SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 16, 2017 3:02 PM FILING ID: 23A5F5C287B24 CASE NUMBER: 2017SC154
Colorado Court of Appeals Case No. 2015CA1159 Opinion, J. Román; Concurring JJ. Lichtenstein, Freye Boulder County District Court No. 2013CV31563 Honorable Judith J. LaBuda, Judge	
Petitioner: CITIZENS FOR QUIET SKIES, INC., KIMBERLY GIBBS, TIMOTHY LIM, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER **Respondent:** MILE-HI SKYDIVING CENTER, INC.,	▲Court Use Only▲
Counsel for Respondent: Anthony L. Leffert, No. 12375 Laura J. Ellenberger, No. 43931 Robinson Waters & O'Dorisio, P.C. 1099 18th Street, 26th Floor Denver, Colorado 80202 Phone Number: (303) 297-2600 Fax Number: (303) 297-2750 E-mail: aleffert@rwolaw.com lellenberger@rwolaw.com	Case No.: 2017SC154

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition brief complies with the requirements of C.A.R. 32 and C.A.R. 53, including the formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 53(c) because it contains 3,742 words.

s/Anthony L. Leffert

I. ISSUES PRESENTED FOR REVIEW

A. The Court of Appeals correctly affirmed the District Court's rulings in favor of Mile-Hi on Plaintiffs' negligence *per se* and nuisance claims.

B. The Court of Appeals correctly held that Longmont's general noise ordinance, Longmont Municipal Code 10.20.110, exempts aircraft and airport activities.

C. The court below properly did not address Plaintiffs' contention that Mile-Hi systematically exceeded the Longmont general noise ordinance.

II. PETITIONERS IMPROPERLY ATTACHED DOCUMENTS NOT IN THE RECORD TO THE PETITION FOR WRIT OF CERTIORARI

To begin, the "Petition for Certiorari" ("Petition") does not comply with the Colorado Appellate Rules or Colorado case law. Specifically, C.A.R. 53(a)(6) provides, in relevant part, that a petition for writ of certiorari must include an appendix containing a copy of the Court of Appeals' opinion and the text of any pertinent statute or ordinance. Petitioners-Appellants-Plaintiffs (referred to herein as "Petitioners" or "Plaintiffs") impermissibly included in their Appendix documents that are not in the record and should not, therefore, be considered on appeal. These documents include: recent articles and editorials from the Longmont Times-Call (Appendices 5 and 6); and a February 24, 2017 printout from the City of Longmont's website (Appendix 8).

Not only are these attachments not permitted pursuant to the appellate procedural rules, they are also not part of the record and should not be considered

by this Court. *See Del Monte Live Stock Co. v. Ryan*, 133 P. 1048, 1050 (Colo. App. 1913) ("It is well settled in our Supreme Court that appealed cases must be based upon matters contained in the record."); *Loomis v. Seely*, 677 P.2d 400, 401 (Colo. App. 1983) (generally appellate courts may only consider documents contained in the record).

The two Longmont Times-Calls newspaper articles Plaintiffs attached to the Petition as Appendices 5 and 6 are also improper and irrelevant. Journalists do not decide or dictate the state of the law. While there is no question that this case has received a lot of publicity and attention in the Longmont community, this does demonstrate that the state of law is in "disarray." (*See* Petition at p. 9.) In actuality, the District Court's order and the Court of Appeals' opinion are in accord with state and federal law and uphold the status quo regarding airport noise regulation.

Plaintiffs also attached an excerpt from the Airport Master Plan to the Petition as Appendix 4. Even though this document was not admitted into evidence at trial, both William Kamin, Mile-Hi's real estate expert, and Richard Stewart, a former chairman of the Airport Advisory Board, testified about the Airport Master Plan and its adoption of the federal noise limit of 65 decibels ("dB"). (R. Tr. (4/14/15) p. 1290, l. 7-9; R. Tr. (4/17/15) p. 1447, l. 23 - p. 1448, l. 10, p. 1450, ll. 14-25.)

