10-3-2003

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

SUPREME COURT , STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(303) 837-3785

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF PARK COUNTY SPORTSMEN'S RANCH

Appellants:

CITY OF AURORA, a municipal corporation of the counties of Adams, Arapahoe and Douglas, acting by and through its Utility Enterprise; and PARK COUNTY SPORTSMEN'S RANCH, L.L.P

Appellees:

Colorado State Engineer, Harold D. Simpson; Division Engineer for Water Division No. 1; Colorado Water Conservation Board; Colorado State division of Wildlife; City of Thornton; City of Englewood; City and County of Denver; County of Park; 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.; Cassandra L. Benes Trust; Tarrayall Land and Cattle, LLC; Magness Land Holdings, LLC; Estate of Bob Magness; Personal Representatives of the Estate of Bob Magness; Town of Fairplay; James Campbell; Ruth Barlel; Indian Mountain Corporation; Jill E. Boice; Bob Burch; Robert W. Heckendorf; Michael and Vicki Lothrop; Richard A. Grenfell; Davis Wilson; Darrell Johns; David Johns; John Johns; Joseph G. & Joyce C. Minke; James E. Copanos; Central Colorado Cattlemen's's Association; Gregory Snapp; Roy G. Doerr; Erik Taylor; Wildwood Recreational Village Assoc.; Mark and Carol Carrington; Hansludwig Kommert; and Stephen R. Client, Esq..

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Case Number: **01 SA 412**

PARK COUNTY SPORTSMEN'S RANCH OPENING BRIEF ON ATTORNEY FEES AND COSTS

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Appellant, Park County Sportsmen's Ranch, LLP, a Colorado limited liability partnership, by and through its attorney Gary L. Crandell, P.C., respectfully submits the following Opening Brief.

I. STATEMENT OF THE ISSUES

1. In complex cases involving substantial claims for attorney fees under C.R.S. §13-17-102, does due process require a separate evidentiary hearing to determine whether a claim lacks substantial justification where there was no notice of the claim prior to trial?

2. In the absence of bad faith, may C.R.S. §13-17-102 be construed to permit a finding of groundlessness with respect to any claim for which an expert witness has been qualified under C.R.E. 702 and such expert has testified at trial in support of the claim?

3. If a claim is determined to be groundless for lack of evidence at trial, and credible evidence was offered by the claimant but excluded by the Water Court on grounds of late disclosure, may the Water Court award attorney fees for any period prior to the last date on which the excluded evidence could have been timely disclosed?

4. Is it against public policy or contrary to law to include in an award of costs reimbursements to the prevailing party for fees charged by the unlicensed engineer for engineering services performed in violation of C.R.S. §12-25-105(4)?

5. Is a Bill of Costs inadmissible as an exhibit at trial where the proponent of the exhibit fails to make the data and material underlying the exhibit available for trial as required by C.R.E. 1006?

II. STATEMENT OF THE CASE

The Applicant incorporates herein its Statement of the Case as set forth in its Opening Brief on the merits, and adopts the Statement of the Case set forth in the Opening Brief of the City of Aurora.

III. STATEMENT OF FACTS

A. Attorney fees .

On June 1, 2001, the Water Court dismissed the application. Prior to the entry of that

order, no party or attorney of record had ever raised the issue of attorney fees. The claim had never been argued in any hearing, status conference or pretrial proceeding. Neither the Applicant, the City of Aurora, nor Mr. Burke had any notice of a claim of attorneys fees at any time prior to or during trial. Despite the enormous legal and scientific energy and expertise brought to bear on this litigation by a highly qualified and motivated defense team, not one attorney for the Opposers thought to file a counterclaim, a motion, or a pleading of any kind to the effect that the application lacked substantial justification.

None of the evidence admitted or considered at trial, including the extensive cross examinations by numerous defense counsel, was offered for the purpose of furthering or defending a claim of attorney fees. There were no pretrial warnings or admonitions by the Water Court. The City of Aurora was not even a party to the case.

