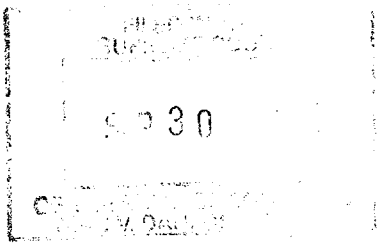
9-30-2001

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



SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, Fourth Floor Denver, Colorado 80203	
Appeal from the District Court, Water Division 1 State of Colorado Case Number: 96CW014 Honorable Jonathan W. Hays, Presiding IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF PARK COUNTY SPORTSMEN'S RANCH **Appellants:** CITY OF AURORA, a municipal corporation on the counties of Adams, Arapahoe and Douglas, acting by and through its Utility Enterprise; and PARK COUNTY SPORTSMEN'S RANCH, LLP, and KENNETH BURKE, former counsel for Park County Sportsmen's Ranch, LLP **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 Homeowners 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; Tarryall 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 Bartle; 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. and 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; Husludwig Kommert; and Stephen R. Cline, Esq.	**▲COURT USE ONLY▲**
Attorneys for: Amicus Curiae, The Colorado Trial Lawyers Association Name: Bennett S. Aisenberg, #3097 H. Paul Himes, Jr., #8320 Address: The Law Offices of Bennett S. Aisenberg, P.C. 1600 Broadway, Suite 2350 Denver, Colorado 80202 Phone: (303) 861-2500 Fax Number: (303) 861-0420	01-SA-412 Case Number

AMICUS CURIAE BRIEF OF THE COLORADO TRIAL LAWYERS ASSOCIATION

TABLE OF CONTENTS

CASES

STATUTES AND OTHER AUTHORITIES

The Colorado Trial Lawyers Association (CTLA), by and through its attorneys The Law Offices of Bennett S. Aisenberg, P.C., respectfully submits the following Amicus Curiae Brief in support of Applicant-Appellant Park County Sportsmen's Ranch, LLP's (PCSR) trial court counsel Kenneth J. Burke.

THE ISSUE PRESENTED FOR REVIEW

The issue presented for review is:

Did the Water Judge err in assessing attorney's fees under C.R.S. 13-17-102 against PCSR's trial court counsel Burke despite Burke's reliance on experts to support his clients' application for adjudication of water rights?

CTLA'S INTEREST

CTLA is a voluntary bar association whose members primarily represent injured tort plaintiffs, often in cases which must be evaluated and supported by expert opinion, and often in controversial cases. Examples are professional malpractice where expert opinion is almost always required to establish whether a physician or attorney's conduct did or did not meet the requisite standard of care [see *Williams v. Boyle*, 72 P.3d 392, 397 (Colo. App. 2003)], defective products where expert opinion is required to determine if there is a design or manufacturing flaw and explain the flaw to the judge or jury, and automobile accidents in which accident reconstruction experts assist attorneys, judges and jurors in establishing how an accident occurred. While the pending case does not involve a personal injury, CTLA believes the Water Judge's award of attorney's fees under the circumstances of this case, if affirmed, will have

serious adverse ramifications on its member attorneys' willingness and ability to represent injured tort victims. CTLA asserts that the Water Judge's decision awarding attorney's fees for an allegedly groundless and frivolous water rights application, despite several experts' testimony supporting the predicates for approval of the application, will significantly chill the use by personal injury and malpractice counsel of experts to help evaluate and support legitimate plaintiff claims. No longer will counsel be able to assume that favorable expert opinion supporting the client's claim provides the reasonable basis necessary to go forward with the claim without fear that counsel and client could be hit with large attorney fee awards. Generally, both attorney and client lack the medical, scientific, or technical expertise to independently evaluate the claims without expert review and opinions. Such a chilling effect will in turn deny many injured tort plaintiffs access to the courts for enforcement of their claims. CTLA believes that many victims may go uncompensated if the Water Judge's decision is not reversed.

