

DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 Sixth Street P.O. Box 4249, Boulder, CO, 80306-4249	DATE FILED: June 24, 2015 11:20 AM CASE NUMBER: 2013CV31563 <p style="text-align: center;">△ COURT USE ONLY △</p>
Plaintiff(s) KIMBERLY GIBBS et al. v. Defendant(s) MILE HI SKYDIVING CENTER INC	
Order Re: Defendant's Bill of Costs	

The Court has reviewed the Defendant's June 2, 2015 Bill of Costs, the Plaintiff's June 16, 2015 Objection to the Defendant's Bill of Costs, Defendant's June 18, 2015 Supplement to Bill of Costs, Defendant's June 19, 2015 Reply, Plaintiff's June 19, 2015 Objections to the Supplement and Defendant's June 22, 2015 Reply in Support of the Supplement, as well as all exhibits attached thereto and the relevant portions of the file.

The Court finds Defendant inadvertently failed to attach certain invoices to support its original Bill of Costs, but those costs were indeed contained within the original June 2, 2015 pleading. Plaintiff had the opportunity to object to those costs following both in its June 16, 2015 Objection and its June 22, 2015 Objection to Supplement. Thus, no party has been prejudiced. The Court considers all of the aforementioned pleadings and exhibits in its ruling. Being fully advised of the premises, the Court enters the following ruling:

C.R.C.P. 54(d), states, "Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." No party asserts, nor does the Court find, that any express provision of statute or these rules is applicable to this case. Thus C.R.C.P. 54(d) applies.

When a case involves many claims, some of which are successful and some of which are not, it is left to the sole discretion of the trial court to determine which party, if any, is the prevailing party and whether costs should be awarded. Archer v. Farmer Bros. Co., 90 P.3d 228, 231 (Colo. 2004). It is unquestionable that Defendant substantially prevailed in this case. Plaintiff filed seven claims against Defendant. The Court either dismissed Plaintiff's claim on summary judgment or found against Plaintiff at trial on all of Plaintiff's claims. Plaintiff prevailed only on Defendant's counterclaim of abuse of process. Given the week-long trial on Plaintiff's three claims that survived summary judgment, the amount of time and resources spent on the summary judgment issues, and that the dismissal of the abuse of process claim came early on in this case, Plaintiff prevailing on an abuse of process counterclaim does not rise to a level of prevailing on a substantial or significant portion of this case.

Therefore, the Court finds Defendant is entitled to its costs incurred in defending this case. Costs are a separate and distinct issue from attorney fees.

The Court has reviewed all of the invoices that accompanied the Bill of Costs and Supplemental bill of costs. The Court finds:

1. The filing fees, which were required for Defendant to file pleadings and other legal documents with the Clerk of Court in this case, are reasonable and necessary. The Court awards Defendant its cost of \$1,568.50 pursuant to section 13-16-122(1)(a), C.R.S.
2. The copy and postage costs, which were necessitated by the magnitude of this case, are reasonable and necessary and a detailed and itemized bill for every charge was provided. The Court awards Defendant its cost of \$2,998.05 pursuant to section 13-16-122(1)(f), C.R.S.
3. The deposition and court reporter costs incurred by Defendant, including the Defendant being present at the deposition of John Freytag at a California location selected by Plaintiff, were reasonable and necessary given the number of witnesses

deposed and the issues litigated. Further, the Court finds the \$145.00 to transcribe the comments Ms. Gibbs made at a public hearing on the issues related to this case, were reasonable and necessary as the comments were utilized during trial as a statement against interests of a party and for impeachment purposes. The Court finds the cost of Defendant's counsel's hotel of \$278 in San Francisco was reasonable. The Court awards Defendant its cost of \$6,872.25 in deposition costs and reporter fees plus \$1,174.20 in travel costs for the deposition of Mr. Freytag in California pursuant to section 13-16-122(1)(d) and (g), C.R.S., for a total of \$8,046.45

