

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3744	DATE FILED: September 23, 2015 3:33 PM CASE NUMBER: 2013CV31563  <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Plaintiffs:</b>          CITIZENS FOR QUIET SKIES, KIMBERLY GIBBS,          TIMOTHY LIM, ROBERT YATES, SUZANNE          WEBEL, JOHN BEHRENS, CARLA BEHRENS, and          RICHARD DAUER</p> <p>v.</p> <p><b>Defendant:</b>          MILE-HI SKYDIVING CENTER, INC.</p>	
<p><i>Attorneys for Plaintiffs:</i>          Randall Weiner, Matthew Osofsky, and Annmarie          Cording</p> <p><i>Attorneys for Defendant:</i>          Anthony Leffert and Laura Ellenberger</p>	Case Number: 13CV31563  Division: 2      Courtroom: Q
<p><b>ORDER RE: PLAINTIFFS' MOTION TO RECONSIDER AWARD OF ATTORNEY FEES</b></p>	

This Matter comes before the Court on Plaintiffs' August 13, 2015 Motion to Reconsider Award of Attorney Fees. Defendant filed a Response on September 3, 2015, to which Plaintiffs filed a Reply on September 10, 2015. Having considered the file, pleadings, and applicable case law the Court finds and rules as follows:

### I. BACKGROUND

Plaintiffs, Citizens for Quiet Skies, Inc. and seven individuals ("Plaintiffs"), filed suit against Defendant, Mile-Hi Skydiving Center, Inc. ("Defendant"), for negligence, trespass, nuisance, negligence per se, respondeat superior, equitable relief, and unjust enrichment. Defendant operates multiple airplanes mostly inside a geographical "flight box" of detailed latitudes and longitudes for recreational skydiving activity.

The Court dismissed all of the claims except for the claim for injunctive relief of Plaintiff Citizens of Quiet Skies, Inc. in its November 24, 2014 Order on Defendant's Motion for Summary Judgment, finding the entity did not own any real or personal property and therefore had not incurred damages. The Court dismissed Plaintiffs' negligence per se claim regarding a Boulder County Ordinance in its December 31, 2014 Order on Defendant's Motion for Summary Judgment, but denied the summary judgment motion as to the negligence per se claim relating to

the Longmont Municipal Code. The Court dismissed the individual Plaintiffs' trespass and unjust enrichment claims in its January 5, 2015 Order on Defendant's Motion for Summary Judgment.

The Court held a bench trial on April 13, 14, 15, 16, and 17, 2015. The Court conducted a site visit on May 2, 2015, and heard closing arguments on May 6, 2015. The Court found in favor of Defendant and denied Plaintiffs' claims for nuisance, negligence, and negligence per se. The Court entered an entry of judgment in favor of Defendant and against Plaintiffs jointly and severally in the amount of \$67,791.05, consisting of an award of costs pursuant to C.R.C.P. 54(d). Defendant filed a Motion for Attorneys' Fees on June 11, 2015, and requested an award in the amount of \$58,420.74 representing amounts expended on claims that were dismissed by the Court on summary judgment motions or untimely withdrawn by Plaintiffs. The Court awarded attorneys' fees in the amount of \$47,984.41 pursuant to section 13-17-102, C.R.S.

## II. STANDARD OF REVIEW

C.R.C.P. 59 provides that a party may move for post-judgment relief within 14 days of entry of judgment or such greater time as the court may allow. Such relief includes a new trial of all or part of the issues and amendment of findings or judgment. *See* C.R.C.P. 59(a)(1),(3), and (4). "The primary purpose of a motion to amend judgment or for new trial is to give the court an opportunity to correct any errors that it may have made." *In re Marriage of Jones*, 668 P.2d 980, 981 (Colo. App. 1983). Whether to amend findings or judgment under C.R.C.P. 59 is a matter within the discretion of the trial court. *Id.* at 981-82. Said findings "will not be disturbed on review unless the trial court did not consider relevant factors or unless a clear abuse of discretion appears in the record." *Id.*

