

DISTRICT COURT, COUNTY OF BOULDER, COLORADO Boulder County District Court Boulder County Justice Center 1777 6 th Street Boulder, CO 80302	DATE FILED: July 1, 2015 4:19 PM FILING ID: 6BDC2AFBCCA30 CASE NUMBER: 2013CV31563
Plaintiff: CITIZENS FOR QUIET SKIES, INC., KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER Defendants: MILE-HI SKYDIVING CENTER, INC.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case Number: 2013CV031563
<i>Counsel for Defendant</i> Anthony L. Leffert, #12375 Laura J. Ellenberger, #43931 Robinson Waters & O'Dorisio, P.C. 1099 18th Street, Suite 2600 Denver, CO 80202-1926 Telephone: 303-297-2600 Facsimile: 303-297-2750 E-mail: aleffert@rwolaw.com lellenberger@rwolaw.com	Div. 2 Crtrm.: Q
REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR ATTORNEYS' FEES	

Defendant, Mile-Hi Skydiving Center, Inc. (“Mile-Hi”), by and through counsel Anthony L. Leffert of Robinson, Waters & O’Dorisio, P.C., hereby submits this Reply in Support of Defendant's Motion for Attorneys' Fees, and states and alleges the following:

INTRODUCTION

1. Mile-Hi is seeking an award of attorneys' fees incurred in this litigation pursuant to C.R.S. § 13-17-102 attributable to defending against the Plaintiffs' substantially groundless and/or frivolous claims. These claims include: (1) claims asserted by Citizens for Quiet Skies, Inc. ("Citizens"); (2) claims for physical and mental injuries; (3) claims for trespass; (4) negligence *per se* claim with regard to the Boulder County Noise Ordinance; and (5) the Plaintiffs' unjust enrichment claim. The total amount of fees properly apportioned to these claims and awardable against the Plaintiffs in favor of Mile-Hi is **\$58,420.74**.

2. The factors Colorado courts must consider in determining whether to assess attorneys' fees and the amount of an attorneys' fees award as set forth in C.R.S. § 13-17-103 all support an award of attorneys' fees in favor of Mile-Hi and against the Plaintiffs, jointly and severally.

REPLY

3. There was no rational argument or basis in law or in fact to support the Plaintiffs' claims for which Mile-Hi is seeking fees. Nor were these claims supported by a "good faith argument for an extension, modification, or reversal of existing law." *See Pedlow v. Stamp*, 819 P.2d 1110, 1111 (Colo. App. 1991); *see also* Plaintiffs' Response to Defendant's Motion for Attorney Fees ("Plaintiffs' Response") at pp. 2-3. There was not even an "arguably meritorious" legal theory or set of facts to support Citizens' claims, the trespass, unjust enrichment, and negligence *per se* claims, or the Plaintiffs' claims for physical and mental injuries. The Plaintiffs did not espouse any new ideas or challenge any allegedly improperly decided cases. In short, these claims are the very definition of those that lack substantial justification, entitling a defendant to an award of attorneys' fees pursuant to C.R.S. § 13-17-102

4. To begin, the Plaintiffs do not even attempt to argue that the claims brought by Citizens did not lack substantial justification. Accordingly, Citizens' failure to respond to Mile-Hi's request for an award of attorneys' fees attributable to these claims should be considered a confession of that portion of Mile-Hi's Motion for Attorneys' Fees. *See* C.R.C.P. 121 § 1-15(3) ("Failure of a responding party to file a responsive brief may be considered a confession of the motion.").

5. In addition, the law in Colorado is clear and well settled that to prevail on a claim for trespass, a plaintiff must show either a **physical** intrusion on his property, or an intangible intrusion that causes **physical damage** to his property. *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 389-91 (Colo. 2001). Each and every one of the Plaintiffs admitted during their depositions that none of their real or personal property had been damaged in any way by Mile-Hi's skydiving operations. *See* Defendant's Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims at Statement of Facts at ¶¶ 25, 27, 29 and pp. 11-12. There was no factual dispute on this issue. The Colorado Supreme Court was clear in *Van Wyk* that intangible intrusions such as noise that do not cause physical harm cannot form the basis of a trespass claim as a matter of law. *Van Wyk*, 27 P.3d at 390. Therefore, the Plaintiffs' trespass claim was substantially frivolous and groundless because the Plaintiffs knew they had not suffered any physical damage to their property but asserted this claim with no basis in fact or law anyway.

