SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 (720) 625-5150	
Petitioner: INDIAN MOUNTAIN METROPOLITAN DISTRICT, a Colorado metropolitan district; **Respondent:** INDIAN MOUNTAIN CORP., a Colorado corporation.	▲ COURT USE ONLY ▲
Court of Appeals, State of Colorado Freyre, Taubman, and Dailey, JJ. Case No. 15CA1055 District Court, Park County Hon. S. A. Groome Case No. 14CV30056	Case No. 16SC____
Attorneys for Petitioner: David W. Robbins, # 6112 Peter J. Ampe, # 23452 Matthew A. Montgomery, # 44039 Hill & Robbins, P.C. 1660 Lincoln Street, Suite 2720 Denver, CO 80264 Phone: (303) 296-8100 Fax: (303) 296-2388 E-mail: davidrobbins@hillandrobbins.com	
PETITION FOR WRIT OF CERTIORARI	

I hereby certify that this Petition for Writ of *Certiorari* complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. I further certify that this Petition complies with C.A.R. 53(a). It contains 3,761 words.

DATED: November 17, 2016.

Respectfully submitted,
signed original on file at Hill & Robbins, P.C.

/s David W. Robbins
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Attorney for Petitioner

I. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals err by holding that the record title holder of an augmentation plan for the benefit of a residential subdivision may operate as a private water utility and "charge whatever price for its services the market will bear;"

B. Did the Court of Appeals err by holding that an appellate court may reverse a trial court's factual findings that are supported in the record if the appellate court has a "firm and definite conviction that a mistake has been made;"

C. Did the Court of Appeals err by holding that an appellee is required to cross-appeal an alternative claim that was not addressed by the trial court to preserve that claim on remand.

II. OPINION BELOW

A Writ of *Certiorari* is sought for the Court of Appeals' decision issued in 15CA1055. The opinion was published as 2016COA118M, attached as Appendix A. The judgment of the trial court is attached as Appendix B.

III. JURISDICTIONAL GROUNDS

The Court of Appeals' opinion was announced on August 11, 2016. The opinion was modified and a Petition for Rehearing denied on October 20, 2016.

IV. STATEMENT OF THE CASE

A. RELEVANT FACTS

The Indian Mountain subdivision is the largest residential subdivision in Park County, Colorado. Appdx. A at 5. Park Development Company ("Developer") began selling lots in Indian Mountain in the early 1970's. *Id.* Today, there are approximately 2,500 lots in Indian Mountain. *Id.* Approximately 800 of these lot owners have constructed residential homes or other improvements. *Id.* The remaining lots are undeveloped. *Id.*

Municipal water service is not available in Indian Mountain. *Id.* Accordingly, the lot owners must drill wells to obtain domestic water. *Id.* Initially, the well drilling was unregulated. *Id.* However, in 1972, the General Assembly passed Senate Bill 35, which required the Developer to obtain an augmentation plan ("Plan") to allow for well drilling and the sale of lots to continue. *Id.*

The Plan was decreed in 1974. *Id.* at 6. The Plan allows any lot owner who applies to the State Engineer to obtain a well permit for indoor domestic use and drill a well. *Id.* Under the Plan, the Developer is required to release water from a local reservoir to offset the out-of-priority depletions caused by pumping the lot

owners' wells. *Id.* If the Developer does not operate the Plan, the State Engineer must curtail the lot owners' wells when there is a call on the river. *Id.*

In 1976, the Developer conveyed its assets, including the Plan, to the Indian Mountain Corp. ("IMC"). *Id.* at 7. IMC continued to sell lots and to operate the Plan for the benefit of the lot owners. *Id.* While IMC was selling lots, it absorbed the costs to operate the Plan, which were less than $4,000 per year. Appdx. B at 6.

After all of the lots had been sold, in 2012, IMC allowed the Plan to lapse. *Id.* Appdx. A. at 10. Lot owners—fearful that their wells would be shut off—converted the subdivision's recreation district into the Indian Mountain Metropolitan District ("IMMD"), with the intent that IMMD, among other things, would take over operation of the Plan. *Id.* Instead, in 2013, IMC sold the Plan, along with its remaining assets, to an investment company, Bar Star, Inc. ("Investor") for $290,000.[1] *Id.* at 6.

