Ground Water Commission, 579 P.2d at 634-635.*

PCSR proposed to pump 140,000 acre feet from two tributary aquifers and to replace the out-of-priority stream depletions caused by that pumping with a 1996 priority augmentation water source. In light of the magnitude of the project and the resulting potential for injury, the Water Judge did not hold the Eastman Model to an unrealistically high standard by requiring that PCSR provide credible evidence of depletions in time, place and amount as required by law. It was neither unrealistic nor unreasonable for the Water Judge to expect that PCSR would present a model that: (1) was properly calibrated in conformity with basic ASTM guidelines, *Dismissal Order at 6*; (2) did not produce anomalous results that "made no sense" to the model's own developer, *Ex. P-525*; (3) was subject to proper sensitivity analyses of both the calibrated and predictive models as recommended by the model's developer, *Ex. P-526,* and Dr. Eastman's own references, *Ex. P-520 at 246; P-556 at 4-5*; (4) did not utilize "suspect" calibration targets *Ex. P-526*;

(5) relied upon adequate data, *Dismissal Order at 6*; (6) did not need additional calibration and sensitivity analyses if it was to be used to quantify depletions for operation of the plan for augmentation, *8/10/00 at 106: 24 - 107:10; 108: 10-20; 109: 4-16*; and (7) did not under predict depletions during the 3-4 month runoff period, *8/14/00 at 120: 25 - 122: 14,* without even attempting to quantify the extent of the under prediction. *08/14/00 at 123: 5-23.* The Eastman Model did not satisfy any of those reasonable expectations of the Water Judge.

5. <u>The Water Judge did not Mislead and Prejudice PCSR Regarding the Importance of the ASTM Standards</u>.

Burke argues that the Water Judge prejudiced PCSR by improperly attaching significance to the ASTM standards when the Judge had ruled, in rejecting testimony about a subsequent, revised version of ASTM D-5447, *Ex. P-566*, that the standards were not binding. *Burke Brief at 32 ("The Water Judge's order did not follow his earlier pronouncements, on the basis of which PCSR tried its case").* Burke's argument cannot withstand a careful examination of the record.

Dr. Eastman consulted and relied upon ASTM D-5447-93, *Ex. P-566,* in developing his model. *Ex. A-800 at 86*; *8/15/00 at 122: 1-17.* During Dr. Eastman's <u>redirect</u> examination on August 23, 2000, Burke attempted to elicit testimony about a later revision of *Ex. P-566* which purportedly indicated that the ASTM standards were not "hard and fast rules" and that the modeler's professional judgment applied to all modeling decisions. *8/23/00 at 24: 8-16.*

The Water Judge sustained Opposers' objection to this testimony. The objection and the ruling were based on the subsequent ASTM standard being irrelevant as it was not used by Dr. Eastman as a reference in his modeling, *8/23/00 at 22: 12-25,* and because

Ex. P-566 already contained a similar statement to the one which Burke sought to elicit. *Id. at 25: 4-11.* The Water Judge's ruling occurred at the end of Burke's redirect examination of Dr. Eastman on August 23, 2000. Trial began on July 10, 2000 and Dr. Eastman testified on direct examination from July 19 - August 10, 2000. Thus, PCSR and Burke could not have, and did not, rely on any statement made by the Water Judge on August 23, 2000 in structuring the presentation of the vast majority of its evidence. Neither PCSR nor Burke were misled by the Judge's evidentiary ruling on the modified ASTM standard.

6. Dr. Eastman Did Not Disavow the Need for Sensitivity Analyses.

Aurora asserts that subsequent statements made by Dr. Eastman rendered his prior recommendations in the *Eastman Memo* meaningless. *Aurora Brief at 15.* Aurora bases this argument on Dr. Eastman's participating in the decision to not conduct the recommended sensitivity analyses in October, 1998, *8/16/00 at 139*, statements from Dr. Eastman's deposition and that Dr. Eastman issued opinions in his May 1, 2000 rebuttal report that the model was valid. *Aurora Brief at 15-16.*

The evidence in the record does not establish that Dr. Eastman believed his recommended additional sensitivity analyses were not necessary.[5] On the contrary, the trial and deposition evidence relied upon by Aurora establish the following: (1) after drafting the *Eastman Memo*, Dr. Eastman met with Ken Burke and Jim Jehn and "it was decided to not conduct the sensitivity analysis," *8/16/00 at 139: 2-9*; (2) that Mr. Jehn and Burke

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[5] The Water Judge found: "*Applicants gave no explanation at trial as to why Eastman was incorrect, or why its other experts, who relied solely upon Eastman's work, disagreed with Eastman's conclusions.*" *Order, 8/2/02 at 2.*

preferred that Aurora's engineers, Rocky Mountain Consultants, Inc., perform them, *5/31/00 Deposition at 1231: 8 -1232: 5 (Item 46 of Aurora's 12/16/02 Compendium of Citations, 2nd Supp.)*; (3) that Dr. Eastman simply ran out of time to perform them prior to the July 31, 1998 *Second Model Report* disclosure deadline, *Id. at 1075:19-24*; *8/16/00 at 135:16 - 136: 4;* (4) that PCSR preferred to wait until rebuttal after receiving Opposers' criticisms of the model to perform them so that the analyses could be more targeted to specific criticisms, *5/31/00 Deposition at 1233: 6 - 1234: 9;* (5) PCSR chose this route despite Dr. Eastman's belief that Opposers would criticize the lack of sensitivity analyses of his predictive model and that was one reason he recommended in the *Eastman Memo* that they be conducted. *Id. at 1233: 17 - 1234: 9*; (6) Dr. Eastman acknowledged that the work being done by RMC for rebuttal was "quite limited" compared to the thorough sensitivity analyses Dr. Eastman had recommended in the *Eastman Memo, Id. at 1235: 6-11;* and (7) Dr. Eastman testified that he would want to conduct additional sensitivity analyses to help with the determination of the range of stream depletions to expect if his model was used to predict stream depletions in amount and time in an augmentation plan. *8/10/00 at 109: 4-16.*

Aurora's claims, that Dr. Eastman disavowed his sensitivity analyses recommendations from the *Eastman Memo* are not supported by the record. To the contrary, the Water Judge's finding that the absence of proper sensitivity analyses of the Eastman Model was a serious flaw which PCSR could have and should have remedied has ample support in the record and should not be overturned on this appeal.