Once the Order of Dismissal was entered, the Opposers sought to capitalize on the findings and conclusions of the Water Court by seeking attorney fees under C.R.S. §13-17-102. For purely financial reasons, the Opposers also sought joinder of the City of Aurora as a party to the action. Although the motion for attorney fees itself lacked substantial justification, the Water Court nonetheless determined that it would consider the briefs and arguments of counsel regarding the issue of entitlement to fees, without the participation of the City of Aurora, and without hearing additional evidence. (Order, September 25, 2001).

On November 13, 2001, the Water Court entered its Order Concerning Post-Trial Motions which, for the first time, considered the trial evidence in light of the claim of attorney fees. Despite the immense volume of evidence, expert testimony and scientific research admitted at trial, and without having heard any evidence from the Opposers' experts, the Water Court simply adopted

the statements and arguments of Opposers' counsel and found that, "the model would not be defensible at trial without further calibration, sensitivity analysis, and other refinements . . . [Thus] 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." (Order, November 13, 2001, p.10)

Having determined that the Opposers's were entitled to an award of fees, the Water Court held a hearing on the issue of the "reasonableness," but limited proof only to the amount of fees to be awarded. The Water Court did "not entertain testimony or evidence concerning the finding of groundlessness or assignment of liability at the Costs and Fees hearing . . . " (Order, October 8, 2002, p.1). Even after the parties were invited to submit citations to the record in lieu of testimony (Order, May 24, 2002, para. 4), the Water Court refused to consider the submissions of the City of Aurora or the Applicant, including the deposition of Dr. Eastman. (Aurora's Citations to the Record, December 16, 2002, Items 43-46).

On May 1, 2003, the Water Court entered its final order awarding costs and fees to the Opposers. In that Order, the Water Court revealed for the first time that it considered a finding of groundlessness pursuant to C.R.S. §13-17-102 to be a question of law, not a question of fact. (Order, May 1, 2003, p.4) The Water Court went on to apply this new standard and awarded attorney fees as costs to the Opposers in the same manner as it would award fees pursuant to a contractual provision, or after a voluntary dismissal pursuant to C.R.C.P. 41(a)(2).

B. The Eastman Draft Memo.

On October 28, 1998, Dr. Harvey Eastman, drafted a memo to PCSR's lawyer Kenneth Burke, in which he proposed "modeling and model related tasks which would be useful to both enhance the model and to assist in and perform sensitivity analysis for the model." However, after

the memo was published, Dr. Eastman had a meeting with James Jehn and Kenneth Burke, during which it was decided not to conduct the sensitivity analysis. (Trans. Aug.16, 2000, p.139) Dr. Eastman participated in and agreed with the decision based upon the fact that, "the amount of time would be excessive and would not alter the model results." In Dr. Eastman's expert opinion, the sensitivity analysis which was performed was sufficient for the purpose of the model and further analysis would be a waste of time. (Depo. of Harvey Eastman, 6/1/2000, pp1076-77 and 1096-97; See, Aurora's Citations to the Record, December 16, 2002, Items 43 and 46) . Dr. Eastman also testified that the model was a reliable tool to determine project feasibility and could be used in conjunction with stream monitoring gauges to measure stream depletions. Additional sensitivity analysis would only be necessary if the model was used for administrative purposes. (*Trans.*, August 10, 2000, p. 63-64).

There was no evidence admitted at trial to the effect that Dr. Eastman did not perform the sensitivity analysis mentioned in his draft memo. Although the Opposers attempted to urge Dr. Eastman to testify that no sensitivity analysis was done, Dr. Eastman refused to do so. While his testimony was later stricken, Dr. Eastman attempted to testify that the additional sensitivity analysis had been performed by Rocky Mountain Consultants. (Trans. 8/16/2000, pp. 138-39.) The suggestion that the model was flawed or otherwise inadequate was nothing more than the unsupported arguments of counsel. In a fair trial setting, these arguments would have been rejected out of hand.

C. Costs.

Early in the litigation, the Opposers hired Isabella McGowan to perform engineering services and to testify as an expert at trial. She was endorsed by the Opposers as a licensed

professional engineer. Pursuant to C.R.S. §12-25-101, Ms. McGowan was required to be licensed by the State of Colorado.

On August 19, 2002, Ms. McGowan discovered that her license had expired in 1995. (Trans., October 18, 2002, p.147. l.11-21). Although her license had been reinstated prior to hearing, she had been providing engineering services to the Opposers throughout the entire case in direct violation of C.R.S. §12-25-105(4).