After acquiring the Plan, the Investor submitted invoices to IMMD, totaling $286,000, for what the Investor asserted were IMC's un-recouped costs to operate the Plan in 2012 and 2013. *Id.* In addition, the Investor informed IMMD that it

[1] After the sale in 2013, the Investor and IMC became synonymous. For clarity, "IMC" is used herein to refer to the corporation's pre-sale actions; "Investor" is used to refer to post-sale actions.

would need to reimburse the Investor for IMC's un-recouped costs from 1976 to 2012, and pay to the Investor $143,000 per year, going forward, or the Investor would stop operating the Plan and allow the State Engineer to shut off the lot owners' wells. *Id.*

IMMD refused to pay the Investor; the Investor sued IMMD. *Id.* The Investor asserted that the lot owners had been unjustly enriched by IMC's past operations of the Plan, and sought $286,000 in damages from IMMD (as a proxy for the lot owners). *Id.* In addition, the Investor asserted that IMMD was not complying with its Amended Plan as a district and should be enjoined from operation. *Id.*

IMMD counterclaimed. *Id.* IMMD asserted that, although the Investor was the record title holder of the Plan, the lot owners, as the beneficial users of the Plan, were the actual owners of the Plan. *Id.* Accordingly, IMMD asked that, if the Investor was going to continue to operate the Plan, the Court impose an equitable remedy on behalf of the lot owners, limiting the Investor to the actual and reasonable costs of operating the Plan (which could be paid by IMMD on behalf of the lot owners). *Id.* In the alternative, IMMD asserted that if Investor was

authorized to operate the Plan for profit, the Investor was acting as a public utility subject to regulation by the P.U.C. *Id.*

B. PROCEDURAL HISTORY

i. Trial Court Judgment. The trial court held that the Investor was the record title holder of the Plan. Appdx B. at 7. However, the trial court also concluded that, by controlling the lot owners' access to water, the Investor had the lot owners "over a barrel." *Id.* at 8. Accordingly, the trial court imposed a constructive trust on the Plan for the benefit of the lot owners, finding that, as long as the Investor operates the Plan, the Investor is entitled to recoup only its actual and reasonable costs. *Id.* at 7-8. In addition, the trial court denied the Investor's claim for unjust enrichment and injunctive relief and concluded that, since it found in favor of IMMD regarding its first claim for relief, "the court need not address [IMMD's] alternative claim" regarding jurisdiction of the P.U.C. *Id.* at 8-9.

ii. Post-Trial Contempt Hearing. After trial, the Investor mailed invoices to the lot owners in Indian Mountain, informing them that it had prevailed at trial; and that, as a result, the lot owners were obligated to pay $1,000 per lot to continue water service. The trial court held the Investor in criminal contempt of court, and ordered the Investor to refund all payments received.

iii. Court of Appeals' Opinion. The Investor appealed the imposition of the constructive trust and the denial of the injunction against IMMD.[2] Appdx. A at 4. The Court of Appeals affirmed the denial of an injunction against IMMD. *Id.* The Court of Appeals, however, reversed the imposition of the constructive trust because it had a "firm and definite conviction that a mistake [was] made." *Id.* at 4, 20-27.

iv. Petition for Rehearing. IMMD filed a Petition for Rehearing requesting that the Court of Appeals modify its remand instructions to include further proceedings on its unaddressed counterclaim. *See* Appdx A at 2-3. The Court of Appeals denied this request, and instead modified its opinion to state:

> the court denied IMMD's second counterclaim concerning whether IMC was a public utility, and IMMD did not appeal this ruling. In light of our disposition, the court need not address IMMD's remaining request for injunctive relief.

Id.

[2] The Investor did not appeal the denial of its unjust enrichment claim or the contempt finding. By unopposed motion, IMMD asked that the contempt proceedings be included in record of this appeal. The Court of Appeals summarily denied this request.

VI. ARGUMENT

Certiorai review is warranted in this case because the Court of Appeals has: (1) decided a question of water law in a way not in accord with applicable decisions of the Supreme Court; and (2) adopted new appellate procedures that so far depart from the accepted and usual course of judicial proceedings to call for the exercise of the Supreme Court's power of supervision. *See* C.A.R. 49.