7. The Water Judge Did Not Rely Upon Opposers' Experts in Making the Groundlessness Finding.

Aurora argues that the Water Judge improperly relied upon non-trial evidence, the February ,1998 *TRC Report,* in making its groundlessness findings. *Aurora Brief at 30-31.*

Contrary to Aurora's argument, the Water Judge did not rely upon the substantive criticisms detailed in the *TRC Report* to find the Eastman Model unreliable or in making the groundlessness determination. The Water Judge found the model unreliable based on the evidence presented at trial for the reasons described in the *Dismissal Order.* The Judge determined the application to be groundless and awarded fees due to PCSR's failure to provide credible evidence at trial and PCSR's continued pursuit of the application after it knew or reasonably should have known it could not prevail at trial. *Post-Trial Motions Order at 10.* To the extent the Water Judge relied upon the *TRC Report* at all, it was for the fact that PCSR had been put on notice in February, 1998 of the types of criticisms Opposers' had of the Eastman Model, which PCSR chose to ignore. *Id.* The Water Judge did not rely on the substantive criticisms in the *TRC Report* either for the *Dismissal Order* or the groundlessness finding in the *Post-Trial Motions Order.*

C. PCSR's Case was Groundless Despite Expert Testimony that it was Feasible.

Aurora, Burke, PCSR and the Colorado Trial Lawyers Association ("CTLA") all argue that the Water Judge erroneously found groundlessness because a case cannot be groundless where so much supporting evidence was introduced and where so many experts testified that the project was feasible. *Aurora Brief at 16-18; Burke Brief at 13-14; PCSR Attorney Fee Brief at13-14; CTLA Brief at 9-16.* Aurora and the CTLA go so far as to argue that a case premised upon expert testimony cannot be groundless as a matter of

law unless there is an "unequivocal expert opinion that the claim should not be pursued," *Aurora Brief at 16*, and that "attorney fees should not be awarded so long as any qualified expert supports a claim." *Id.; See also CTLA Brief at 11.* Finally, Aurora, Burke and the CTLA argue that the holding of *Coffey v. Healthtrust, Inc., 1 F.3d 1101 (10th Cir. 1993)*, precludes an award of attorney fees against a party and attorney where the attorney relied upon the judgment of expert witnesses in proceeding with its case. *Aurora Brief at 16; Burke Brief at 39; CTLA Brief at 15-16.*

1. The Introduction of Expert Testimony in Support of a Claim Does Not Preclude an Award of Attorney Fees.

PCSR did introduce a lot of evidence in its case-in-chief, including the testimony of 7 experts and approximately 420 exhibits, *Trial Exhibit Index, 4/1/03, 1st Supp.* However, the test for groundlessness is not whether expert opinions were admitted at trial, but whether the claims were supported by credible evidence. *Western United Realty, 679 P.2d at 1069.* It is well established that the trial judge is the sole judge of credibility in this context and the Water Judge found the expert opinions, and the computer models upon which they were based, to be lacking credibility and reliability. If adopted, the arguments offered by the Appellants and CTLA would effectively remove the fact-finding role from the trial judge and put it in the hands of testifying experts. This is not the law in Colorado. *See, Ackerman v. City of Walsenburg, 467 P.2d 267, 272 (Colo. 1970)* ("*it is the court and not the parties who is the judge of the credibility of witnesses and the weight to be given their testimony*").

No rule of law precludes a trial judge from assessing credibility and making a groundlessness finding, regardless of the volume of expert testimony and the number of

exhibits introduced. There is no exception to liability written into §13-17-101, *et. seq.*, providing that when any expert testimony is admitted, or when a lot of evidence is admitted in support of a claim, the claim cannot be groundless as a matter of law. Since, no such exception is written into the attorney fee statute, this Court should not create one. *See Sargent School Dist. v. Western Services, Inc., 751 P.2d. 56, 60 (Colo. 1988).*

2. Burke Misconstrues the Nature of the Water Judge's "Gatekeeper" Role Under C.R.E. 702.

Burke and PCSR argue that the Water Judge erred in not accepting at face value the opinions of experts allowed to testify under C.R.E. 702. *Burke Brief at 39-40; PCSR Attorney Fee Brief at 13-14.* PCSR goes so far as to argue that once the Water Judge allowed PCSR's experts to testify, that no attorney fees could be assessed related to the subject of expert testimony. *Id.* ("Therefore, once the trial court has exercised its discretion under Rule 702, a party should be relieved of any further obligation to defend its claim at least with respect to the subject matter of the expert testimony.")

Burke and PCSR confuse the C.R.E. 702 standard for admissibility of opinion testimony with the decision by the trier of fact on the weight and credibility to be given to that evidence. The decision whether to allow an expert to testify is simply a threshold question based upon the expert's qualifications and a preliminary decision (made by the trial judge before hearing the actual testimony) that: (1) the scientific principles behind the testimony are reliable, (2) that the witness is qualified, and (3) that admission of the testimony will be helpful to the trier of fact. *See People v. Shreck, 22 P.3d 68, 82-83 (Colo. 2001); see also People v. Martinez, 74 P.3d 316, 322-3 (Colo. 2003)(" CRE 702 and CRE 402 govern the admissibility of expert testimony.").* The C.R.E. 702 decision to admit

testimony has nothing to do with the Water Judge's duty as the trier of fact to evaluate the strengths and weaknesses of the expert evidence. *People v. Hampton, 746 P.2d 947, 952 (Colo. 1987), overruled on other grounds, People v. Shreck, supra* ("*Any flaws present in expert testimony go to weight to be given evidence rather than its admissibility, and can be subject of cross-examination of expert witness.*"); *see also People v. Martinez, 74 P.3d at 324 ("the factual basis of an expert opinion is admissible, and cross-examination should reveal the weaknesses in its underpinnings").* Just because PCSR's expert evidence passed the threshold test, the Water Judge was neither obligated to accept such testimony as credible nor precluded from finding that the case was groundless. *See Hampton v. People, 465 P.2d 394, 400 (Colo. 1970) (*The weight to be accorded expert testimony is solely for the trier of fact. Such testimony is subject to the test of cross examination as any other testimony and the trier of fact is not bound by it and may accept or reject it as they see fit.*)*

To accept Burke's and PCSR's arguments would result in a bar against a finding of groundlessness in any case premised upon expert opinion. C.R.E. 702 provides no such blanket immunity in this, or any other, case.

3. <u>Coffey v. Healthtrust, Inc., does not apply to the present case.</u>

Coffey v. Healthtrust, Inc., 1 F.3d 1101 (10th Cir. 1993) holds that "as long a party's reliance is reasonable under the circumstances, the court must allow parties and their attorneys to rely on their experts without fear of punishment for any errors made in judgment by the expert." *Id at 1104.* Aurora, Burke, PCSR and the CTLA argue that this holding precludes an award of fees because Burke and PCSR relied upon their experts in

trying the case. *Aurora Brief at 16; Burke Brief at 39; PCSR Attorney Fees Brief at 13; CTLA Brief at 13-15.*

The *Coffey* exception to attorney liability does not apply to this case because in order for the exception to apply, two conditions must be met: First, the sanction against the attorney must be due to errors in judgment by the expert, not the attorney, and second, the attorney must have reasonably relied upon the expert's failure. *Coffey at 1104.* Neither of those conditions are satisfied in this case.