STATEMENT OF THE CASE

Attorney Burke represented PCSR in the trial court in its effort to adjudicate the necessary water rights to develop a water supply project on and under land in South Park, Colorado in order to supply water to Appellant City of Aurora and itself. The planned project included pumping ground water from aquifers under the land and recharging the aquifers through surface water sources, i.e., area streams, to store water for later uses. The water rights application sought approval of its plan to utilize such ground and surface water. In eight weeks of trial, Burke and PCSR presented testimony from five principal expert witnesses on behalf of the project. The following is but a very brief summary of that expert testimony, but we believe

reflective of the effort put in to evaluate the feasibility of the project, and reflective of the support for the project by PCSR's principal water experts.

Expert Bethel testified that he had 25 years experience and spent over 2,000 hours studying the surface water available for the project. He used and testified to the reliability of a recognized computer model (RIBSIM), fed with the underlying data Bethel had accumulated, to determine the amount of water in the project streams that would probably be available in priority for the project (7/12 p.m., pgs. 5-13; 7/14, pgs. 87, and 105-109).

Expert Eastman testified for nearly six weeks. He studied extensively the geology and hydrology of the area and testified the South Park basin where the project was to be done was capable of controlling water for the purposes contemplated by the project, i.e., that the basin was able to maintain a cone of depression for water storage and recharge the aquifer through surface facilities (7/19, pg. 117). He used a recognized computer groundwater model (MODFLOW) and RIBSIM, and data on Aurora's projected water usage, to support the project's feasibility (8/7, pg. 52; 8/24, pgs. 50-51). His model approach was consistent with that done in other Colorado water court cases (8/18, pgs. 134-135). Dr. Eastman testified at trial in support of his model approach, and he and five other experts testified in support of the project's feasibility.

Expert Jehn, also an expert in groundwater modeling, testified that he spent over 4,500 hours performing and studying percolation tests, well pumping tests, peizometer studies, and measurements of aquifer characteristics for use in the groundwater model used by Dr. Eastman.

Mr. Jehn testified the size and location of the cone of depression for water storage could and would be controlled by well pumping and redistributing the groundwater using wells and by use of recharge facilities (8/23, pgs. 56, 89-107, 113, 119; 8/24, pgs. 11-14, 17-19, 28-31 and 57-83).

Expert Hesemann likewise investigated the geology and aquifer characteristics by conducting independent field visits, constructing and operating test pits and peizometers, and also made water and geochemical modeling studies to determine the suitability of the aquifers for recharge. He concluded the site was excellent for the planned water storage project and that the project would control water by holding it within the aquifer until removed by pumping. He also verified the accuracy of the data used in, and the predictions made by, the computer model MODFLOW used by Dr. Eastman (8/29, pgs. 17, 85; 2/20, pgs. 37-38 and 79).

Expert Ault reviewed the entire project, including Aurora's projected water usage, surface water availability, expected project yield, and the computer models used, and concluded the project was economically, financially and technically feasible (2/20, pgs. 93-95, 131; 2/21, pgs. 266-68, 272).

As was made apparent to the Water Judge, the experts cumulatively spent several thousands of hours investigating and evaluating the planned water storage project, at a cost to PCSR and Aurora of several million dollars. The experts' testimony strongly supported the project.

In his Order Dismissing the Application, the Water Judge found or accepted (1) that expert Bethel's method for determining average annual stream flows produced reasonable threshold estimates (although he questioned whether other variables were properly considered) [p. 9 & 10 of Order]; and (2) that more water would annually be available than would be pumped from the aquifer to meet contract requirements with Aurora, and so the collection system would generate significantly more water than would be withdrawn [p. 11 of Order].

Additionally, in his Order Concerning Post-Trial Motions, the Water Judge found (1) that the validity and reliability of the RIBSIM model to determine the amount of surface water available was not disputed (also noting, however, that the accuracy of the results depended on the accuracy of the data used in the model) [p. 2 of Order]; and (2) that at the time of the application, PCSR had legitimate claims for groundwater rights, surface water rights, and a plan for augmentation [p. 10 of Order].

Finally, in his Order, Re: Costs and Attorney's Fees Award, the Water Judge concluded (1) that PCSR's use of the groundwater model to support an augmentation plan was scientifically defensible, and its plan for augmentation did not involve any new theory of law [p. 10 of Order]; and (2) that all of PCSR's experts opined in numerous instances during the trial that the model used was useful in predicting depletions, available replacement water, and overall project feasibility (but questioned whether the experts had independently analyzed the model or whether the data input was complete) [p. 15 of Order].