Plaintiffs now argue that because the Airport Master Plan, itself, was not introduced as a trial exhibit, neither the District Court nor the Court of Appeals should have considered the testimony about it. (Petition at pp. 14-15.) Plaintiffs waived this objection by failing to raise it before either the District Court or the Court of Appeals and failed to preserve the objection for appeal. *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 370 P.3d 353, 359 (Colo. App. 2016) (appellate courts do not consider arguments never presented to, considered by, or ruled upon by the district court).

This Court should not consider the irrelevant and improper attachments to the Petition and evidence not contained in the record pursuant to the Colorado Appellate Rules and Colorado case law.

III. PETITIONERS MISSTATEMENT THE LOWER COURTS' HOLDINGS AND FACTS IN THE RECORD

The Petitioners' frivolous and groundless request for certiorari review of the lower courts' decisions is indicative of how they have pursued this litigation from the beginning. From the time the Plaintiffs initiated this lawsuit in 2013, they have made every effort to make this litigation as difficult and expensive as possible for Mile-Hi. Indeed, Plaintiffs' assertion of baseless claims is precisely why the District Court awarded attorneys fees against the them pursuant to C.R.S. §13-17-102 on two separate occasions. (CF, pp. 2533 - 2546; CF, p. 2861.)

This conduct has continued through the Plaintiffs' post-trial activities by filing a groundless appeal; missing deadlines and failing to adhere to the Colorado Appellate Rules; and by making numerous misrepresentations to this Court regarding the facts in the record and the lower courts' decisions. Plaintiffs simply refuse to accept that the law and facts of this case do not support their claims. Consequently, Mile-Hi intends to seek an award of attorney fees and costs on appeal pursuant to C.R.S. §13-17-102, C.A.R. 38, and C.A.R. 39.1 for filing a frivolous appeal and a frivolous Petition for Writ of Certiorari.

In their Petition, Plaintiffs misstate numerous facts in the record and the holdings of both the District Court and the Court of Appeals. For example, Plaintiffs claim the District Court held that "Colorado airports are completely subservient to the Federal Aviation Administration ("FAA") under the doctrine of preemption…" (Petition at p. 1.) In its bench trial order, however, the District Court recited the standard for private nuisance pursuant to Colorado law and found that "the noise produced by Mile-Hi's operations is not offensive, annoying, or inconvenient to a degree significant enough that a normal person in the community would consider it unreasonable for those individuals who choose to reside in close proximity to an airport." (CF 2301, ¶¶ 58.) The District Court carefully tailored its holdings to the facts and evidence before it and did not base its decision on the "subservient" nature of Colorado's airports. (*Id*., ¶¶ 1, 57, 58; Petition at p. 1.)

Even more importantly, Plaintiffs argue that the District Court's ruling contradicts this Court's decision in *Arapahoe Cnty. Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). This is another example of the Plaintiffs misstating the decisions of the courts below. Both the District Court and the Court of Appeals found the Airport Master Plan provides that the FAA 65 dB noise limit applies to the Airport's activities and that the Master Plan was adopted by the City of Longmont. (CF 2299, ¶ 46; Appx. 1, pp. 4-5, ¶¶ 9-11.)

The Airport Master Plan, which was drafted and adopted by the City, establishes that the 65 dB is the applicable noise limit for the Airport's activities. (R. Tr. (4/14/15) p. 1290, l. 7-9.) This is precisely what the "proprietor exception," discussed at length in *Centennial Express*, allows the City to do as the owner and operator of the Airport. Accordingly, the decisions below are in accord with this Court's decision in *Centennial*.

Further, Plaintiffs claim that the "first mention of the Airport Master Plan appeared in Mile-Hi's Answer Brief" filed with the Court of Appeals. (Petition at p. 14.) To the contrary, multiple witnesses testified about the Airport Master Plan at trial, and Mile-Hi's counsel argued in his closing statement that the City adopted the FAA's 65 dB limitation as the noise limit applicable to aircraft and the Airport's activities. (R. Tr. (5/6/15) p. 104, ll. 3-17, p. 111, ll. 15-20, p. 119, ll. 6-14.) The

City's adoption of the 65 dB limit is also specifically included in the District Court's Finding of Facts. (CF 2299, ¶ 46.) Plaintiffs' contention that they were unaware of this argument until Mile-Hi responded to Plaintiffs' appeal is specious.