The Water Judge determined from all of the evidence that Burke and PCSR did not rely upon their experts. Rather, PCSR and Burke ignored Dr. Eastman's recommendation and proceeded to trial. *Post-Trial Motions Order at 10 ("PCSR ignored its expert's opinions about the defensibility of the model at trial, and proceeded to litigate its claims. Thus, it did not rely upon its expert.").* This finding is supported in the record.

It was PCSR and Burke who elected to "stand on" the Eastman Model in 1998, despite the *Eastman Memo* and despite the Opposers' February, 1998 *TRC Report*, without advising the Water Judge they needed more time to make modifications or improvements to the model. *Post-Trial Motions Order at 8-9; Attorney Fees Order at 8-9.*

It was PCSR's and Burke's responsibility to ensure that the sensitivity analyses ultimately performed by RMC in June, 2000 were completed in a timely manner, rather than after all of the disclosure deadlines had expired. *See, Attorney Fees Order at 8 ("Although Aurora's experts eventually decided to put together a sensitivity analysis of the model, there was no representation by Applicant to the court or to the parties as of October 28, 1998, that it wanted to revise or do more work on the model.")*

These decisions were not made by Dr. Eastman. Rather, these decisions were made by PCSR and Burke, who was both a principal and attorney for PCSR.

There is ample evidence in the record to support the Water Judge's conclusions that the failure of PCSR's case was not due to reasonable reliance by PCSR and Burke on errors in judgment by their experts, thus, those findings may not be overturned by this Court absent an abuse of discretion. *Coffey, 1 F.3d at 1104.*

D. The Water Judge Properly Found that PCSR's Claims to Store Water Naturally Entering the Aquifer Was Frivolous.

Burke challenges the Water Judge's finding that PCSR's claims for water naturally infiltrating the aquifer were frivolous. *Burke Brief at 42-49.* The basis for the Water Judge's dismissal of PCSR's claims for precipitation, irrigation return flows and salvaged water is set forth in Opposers' Merits Brief, §§ F.1 and D, and will only be briefly summarized here.

PCSR's application claimed precipitation and irrigation return flows as sources of water for underground storage. *Application at 13-14.* Its own expert report acknowledged that water from these sources "naturally" infiltrates into the aquifer. *Ex. A-1200 at 4-3, § 4.3.* PCSR also claimed to reduce its augmentation obligations using water salvaged by the elimination of native plants. *08/17/00 at 32: 14 - 34: 24; PCSR Brief at 33, § F; Post-Trial Motions Order at 10-11.*

The Water Judge rejected PCSR's claim for salvage credits on motion for partial summary judgment. *Order 06/05/00, #875.* After trial, the Water Judge denied all of the claims for precipitation, irrigation return flows and salvaged water as violating the requirements of §37-92-103 (10.7) 10 C.R.S. (2003). That statute requires that water stored underground must be placed into the aquifer by "other than natural means."

Dismissal Order at 7. In the *Post-Trial Motions Order*, the Water Judge concluded that these claims "were frivolous from their inception." *Post-Trial Motions Order at 12, ¶5.*

The methods utilized by PCSR to avoid pre-trial dismissal of these frivolous claims are illustrative of its litigation tactics in this case. Opposers moved for summary judgment denying PCSR's claims for precipitation and irrigation return flows entering the aquifer by natural means. *10/04/99, #431.* In order to avoid the granting of the motion, PCSR stated this water would be "induced" into the aquifer by the operation of its wells. *Brief in Opposition, 11/02/99 at 4, #448, and Affidavits of Ault and Jehn attached thereto, #437 (Ault) at 2, ¶¶ 5-6 and #438 (Jehn) at 2, ¶ 5.* However, at trial, Dr. Eastman, testified that the ground water model never determined any amount of increased or induced recharge into the aquifer from precipitation or irrigation return flows. *08/16/00 at 172:5 to 174:17.* PCSR never produced any evidence at trial concerning the amount of this claimed induced or increased recharge from precipitation and irrigation return flows despite the representations made to the Court in response to Opposers' summary judgment motion.[6]

In response to Opposers' motion for summary judgment on salvaged water, PCSR argued that the plants to be eliminated are not phreatophytes, and, thus, the taking credit for this water was not prohibited by § 37-92-103(9) ("Plan for augmentation does not include the salvage of tributary water by the eradication of phreatophytes,..."). PCSR also stated that it was just claiming the salvaged water in priority. *See Brief in Opposition to Summary Judgment, 5/0100 at 6-11 and 13-14, #732.* The Water Judge refused the

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[6] Burke's Brief at 42-47 makes no claim that the precipitation and irrigation return flows claimed are induced, thus, apparently abandoning the position taken in the response to summary judgment.

"phreatophyte" distinction as it had already been rejected by this Court in *Giffen v. State*, *690 P.2d 1244, 1247-1248 (Colo. 1984)*. *Order, 6/5/00 at 2-3, ¶2, #875.* The Water Judge accepted PCSR's admission that it only sought credits in the priority system, *Id. at 2, ¶4*, an admission now retracted on appeal by PCSR. *PCSR Brief at 38-39.*

These claims were frivolous because PCSR never presented a rational argument to support them and its legal arguments were flatly contrary to clear and long-established law. Thus the Water Judge was correct in finding them frivolous. *See Foxley v. Foxley, 939 P.2d 455, 460 (Colo. App. 1996).*

E. Fees Were Properly Awarded Against Aurora Under the Vicarious Liability Laws.

Aurora argues that holding it liable for fees would be an impermissible extension of §13-17-101, which applies only to "parties" who litigate groundless claims. *Aurora Brief at 39.* This is a red herring. Fees were awarded against Aurora pursuant to the common law of principal and agent and vicarious liability because its agent pursued a groundless claim. *Post-Trial Motions Order at 12 ("The City of Aurora and PCSR stand in the relationship of principal-agent with respect to pursuit of this Application. Therefore, the City of Aurora is liable ... for attorney fees imposed against PCSR pursuant to § 13-17-101...")* (Emphasis added). The Water Judge's order is supported by the facts and law.

1. PCSR was Aurora's Agent.

PCSR litigated the application on Aurora's behalf pursuant to the express terms of the contract between Aurora and PCSR. *Ex. A-4 at 2, ¶1 ("Partnership [PCSR] will act as agent for Aurora's Utility Enterprise in pursuing water adjudications . . . . The purpose of the*

agency will be to secure for Aurora and Partnership decreed entitlements to utilize water available under the Trident [PCSR] Project....").[7]

Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Stortroen v. Beneficial Finance Company of Colorado, 736 P.2d 391, 395 (Colo. 1987) citing the Restatement (Second) of Agency § 1(1) (1957).* Express authority exists whenever the principal directly states that its agent has authority to perform particular acts on the principal's behalf. *Willey v. Mayer, 876 P.2d 1260, 1264 (Colo. 1994).* The existence of an agency relationship is ordinarily a question of fact. *Id.*

Before trial, the Opposers' sought dismissal of PCSR's application on the grounds that the Aurora/PCSR contract did not meet the anti-speculation statute, C.R.S. 37-92-103(3). *Motion, 3/28/00, #655.* PCSR vigorously defended the motion arguing that its contract with PCSR created an agency relationship. *Response, 5/1/00 at 1-2, #702 ("The fact of PCSR's agency is established by legislative action of Aurora, by a contract through which Aurora designated PCSR as its agent to secure the rights contemplated by the application, by Aurora's control over PCSR in the conduct of the application and settlement negotiations, and by modification of the legal relations between Aurora and third parties.").* PCSR also asserted that Aurora controlled or had the right to control PCSR:

> Further, PCSR may be required to report to Aurora or receive instructions from Aurora. *Exhibit 2, §II.4.* Those instructions may relate to settlements and stipulations which Aurora must approve prior to PCSR's commitment.