Despite the overwhelming expert support for the project, and the Water Judge's favorable findings as to numerous predicates for a favorable adjudication, the Water Judge not only dismissed the application but awarded $1.3 million attorney's fees against PCSR, the City of Aurora, and Burke personally for an allegedly groundless and frivolous water application filing.

SUMMARY OF ARGUMENT

Attorneys have an obligation to help provide access to the Courts for injured tort victims to seek compensation for their injuries. Attorneys also have an obligation to zealously represent their clients in litigation to recover that compensation. Many tort cases require an attorney to rely on expert witnesses in evaluating and prosecuting their client's claim. An attorney, such as counsel Burke in the present case, who has relied on experts to establish the basis for his client's claim, and has successfully qualified and had the expert's testimony admitted into evidence by the Court, should not have to fear having attorney's fees assessed against him and his client for an allegedly frivolous and groundless claim. The Water Judge's assessment of attorney's fees against counsel Burke in the present case will, if not reversed, act to chill attorneys' reliance on experts to establish a basis for the client's claims. Because many tort cases cannot be prosecuted without reliance on expert witnesses, many injured tort victims may not have access to the Courts, may not be able to obtain zealous representation, and will go uncompensated as a result.

ARGUMENT

All injured tort plaintiffs should have access to the Courts.

This Court has repeatedly stressed the importance of making legal representation available to injured persons with legitimate tort claims. For instance, it has rules to encourage

attorneys to represent injured tort plaintiffs pro bono or for reduced costs, and in promulgating those rules has indicated an attorney has an ethical obligation to help provide access to the courts. See for instance Colorado Rules of Professional Conduct 6.1.

The Comment to Rule 3.1, Colo.R.P.C., while mandating ethically that a lawyer not assert a frivolous claim, stresses a lawyer's duty to help provide access to the Courts.

> "The professional responsibility of a lawyer derives from membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. Each member of our society is entitled to have his or her conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.
>
> [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause...."

Courts in other jurisdictions have warned that statutes equivalent to C.R.S. 13-17-102 should be viewed with suspicion and not be allowed to deny persons access to the courts.

> "....In considering an application for fees and costs under the [frivolous claim] Act, we must be mindful of the fact that 'the right of access to the court should not be unduly infringed upon, honest and creative advocacy should not be discouraged....' [cite] 'In a democratic society, citizens should have ready access to all branches of government, including the judiciary.'[cite]..."

Graziano v. Grant, 741 A.2d 156, 166-67 (N.J. App. 1999).

> "....application of the statutory authorization for recovery of attorney's fees [for a frivolous or groundless claim] under Indiana Code §34-1-32-1 must

> leave breathing room for zealous advocacy and access to the courts to vindicate rights [citation]. Courts must be sensitive to these considerations and view claims of 'frivolous, unreasonable, or groundless' claims or defenses with suspicion...."

Mitchell v. Mitchell, 695 N.E.2d 920, 925 (Ind. 1998)

An attorney must represent his client zealously.

This Court has also emphasized that an attorney has an ethical and legal duty to zealously represent his client. The Comment to Rule 1.3, Colorado Rules of Professional Conduct, states in part that

> "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf....a lawyer should carry through to conclusion all matters undertaken for a client." [Emphasis supplied.]

To advocate on a client's behalf with zeal means to advocate with fervor and passion in pursuit of the client's claim or project (Webster's New Collegiate Dictionary). See also *Mission Denver Co. v. Pierson*, 674 P.2d 363, 365 (Colo. 1984), *Sullivan v. Lutz*, 827 P.2d 626, 628 (Colo. App. 1992), and *Wood Bros. Homes v. Howard*, 862 P.2d 925, 935 (Colo. 1993). [An attorney has an ethical obligation to zealously represent a client.]