The Court of Appeals held that the Plaintiffs did not challenge the Trial Court's finding that the Master Plan adopted the 65 dB standard in their opening brief and, therefore, waived this argument on appeal. (Appx. 1, p. 5, n4.) Accordingly, Plaintiffs failed to preserve this issue for review by this Court. *Flagstaff Enters. Constr., Inc. v. Snow*, 908 P.2d 1183, 1185 (appellate courts do not consider arguments raised for the first time in an appellant's reply brief).

IV. STATEMENT OF THE CASE

A. Nature of The Case

Mile-Hi provides recreational and professional skydiving services out of the Vance-Brand Municipal Airport in Longmont, Colorado (the "Airport"). (CF, p. 2294, ¶8.) In late 2013, a small group of six Longmont-area residents and Citizens for Quiet Skies, Inc., a nonprofit corporation formed by Kimberly Gibbs, one of the individual plaintiffs, sued Mile-Hi under a variety of tort theories, alleging Mile-Hi's skydiving activities negatively impacted their quality of life. (CF, p. 2294, ¶9; *see, generally*, CF 77-87, Second Amended Complaint.)

Before trial, the District Court dismissed many of the Plaintiffs' original claims on summary judgment (CF, pp. 809-810, 1000, 1002, 1006-1007, 1009-

1010). Following a week long bench trial, Mile-Hi prevailed on the Plaintiffs' remaining claims of private nuisance, negligence, and negligence *per se*. (CF, p. 2302, ¶¶ 62-67.) After trial, the District Court granted Mile-Hi an award of attorneys' fees pursuant to C.R.S. § 13-17-102, finding several of the Plaintiffs' original claims lacked substantial justification. (CF, pp. 2342-2352, 2545-2546). Plaintiffs challenged this award in a motion to reconsider pursuant to C.R.C.P. 59, (CF, pp. 2567-2574), which the trial denied and found to be groundless. (CF, p. 2787) The Trial Court again awarded Mile-Hi its attorneys' fees for having to respond to yet another groundless motion and attempt by the Plaintiffs to make this litigation unreasonably difficult and expensive. (*Id*.)

Plaintiffs then appealed the District Court's holdings on a variety of issues, asserting arguments the Trial Court had previously rejected at various stages of litigation, and sought a new trial on their private nuisance and negligence *per se* claims. (Appx. 9, pp. 7-42.) Plaintiffs unsuccessfully argued to the Court of Appeals that the Trial Court misapplied federal and state law regarding federal preemption in the area of airplane noise. (Appx. 1, ¶¶ 11-13, 16-20.) The Court of Appeals affirmed the Trial Court judgment in favor of Mile-Hi. (Appx. 1, ¶¶ 12, 20.)

B. Statement of Relevant Facts

The Vance-Brand Municipal Airport is a general aviation airport owned and operated by the City of Longmont (the "City"). (CF, p. 2295, ¶22.) It is part of the National Plan of Integrated Airport Systems and has received over $4.7 million in federal grant funds since 1988 as part of the Airport Improvement Program. (*Id.*) To obtain these grants, the City must, among other requirements, adopt and submit to the FAA for its approval an Airport Master Plan that is updated periodically. (R. Tr. (4/15/15) p. 925, l. 20-p. 926, l. 13; p. 870, l. 6-19.)

The Airport Master Plan, which is drafted and adopted by the City and approved by the FAA, provides that 65 dB is the noise limit applicable to the Airport's activities in accordance with 14 C.F.R. Part 150. (R. Tr. (4/14/15) p. 1290, l. 7-9.) In exchange for the federal grant funds, the City also agreed to be bound by certain "Grant Assurances," which require, among other things, that the Airport remain available to all general operations, including skydiving. (CF, p. 2295, ¶22.) Mile-Hi's operations comprise only about 6% of the total flight operations out of the Airport on an annual basis. (CF, p. 2296, ¶26.)