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[7] In its capacity as Aurora's agent, every pleading filed by PCSR in this case began with the caption - "PCSR, for itself and as agent-in-fact for the City of Aurora."

> *See Exhibits 3 and 4.* Aurora has participated in settlement discussions on its own behalf in this case. *Exhibit 5.* Critically, Aurora may terminate the relationship if it believes that PCSR is conducting its agency contrary to the Agency Contract. *Exhibit 2, §II.1.* This constitutes control, and Objector's argument fails. (Emphasis added). *Id. at 12, #702.*

Based upon the evidence submitted and the express terms of the PCSR/Aurora contract, *Ex. A-4,* the Water Judge denied Opposers' motion ruling that a "legally binding principal and agent relationship" exists between Aurora and PCSR. *Order, 6/13/00 at 1, ¶ 2, #892.*[8] Ample evidence in the record supports the Water Judge's agency finding, thus it should not be disturbed on appeal.

2. Aurora is Vicariously Liable for PCSR's Litigating a Groundless Case.

Under Colorado law, a principal is vicariously liable for its agent's acts committed within the scope of the agency. *See Branscum v. American Community Mutual Ins. Company, 984 P.2d 675, 680 (Colo. App. 1999); Colorado Jury Instruction, Civil 8.1 ("...acts or omissions of the (agent) are in law the acts or omissions of the (principal)."* In *Grease Monkey International Inc., v. Montoya, 904 P.2d 468, 476 (Colo. 1995)*, this Court explained the reasoning behind the vicarious liability rule:

> Few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own. Our decision recognizes the legal principle that 'when one of two innocent persons must suffer from the acts of a third, he must suffer who put it in the power of the wrongdoer to inflict injury.' This policy motivates organizations to see that their agents abide by the law. (Citations omitted).

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[8] Aurora argued to the Water Judge in the attorney fee proceeding that PCSR was not really its agent, rather that PCSR was only its agent to comply with the anti-speculation statute, C.R.S. 37-92-103 (3) but not to create a common law principal/agent relationship. *Aurora Response to Motion for Joinder, 8/27/01 at 14.* The Water Judge determined this argument to be "disingenuous." *Post-Trial Motions Order at 11.*

The rule provides an incentive for a principal to select reliable agents. It also recognizes that the principal is in a better position to supervise an agent's conduct and that, because of the agency relationship, "it is not unfair to require that it [the principal] also bear the costs of its agent's abuses of authority where they harm innocent parties." *Willey v. Mayer, 876 P.2d at 1266.*

Colorado law is clear - a principal is liable for the acts of its agent done within the real (actual) or apparent authority of the agent. *See Id. at. 1264; see also Branscum, 984 P.2d at 680.* PCSR was Aurora's agent and it had actual authority to litigate the application on Aurora's behalf. Aurora's agent litigated a groundless application under §13-17-101, and Aurora is vicariously liable for PCSR's conduct.

Nor is this a case, as implied by Aurora, where it was simply an inactive bystander in the litigation and the implosion of PCSR's case took it by complete surprise. The evidence showed Aurora actively participated in this litigation. Aurora's attorneys attended all of the pre-trial conferences, almost all of depositions, and every day of trial. *See, Reply to Motion to Join City of Aurora, 10/25/2001 at 10, #1317.* Five of the seven expert witnesses who testified at trial were employees of, or consultants hired by, Aurora (Tom Griswold, Douglas Kemper, Dan Ault, Tom Hesemann and Ross Bethel). Aurora had a significant presence in this case from its inception through trial, thus it certainly was not unforeseeable that PCSR's wrongful actions might end up obligating Aurora to pay fees. If Aurora did not anticipate such a result, then it has no one to blame but itself.

The Opposers incurred several million dollars in fees and costs to defend against this application. Absent Aurora's relationship with PCSR, the case could not have proceeded and would have died in the face the motion to dismiss under the anti-speculation

statute, §37-92-103(3). Aurora chose to prosecute the application through its agent and it cannot be allowed to reap the benefits of that agency relationship without accepting the corresponding burdens. *Grease Monkey, 904 P.2d at 477.*

3. The "American Rule" exemption from attorney fees does not apply.

Aurora argues that the "American Rule" which prohibits an assessment of attorney fees against a litigant absent specific statute or agreement, bars the Park County Opposers' claims. *Aurora Brief at 40-41.* This is incorrect. The attorney fee statute authorizes recovery of attorney fees against a municipality. *See Colorado City Metropolitan District v. Graeber & Sons, Inc., 897 P.2d 874, 876 (Colo. App. 1995) ("We conclude that the Colorado Governmental Immunity Act was not intended to shield public entities from the remedial provisions of § 13-17-102").* The "American Rule" does not shield a principal from vicarious liability under the attorney fee statute. Aurora cannot avoid liability for an action done by its agent when that same action, if done by Aurora, would give rise to liability.

F. The Water Judge Properly Considered the Applicable Statutory Factors in Awarding Attorney Fees.

Section 13-17-103(1) 10 C.R.S. (2003) directs the trial judge to consider certain factors when assessing attorney fees against any party or attorney. The statute recognizes that the court may consider factors other than those listed (". . . and shall consider the following factors, among others. . ."). *Id.* The Court is not required to make findings on all of the statutory factors, just the relevant ones. *See In Re the Marriage of Aldrich, 945 P.2d 1370, 1379 (Colo. 1997); see also Bilawsky v. Faseehudin, 916 P.2d 586, 590 (Colo. App. 1995)* (Court findings on 3 factors are sufficient). Here, the Court made findings on all eight

of the factors. *Attorney Fees Order at 13-16.* Aurora contends that three of eight factors enumerated in this section mandate that no fees be awarded. *Aurora Brief at 25-26.*

1. <u>The Factors Focused on By Aurora Do Not Warrant Any Reduction in the Fee Award</u>.