> The past reluctance by state appellate courts to impose sanctions in the nature of attorney fees and court costs derived from the general principles established by DR 7-101 and DR 7-102 of the Code of Professional Responsibility which obligated an attorney to zealously represent his or her client...[18]

> 18. Rules 1.2, 1.3, and 3.1, among other provisions of our new Rules of [Professional] Conduct obligate attorneys to, among other things, represent their clients in a fashion similar to that required under DR 7-101 and DR 7-102."

[*Howard* at pg. 935].

That obligation to zealously pursue a client's claim must not be hindered. *Stone v. Satriana*, 41 P.3d 705, 710 (Colo. 2002).

Helping to provide access to the Courts, and representing a client zealously, in many cases requires counsel to rely on experts.

Colorado Rules of Evidence 702 authorizes admission of expert testimony regarding scientific, technical or other specialized knowledge which will assist the judge or jury in understanding the evidence or in determining a fact in issue.

> "**Rule 702. Testimony by experts**. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. *(Federal Rule identical)*" C.R.E. 702.

Many cases require an attorney to rely upon expert review and testimony to prove a client's case. Professional malpractice cases require analysis by an expert in the pertinent profession as to whether the defendant met the requisite standard of care of that profession in the community. Product liability cases require expert engineering analysis of design and manufacture. Automobile accidents often require expert accident reconstructionists to explain

the probable chain of events leading to a crash. Without the use of such experts, the victims of professional malpractice, defective products, or careless drivers could never prove their case and thus could never be compensated for their many times devastating injuries. In the same manner, PCSR's attorney Burke relied upon water experts, who were qualified by the Court under Rule 702, to establish the basis for the required water rights for the project. All supported the feasibility of the project and gave the basis for their support.

> "....litigants must have access to expert opinion evidence....To permit actions such as plaintiff contemplates in this case [conspiracy against doctor for allegedly preparing a false medical report in support of a personal injury claim] might ultimately result in depriving the judicial system of expert witnesses who are invaluable to all segments of the bar....The Courts must zealously protect the rights of all litigants to present their evidence [through experts] within the framework of the law."

OMI Holdings, Inc. v. Howell, 918 P.2d 1274, 1283-84 (Kan. 1996), quoting and adopting the reasoning of the Kansas Court of Appeals in *Hokanson v. Lichtor*, 626 P.2d 214 (Kan. App. 1981). [Emphasis supplied]

This court held in *People v. Schreck*, 22 P.3d 68 (Colo. 2001), that CRE 702 governs a trial court's determination as to whether scientific or other expert testimony should be admitted.

> "Such an inquiry should focus on the reliability and relevance of the proffered evidence and requires a determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury [in our case to the court itself]. We also hold that when a trial court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case.... [*Schreck* at pg. 70.]

> The [United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, at 585, 113 S.Ct. 2786] Court thus held that under Rule 702, the reasoning or methodology underlying the testimony must be scientifically valid, and that such reasoning or methodology may properly be applied to the facts of the case...The court concluded its analysis by noting that the 'inquiry envisioned by Rule 702 is...a flexible one,' and that the focus of the inquiry should be scientific validity as it pertains to evidentiary relevance and reliability. *Id.,* at 594, 113 S.Ct. 2786.
>
> Recently, the United States Supreme Court expanded *Daubert's* general holding concerning the trial judge's gatekeeping function to testimony based not only on scientific knowledge, but also to testimony based on technical and 'other specialized' knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)." [*Schreck* at pg. 74.]

In *Daubert*, at 113 S.Ct. 2797, the United States Supreme Court also explained that the inquiry into reliability for admission of expert testimony requires a court to make a determination, focusing solely on the principles and methodology used, that the expert has "good grounds" for his or her opinion.

Thus, we believe the Water Judge's admission of PCSR's expert testimony was necessarily a determination the experts had good grounds for their opinions that the planned water storage project was feasible, and a confirmation of the reliability of the experts' work. Hence, counsel Burke must be able to rely on those experts to advance his clients' claims. CTLA asserts the Water Judge's admission of PCSR's expert testimony as reliable and based on "good grounds" [*Daubert*] necessarily precluded the Judge's later ruling that the application was frivolous and groundless. His admission of PCSR's experts' testimony established reliability and effectively lulled PCSR and counsel Burke into believing there was no necessity to present testimony of their several other experts to establish a reliable basis for the application.