Over the Applicant's timely objections, the Water Court awarded fees to the Opposers for the engineering services of Isabella McGowan during the time she was in violation of the licensing laws. Choosing to ignore the plain language of the licensing statute, the Water Court found that, "if Opposers were content with services of Ms. McGowan, and paid her bill, then PCSR is liable, no matter whether Ms. McGowan was licensed or not." (Order, May 1, 2003, p. 13).

Finally, the Center of Colorado for Water Conservancy District ("CCWCD"), through its attorney James W. Culichia, submitted a Bill of Costs seeking total costs of $206,687.67. (CCWCD'S Exhibit 2, Trans., October 17, 2002, p. 26, l.16-17) At hearing, Mr. Culichia testified that the Bill of Costs was compiled from his personal review of his own records, including invoices, checks, an accounting program and other information. (Trans., October 17, 2002, pp.43-44). Mr. Culichia admitted that CCWCD had not supplied the Appellants with any of the original data from which the bill of costs had been prepared. (Trans., p.47, ll.4-7).

The Applicant timely objected to admission of CCWCD's Exhibit 2 based upon C.R.E. 1006. (Trans., October 17, 2002, p. 47, l.8-11) The Water Court overruled the Applicants objection and admitted Exhibit 2, finding that "Mr. Khan's [sic] recollections and his reference to the source documents presents a sufficient foundation, and order that Central's numbered Exhibit 2 be

received." (Trans., October 17, 2003, p. 48, l.16-23)

The Applicant appeals from all of these erroneous orders and rulings.

IV. SUMMARY OF THE ARGUMENT

The Water Court failed to conduct an evidentiary hearing after notice of the claim or attorney fees as required by due process. The Water Court made a determination as a matter of law the application was substantially groundless thereby relieving the Opposers of the evidentiary burden to prove groundlessness by a preponderance the evidence. In addition, the Water Court incorrectly applied the wrong evidentiary standard for determining "groundlessness" by ignoring uncontradicted facts and expert opinions to the effect that the project, including the groundwater model, was feasible.

The Water Court abused its discretion by awarding attorney fees for a groundless claim despite the opinions of Applicant's experts, and without factual support in the record for the Water Court's own conclusions regarding the expert's testimony.

The Water Court abused its discretion and violated public policy by improperly awarding expert witness fees to the Opposers for engineering services performed by an unlicensed Colorado engineer in violation of the express prohibitions of the licensing statute.

The Water Court erred by improperly admitting summary evidence over the Applicant's timely objection where the proponent of the summary failed to make the underlying documents and records available to the Appellants at any time prior to trial.

V. ARGUMENT

A. Standand of Appellate Review.

The Applicant adopts the standards of review set forth in its Opening Brief on the Merits and

in the Opening Brief of the City of Aurora.

B. Due Process Requires That Notice of a Claim of Attorney Fees Must be Provided in Advance of an Evidentiary Hearing on the Claim.

The essence of due process is a fair procedure. Due process requires, "adequate notice of opposing claims, a reasonable opportunity to defend against those claims, and a fair and impartial decision. *Colorado State Board of Medical Examiners v. Hoffner*, 832 P.2d 1062, 1066 (Colo. App. 1992). A claim for sanctions in the form attorney fees pursuant C. R. S.§13-17-102 is a claim which requires a hearing after a party places a claim for attorney fees in issue. *Zarlengo v. Farrer*, 683 P.2d 1208 (Colo. App. 1984). Once a party has filed a motion seeking attorney fees, due process requires that all parties against whom the motion is directed be given an appropriate notice and an opportunity to controvert the motion at a hearing where the movant bears the burden of proving entitlement to an award by a preponderance of the evidence. *Board of County Commissioners vs. Auslander*, 745 P.2d 999 (Colo. 1987) (Emphasis supplied.).