4. The Court notes Plaintiffs do not contend the fees for Defendant's expert, Mr. Freytag, were unnecessary but contest the amount of the fees. The fees for John Freytag, the Defendant's most crucial expert witness, were reasonable and necessary. The Court found Mr. Freytag's testimony credible and persuasive and found him to possess a high level of expertise and knowledge in his field. His degree of skill and years of experience as an expert in the field of aviation and airport noise support his hourly fee of \$395.00. Mr. Freytag resides in California and travel to Colorado was necessitated for conducting a detailed noise sound study, as well as for his testimony at the April 2015 trial. Detailed invoices for time and costs were provided for Mr. Freytag. Mr. Freytag's 14 hours of round trip travel time from California to Colorado in April 2015 was reasonable, given the time to travel from his home to the airport, wait time in an airport, travel by plane and travel to his hotel and then return home. The Court finds Mr. Freytag utilized reasonable car rental services and dined at moderately priced restaurants for the Boulder area. Mr. Freytag stayed in moderately priced accommodations (Marriott Springhill Suites and a Quality Inn). The Court does not find the price of airline tickets for an October 2014 San Francisco to Denver round trip flight for Mr. Freytag and his associate of \$1,009.93 and \$871.93 respectively to be reasonable. Though the Court finds the flight for both individuals to be warranted it finds that with advance purchase, which would have been possible for the October 2014 trip, an amount of \$400 per ticket was reasonable. Thus, the Court reduces the total airline fare of \$1,881.86 to \$800.00. The Court finds the time for Mr. Freytag's assistant to assist in conducting the sound study to be reasonable based on the testimony. Mr. Freytag's detailed invoices combined with his testimony at trial outlining the work performed support the fees he charged. The Court therefore awards Defendant cost of \$38,880.50 pursuant to section 13-16-122(1)(e), C.R.S.

5. The Court finds Defendant's deposition fees for Plaintiff's experts Matthew Robinson (\$830), Robert Meyers (\$473) and Robert Rand (\$650) were reasonable and necessary. The Court awards Defendant cost of \$1,953 pursuant to section 13-16-122(1)(e), C.R.S.

6. Defendant's cost for expedited courier costs of \$50; service of process of \$367.50 and witness and mileage fees of \$126 are all appropriate, reasonable and necessary pursuant to section 13-16-122(1)(e) and (i), C.R.S. The Court awards Defendant \$543.50 in said costs.

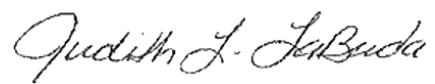
7. Pursuant to *Mackall v. Jalisco Intern., Inc.*, 28 P.3d 975, 977 (Colo.App. 2001) when computerized legal research expenses are not commingled with other costs of conducting business or costs of litigation, they may be recovered as a cost. The Court finds Defendant did not commingle the legal research costs and thus awards Defendant \$1,193.92 in said costs.

8. Defendant's cost for mandatory court settlement of \$785.13 is reasonable and necessary as the alternative dispute resolution between the parties was ordered by this court. The Court awards Defendant \$785.13 in alternative dispute resolution costs.

9. The Court notes Plaintiffs do not contend the fees for Defendant's expert Mr. Kamin were unnecessary but contest the amount of the fees. Though the Court found William Kamin's testimony persuasive and found Mr. Kamin has expertise in the field of appraising property, it finds his fees of \$27,775.75 to be excessive for the work that was reasonable and necessary in this situation. The Court finds Mr. Kamin's hourly rate of \$195.00 to be reasonable for an appraiser but finds his time of 118.5 hours to be excessive to conduct five appraisals of residential property, contact other realtors, draft a report and testify at trial. Mr. Kamin did not provide a detailed invoice of the time spent on the various endeavors necessary to render his opinion. In reaching its conclusion that Mr. Kamin's fees are excessive the Court does not compare Mr. Kamin's fees to that of Plaintiff's expert, Mr. Meyers. Based on the efforts described in Mr. Kamin's report and his testimony at trial, the Court finds it reasonable for Mr. Kamin to have spent 30 hours for the five appraisals, 15 hours for drafting his report, 10 hours for investigation and contacting other realtors and 5 hours for miscellaneous activities, for a total of 60 hours and \$11,700. The Court finds 3.5 hours of staff/administrative time at \$122.00 for Mr. Kamin's work was reasonable. The Court awards Defendant \$11,822 in said costs.

The Court therefore awards the Defendant total costs of \$67,791.05 in costs, which shall be tendered to Defendant in good funds within 30 days of this Order. Plaintiffs Citizens for Quiet Skies, Inc., Kimberly Gibbs, Timothy Lim, Robert Yates, Suzanne Webel, John Behrens, Carla Behrens, and Richard Dauer, shall be jointly and severally liable for said costs.

Issue Date: 6/24/2015

A handwritten signature in cursive script that reads "Judith L. Labuda". The signature is written in black ink and is positioned above the printed name.

JUDITH L LABUDA
District Court Judge