C.R.S. 13-17-102 was not meant to chill an attorney's reliance on experts to help evaluate and support his case.

The Water Judge awarded attorney's fees against PCSR, Aurora, and attorney Burke under C.R.S. 13-17-102. That statute authorizes an award of fees when a claim lacks substantial justification (13-17-102(2)). The statute defines the term "lacked substantial justification" as "substantially frivolous, substantially groundless, or substantially vexatious."

In *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991), at page 202, the Colorado Court of Appeals "recognize[d] the tension that exists between the statute at issue [C.R.S. 13-17-102] and the Code of Professional Responsibility, Canon 7 [see Comment to Rule 1.3, referred to above, of the current Colorado Rules of Professional Conduct] which requires lawyers to represent their clients zealously."

Thus, the purpose of awarding attorney's fees under C.R.S. 13-17-102 is to deter egregious conduct only, without deterring a lawyer from vigorously asserting his client's rights. *Wood Brothers Homes, Inc. v. Howard*, 862 P.2d 925, 935 (Colo. 1993). *Mission Denver Co. v. Pierson*, 674 P.2d 363, 365 (Colo. 1984). An award of attorney's fees is not authorized by the statute unless the claim is substantially frivolous, groundless or vexatious. *Shaw v. Baesemann*, 773 P.2d 609, 611 (Colo. App. 1988). A claim or defense is frivolous only if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). *Fox v. Division*

Engineer for Water Division 5, 810 P.2d 644, 647 (Colo. 1991). A claim is groundless only if it is not supported by any credible evidence at trial. *Western United Realty, supra.*, at pg. 1069.

However, an award of attorney's fees under C.R.S. 13-17-102 does not apply to meritorious claims which prove unsuccessful. *Western United Realty, supra.*, at pg. 1068. Attorney's fees should not be awarded merely because a plaintiff is determined not to be entitled to relief. *Torres v. Portillos*, 638 P.2d 274, 276 (Colo. 1981). *Lobato v. Taylor*, 13 P.3d 821, 836 (Colo. App. 2000), reversed on other grounds at 71 P.3d 938 (Colo. 2002). A good faith presentation of a legal theory which is arguably meritorious is sufficient to avoid an award of attorney's fees. *Sabell's, Inc. v. City of Golden*, 832 P.2d 974, 978 (Colo. App. 1991). Where there is a rational basis grounded in law and evidence for plaintiff's claim, a trial court's finding that the claim is frivolous cannot be sustained. *Hart & Trinen v. Surplus Electronics Corp.*, 712 P.2d 491, 493 (Colo. App. 1985).

In the case at issue, attorney Burke qualified several water experts to testify on behalf of the project. By admitting their testimony under C.R.E. 702, the Water Judge necessarily made a determination that their testimony was reliable. Each of the experts testified to various facets of the project. They concluded the project was scientifically, technically and financially feasible. Yet the Water Judge awarded fees against PCSR, Aurora, and attorney Burke for maintaining a frivolous and groundless position.

In *Coffey v. Healthtrust, Inc.*, 1 F.3d 1101 (10th Cir. 1993), the United States Court of Appeals for the Tenth Circuit directly addressed the issue now addressed by amicus curiae CTLA. In *Coffey,* the trial court had entered Rule 11 sanctions against an attorney finding that he had filed a false and misleading pleading, i.e., that the attorney knew the authors of an economic analysis study the attorney used to support his pleading believed the study did not help the client's position. The attorney also had simultaneously filed his expert economist's affidavit stating that the study did support the plaintiff's position. In reversing the district court's imposition of sanctions, the Court of Appeals held that an attorney cannot be subject to sanctions when relying on his expert.

> "....Rule 11 requires that the pleading be, to the best of the signer's knowledge, well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose....
>
> In a case such as this, where the attorney does not have the necessary knowledge, involvement of the specialized knowledge of an expert is necessary. The attorney relies on the expert to explain to the judge or jury what is not within his or her realm of knowledge. There would seem to be no problem for the attorney to rely on the expert's opinion as the basis of his client's position. As long as 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 in judgment made by the expert....
>
> In light of Dr. Horrell's [the expert] affidavit and later testimony, High's [the attorney] reliance was reasonable under the circumstances. Dr. Horrell swore in his affidavit submitted with the study that the study supported High's position. Further, Horrell had been accepted as an expert by the trial court....."