In addition, C.R.S. §13-17-103(1) expressly requires the court to consider certain factors in "determining whether to assess attorney fees and the amount of fees to be assessed." Because consideration of the statutory factors is mandatory, "a proper determination of the issue requires a hearing in order to afford the parties an opportunity to address those statutory factors and to enable the court to make informed findings prior to entry of the award." *Irwin v. Elam Construction, Inc.*, 793 P.2d 609 (Colo. App. 1990); citing, *Pedlow v. Stamp*, 776 P.2d 382 (Colo. 1989) (the statue requires a hearing on the issue of whether a lawsuit is frivolous or groundless.); and see, *Alessi v. Hogue*, 689 P.2d 649, 651 (Colo. App. 1984) (an evidentiary hearing is required to develop facts sufficient for the trial court to exercise its discretion).

Here, the claim of attorney fees was never raised until two months after trial. Once the Water Court had dismissed the application, the wording of the Water Court's Order of Dismissal first prompted the Opposers to seek an award of fees. Once the issue of attorney fees was raised, the Water Court adopted a procedure to be followed by the parties whereby the issue of entitlement was to be decided exclusively on the written submissions without additional evidence of any kind. The selected procedure appears to contemplate that the parties present their respective arguments for or against the award or attorney fees based upon counsels' interpretation of the evidence admitted at trial. However, as the evidence at trial was never offered, or considered with regard to the factual determinations required by §13-17-103, neither the Applicant nor the Opposers could ever have developed the evidence at trial in a manner sufficient to form the basis of an opinion as to the statutory factors. In fact, pursuant to C.R.C.P. 16(5), the effect of the Trial Management Order is to control the course of the trial and precludes the introduction of any evidence for purposes other than the claims identified at least thirty days prior to trial.

While the failure of a party to include a claim of attorney fees in the trial management order is not a waiver of the claim, *Roberts v. Adams*, 47 P.3d 690 (Colo. App. 2001), due process requires that Rule 16 be construed to limit the ability of courts to treat evidence admitted at trial as evidence which was also admitted for the purpose of determining unstated claims such as attorney fees. Because the party seeking fees bears the burden of proof on an unstated and untried claim of attorney fees, the procedure adopted by the Water Court in this instance is fundamentally unfair and has the effect of relieving the Opposers of their burden to prove the lack of substantial justification by a preponderance of the evidence.

The Applicant is cognizant of this Court's ruling in, *In re Marriage of Aldrich*, 945 P.2d

1370 (Colo. 1997), wherein this Court held that a trial court is not required to conduct a hearing on the issues of attorney fees, *sua sponte.* However, the facts and circumstances in *Aldrich* with respect to the claim of attorney fees are so vastly different from the facts and circumstances of this case, due process should require a different result here .

First, the factual issues in *Aldrich* are not complex. That matter involved a routine motion for modification of child support based upon one disputed issue of fact. This application involves enormously complex scientific and legal issues based upon volumes of scientific data and facts. In *Aldrich*, the issue of attorney fees was raised during trial and that claim included only fees incurred for the defense of one motion by one lawyer. Here, the claim arose well after a very long trial which involved weeks of testimony, hundreds of exhibits, and represented the combined work product or many scientists, engineers, hydrologists, and attorneys complied over five years. Unlike the court in *Aldrich*, there was no opportunity whatsoever to consider the evidence in light of the claim for fees while that evidence was being presented.

Finally, the economic impact of the award in *Aldrich* must to be taken into consideration is determining whether the fundamental fairness required by due process would be served. "Due process is flexible and calls for such procedural protections as the particular situation demands." *People v. Taylor*, 618 P.2d 1127 (Colo. 1980). In *Aldrich*, the cost and expense of the hearing on fees could be equal to or greater than the cost of the motion hearing itself. In this case, the Water Court insisted upon an evidentiary hearing on the amount of fees to be awarded and set that amount in excess of $1 Million. Given the economic magnitude of the claim, as well as the relative ease of hearing the issues of entitlement and amount at the same time, the Applicant respectfully suggests that while due process would not require a different result in *Aldrich,* the substantial and

complex claims for attorney fees in this case should dictate a different procedural standard.