## III. ARGUMENTS

### A. Plaintiffs' Argument

Plaintiffs' Motion to Reconsider Award of Attorney Fees ("Motion") requests the attorneys' fees ("fees") previously awarded by the Court on July 28, 2015 be reduced. As the basis for its Motion, Plaintiffs argue:

- 1) The fees awarded on the dismissal of claims advanced by Citizens for Quiet Skies ("CQS") should be awarded against CQS only and reduced because Defendant did not meaningfully confer prior to filing its October 2, 2014 Motion for Summary Judgment Regarding Claims by Plaintiff Citizens for Quiet Skies, Inc. and because Defendant did not complete any additional work on the monetary damages claims dismissed by the Court.
- 2) The fees awarded for claims relating to physical and mental injuries should be withdrawn because: Defendant's counsel agreed not to pursue fees relating to the dismissal of those claims; Defendant included in its accounting of fees submitted to the Court time spent on another matter; Defendant incurred fees for premature discovery; and Plaintiffs maintain they never asserted a claim for physical or mental injuries despite the Notice of Withdrawal, which Plaintiffs assert was filed solely to mollify Defendant.

- 3) No fees should be awarded on the respondeat superior claim because the claim did not lack substantial justification for being substantially frivolous or groundless.
- 4) The fees awarded on the unjust enrichment claim should be reduced because the Court should have allocated fees according to the amount of paper space utilized by Defendant in its November 13, 2014 Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims addressing the unjust enrichment claim rather than dividing time equally between the involved claims.
- 5) The fees awarded on the negligence per se claim involving the Boulder County Noise Ordinance should be reduced because Defendant expended or reasonably should have expended a minimal amount of time on legal research and drafting the issue in the October 27, 2014 Motion for Summary Judgment Regarding Preemption of State and Local Laws.
- 6) The fees awarded for discovery and depositions should be reduced because minimal discovery was conducted by Defendant for the claims for which the Court awarded attorneys' fees.

#### *B. Defendant's Argument*

Defendant argues Plaintiffs' Motion must fail because Plaintiff does not assert any newly discovered evidence that could not have been discovered with reasonable diligence at the time when Plaintiff responded to Defendant's Motion for Attorneys' Fees. Further Defendant asserts Plaintiff fails to identify an error in law in the Court's Order awarding attorney fees. Further, Defendant asserts Plaintiffs' failure to raise the arguments in their Response to Defendant's Motion for Attorneys' Fees constitutes a waiver of the objections. Defendant requests an award of additional attorneys' fees and costs incurred by responding to the present Motion.

### **IV. ANALYSIS**

C.R.C.P. 59(a) requires motions for post-trial relief to state the ground asserted and the relief sought. Here, Plaintiffs request clarification and reconsideration of the award, pursuant to C.R.C.P. 59(a)(3), (4) but fails to identify what grounds exist as a basis for the Court to order a new trial, amend findings, or amend the judgment. Motions for post-trial relief may be combined or asserted in the alternative, but said motions shall state the ground asserted and the relief sought. *See* C.R.C.P. 59(a). Instead, Plaintiff raises factual assertions that could have been raised and were available at the time of Plaintiffs' Response to Defendant's Motion for Attorney Fees.

The Court understands Plaintiffs' argument to be that the fees awarded should be reduced because the amounts awarded by the Court were unreasonable considering the simplicity of the claims and amount of time reasonably spent by Defendant regarding the claims. A court need not entertain new arguments or theories asserted for the first time in a motion to reconsider. *Bowlen v. Federal Deposit Insurance Corp.*, 815 P.2d 1013, 1015 (Colo. App. 1991); *see also*

*Hice v. Lott*, 223 P.3d 139, 149 (Colo. App. 2009) (trial court acted within its discretion in declining to reconsider or reverse its previous ruling based on a new argument or theory presented on a motion to reconsider).

