DISTRICT COURT, COUNTY OF BOULDER, COLORADO **Boulder County District Court** **Boulder County Justice Center** **1777 6th Street** **Boulder, Colorado 80302**	**▲COURT USE ONLY▲**
Plaintiffs: CITIZENS FOR QUIET SKIES**,** KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER **v.** **Defendant:** MILE-HI SKYDIVING CENTER, INC.	**Case Number:** 2013CV031563
Randall M. Weiner, #23871 Annmarie Cording, #42524, Of Counsel **Law Offices of Randall M. Weiner, P.C.** 3100 Arapahoe Avenue, Suite 202 Boulder, Colorado 80303 Phone Number: 303-440-3321 Fax Number: 720-292-1687 randall@randallweiner.com acording@cordinglaw.com The Law Office of Matthew B. Osofsky, Esq. Matthew Osofsky, #34075 3100 Arapahoe Avenue, Suite 202 Boulder, Colorado 80303 Phone Number: 303-440-3321 mosofsky@live.com	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEY FEES

Plaintiffs, by and through counsel, Law Offices of Randall M. Weiner, P.C. and The Law Office of Matthew B. Osofsky, Esq., hereby submit this Response to Defendant's Motion for Attorney Fees.

1. Defendant's Motion for Attorney Fees asserts that "several of [Plaintiffs'] claims for relief and claims for damages … were legal frivolous and lacked any factual basis," and states that the Court should "punish" the Plaintiffs. *See* Motion at ¶4. The Motion appears to be

limited to the claims for (1) trespass, (2) unjust enrichment, and (3) negligence *per se*, and (4) a request for damages for "physical and mental injuries." *Id.* at ¶¶8(a)(e)&(g).[1]

2. Defendant's Motion reviews the eight factors to be considered for sanctions under C.R.S. §13-17-103. However, the analysis of these factors is nothing more than conclusory statements, frequently consisting of a single sentence. *Id.* at ¶¶8(a)(c)(e)&(g). No exhibits are offered. There are no citations to the record. There isn't even so much as a quoted statement to support allegations such as "Plaintiffs and their attorneys brought the claim … in bad faith and to prolong the litigation." *Id.* at ¶¶8(e). The issues regarding these claims were thoroughly briefed in various Motions. If Defendant genuinely wished for the Court to analyze whether Plaintiffs' claims warranted sanctions, then it was inappropriate for it to leave the Court to sift through a voluminous record to find them. Instead, the Motion appears to be a venting of the hostilities felt by Defense counsel toward Plaintiffs' counsel, in continuation of a practice that the Court has attempted to mitigate throughout the action.

3. The statute regarding frivolous or groundless actions is not intended to deter claimants from good faith efforts to include all potentially applicable legal theories. Defendants that assert a claim is frivolous after prevailing, would not hesitate to argue that the same theory was the necessary cause of action if the plaintiffs had failed to raise it. Thus, all plaintiffs are attempting to navigate the space between losing a case for failing to identify a claim and overburdening a case with claims which are an overreach. Judge Dubofsky gave a thoughtful exposé on this difficulty in his concurrence in *Pedlow v. Stamp*, 819 P.2d 1110, 1112-14 (Colo.App. 1991). Among his many points, he noted that:

> By punishing the litigant through an adverse award of attorney fees, the courts may too readily slam the door on the litigant's right to espouse new ideas and to challenge improperly decided cases. Furthermore, in closing this door, we threaten the very source of ideas which is essential for enlightened decisions that reflect the needs of the society.

Id. at 1113-14. He also acknowledged that it is difficult to prognosticate which claims a tribunal may identify as applicable, and rulings among trial courts can be inconsistent so experience provides only limited guidance. *Id.* at 1113 ("since the determination of what is a frivolous claim or lawsuit is subjective and variable, a party cannot be confident of which claims will be so classified"). In general, the risk of losing a case entirely for failure to state a claim is the paramount consideration. Therefore, parties can raise any claim for which there is simply a "rational argument." *SaBell's, Inc. v. City of Golden*, 832 P.2d 974, 978 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993) ("In determining whether a claim is frivolous, it must appear

[1] Defendant's Motion briefly alludes to alleged abandonment of the claim for Respondeat Superior in ¶8(b) of the Motion but the claim is not discussed in relation to any other factor. Thus, it is unclear whether Defendant is seeking sanctions for this claim. To the extent that Defendant intended to do so, Plaintiffs assert that the claim was not abandoned. It is a claim that asserts vicarious liability, and was not therefore listed as an independent cause of action in the Trial Management Order. As a legal entity, Defendant can only act through agents and employees. Therefore, it was clearly implicit throughout this action that Plaintiffs sought to hold Defendant liable for the acts taken on its behalf by its agents.

that the proponents are unable to present a rational argument based on the evidence or law in support of their claim or defense.")