A. FIRST ISSUE – WATER LAW

By holding that the record title holder of a residential plan for augmentation may operate as a private utility and "charge whatever price for its services the market will bear," the Court of Appeals' decision unconstitutionally takes the lot owners' water rights, violates the anti-speculation doctrine, and imperils the lot owners' access to water.

i. The Court of Appeals' Opinion unconstitutionally takes the lot owners' water rights.

In Colorado, a water right is the right to *beneficially use* a specific amount of water.[3] *Kobobel v. State Dep't of Natural Res.*, 249 P.3d 1127, 1134 (Colo. 2011).

[3] A plan for augmentation is a specific type of water right. *In re Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595, 615 (Colo. 2005).

An individual or entity does not "own" water, but owns the right to place water to a beneficial use within the limitation of the prior appropriation doctrine. *Id.;* COLO. CONST., Art XVI § 6.

Although the Investor holds title to the Plan, the lot owners are the actual owners of the water right because they beneficially use the water provided for by the Plan. *See Jacobucci v. District Court*, 541 P.2d 667,673 (Colo. 1975). As the Colorado Supreme Court explained in *Jacobucci*, "ownership of [a] water right can be acquired…only by the actual beneficial use of water." *Id.* at 674. Accordingly, while the Investor may hold "naked title" to the Plan, its ownership interest is in the "mere vehicle" through which the Plan has been organized for the benefit of the lot owners. *See id.* at 672.

The trial court's equitable remedy protects the lot owners' constitutional right to beneficially use the water provided by the Plan. The Court of Appeals' Opinion, on the other hand, obviates the lot owners' water rights; and provides, instead, that they must enter into contracts with the Investor to purchase the water provided by the Plan, even though the lot owners, not the Investor, have the legal right to beneficially use the water provided by the Plan. This creates, for the Investor, a non-appropriative interest in water that is not recognized by the

Colorado constitution, and unconstitutionally takes the lots owners' decreed water rights. *See Water Rights of Pub. Serv. Co. v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 341 (Colo. 2006) ("contractually-delivered water rights are 'far different' than a water right acquired by original appropriation, diversion, and application to beneficial use."); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010). The Colorado Supreme Court's holding in, *inter alia*, *Jacobucci* does not permit this result.

ii. The Court of Appeals' Opinion creates a significant exception to the anti-speculation doctrine.

Under the anti-speculation doctrine, a private entity may not obtain a water rights decree with the intent that it will beneficially use the water by contracting to sell it. *See Colorado River Water Conserv. Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 568 (Colo. 1979) ("Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit."); *see also High Plains A&M, LLC v. Southeastern Colo. Water Conserv. Dis't*, 120 P.3d 710, 720 (Colo. 2005).

By imposing an equitable remedy that limits the Investor to its actual and reasonable costs, the trial court's judgment respects the essential contours of the

anti-speculation doctrine. The Court of Appeals' Opinion, on the other hand, provides that a developer may obtain a required plan for augmentation for the benefit of a residential subdivision, with the intent that the developer will subsequently contract to sell water to the residents of the subdivision as a "service." This creates a significant new exception to the anti-speculation doctrine, judicially sanctions unregulated private water monopolies, and is rife with the potential for future abuses by developers. Historically, only governmental, or otherwise-regulated, entities, subject to minimum democratic controls, have been authorized to obtain water rights to sell water service to the public. *See Vidler*, 594 P.2d at 568. The Court of Appeals' decision fundamentally changes this constitutional restriction on the private sale of water.

iii. The Court of Appeals' Opinions threatens thousands of peoples' access to water.

The Court of Appeals' Opinion creates a state of public emergency that threatens IMMD's constituents' access to water. Eight-hundred lot owners must now pay whatever the Investor demands, or risk having their wells shut off by the State Engineer. Contrary to the Court of Appeals' conclusion, there is not a competitive market for domestic water services in Indian Mountain, or anywhere

else in Colorado. Rather, the only other option available to the lot owners is to forego their rights under the Plan, and purchase, either individually or acting through IMMD, different water rights to offset the depletions caused by their wells—a solution that the trial court specifically found was exorbitantly expensive. To put this in perspective, irrigation water rights are routinely put up for sale along the South Platte River; yet no rationale court would conclude that this authorizes Denver Water to charge whatever price the market will bear, under the duress of shutting off water, because Denver residents could purchase irrigation water rights along the South Platte and change them to domestic use. But this is exactly what the Court of Appeals' Opinion holds, only in the context of a rural augmentation plan.