Here, Defendant requested \$58,420.74 in attorney fees when it filed its June 11, 2015 Motion. Defendant filed Exhibit A to Exhibit 1 which set forth Defendant's invoices for the requested fees. Exhibit 1 contained an Affidavit of Defendant's counsel as to the reasonableness of the requested fees. The initial estimate by the court of a reasonable attorney fee is reached by calculation of the "lodestar" amount. *Spensieri v. Farmers Alliance Mut. Ins. Co.*, 804 P.2d 268, 270 (Colo. App. 1990). This amount represents the number of hours reasonably expended multiplied by a reasonable hourly rate and carries with it a strong presumption of reasonableness. *Id.* In its fourteen page Order of July 28, 2015, the Court used the "lodestar" method to determine reasonable fees. In said Order, the Court noted Plaintiffs' failure to contest or dispute the reasonableness of Defendant's requested attorney fees. *See* Plaintiffs' June 25, 2015 Response to Defendant's Motion for Attorney Fees. Further, Plaintiffs failed to request a hearing on the reasonableness of attorney fees.

The Court finds Plaintiffs failed to raise the arguments regarding the reasonableness of Defendant's requested fees in its Response and declines to consider new arguments on a motion to reconsider. Plaintiffs should have raised their arguments regarding the amount of attorneys' fees to be awarded, if any, in the briefing on the Motion for Attorneys' Fees. Plaintiffs now seek to break down the amount of time expended by Defendant according to specific pleadings and discovery. Plaintiffs' arguments seek to reduce the amount of fees by challenging the amount of time Defendant actually spent on matters as evidenced by the amount of paper space dedicated to an issue in a particular briefing, the necessity of research or drafting notwithstanding another claim, the minimal time required to research a particular claim, or the limited amount of discovery conducted relative to a claim.

Plaintiffs should have raised the above arguments in their Response and cannot wait until after the Court's ruling to raise new arguments. Simply put, Plaintiffs cannot now contest the amount of attorneys' fees to be awarded when that issue was before the Court in the Defendant's June 11, 2015 Motion for Attorney Fees, Plaintiff failed to respond to the reasonableness of the fees requested, and failed to request a hearing on the reasonableness of fees. While not binding law, the Court finds persuasive the reasoning from the United States District Court for the District of Colorado that "[a] motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple.'" *Shields v. Shelter*, 120 F.R.D. 123, 126 (D. Colo. 1988); *see also Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (A motion for reconsideration "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing."). Thus, Plaintiffs should have addressed all their theory and arguments regarding the reasonableness of Defendant's claimed attorneys' fees in its Response, and the Court will not address similar and further arguments again on a motion to reconsider.

The Court notes the essential goal in shifting fees is to do rough justice, not to achieve auditing perfection. *Payan v. Nash Finch Co.*, 310 P.3d 212, 219 (Colo. App. 2012) (*citing Fox v. Vice*, 563 U.S. 826 (2011)) ("[T]rial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time."). The Court in its Order

on Defendant's Motion for Attorneys' Fees took into account the overall sense of the suit and used estimates to calculate and allocate the attorneys' time. The Court finds no clear error in its methodology and no error in law. The Court finds it did not misapprehend the facts, the parties' positions, or the controlling law. The Court considered all relevant factors related to Defendant's Motion for attorney fees. The Court therefore DENIES Plaintiff's Motion to Reconsider.

The Court finds Plaintiffs have not raised any basis for this Court to reconsider its judgment. The Court hereby finds Plaintiffs' Motion to Reconsider to be groundless pursuant to section 13-17-101, C.R.S., et. al for the reasons set forth above, and awards Defendant attorney fees for its time incurred in reviewing, researching, and responding to Plaintiffs' Motion. Defendant shall submit an Attorney Fee Affidavit no later than October 12, 2015. Plaintiff may file an objection, if any, to the reasonableness of the fees no later than October 26, 2015.

## V. CONCLUSION

The Court hereby **DENIES** Plaintiffs' Motion to Reconsider.

DATED: September 23, 2015

BY THE COURT



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Judith L. LaBuda  
District Court Judge