4. The attorney fee statute provides that "No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado." C.R.S. §13-17-102(7).

> This provision of the statute reflects the principle that an attorney's ethical obligation zealously to represent a client permits the pursuit of a claim which is not recognized under existing law "if it can be supported by a good faith argument for an extension, modification, or reversal of existing law." *See Mission Denver Co. v. Pierson*, 674 P.2d 363 (Colo.1984).

Pedlow, 819 P.2d at 1111. A good faith presentation of a legal theory which is "arguably meritorious" is sufficient to avoid an award of attorney fees. *SaBell's, Inc.*, 832 P.2d at 978.

5. Plaintiffs' claims for trespass and unjust enrichment were challenged in a Motion for Summary Judgment filed by the Defendant on October 7, 2014. A Response was filed by Plaintiffs on December 10, 2014. A Reply was filed on December 22, and the Court ruled on January 5, 2015.

6. Defendant asserts that Plaintiffs' claim for trespass should be deemed groundless because Plaintiffs were unable to show "physical damage" to their properties. In the Response brief on this issue, Plaintiffs made the following argument:

> At least two Plaintiffs have stated that the noise from Defendant's operations physically vibrate their homes. []. Ms. Webel has testified that the windows in her home shake as a result of Defendant's operations. []. While in both situations, counsel at the deposition attempted to mischaracterize these vibrations by asking both Mr. Yates and Ms. Webel if their homes were "damaged," Defendant fails to recognize that the vibrations, themselves, are physical damages to the Plaintiffs' properties. At any time that the Plaintiffs' homes or parts of their homes are vibrating, the homes are unfit for their intended purpose. The fact that the Plaintiffs have not yet experienced structural damage, such as broken windows or cracked walls, does not change the fact that the vibrations are a damaging condition that occurs every time Defendant's fly their planes overhead.

Response Brief at p.4-5 (citations omitted). Thus, while the facts regarding the physical effects of the noise were not in dispute, there was a legitimate dispute regarding the law. There were two issues of open interpretation. First, while noise is generally regarded as an "intangible" intrusion, in this matter the evidence showed that the intrusion was tangible because it caused physical shaking of the homes. Second, Plaintiffs asserted that this physical effect qualified as physical damage to the properties. The Court ultimately concluded that a temporary physical condition was insufficient and structural damage was required to meet the physical damage element of the claim. However, a legal theory "should not be considered frivolous simply

because it proves to be ultimately unsuccessful." *SaBell's, Inc.*, 832 P.2d at 978. Plaintiffs were entitled to argue in good faith for a different interpretation of the law.

7. Defendant's Motion does not substantively analyze the claim for unjust enrichment. In the Response Brief on this claim, Plaintiffs contended that the Defendant had appropriated use of the outdoor in a manner that excluded others. The Court found that, the Plaintiffs had not "conferred the claimed benefit upon Defendant; only that Plaintiffs allegedly suffered because of Defendant's activities which may have resulted in a financial benefit to Defendant." *See* Order at p. 7. Thus, this issue hinged on a legal dispute regarding the meaning of the term "conferred." Plaintiffs were entitled to make a good faith argument for a more expansive interpretation of the term. The Court may note that in the subsequent trial briefs the parties discussed numerous reverse condemnation cases from other jurisdictions in which airports had taken a property interest of its neighbors by creating nuisance level noise. These cases support the underlying point Plaintiffs were attempting to make with respect to unjust enrichment; that value (or a right) was involuntarily conferred from Plaintiffs to the Defendant. Although Plaintiffs lost on this argument, the effort to assert the claim in good faith should not be penalized.

8. Defendant's Motion does not state why Plaintiffs' claim for negligence *per se*, which proceeded to trial, should nonetheless be regarded as frivolous or groundless. Defendant notes that the Court determined that the ordinance was not applicable to aircraft. However, the fact that Defendant prevailed on this issue is not a basis for sanctions. *SaBell's, Inc.*, 832 P.2d at 978. Indeed, there is absolutely no indication that Plaintiffs' position on the ordinance was asserted in bad faith. The Court analyzed this issue in an Order dated December 31, 2014. At that time, the Court noted that the Boulder County noise ordinance exempted aircraft noise while the Longmont Ordinance did not. *See* Order at p.4. The Court found that, "federal law does not preempt the Longmont Municipal Code," but federal regulations "may provide a defense to the application of state or local law." Though the Court eventually concluded that the Longmont Code was not applicable to aircraft noise, Plaintiffs' position was not frivolous or groundless. The ordinance contained no such exclusion on its face, and the argument that they applied was clearly rational.