First, Aurora identifies §13-17-103(1)(c) which requires the Court to consider the availability of facts to assist a party in determining the validity of a claim. The Water Judge considered this factor in detail. *Attorney Fees Order at 14-15,* ¶*3.* The Judge found that PCSR was obligated to determine whether it had sufficient evidence to proceed to trial. *Id.* Based on the evidence, the Court held that (1) as of October 28, 1998, PCSR knew or should have known that the ground water model did not produce sufficiently reliable information with respect to depletions and replacement to the aquifer and stream system; (2) PCSR had this information but chose to ignore it; and (3) the ground water model could have been refined, but PCSR pursued its claim without doing so. *Id. at 8, 14-15.* Since the information to determine the validity of PCSR's claim was available to it, but PCSR chose to ignore it, the Water Judge properly applied this factor against PCSR.

Second, Aurora points to §13-17-103(1)(f) which directs the Court to consider whether issues were reasonably in conflict. Aurora cites to instances where its experts concluded that the model was valid and adequate. *Aurora Brief at 26.* In its finding on this factor, however, the Water Judge held that all of PCSR's experts' opinions, other than Dr. Eastman, were not based upon an independent analysis of the model or a response to Dr. Eastman's identification of specific concerns about the model. *Attorney Fees Order at 15,* ¶*6.* These factual findings are supported in the record, *Id.,* and should not be overturned on appeal.

2. **Bad Faith Is Not Necessary for a Case to Be Groundless.**

Aurora and PCSR argue that since the Water Judge found that PCSR did not act in "bad faith," then an award of attorney fees is barred. *Aurora Brief at 26; PCSR Attorney Fee Brief at 10-17.* There is no authority for the proposition that a finding on this one factor is determinative of the overall outcome of a fee award and that absent bad faith, fees are precluded as a matter of law.

In the context of the attorney fee statute, "bad faith" includes conduct that is "arbitrary, vexatious, abusive, or stubbornly litigious, and it may also include conduct that is aimed at unwarranted delay or is disrespectful of truth or accuracy." *In re Estate of Becker*, 68 P3d 567, 569 (Colo. App. 2003). The Water Judge believed that "bad faith" was not at issue here. *Attorney Fees Order at 15,* ¶5. This finding, however, does not nullify the Water Judge's findings that PCSR's claims were groundless based upon the other factors and the evidence considered by the Water Judge. If the Water Judge had not made a finding on this factor, the award would still be valid based upon his findings on the other factors. *Bilawsky, 916 P.2d at 590.*

3. **Other Factors.**

In addition to the three factors specified above, Aurora challenges the Water Judge's finding on the factors contained in subsection b (the extent of the effort to reduce claims after the action was filed), and subsection h (the amount and conditions of any offer of judgment or settlement as compared to the amount and conditions of the ultimate relief granted). *Aurora Brief at 27-29.*

With respect subsection b, the Water Judge rejected Aurora and Burke's argument that the reduction of claims after the commencement of this action was an obligation of

Opposers. *Attorney Fees Order at 13-14.* The Court found that PCSR itself, not the Opposers, had the information available to it to evaluate its evidence before trial and failed to respond to that information. *Id.*

With respect to subsection h, the Court found that no offer of judgment was filed pursuant to §13-17-202. *Attorney Fees Order at 15-16, ¶8.* The Court also noted that the ultimate relief granted, dismissal of the entire application, was unlikely to be a worse result for the Opposers than any settlement that may have been offered to them. *Id.*

Aurora also criticizes the Judge for not considering or admitting evidence of a settlement with parties not claiming fees. *Aurora Brief at 28-29.* The terms of this settlement were set forth in the "Bargas Stipulation," *8/14/00, #1107.* The Water Judge ruled that settlement with parties not claiming attorney fees was irrelevant to the attorney fees proceeding. *12/17/02 at 43:1-22.* Obviously, a settlement that protected the interests or water rights of only one opposer, cannot be used as a factor against other opposers. The Court so ruled. *Attorney Fees Order at 16, ¶8.* There is no error with respect to the factor in subsection h.

4. Opposers' Alleged Failure to Mitigate.

Aurora argues that it would be unfair to hold it liable for 1.2 million dollars in attorney fees when Opposers "concluded early in the case that the Applicant's claims lacked any merit." *Aurora Brief at 44.*

The Water Judge easily dispatched this argument. *Attorney Fees Order at 14.* Regardless of any belief that Appellees may have had that PCSR's case lacked merit, the

bottom line is that Appellees were forced by PCSR to fully litigate the case and demonstrate its faults to the Water Judge. *See, AWDI, 847 P.2d at 385.*[9]

5. This Was Not a Case of "First Impression."

Aurora notes that the Court said that this was a "case of first impression." Aurora then asserts that any attorney fee award should reflect that fact. *Aurora Brief at 33-34.* While certain aspects of this case were of first impression, it was foremost a plan for augmentation. The Water Judge's finding of groundlessness was based on the lack of credible evidence supporting the ground water and surface water models and the proposed plan for augmentation. *Attorney Fees Order at 10, § 7.* The Water Judge found that there is nothing new or novel about using such models in support of a plan for augmentation. *Id.*

6. The Court's Use of the "Lodestar Amount" Does Not Constitute Error.

Aurora questions the Water Judge's use of the "lodestar" amount in determining the reasonableness of the claimed attorney fees. *Aurora Brief at 32-33.*

The Water Judge commenced the determination of reasonable attorney fees by computing the lodestar amount. *Attorney Fees Order at 3 (2nd ¶ in § I.A.) and 4-5, § II.A.1.* The lodestar amount is calculated by multiplying the amount of time spent in litigation times a reasonable hourly rate. *Id. at 3, AWDI,* 874 P.2d at 386; *Tallitsch v. Child Support Services, Inc. 926 P.2d, 143, 147 (Colo. App. 1996).*[10]

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[9] Additionally, it should be noted that Opposers did, in fact, point out to PCSR and the Water Judge more than two years before trial that the groundwater model was seriously flawed and would not be helpful in resolving the case. *TRC Report, 2/12/98, #283.*

[10] Here, PCSR, Aurora and Burke stipulated that Opposers' counsel hourly rates were reasonable. *Attorney Fees Order at 6.* Thus, the Court only had to determine if the time spent was reasonable. *Id.*

After determining the "lodestar amount, the Water Judge then considered whether that amount should be adjusted based on the factors listed in §13-17-103, 10 C.R.S. (2003). *Id. at 3, 4-5, 6-7 and 13-16.* This approach is supported by Colorado law. *Tallitsch*, 926 at 147-148; *Spensieri v. Farmers Alliance Mutual Ins. Co., 804 P.2d 268, 270-271 (Colo. App. 1990).* The Water Judge properly considered the factors listed in §13-17-103(1) in determining reasonable attorney fees.