6. The Plaintiffs' claim for unjust enrichment also lacked substantial justification and was substantially groundless. There was no evidence or factual basis to support the allegation that the Plaintiffs conferred a benefit on Mile-Hi, a required element for any unjust enrichment claim. *See* Order re: Defendant's Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims at p. 7. The Plaintiffs' argument that in certain reverse condemnation cases courts have held **governmental** entities liable for "takings" is inapposite. Mile-Hi is not a governmental entity, and this is not an inverse condemnation/eminent domain case. Accordingly, Plaintiffs' claim for unjust enrichment lacked substantial justification and

was factually groundless. Mile-Hi is entitled to its reasonable attorneys' fees incurred to defend against this claim.

7. The Plaintiffs misconstrue Mile-Hi's request for attorneys' fees attributable to the their negligence *per se* claim with respect to alleged violations of the Boulder County Noise Ordinance. Despite the Plaintiffs' confusion, Mile-Hi is not seeking any fees attributable to defending against the negligence *per se* claim with respect to the Longmont Municipal Code, which did proceed to trial. The Motion for Attorneys' Fees clearly states that the negligence *per se* claim with respect to the Boulder County Noise Ordinance lacked substantial justification because the ordinance, itself, unequivocally includes an exception for the operation of aircraft. Moreover, Mile-Hi requests only half of the total legal fees incurred for services rendered to defend against the Plaintiffs' claims for negligence *per se*, specifically excluding the fees incurred for defending against the Longmont Municipal Code based claim.

8. The Plaintiffs maintain that they "made only a general claim for physical and mental suffering" in this action. *See* Response at ¶ 9. They go as far as to state, "Defendant insisted without *any basis* that there were medical conditions at issue and continues to pretend in the current motion that Plaintiffs asserted medical conditions and then withdrew such claims." *Id.* (emphasis added). These statements are blatantly false when compared to the Plaintiffs' own pleadings. In the Plaintiffs' Second Amended Complaint, they alleged that the Plaintiffs' lost sleep, endured stress and anxiety, and had their lives disrupted due to what was alleged to be excessive noise created by Mile-Hi's skydiving operations. *See* Second Amended Complaint ("Complaint") at ¶ 40. Additionally, the Plaintiffs alleged that as a result of Mile-Hi's conduct, they had been and continued to be injured physically and mentally, and had experienced headaches, stress, sleep disruption, and other mental and physical conditions. *See id.* at ¶ 43. Further, the Plaintiffs alleged that Mile-Hi's conduct had caused them discomfort and annoyance and had caused damage to their health, safety, and well-being. *Id.* at ¶ 61. In their request for relief, the Plaintiffs specifically sought damages for past and future pain and suffering, for physical and mental injuries, and for medical expenses. *See id.* at p. 9. There is no question that the Plaintiffs, themselves, put their physical and mental conditions in controversy by seeking claims for relief and damages for physical and mental injuries, past and future.

9. The Plaintiffs cite the Honorable Judge Robert Gunning's September 23, 2014 Order denying Mile-Hi's Motion for C.R.C.P. 35 Examinations of the Plaintiffs, but misstate Judge Gunning's holding. In his Order, Judge Gunning stated:

Defendant has failed to show good cause for the requested examinations under C.R.C.P. 35. In particular, **Defendant's request for examinations is premature.** The Motion is premised entirely on allegations in the Second Amended Complaint. (Motion, ¶ 1). No showing has been made that Plaintiffs are seeking to recover damages for specific medical expenses, or that they are in fact pursuing damages for physical and mental conditions. For instance, neither party supplied C.R.C.P. 26(a)(1) disclosures, which would identify Plaintiffs' damages calculations and the bases therefor.