Finally, whether or not a hearing is required, the Water Court's award in this case is still fatally flawed. According to the Water Court, the Opposers had no evidentiary burden whatsoever with respect to the issue of entitlement. According to the Water Court, the issue of "groundlessness" is a question of law for the court:

> "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. On the other hand, the reasonableness of hourly rates and volume of work performed inherently turns upon questions of fact. Accordingly, the court concludes that the determination of frivolousness may be made *sua sponte*, without a hearing set . . . "
>
> (July 30, 2003 Correct Order at p.5)

Given the Water Court's express misinterpretation of the law in deciding whether to award attorney fees, it is clear that the Water Court failed to consider the trial evidence in light of the Opposers' evidentiary burden to prove the fact that the application lacked substantial justification "by a preponderance of the evidence." *Board of County Commissioners of Boulder v. Eason,* 976 P.2d 271 (Colo. App. 1998); *Board of County Commissioners v. Auslander, supra.* Having failed to apply the proper evidentiary standard to the determination of entitlement, the Water Court's award simply cannot stand.

C. In the Absence of Bad Faith, C.R.S.§13-17-102 Should Not Be So Liberally Construed as to Permit Sanctions for Groundless Actions in Complex Litigation Where the Evidence Includes Expert Testimony Which Supports the Claim.

Pursuant to the "American Rule," an award of attorney fees is improper in the absence of a contractual agreement or specific statute. *City of Wheat Ridge v. Cerveny,* 913 P.2d 1110 (Colo. 1996). The Colorado statute permits fees to be awarded only in those instances where "the

bringing and defense of an action, or part thereof (including any claim for exemplary damages). Is determined to have been substantially frivolous, substantially groundless, or substantially vexatious." C.R.S. §13-17-101, et seq. According to the general assembly, the legislative purpose of the statute is to prevent burdensome litigation which interferes with the effective administration of justice. The statute is not designed to shift the burden and expense of litigation to the prevailing party. "The statute not intended to discourage counsel from zealous representation of client, but to balance that duty against the important policy of discouraging unnecessary and unwarranted litigation." *Western Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984).

C.R.S. §13-17-102(4) authorizes the filing of a motion for attorney fees only upon a showing that a party or his attorney brought or defended an action which lacked substantial justification. A claim is frivolous if no rational argument is presented based upon the law or evidence to support the claim. A claim is groundless if the allegations of the complaint are sufficient to survive a motion to dismiss for failure to state a claim, but are not supported by any credible evidence at trial. *Western Realty, Inc. v. Isaacs, supra.* A vexatious claim has been defined as one which is brought or maintained in bad faith. *Bockar v. Patterson*, 899 P.2d 233 (Colo. App. 1994). However, novel questions of law are not frivolous. *M Life Insurance Company v. Sapers & Wallack Insurance Agency*, 962 P.2d 335, 338 (Colo. App. 1998). Groundless claims do not exist where reasonable trier of fact might well have drawn differing conclusions as to the evidence. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188, 1199 (Colo. App. 2000), *aff'd in part and rev'd in part of other grounds,* 17 P.3d 797 (Colo. 2001).

In addition, "bad faith" is not just vexatious. Bad faith is a factor which is or should be

considered in every claim for sanctions under the statute. See, *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989). "If the record reveals that counsel or any party has brought, maintained or defended an action in bad faith, the rationale for awarding attorney fees is even stronger. *"Western Realty, Inc., supra.* Conversely, good faith is a factor militating against an award of attorney fees. C.R.S. §13-17-102(5) expressly exempts reasonable and voluntary dismissals from sanctions under the statute, and §13-17-102(7) specifically authorizes good faith attempts to establish new theories of law. See also, *SaBell's, Inc. v. City of Golden*, 832 P.2d 974, 978 (Colo. App. 1991)(a good faith presentation of legal theory which is arguably meritorious is not sanctionable); and see the concurring opinion of Judge Dubofsky in, *Pedlow v. Stamp*, 819 P.2d 1110. 1112 (Colo. App. 1991):

> ". . . I would adopt an interpretation of §13-17-101, et seq., that only permits the recovery of attorney fees for bringing frivolous claims when the claim is totally meritless and the attorney/party advocating the claim knew or should have known it was meritless." (Emphasis supplied.)

Here, the application was originally filed in 1996. The matter came on for trial on July 10, 2001 - some five years later. During that pretrial period, the combined knowledge and expertise of water lawyers, engineers, hydrologists, and geologists were brought to bear on the project by both the Applicant and the Opposers. Together the applicant's experts and attorneys spent thousands of man hours preparing and analyzing highly technical and scientific data, involving an unimaginably complex system of groundwater and surface water storage and drainage. The fact that the trial consisted of 37 days of testimony involving only seven witnesses, six of whom were experts, manifests the daunting complexity of this case.