G. The Evidentiary and Discovery Rulings by the Water Judge do not Constitute Reversible Error.

1. The Exclusion of Certain Materials.

Aurora alleges error in the exclusion of certain materials it offered at the fees hearing. *Aurora Brief at 29-30.* First, Aurora contends that the Judge improperly refused to admit material related to the finding of liability for the attorney fees. These offers, designed to convince the Water Judge to reconsider its finding, were offered during the proceeding held to determine the amount and reasonableness of the claimed fees. The Water Judge was under no obligation to admit this evidence as it was irrelevant to the issues involved in that proceeding. Absent an abuse of discretion, the Water Judge's decision regarding admissibility of evidence may not be overturned on appeal. *See Scott v. Matlack, Inc., 39 P.3d 1160, 1170 (Colo. 2002); American Guarantee and Liability Insurance Company v. King, 02CA0927, 2003 WL22413835 at 7 (Colo. App. 2003).*

The Water Judge also excluded offers or examination related to the details of discussions between Opposers' counsel and non-testifying experts, *12/17/02 at 130:12 - 131:23,* and between counsel and testifying experts. *Id. at 146:18 - 147:14.* The Court found that these details would not be helpful in determining a reasonable fee. *Id.* These

rulings do not constitute an abuse of discretion and are not cause for reversal as alleged by Aurora.

Finally, Aurora claims error in the exclusion of Exhibit AU-5. *Aurora Brief at 19.* An examination of the record, however, reveals that the Court accepted the exhibit, but noted that it was not going to make "any inferences from it." *10/17/02 at 178:25 - 179:24. See, List of Exhibits for Record in Cost and Attorney Fees Appeal, 2nd Supp.*

2. <u>The Aurora discovery dispute</u>.

Aurora argues that the Water Judge's findings must be reversed because the Water Judge barred it from seeking discovery "of one narrow category of documents from the parties seeking fees - the written communications between Opposers' counsel and Opposers' experts." *Aurora Brief at 34-36.* Aurora's characterization of its discovery request as being "narrow" is questionable. Aurora sought discovery of

> all written communications between the attorneys and experts/consultants (whether those communications are by e-mail, regular mail, fax, or otherwise and whether in the form of letters, draft reports, memos or otherwise), including those illustrative communications specifically set forth above in the section entitled "The Requested Communications. Aurora requests that the disclosure encompass all such communications in the possession, custody, or control of the clients, the attorneys, and the experts/consultants." *Aurora Motion for Disclosure and Discovery Regarding Attorney Fees, 3/5/02 at 13-14.*

Aurora's justification for seeking such extensive discovery was that it believed Opposers' experts secretly harbored opinions that PCSR's project was legitimate. *5/24/02 at 12: 19-24.*

The Water Judge denied Aurora's discovery request in an oral ruling. *5/24/02 at 7: 18-23, 8-11: 24.* The Water Judge noted that C.R.C.P. 121 §1-22(b) authorized discovery

in an attorney fee proceeding only upon a showing of "good cause." *Id. at 9:16-21.*[11] Since the Court had ruled the application groundless based upon the lack of credible evidence introduced by PCSR during trial, further discovery of every communication that took place between Opposers and their experts was not warranted and would not be helpful. *Id. at 11: 3-19.*[12]

The Water Judge provided Aurora and Burke with a second opportunity to seek discovery, so long as it was targeted to a specific and relevant issue (*"Still, I'm not sure you can meet the good cause burden, but I will entertain specific requests for discovery if good cause is shown, but good cause is not speculation that we might find some skeleton in the Opposers' closet if allowed to rummage through the closet without limitation.*") *5/24/02 at 28: 11-25.*

Aurora filed a *Restated Motion for Discovery, 6/14/02,* but the Water Judge found it still did not meet the good cause standard. *Order re: Aurora's Disclosure Request, 8/2/02.* The "good cause" standard of §1-22(b) does not require the full range of disclosures and discovery mandated under C.R.C.P. 26. *See Chartier v. Weinland Homes, Inc., 25 P.3d 1279, 1282 (Colo. App. 2001).* The Water Judge's rejection of Aurora's broad discovery requests as lacking good cause was a reasonable exercise of his discretion to control discovery and, under the circumstances of this case, should not be disturbed on this appeal. *See In re Marriage of Mann, 655 P.2d 814, 816 (Colo. 1982).*

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[11] C.R.C.P. 121, §1-22(b) states that the "Court may permit discovery only upon good cause shown when requested by any party."

[12] The Water Judge also noted that the full disclosure and discovery regarding the Park County Opposers' testifying experts was available to PCSR. *5/24/02 at 7: 24 – 8:3.*

H. None of the Case Law Cited by Aurora or Burke Support a Reduction of the Fees Awarded.

Aurora, Burke and PCSR argue that several opinions of this Court and the Colorado Court of Appeals mandate a reduction in the fees awarded. In each instance, their arguments were made to the Water Judge and rejected. As demonstrated below, this Court should reach the same conclusion.

1. The Holding in *Harrison v. Smith* is Distinguishable.

Aurora, Burke and PCSR rely on *Harrison v. Smith, 821 P.2d 832, 834-835 (Colo. App. 1991).* In *Harrison*, the Court of Appeals held that, under the facts of that case, the plaintiff's claim was not groundless until the last date credible evidence to support the claim could have been endorsed. The evidence to make the claim credible was available but plaintiff's attorneys failed to designate or present it at trial. *Id. at 835.* Aurora, relying on this holding, asserts that, until February 14, 2001, PCSR could have filed evidence on terms and conditions, and, thus, fees should not be awardable until after that date. *Aurora Brief at 29-30.* Similarly, Burke argues that, under the holding of *Harrison*, PCSR had a "reasonable belief" that rebuttal evidence would be admitted in PCSR's case-in-chief. *Burke Brief at 40-42.* Alternatively, Aurora argues that fees are not awardable until after May 1, 2000, when PCSR's rebuttal reports were due. *Id.* PCSR also claims that May 1, 2000 is the earliest date that fees should be awarded. *PCSR Attorney Fee Brief at 17-18.*

The Water Judge Court reviewed these arguments in detail and found that the holding in *Harrison* was inapplicable to the facts of this case. *Attorney Fees Order at 7-9 (under § 3, "Attorney fees for work done prior to Applicant's last chance for disclosure").* In summary, the Water Judge found that the evidence which would have been submitted

by these dates "could not have cured the shortcomings of the model" which were the basis for the finding of groundlessness. *Id.* The Judge found that, unlike in *Harrison,* no credible evidence existed which could have been produced, but for an oversight. On the facts of this case, the Water Judge properly found the holding in *Harrison* was inapplicable, and there is no basis to reverse that finding.

Additionally, Burke argues that he expected that the special statutory procedures for water rights adjudications, and the filing of a proposed decree shortly before trial, allowed him to avoid the previously ordered disclosure deadlines. *Burke Brief at 33-36.* This argument should be rejected for several reasons. First, PCSR never demonstrated that it possessed credible evidence to fix the ground water model, *Attorney Fees Order at 8,* and thus, there was no evidence to support any of its findings, terms and condition in the proposed decree. For the same reason, the contention that the filing of the new proposed decree or the proposal of terms and conditions to prevent injury would allow PCSR to cure all of the ills of its ground water model has no basis.[13] The new proposed decree did not prove the depletions or the availability of augmentation water. Second, the special statutory procedures and deadlines for filing a proposed decree do not allow a party to avoid the C.R.C.P. 26(a)(2) disclosure deadlines. See, Opposers' Merits Brief, §V.A.4.