Furthermore, and contrary to the Court of Appeals' Opinion, the lot owners cannot seek redress in water court if a developer fails to operate the Plan, or charges extortionary fees for water. The water court's jurisdiction is limited to the *use* of water. *In re Tonko*, 154 P. 3d 397, 404 (Colo. 2007). Accordingly, if the developer fails to operate the Plan, or charges fees that the lot owners cannot afford, all the water court can do is curtail the lot owners' out-of-priority use of water to protect senior users; the water court cannot hold the Investor

"accountable," or compel the Investor to release water to bring the Plan into compliance. Only the district court has jurisdiction to remediate the inequities that have resulted because the legal title to the Plan does not coincide with its actual *ownership*—an avenue of relief the Court of Appeals' Opinion has foreclosed.

B. SECOND ISSUE – APPROPRIATE STANDARD OF REVIEW

By concluding that an appellate court may reverse a trial court's factual findings that are supported by the record if the appellate court has "firm and definite conviction that a mistake has been made" the Court of Appeals has adopted an inherently subjective standard of review that expressly permits an appellate court to substitute its judgment for that of the trier of fact, contrary to the Colorado Supreme Court's holding in *Page v. Clark*, 592 P.2d 792 (Colo. 1979), and the U.S. Supreme Court's holding in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

i. The Court of Appeals has adopted a new standard of appellate review that is contrary to the Colorado Supreme Court's holding in *Page v. Clark*.

In *Page v. Clark*, the Colorado Supreme Court held that the trier of fact's findings with respect to a constructive trust "must be accepted on review, unless they are so clearly erroneous as not to find support in the record." *Page v. Clark*,

592 P.2d 792, 796 (Colo. 1979). The Court of Appeals rejected this standard, concluding instead, that it may reverse a trial court if it has a "firm and definite conviction that a mistake has been made" even though the trial court's factual findings were supported in the record.

This new standard expressly authorizes an appellate court to sidestep clear error review, and instead, subjectively reverse a trial court simply because it disagrees with the result—contrary to the long-standing precedent of this Court. *See id.* ("We have consistently disapproved of the substation of new factual findings by reviewing courts for those made by the trial court."); *see also* C.R.C.P. 52 (findings of fact shall not be set aside unless clearly erroneous); *Buffalo Park Dev. Co. v. Mt. Mut. Reservoir. Co.*, 195 P.3d 674, 689 (Colo. 2008) (findings of fact are clearly erroneous if they "find no support in the record."). If this standard is allowed to stand, every future appellant is entitled to ask for record review, and reversal if the appellate court has a firm and definite conviction that a mistake was made. Against this standard, there is no groundless or frivolous appeal.

Although Colorado appellate courts have quoted the "firm and definite conviction" language *in dicta* before, prior to this case, no Colorado appellate has ever reversed a trial court's factual findings because it had a "firm and definite

conviction that a mistake has been made." *See People v. Harlan*, 109 P.3d 616, 635 n. 4 (Colo. 2005) (Rice, J., *dissenting*); *Valdez v. People*, 966 P.2d 587, 602 (Colo. 1998) (Kourlis, J., *dissenting*); *St. James v. People*, 948 P.2d 1028, 1031 n. 8 (Colo. 1997); *In re Estate of Schlagel*, 89 P.3d 419, 422 (Colo. App. 2003); *Quintana v. Westminster*, 56 P.3d 1193, 1196 (Colo. App. 2002); *Molla v. Colo. Serum Co.*, 929 P.2d 1, 2-3 (Colo. App. 1996).[4] This new standard significantly, and impermissibly, alters the scope of appellate review in Colorado.

ii. The "firm and definite conviction" standard of appellate review is contrary to the U.S. Supreme Court's holding in *Anderson v. Bessemer City*.