Despite this complexity, and although the pleadings themselves consist of approximately

one thousand separately filed documents, not one sanction/order was issued by the Water Court against the Applicant for any discovery violation or other improper conduct. In addition, the record is devoid of any ruling, warning or admonition of any kind with respect to any party for any reason. Most notably, the Water Court never admonished nor warned the Applicant's attorneys or witnesses at any stage of the proceeding regarding the credibility of the Applicant's experts or as to the truth or veracity of their testimony. In fact, the Water Court and the Opposers agreed that there was never any bad faith on the part of any Appellant. (Trans., October 18, 2002, p.97-98)

"As long as 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." *Coffey v. Healthtrust, Inc.*, 1 F.3d 1101 (10th Cir. 1993). Where the expert testifies in support of his opinion after having been accepted by the court to testify as an expert, the federal courts consider the reliance to be reasonable. *Id, at p. 1104.* This Court has not yet considered the extent to which a party or its attorney may rely on the opinions of its experts. The Applicant urges this Court to adopt the federal standard as set forth in *Coffe, supra.*.

Under Colorado evidentiary rules, the trial court must make an initial determination as to the qualifications of a witness to testify as an expert. C.R.E. 702 establishes the standard to be applied in determining whether expert testimony should be admitted in a particular case. *Huntoon v. TCI Cablevision of Colorado, Inc.*, 969 Colo. 681 (Colo. 1998). Once qualified, the expert is free to testify in the form or opinion or otherwise as to an ultimate issue of fact, C.R.E. 704; or to base his opinions on the reports of other experts whether or not those reports are admissible. C.R.E. 703. 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.

Here, the Applicant offered six witnesses for qualification as experts under Rule 702. All of the Applicant's experts were so qualified by the Water Court, without objection from the Opposers. The Applicant's expert testified at length regarding all aspects of the project. Without exception, these experts opined in support of the project and the effectiveness of the modeling tools.

In the face of this extensive record, the Water Court found that an award of attorney fees could properly be based upon one draft memo prepared a year and a half prior to trial. With this tidbit of evidence, the Water Court rejected every expert opinion and concluded that the Applicant had "ignored its expert's opinion about the defensibility of the model at trial, and proceeded to litigate its claims. Thus, it did not rely on its expert." (Order Concerning Post-Trial Motions, November 13, 2001, at p.10). The Water Court's conclusions constitute a gross abuse of discretion.

First, the Water Court's conclusion presupposes that there was evidence admitted at trial to the effect that no steps were taken after October 1998 to "correct the flaws in the model," and that the model was, in fact, "indefensible at trial." Second, even assuming *arguendo* that there is some testimony at trial which tended to support the Water Court's finding, the contents of the draft memo should have no impact whatsoever on the issue of attorney fees in light of the all of the other expert testimony admitted at trial. On August 10, 2000, Dr. Eastman testified as follows:

> "Q. (Mr. Burke) While we're waiting for that, Doctor, could you tell me again what the purposes of the groundwater model was?
>
> A. The purpose of the groundwater model was to assist in determining feasibility of the project, and this included: the determination of potential stream depletions by the project; the determination of a reasonable pumping scenario for the design of the project; to determine the ability of the project

to recharge the aquifers, capability of recharge, and to determine the potential impacts on existing wells in the South Park Basin and vicinity.

Q. You have an opinion as to whether the model has met its intended purposes?

A. I believe that it has. That is my opinion.

Q. And how has it done that?

A. It's done that by providing stream depletions. It has done that by determining an efficient method of recharging the aquifers, and has shown the aquifers capable of being recharged. It has come up with a reasonable pumping scenario, reasonable recharge facility design, and all this is made available to other consultants to assist in determining the project feasibility.

Q. Doctor, have you formed an opinion to a reasonable degree of scientific certainty whether the model has the ability to be used as a predictive tool to accomplish those purposes?

A. Yes . . .

Q. I asked you before if you formed an opinion to a reasonable degree of scientific certainty regarding the ability of the model to be used as a predictive tool for these purposes, and you answered in the affirmative. What is your opinion?