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[13] Burke also claims that PCSR had good cause to believe the Court would allow Ault's and Hesemann's testimony because it granted the request of certain Opposers (Denver, Englewood, Thornton and Centennial) to allow a late filing. Ault and Hesemann's testimony regarding the ground water model and the Glover model was almost two years late (the deadline was July 31, 1998). The above identified Opposers' disclosure was filed six minutes after the deadline for surrebuttal disclosures on a certain subject. Upon motion by the disclosing opposers, that deadline was extended by the Water Judge two weeks past an agreed upon deadline. *See, 07/20/00 at 79:2 to 80:12; Downstream Objectors' Reply to Applicant's Response to Motion for Enlargement of Time to File Limited Additional Expert Disclosures, 07/05/00, #1028; Minute Order, 7/20/00, #1070.*

2. Opposers' Fee Statements Provided Sufficient Detail.

Aurora contends that certain Opposers' attorney fee statements do not provide enough detail concerning the subject matter of the work performed to support an award of the fees billed in those particular statements. *Aurora Brief at 31-33.* Although all of the time billed in these statements was expended in defending against this application, Aurora asserts that the failure to identify a more specific subject matter disqualifies certain time entries. In making this argument, Aurora relies on this Court's opinion in *AWDI.* In *AWDI*, the opposers to a water court application were awarded fees for defending one claim, which was withdrawn, but not for another, which was tried. *AWDI* at 383-384. The opposers had to do an after the fact division of time between the two claims. *Id.* This method of allocation was approved by this Court. *Id.*

The Water Judge thoroughly considered Aurora's argument. *Attorney Fees Order at 5-6, § a.* ("Sufficiency of Billing Statements"). The Judge ruled that, under the facts of this case, the statements provided adequate detail. Because all of the claims in this case were dismissed, the Court found that, unlike in *AWDI*, a segregation of time between claims was not required. Based on the contemporaneous time records submitted into evidence, and each attorney's review and testimony concerning the time billed, the Water Judge found that there was sufficient information provided to allow Aurora to challenge the reasonableness of the time expended. *Id.*[14] The factual finding that sufficient detail was provided in Opposers' attorney fee statements is within the discretion of the Water Judge and is supported by evidence in the record.

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[14] In response to certain assertions by Aurora, the Water Judge reduced the claimed fees in several instances. *See Attorney Fees Order at 9-10, ¶¶ 4 and 6.*

I. Procedural Issues.

1. Opposers Were Not Required to Join Aurora.

Aurora argues that its joinder in the case was improper and untimely because Opposers had an obligation to try and join Aurora at an earlier phase of the proceedings. By not doing so, Opposers allegedly prejudiced Aurora. *Aurora Brief at 38-42.*

Certain Opposers' sought Aurora's joinder to give it the opportunity to participate in the attorney fee claim proceeding.[15] However, Aurora's joinder was not required in order for the case to be determined groundless by the Water Judge. Nor was Aurora's participation in the liability finding necessary. PCSR was Aurora's agent, and as such, Aurora is vicariously liable for the acts of its agent. *§ E(1)(2) supra and Post-Trial Motions Order at 11-12.* Thus, contrary to Aurora's claims that it was somehow prejudiced by the joinder, its rights were actually enhanced by being given notice and the opportunity to directly participate in the attorney fee proceeding. That Aurora elected to not brief the attorney fee liability issue at that time is not the fault of Opposers.

Contrary to Aurora's claims that Opposers had some obligation to join Aurora at an earlier stage in the proceedings, Opposers had no reason to do so nor did Opposers have an obligation to give Aurora notice of its own agent's conduct in litigating the case. Aurora,

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[15] The Opposers stated the following purpose for seeking Aurora's joinder: "Though PCSR's liability for attorney fees has not yet been determined by the Court, Objectors sought joinder of Aurora at this juncture to ensure that Aurora was given adequate opportunity to participate and defend the underlying action for attorney fees, to promote judicial economy by having all of the attorney fee issues addressed in one proceeding and to prevent Aurora from claiming in any future proceeding that Objectors should have joined it during this phase to prevent prejudice to its rights." *Reply Brief re Joinder, 10/25/01at 2, #1317.*

not Opposers, had an interest in monitoring and controlling the actions of its agent. If PCSR made decisions that resulted in liability to its principal, Aurora, then those are the risks that any principal runs when it appoints an agent to act on its behalf. *Grease Monkey, 904 P.2d at 476.*

2. C.R.C.P. 20 and 21 apply to this attorney fee proceeding.

Aurora argues that the joinder rules do not apply to water court proceedings and that the Water Judge improperly joined it in this case. *Aurora Brief at 42-44.* Aurora is correct that the joinder rules are normally inapplicable to water court proceedings because the special resume notice provisions of §37-92-302(3) supplant the traditional procedure of identification of parties and service of process in civil proceedings. *See Gardner v. State, 614 P.2d 357, 359 (Colo. 1980).* However, joinder of Aurora in this action is authorized under the Colorado Rules of Civil Procedure and is within the sound discretion of the court. C.R.C.P. 21 states:

> Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms are just.

C.R.C.P. 20 allows joinder in situations where, as here, one party seeks to join a person who may be liable for the same debt or conduct that is already before the court:

> (a) All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.
>
> (c) Persons jointly or severally liable upon the same obligation or instrument . . . may all or any of them be sued in the same action, at the option of plaintiff.

This Court has stated that the broadest possible reading of the language of C.R.C.P. 20 is desirable. *See Sutterfield v. District Court, 438 P.2d 236, 240 (Colo. 1968); see also* C.R.C.P. 1(a) (The Rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action); *Swan v. Zwahlen, 280 P.2d 439, 441 (Colo. 1955)*("[t]he Rules indicate clearly a general policy to disregard narrow technicalities and to bring about the final determination of justiciable controversies without undue delay. And that being their purpose, they should be liberally construed"). Whether to grant joinder is committed to the sound discretion of the trial court. *See Draper v. School Dist. No., 486 P.2d 1048, 1049 (Colo. 1971).* Opposers sought to add Aurora as a party solely to determine whether it was vicariously liable for any attorney fees which the Water Judge may assess against PCSR. Since Rule 20 authorizes joinder at any stage of the proceedings and Rule 21 anticipates joinder where there are joint liabilities and common questions of law and fact, Appellees' joinder of Aurora was within the express language of the rules.

Aurora cites *Southeastern Colo. Water Conservancy Dist. v. Fort Lyon Canal Co., 720 P.2d 133, 142-43 (Colo. 1986)* in support of its argument for disallowing joinder. *Southeastern* addressed the argument that there could not be indispensable objectors to a water court proceeding because resume notice provided an opportunity for every interested party to participate if they so chose. That case is distinguishable because Opposers neither sought to join Aurora as an objector nor as a party to the application. Rather, Opposers sought Aurora's joinder solely for the purpose of resolving the issue of attorney fees. *Southeastern* does not address joinder under C.R.C.P. 20 or 21 and does not prohibit joinder under these circumstances.