[*Coffey*, at pg. 1104.] [Emphasis supplied.]

Similarly, in *DuBois v. U.S. Department of Agriculture*, 270 F.3d 77 (1st Cir. 2001), the United States Court of Appeals for the First Circuit, citing *Coffey*, affirmed the district court's

denial of sanctions against the government's attorney under the court's authority to award attorney's fees to a prevailing party when the losing side has acted in bad faith, vexatiously, wantonly or for oppressive reasons. The denial of sanctions was based upon the attorney's reliance upon his experts in advancing his client's claims.

> "In *Coffey v. Healthtrust, Inc.*, 1 F.3d 1101, 1104 (10th Cir. 1993), an attorney relied upon an expert's conclusions, even though the attorney knew that the expert's conclusions were contradicted by the very author of the study from which the conclusions were drawn. The court refused to sanction the attorney, even though the attorney had reason to doubt the veracity of the expert's conclusions. The court found that the attorney's reliance on the expert's conclusions was reasonable because of the technical nature of the expert's research and the expert's unwavering belief in his findings. *Id.*
>
> Similarly, government counsel in the instant case reasonably relied on the technical expertise of the Forest Service to craft its litigation position. The Forest Service is a recognized expert on environmental issues, and government counsel – unlike the attorney in the *Coffey* case – had no reason to question the accuracy of their client's claims. In addition, the subject matter of the Forest Service's statement was highly technical. Given the Forest Service's high level of expertise and its adamant belief in the 'practicable impossibility' of building storage ponds at Loon, we find no error in the district court's finding that government counsel's reliance was reasonable."

DuBois at pg. 83.

Attorney Burke also necessarily relied upon the highly technical studies and supporting conclusions of his several water experts, qualified and determined to be reliable by the Water Judge, to advance his clients' water rights application.

CONCLUSION

We find quite poignant author Paul Renner's Colorado Lawyer, March 1988 article, "A Trial Lawyer's View of Attorneys Fee Awards" discussing the chilling effect of C.R.S. 13-17-102. Attorney Renner wrote

> "....once a court has applied the statute to an attorney and assessed some monetary penalty against him, a permanent change of attitude can take place on the part of the offending attorney. He may never again zealously represent a client in court because his motivation is chilled by the statute's threat of sanctions. The public, of course, is the loser." [Emphasis supplied.]

17 Colo.Law. 3, at pg. 467.

We believe the chilling effect of C.R.S. 13-17-102 will be far greater in cases where counsel must rely on experts, as attorney Burke has, to establish the reasonable basis for his or her client's claim.

For the foregoing reasons, amicus curiae The Colorado Trial Lawyers Association urges the Court Supreme Court to rule that the Water Judge erred in assessing attorney's fees under C.R.S. 13-17-102 against PCSR's trial court counsel Burke despite Burke's reliance on experts to support his clients' application for adjudication of water rights.

Respectfully submitted,

H. Paul Himes Jr.

Bennett S. Aisenberg
H. Paul Himes, Jr.

CERTIFICATE OF MAILING

I certify that on this 30th day of September, 2003, a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF THE COLORADO TRIAL LAWYERS ASSOCIATION** was placed in the United States mail, postage prepaid, addressed as follows:

Jeffery J. Kahn, Esq.
Steven P. Jeffers, Esq.
Bernard, Lyons, Gaddis & Kahn, PC
PO Box 978
Longmont, CO 80502-0978

Robert E. Schween, Esq.
Robert E. Schween, PC
8185 South Winnipeg Circle
Aurora, Colorado 80016

Stephen J. Sullivan, Esq.
Molly Sommerville, Esq.
Welborn Sullivan Meck Tooley, PC
821 17th Street, Suite 500
Denver, CO 80202

Steven O. Sims, Esq.
Susan Schneider, Esq.
Assistant Attorney General
Natural Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