A. That means that this model is a sufficient— is a sufficient tool, that it can be relied upon for making professional decisions regarding the project.

(Trans. August 10, 2000, p. 36, l.21 to p. 38, l.17)

In addition, on June 1, 2000, the Opposers took Dr. Eastman's deposition wherein he testified in detail regarding the sensitivity analysis which had been performed by Rocky Mountain Consultants. (Aurora's December 16, 2002 Citations to the Records, Items 43, 46) At trial, the Opposers sought to introduce evidence that the sensitivity analysis had not been completed. When Dr. Eastman refused to agree, the Opposers moved to strike his entire testimony.

Q. (By Mr. Culichia) And then over on Page 9 (referring to the October 28, 1998 Memo), you were proposing to do a complete sensitivity analysis of

the predicted model?

A. Yes.

Q. And you never performed the work proposed in your October 28, 1999 [sic.] memo relative to doing the sensitivity analysis?

A. No I did not. I believe Rocky Mountain Consultants did some of it.

MR. CULICHIA: Your Honor, I move to strike that answer for several reasons.

THE COURT: Sustained.

(Trans., August 16, 2000, p.138, l. 15 to p. 139, l. 1)[1]

The testimony of Dr. Eastman supports the application as of the dated of trial. His opinions were admitted without objection. Whether or not the Water Court considered Dr. Eastman's testimony to have any importance or weight when compared to the October 28, 1998 draft memo is not dispositive of the issue of groundlessness. A claim is groundless if the allegations of the complaint are sufficient to survive a motion to dismiss for failure to state a claim, but are not supported by any credible evidence at trial. *Western Realty, Inc. v. Isaacs, supra.* That same rule should logically apply to expert testimony, i.e. if any of the experts opinions support the claim, the claim is not groundless. The fact that a portion of an expert opinion might be interpreted by another to discredit the expert or his opinion is simply an inherent risk of all complex litigation, not proof of a groundless claim.

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[1]Dr. Eastman had every right to rely upon the tests and reports of Rocky Mountain Consultants regarding the sensitivity analysis. Pursuant to C.R.E. 703, the Water Court's exclusion of the RMC reports had no effect actual on Dr. Eastman's opinions as he could to rely on the RMC sensitivity analysis as a basis for his opinions whether or not they were admissible.

Dr. Eastman was qualified by the Water Court pursuant to C.R.E. 702.[2] Once properly qualified, a party who has procured and offered the expert in good faith should never be exposed to a finding that the claim was "substantially groundless." Here, the Water Court made no finding that Dr. Eastman's testimony was not credible. Just as experts have the right to rely on other experts to form the basis of their opinions, so should the parties have the right to rely on their experts as sufficient grounds for their claims.

D. Attorney Fees may not be Awarded for any Period Prior to the Last Date on Which the Applicant was Authorized to Endorse Missing Evidence.

Premised upon the arguments of counsel, the Water Court determined that the Applicant knew or reasonably should have known that the application was groundless as of October 28, 1998. The Water Court's ruling was based upon a mistake of fact that the Applicant had not taken steps to "correct the flaws in the model" prior to trial. However, the date of the Eastman memo is irrelevant to a determination of when the Applicant knew or should have known its claim was groundless.

The failure of a party to present evidence at trial on a required element of a claim does not permit the finding of groundlessness until the last date on which witnesses or evidence on the element may be disclosed or endorsed. "Where credible evidence was in existence which could have been produced at trial . . . , until the time that further designation of [evidence] for trial would not be permitted by the court . . . the claims are not groundless. *Harrison v. Smith*, 821 P.2d 832,

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[2]Aurora and Kenneth Burke have cited to uncontradicted testimony of five additional experts, including the other five experts who have testified in support of the project. The Applicant adopts the arguments, citations to the record and authorities cited by both Aurora and Kenneth Burke regarding the legal effect of the remaining experts having testified on behalf of the Applicant.

835 (Colo. App. 1991).

On July 13, 2000, the Water Court excluded the RMC sensitivity analysis. (Trans., July 13, 2000, p. 6-7) The analysis was excluded based only upon the Water Court's finding that is had not been timely disclosed.[3] According to the Water Court, the last date available to the Applicant's attorneys to disclose the sensitivity analysis was May 1, 2000. Although no fees should be awarded for any period, to the extent that fees are awarded based upon a finding that the application was substantially groundless, the finding of groundlessness cannot predate May 1, 2001.