Even if the "firm and definite conviction" standard is potentially applicable in some cases, *compare generally United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), the Court of Appeals' application of the standard here is an affront to the legitimacy of the trial process, and an insult to the authority of the district courts. As the U.S. Supreme Court explained in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), an appellate court is not entitled "to reverse the

[4] The "firm and definite conviction" standard has only been applied previously in Colorado to a trial court's decision to admit evidence under the residual hearsay exception. *See Hock v. New York Life. Ins. Co.*, 876 P.2d 1242, 1255 (Colo. 1994); *People v. Orona*, 907 P.2d 659, 665 (Colo. App. 1995), *overruled on other grounds, People v. Harlan*, 8 P.3d 448, 474 (Colo. 2000).

finding[s] of the trier of fact simply because it is convinced that it would have decided the case differently…appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Id.* at 573.

In this case, IMMD met every objective standard applicable to trial and appeal. It was undisputed by the Investor that the trial court had legal authority to impose a constructive trust on behalf of the lot owners; and the Court of Appeals explicitly found that the elements of a constructive trust were supported by testimony in the record. Nonetheless, the Court of Appeals reversed. The Court of Appeals is not and cannot be a second trier of fact. As the *Anderson* court explained, the "parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.* at 575.

The Court of Appeal's theory that, "[t]o the extent the district court reached [its] conclusion after conducting its own review of the documents, [the Court of Appeals is] not bound by a district court's (or a witness') construction of a document," is incorrect. As the *Anderson* court explained, "various Court of Appeals have on occasion asserted the theory that an appellate court may exercise

de novo review over findings not based on credibility determinations….[but] it is impossible to trace this theory's lineage back to the text of Rule 52." *Id.* "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* Thus, even if the "firm and definite conviction" standard might be applicable in some cases, the Court of Appeals' application of the standard in this case is untenable.

C. THIRD ISSUE – ISSUE PRESERVATION ON REMAND

By holding that an appellee is required to cross-appeal a counterclaim that was not addressed by the trial court to preserve that counterclaim for remand, the Court of Appeals has erected a new procedural barrier that is contrary to established appellate procedure, denies IMMD its day in court, and violates due process.

Only parties aggrieved may appeal. *City and County of Broomfield v. Farmers Reservoir*, 235 P.3d 296, 302 (Colo. 2010). The word "aggrieved" refers to a substantial grievance; the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation. *Id.* Appeals are not allowed for the mere purpose of delay, or to present purely

abstract legal questions however important or interesting, but to correct errors injuriously affecting the rights of some party to the litigation. *Id.*

Here, the trial court did not address IMMD's alternative counterclaim. IMMD did not appeal this ruling because IMMD was not aggrieved. IMMD obtained relief on behalf of the lot owners from the trial court's judgment on its first counterclaim. The Court of Appeals' holding—that IMMD was required to cross-appeal its unaddressed counterclaim to preserve it for remand—changes the long-standing appellate procedure established by this Court, denies IMMD its day in Court, and violates IMMD's due process rights. *See, e.g.*, *Busse v. City of Golden*, 73 P.3d 660, 667 (Colo. 2003) (Remanding to trial court to address remaining claims); *Rosane v. Senger*, 149 P.2d 372, 375 (Colo. 1944) (There can be no due process without a day in Court); U.S. CONST., Amends. V, XIV; COLO. CONST., Art. II, § 25. If the Investor is authorized to sell water services to the public under the Plan—as the Court of Appeals concluded—IMMD is entitled to a day in court to determine whether the Investor should be subject to regulation by the P.U.C. *See* C.R.S. § 40-1-103(1)(a) ("public utility" includes "water corporation…operating for the purpose of supplying the public."). By denying IMMD even this, the Court of Appeals has disposed of the basic predicates of a

fair and legitimate appellate process—and in so doing, cut off the lot owner's access to water that was part of their agreement to purchase lots in the subdivision.

V. CONCLUSION

Given both the significant legal questions at issue, and the severe practical consequences of the Court of Appeals' opinion, *Certiorari* review is warranted.

Dated this 17th day of November, 2016.

HILL & ROBBINS, P.C.
signed original on file at Hill & Robbins, P.C.

/s David W. Robbins
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CERTIFICATE OF SERVICE

I certify that on the 17th day of November, 2016, a true and correct copy of the above Petition for Writ of *Certiorari* was served by e-filing via ICCES and addressed to the following and/or U.S. Mail, First Class Postage prepaid:

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s/ *Jeri MacAllister*
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