See Order re: Defendant's Motion for C.R.C.P. 35 Examinations of Plaintiffs at p. 2 (emphasis added). Judge Gunning denied Mile-Hi's motion because he believed such exams were premature at that stage of the litigation. The Plaintiffs then failed for months after to properly disclose in detail the alleged mental and/or physical damages that they purportedly suffered, despite Mile-Hi's repeated requests for more information or evidence to support these claims. Mile-Hi was entitled to rely on the Plaintiffs' pleadings, which specifically stated they were seeking damages for mental and physical injuries, to prepare its defense.

In fact, the Plaintiffs had never suffered any mental or physical injuries caused by Mile-Hi's skydiving operations, and they knew this when they filed the Second Amended Complaint. They continued to maintain they had suffered such damages until they finally voluntarily dismissed these claims on November 3, 2014, on the eve of a hearing scheduled on Mile-Hi's Rule 35 Motion. For months counsel for Mile-Hi repeatedly requested additional information from the Plaintiffs regarding these claimed damages, to which he received no response. Mile-Hi was entitled to conduct discovery and prepare a thorough defense to all of the Plaintiffs' alleged claims. By refusing to dismiss their groundless claims for mental and physical damages, the Plaintiffs forced Mile-Hi to incur legal fees to defend against them, and it is entitled to an award of those fees.

10. Finally, Mile-Hi accurately represented to this Court the "settlement" discussions that occurred during the Court ordered pre-trial alternative dispute resolution mediation. That no "substantive discussions" took place cannot be attributed to any refusal by Mile-Hi to cooperate in this mediation. In actuality, Mile-Hi appeared at the mediation and requested that the Plaintiffs provide a list of their specific demands. In response, the Plaintiffs refused to supply a list of any demands unless and until Mile-Hi agreed to their general demand that it change its operations. Mile-Hi would not agree to any such general demand without any specifications or details. The Plaintiffs again refused to provide any specific requests or demands with respect to proposed changes to Mile-Hi's operations, and the settlement discussions came to a grinding halt. Furthermore, the Plaintiffs' statement that "Defendant compelled all Plaintiffs to personally appear at the settlement conference for the sole purpose of conveying a threat about collection of costs and fees" is inappropriate and inaccurate. *See* Plaintiffs' Response at ¶ 10. As part of the settlement negotiations, Mile-Hi made an offer to each of the individual Plaintiffs to not seek an award of legal fees and/or costs against the individual Plaintiff if he or she voluntarily dismissed his or her claims against Mile-Hi before trial. This genuine offer to compromise was not a "threat" but a good faith effort to reach a compromise.

11. Mile-Hi is entitled to an award of attorneys' fees incurred to defend against the Plaintiffs' substantially groundless and frivolous claims for relief and damages claims. The Plaintiffs and their attorneys knew or reasonably should have known that the claims asserted by Citizens; claims for physical and mental injuries; trespass and unjust enrichment claims; and negligence *per se* claim with respect to the Boulder County Noise Ordinance had no basis in fact, law, or any reasonable interpretation or extension of the law.

20. The Plaintiffs have not contested the reasonableness of Mile-Hi's requested attorneys' fee award. Accordingly, Mile-Hi is entitled to an award of attorneys' fees in its favor in the total requested amount of **\$58,420.74**.

WHEREFORE, Defendant Mile-Hi Skydiving Center, Inc. respectfully requests an Order awarding attorneys' fees in its favor in the amount of **\$58,420.74** and against the Plaintiffs, jointly and severally.

Respectfully submitted this 1st day of July, 2015.

ROBINSON WATERS & O'DORISIO, P.C.

s/Laura J. Ellenberger

Anthony L. Leffert, #12375

Laura J. Ellenberger, #43931

Attorneys for Defendant Mile-Hi Skydiving Center, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2015, a true and correct copy of the foregoing **REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR ATTORNEYS' FEES** was delivered via *ICCES*, addressed to the following:

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s/Elizabeth Garfield