Evan D. Ela, Esq.
Collins Cockrel & Cole, PC
390 Union Blvd., Suite 400
Denver, CO 80228

Mary B. Rastall, Esq.
Henry C. Teigen, Esq.
City and County of Denver,
1600 West 12th Avenue
Denver, CO 80204-3412

Veronica A. Sperling, Esq.
Moses, Wittemyer, Harrison and Woodruff
P.O. Box 1440
Boulder, CO 80306-1440

Michael Shimmin, Esq.
Vranesh & Raisch, LLP
P.O. Box 871
Boulder, CO 80306

Stephen H. Leonhardt, Esq.
Burns, Figa & Will, P.C.
6400 South Fiddlers Green Circle,
Suite 1030
Englewood, CO 80111

Gilbert Y. Marchand, Jr., Esq.
Attorney At Law
2737 Mapleton Avenue, Suite 202
Boulder, CO 80304-3835

Stephen R. Cline, Esq.
PO Box 613
Grand Junction, CO 81502

Michael & Vicki Lothrop
7921 Clarkson Court
Denver, CO 80229

David Wilson
PO Box 1173
Fairplay, CO 80440

James E. Copanos
30986 King Valley Way
Conifer, CO 80433

Roy G. Doerr
PO Box 54
Como, CO 80432

James G. Felt, Esq.
James W. Culichia, Esq.
Felt, Monson & Culichia, LLC
319 North Weber Street
Colorado Springs, CO 80903

Carmen Hall
Petrock & Fendel
700 17th Street, Suite 1800
Denver, CO 80202

David G. Hill, Esq.
Berg Hill Greenleaf & Ruscitti LLP
P.O. Box 1719
Boulder, CO 80306

Denise A. Hanson, Esq.
City of Thornton
Thornton Civic Center
9500 Civic Center Drive
Thornton, CO 80229

Robert W. Heckendorf
4085 South Dexter
Englewood, CO 80110

Bob Burch
PO Box 12
Como, CO 80432

Hansludwig Kommert
435 Sugar Loaf Lane
Jefferson, CO 80465

Erik Taylor
2288 S. Milwaukee Street
Denver, CO 80210

Amelia S. Whiting, Esq.
Office of the Regional Solicitor
Rocky Mountain Region
755 Parfet Street, Suite 151
Lakewood, CO 80215

James J. DuBois, Esq.
U.S. Department of Justice
Environmental and Natural Resource Division
999 18th Street, Suite 945
Denver, CO 80202

Robert Trout, Esq.
Trout, Witwer & Freeman, P.C.
The Chancery
1120 Lincoln Street, Suite 1600
Denver, CO 80203

John Johns, Esq.
6400 6th Avenue
Denver, CO 80220

Joseph G Minke
Joyce C. Minke
187 Folsom Lane
Jefferson, CO 80456

Richard A. Grenfell
5636 W. 60TH Place
Arvada, CO 80003

Mark and Carol Carrington
38037 U.S. Highway 285
PO Box 202
Jefferson, CO 80456

Central Colorado Cattlemen's Association
PO Box 37
Fairplay, CO 80440-0037

Gregory Snapp
PO Box 48
Como, CO 80432

Water Division One
Weld County Courthouse

901 9th Street
PO Box C
Greeley, CO 80632

Alan G. Hill, Esq.
Tienken & Hill
P.O. Box 550
Louisville, CO 80027

John M. Lebsack
Jennifer L. Tryjan
White and Steele, P.C.
950 17th Street, Suite 2100
Denver, CO 80202

John Dingess, Esq.
Lynn Obernyer, Esq.
Duncan, Ostrander & Dingess, P.C.
4600 S. Ulster Street, Suite 1111
Denver, CO 80237

Wildwood Recreational Village Asn.
c/o President
P.O. Box 364
Hartsel, CO 80449

Porzak Browning & Bushong LLP
Glenn E. Porzak
Steven J. Bushong
Kevin J. Kinnear
929 Pearl Street, Suite 300
Boulder, Colorado 80302

Kenneth J. Burke, Esq.
1600 Broadway, Suite 2350
Denver, Colorado 80202