3. The Procedure Used to Award Attorney Fees Followed Established Colorado Law.

a. PCSR and Burke never requested a hearing on liability.

PCSR and Burke claim that their due process rights were violated because the Water Judge found liability for attorney fees without conducting a hearing. *PCSR Attorney Fee Brief at 7-10; Burke Brief at 49-50.* As demonstrated below, the procedures used by the Water Judge to award and determine the amount of attorney fees are squarely within the requirements of Colorado law as dictated by *In Re the Marriage of Aldrich*, 945 P.2d 1370 (Colo. 1997) ("*Aldrich*").

In *Aldrich*, the appellant claimed error because the trial court awarded fees without a hearing, "though he did not specifically request a hearing." *945 P.2d at 1379-1380.* This Court held that there is no requirement to hold a hearing at any time under §13-17-102, absent a specific request for a hearing. *Id. at 1380* ("*[A] party who fails to make a timely request for such a hearing waives the right to a hearing.*") A trial court neither has to discern whether an objection to a claim for attorney fees contains an implicit request for a hearing nor hold a hearing *sua sponte. Id., particularly note 7.*

Here, no request for a hearing was made before the Water Judge's determination that there was liability for attorney fees. In fact, PCSR and Burke recognized and never objected to the procedure utilized by the Water Judge. *Response to Opposers' Motion for Attorney Fees, 10/15/01, at 3, §1, #1306,* where PCSR noted that Opposers had requested a hearing prior to determination of a the amount of fees, but not prior to the threshold determination of liability. PCSR did not request a hearing. PCSR and Burke cannot turn back the clock now.

Even in the face of *Aldrich*, PCSR claims error because the Court did not hold a hearing prior to its threshold determination. PCSR attempts to avoid *Aldrich* by claiming that (1) the issues in *Aldrich* were less complex than here; and (2) the economic impact in *Aldrich* was smaller than here. *PCSR Attorney Fees Brief at 9*. Even if true, for strategic or other reasons, PCSR and Burke did not request a hearing and therefore waived it. They cannot now complain an error was committed or that they were deprived of due process, or a fair procedure.[16] This was their choice.

PCSR also claims error based on a statement by the Water Judge in the *Attorney Fees Order at 4*: "Whether a case is frivolous from its inception, or whether it becomes groundless for lack of evidence at trial, is apparent from the state of the record, and for all practical purposes is a question of law." *PCSR Attorney Fee Brief at 10.* PCSR claims this misinterprets the law. The Water Judge was simply expressing his belief that, first, after nine weeks of hearing PCSR's evidence, credible evidence or rational arguments should be apparent on the existing record, and second, that the attorney fee stage of the proceeding in this case involved an application of the law to those facts. If PCSR or Burke desired to present additional evidence, they could have, but they were required to timely request a hearing in order to do so.

Finally, PCSR asserts that Opposers had an obligation to provide PCSR with notice that they intended to claim fees prior to dismissal of the application. *PCSR Attorney Fee*

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[16] Burke simply relies on the holding in *Pedlow v. Stamp, 776 P.2d 382, 388 (Colo. 1989)* as authority for claim that the Water Judge committed reversible error by not *sua sponte* scheduling a hearing, without a request from PCSR or Burke. *Burke Brief at 49-50.* Burke completely ignores *Aldrich*. In fact, the *Aldrich* court cited *Pedlow*, interpreting that case to require a hearing only if a party requested one. *Aldrich, 945 P.2d at 1380.*

Brief at 8. The law imposes no obligation on Opposers' to notify an opposing party, before a case is concluded, that they intend to seek fees. *See Colorado City Metropolitan District v. Graeber & Sons, 897 P.2d 874, 876 ("A request for attorney fees as a sanction for assertion of a frivolous claim may be requested by motion following entry of judgment ....Those fees may even be awarded on the court's own motion.")* (Citations omitted). Opposers properly followed the procedures for claiming fees set forth in C.R.C.P. 121, §1-22(a).

b. Aurora is bound by PCSR's failure to request a hearing.

Aurora argues that it must be given the opportunity to participate in a hearing on the liability issue. *Aurora Brief at 36-38.* However, Aurora chose not to participate in the liability proceeding, rather leaving that issue to be litigated by its agent, PCSR. As demonstrated above, Aurora's agent, PCSR, did not request a hearing on the liability issue. Aurora is bound by its agent's decision to not request a hearing and by its own inaction when presented with the opportunity to participate. Aurora could have entered a special appearance to contest liability just as it did for its Response to Opposers' Joinder Motion. *Response of Aurora to Motion for Joinder, 8/27/01.* It chose not to do so.[17]

Aurora states that the Water Judge "observed that Aurora and the Applicant are still entitled to a hearing on the threshold issue of attorney fee liability and such a hearing will be held if the case is remanded." *Aurora Brief at 37, citing 12/16/02 at 176-77.* This statement is taken out of context. The Water Judge stated:

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[17] In truth, Aurora itself created part of the problem faced by the Water Judge. Aurora never requested a hearing on liability until after it filed this appeal. At that juncture of the case, the Water Judge had no jurisdiction over the liability question, because it was already on appeal.

> . . . if they [Supreme Court] find that I should have held a hearing on that issue, we'll be in a different posture, but at least we'll have the evidence before us on the question of the amount of fees. So, I'm basically just concluding that I don't have jurisdiction to revisit that issue because it's on review, unless it comes back on limited remand, in which case I would hold a hearing and everyone, including Aurora, would get to argue the issue of liability. *12/16/02 at 176: 18-25; 177: 1-2.* (Emphasis added)

Contrary to Aurora's claim, the Water Judge only stated that he would conduct a hearing if this Court ordered one upon remand. As shown above, there is no basis for such a remand.

4. Centennial, Fairplay and Indian Mountain Awards against Aurora.

Aurora argues that Centennial, Fairplay, Jim Campbell and Indian Mountain Corporation were improperly awarded attorney fees against it. *Aurora Brief at 38.* These Opposers did not assert a claim for attorney fees against Aurora and do not now.

V. CONCLUSION.

The Water Judge carefully considered the entire record in this case, and concluded that the Opposers should be reimbursed for the attorney fees unnecessarily spent to demonstrate that the computer models were seriously flawed and did not provide a reliable basis for a decree to be entered in this case. In light of the facts as determined by the Water Judge, fairness and justice speak strongly for the award.

Dated this 19th day of March, 2004.

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I hereby certify that on this 19th day of March, 2004, a true and correct copy of the **APPELLEES' ANSWER BRIEF ON ATTORNEY FEES ISSUES** was placed in the United States mail, postage prepaid, addressed to the following:

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