E. Expert Witness Fees Should Not Be Awarded as Costs of Suit Where to do so Would Violate an Applicable Licensing Statute.

Isobel McGowan is a consulting hydrologist and engineer. Ms. McGowan was endorsed as by Centennial Water and Sanitation District and others to provide engineering services and testimony in defense of the application. Ms. McGowan did not testify at trial. However, Ms. McGowan did provide engineering service to the Opposers and was, therefore, engaged in the "practice of engineering" as defined by C.R.S. §12-25-102 (10). Pursuant to C.R.S. §12-25-105(4), Ms. McGowan may not use a suspended or expired license for any purpose. The statute sets forth the public policy of Colorado with respect to the licensing of engineers.

Isabella McGowan first admitted in October 2002 that she was not licensed by the State of Colorado from 1995 to 2002. The Water Court awarded all of the expert witness fees requested by

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[3]Aurora argues in its Opening Brief that the exclusion of this evidence was erroneous as the Opposers failed to prove any prejudice as a result of the late disclosure, and the Water Court failed to consider whether the Opposers were prejudiced. The Applicant adopts Aurora's arguments and conclusions.

the Opposers for Ms. McGowan engineering services as costs in this action. The award violates C.R.S. §12-25-105(4) and thereby violated public policy. In addition, the Applicant is being forced to compensate an expert for having committed a criminal act. The court of appeals has refused to enforce a contract between an unlicensed engineer and his/her client. See, *Walker Adjustment Bureau v. Wood Brothers Homes,* 582 P.2d 1059, 1063 (Colo App.1978);rev'd on other grounds, 601 P.2d 1369; *Reed V. Bailey*, 524 P.2d 80 (Colo. App. 1974), and see, *Goodfellow V. Kattnig,* 533 P.2d 59 (Colo. App.1975)(Neither party to a contract involving an unlicensed professional may seek judicial assistance to enforce the agreement, including any remedy for the value of services rendered.) It would be unconscionable for the Opposers to be permitted to enforce its contract with Isabella McGowan against the Applicant.

F. It Was Error to Admit CCWCD'S Bill of Costs.

Pursuant to C.R.C.P. 121, §1-22(1), "[a] party claiming costs shall file a Bill of Costs . . . The Bill of Costs shall itemize and total costs being claimed. Taxing and determination of costs shall be in accordance with C.R.C.P. 54(d) and Practice Standard §1-15." However, once the court determines that a hearing is required under Practice Standard §1-15, the admission of a Bill of Costs as evidence should be subject to the same rules of evidence as are other summaries.

Under C.R.E. 1006, it is a condition precedent to the admission of a summary that originals or duplicates of underlying material be made available for examination by the other party. The failure of a party to seek discovery of the underlying materials does not affect that parties right to examine and inspect the documents or records from which a summary is prepared. *International Technical Instruments v. Engineering Measurements, Inc.*, 678 P.2d 558 (Colo. App. 1983). It is the proponent's burden to make the records available to the opposing party. *People v. McDonald,*

15 P.3d 788 (Colo. App. 1992).

Here, CCWCD sought to admit its Bill of Costs without ever having provided the underlying originals or duplicates to the Applicant. At trial, Mr. Culichia conceded that the underlying materials he had reviewed were not made available to the appellant, however the Water Court admitted the Bill of Costs based only upon the proponents review of the underlying records. Where, as here, the proposed Exhibit 2 is the only evidence to establish the amount of costs being sought, the "review" of the proponent of the exhibit is a legally insufficient foundation. The admission of Exhibit 2 and the costs awarded thereon should be reversed.

CONCLUSION

For the reasons stated in the Applicants' Opening Brief on the Merits, and herein, the Water Court's dismissal, order for attorney fees and assessment of costs should be reversed and remanded with instructions.

Respectfully submitted this 3rd day of October, 2003.

GARY L. CRANDELL, P.C.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that I placed a true and correct copy of the foregoing this 3rd day of October, 2003, in the U.S. Mail, postage pre-paid, addressed as follows:

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