9. With respect to the supposed request for damages for "physical and mental injuries," Defendant has consistently mischaracterized this request for relief. Indeed, Defendant has already been reprimanded for this mischaracterization, so it is surprising that Defendant would again assert this misleading description of the request for relief in an attempt to justify sanctions. Plaintiffs in this action made only a general claim for physical and mental suffering. Defendant then attempted to use this allegation as a means of harassment by demanding C.R.C.P. 35 medical examinations. This demand was rejected by Magistrate Gunning on September 23, 2014. He ruled that:

> 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. Typically, in personal injury actions, Rule 35 examinations are not sought until plaintiff makes his or her C.R.C.P. 26(a)(2) expert disclosures. At that point, the specific physical and mental conditions of plaintiff are disclosed, so that the Defendant and, if necessary, the Court, can determine the specific conditions that are "in controversy." *See also Tyler v. Dist. Court*, 561 P.2d 1260, 1262 (Colo. 1977) (a plaintiff's general allegations of mental suffering, mental anguish, and emotional distress do not place plaintiff's mental condition in controversy for purposes of C.R.C.P. 35(a)).
>
> Here, the Motion treats Plaintiffs as a monolithic group, and no showing has been made of specific physical or mental conditions the individual Plaintiffs attribute to Defendant's actions. Based on the claims, it may be that examinations are warranted as to some, but not all, of the Plaintiffs.

In other words, 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. The ruling of Magistrate Gunning makes it explicitly clear that Defendant was overly aggressive and Plaintiff had not asserted such injuries at that time. Despite this ruling, Defendant demanded a further hearing on Rule 35 examinations. To remove any controversy and obviate the need for a hearing, Plaintiffs filed a "Notice of Withdrawal" on November 3, 2014 which further established in no uncertain terms that Plaintiffs were not asserting any medical conditions or physical injuries. Thus, contrary to assertions of bad faith, Plaintiffs were actively seeking to limit the proceedings by clarifying claims. It was the Defendant who was expanding the proceeding unnecessarily. The record is clear that Plaintiffs never asserted the existence of any medical conditions, and Defendant simply invented a controversy where none actually existed. There is no basis for sanctions against Plaintiffs on this issue.

10. As a final matter, Plaintiffs object to Defendant's attempt to mislead the Court about settlement discussions. Defendant asserts that, "Plaintiffs and their attorneys continued to demand unreasonable conditions of settlement." Motion at ¶8(h). In reality, there were no substantive discussions regarding conditions of settlement. Throughout this action, Defendant steadfastly and adamantly refused to discuss any alterations to its practices. Not a single offer to adjust a single practice was ever made. Plaintiffs' "demands" were opening positions in what should have been a discussion in good faith about reasonable measures Defendant might undertake to mitigate its impact on the community. However, Defendant rebuffed any and all efforts to even open a dialog. 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. Defendant immediately stated at the start of the conference that it would not discuss any of the Plaintiffs' concerns. Thus, there were no "demands" by Plaintiffs. Plaintiffs' attempts at dialog met a slammed door.

WHEREFORE, Plaintiffs request that the Motion for Attorney Fees be denied.

Respectfully submitted this 25th day of June, 2015.

LAW OFFICES OF RANDALL M. WEINER, P.C.

Original Signature on file at Law Offices of Randall M. Weiner, P.C.

By: */s/ Randall M. Weiner*
Randall M. Weiner, #23871
Annmarie Cording, #42524, Of Counsel

LAW OFFICES OF MATTHEW B. OSOFSKY, ESQ.

Original Signature on file at Law Offices of Randall M. Weiner, P.C.

By: */s/ Matthew Osofsky*
Matthew Osofsky, #34075

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was E-Served by the Court-authorized E-System provider to all active counsel of record on ICCES' service list on this 25th day of June, 2015:

/s/ Annmarie Cording
Annmarie Cording

In accordance with C.R.C.P. 121 §1-26(9), a printed copy of this document with original signature(s) is maintained by the Law Offices of Randall M. Weiner, P.C., and will be made available for inspection by other parties or the Court upon request.