Mile-Hi entered into an agreement with the FAA in 2007 (the "Letter Agreement") authorizing it to conduct parachute jumping at the Airport and establishing the procedures Mile-Hi must follow. (CF, p. 2296, ¶31.) The Letter Agreement provides that Mile-Hi's airplanes must remain within the confines of a

designated "flight box" surrounding the Airport during a typical skydiving flight, unless otherwise diverted by Denver International Airport Air Traffic Control. (*Id*.) The flight box is bordered by arrival and departure corridors for Denver International Airport and the Rocky Mountains. (CF, p. 2297, ¶33.) This is not, as Plaintiffs' contend, a "self-imposed confined area" but one dictated by the FAA. (Petition at p. 5; *see also* CF 2296, ¶¶ 31-33.)

All of the individual Plaintiffs are residents of Longmont and live within the flight box. (CF, p. 2294, ¶10.) Most of the Plaintiffs also live within a couple miles of the Airport. (CF, p. 2294, ¶¶11-15.) Two of their homes are directly underneath the Airport's primary landing path. (CF, p. 2295, ¶16.) As the District Court found, Plaintiffs are a small group of Longmont residents who are overly sensitive to airplane noise. (CF, ¶¶ 19, 58.) The vast majority of Longmont residents are not bothered by noise produced by Mile-Hi's operations. (*Id*.)

V. ARGUMENT

A. The Court of Appeals correctly affirmed the District Court's rulings in favor of Mile-Hi on Plaintiffs' negligence *per se* and nuisance claims.

The flawed premise underlying Plaintiffs' Petition is that the Trial Court ruled all local noise ordinances as they pertain to airplane noise are preempted by federal law, which, they claim, is an overreach by the federal government. Neither the Trial Court nor the Court of Appeals held that federal law preempts all local controls of airplane noise. Instead, the District Court narrowly held that federal

law preempts the Longmont noise ordinance as it relates to aircraft. The Court of Appeals clarified that the City of Longmont exercised its authority as the airport proprietor by approving the Airport Master Plan and adopting the federal noise regulation for airplane noise of 65 dB. Moreover, the Longmont noise ordinance exempts airport noise under its exception for noise resulting from "activities to the extent they are approved and limited by the city." Longmont Mun. Code. 10.20.110(D)(5)(ii). Both the District Court and the Court of Appeals properly determined that the 65 dB limitation contained in the Airport Master Plan and not the Longmont noise ordinance applies to airport noise.

The lay witness and expert witness testimony from both Plaintiffs' and Mile-Hi's experts demonstrate that Mile-Hi did not unreasonably and substantially interfere with Plaintiffs' use and enjoyment of their homes. (CF, p. 2302, ¶62, 64.) The Trial Court analyzed Plaintiffs' nuisance claim under Colorado law, and applied the test as stated in *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377 (Colo. 2001). "A claim for nuisance is predicated upon a substantial invasion of a plaintiff's interest in the use and enjoyment of his property when such invasion is … intentional and unreasonable…" *Van Wyk*, 27 P.3d at 391; CF, p. 2292, ¶ 1. An "unreasonable" interference must be "significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Id*. at 391; CF, p. 2293, ¶ 2.

Plaintiffs have argued that because their supporters have filed complaints about airport noise, the District Court should have found normal people in the community are annoyed by Mile-Hi's skydiving operations. Of these complaints, the majority of them came from Ms. Gibbs and other supporters at Ms. Gibbs' urging. (R. Tr. (4/16/15), p. 1095, l. 9-13.) Many complaints were made on days when Mile-Hi was not even flying. (R. Tr. (4/16/15), p. 1104, l. 14-21.) Contrary to Plaintiffs' argument, this evidence supports the Trial Court's conclusion that Plaintiffs are a only a small group who are overly sensitive to airplane noise. (CF, p. 2295, ¶19; p. 2301, ¶58.)

Jack Freytag, Mile-Hi's sound expert, conducted sound studies near two of the Plaintiffs' homes and found that noise levels at the two sites from all noise sources were well within the normally accepted range for residential communities. (R. Ex. JJ, p. 677.) These measurements include noise from other aircraft flying in the area. (R. Ex. JJ, p. 677.) Mr. Freytag concluded that the noise exposure contribution from Mile-Hi was less than 0.1 dB to the overall noise environment, which is negligible when compared to all aircraft noise in the area. (R. Ex. JJ, p. 687.) Mr. Rand, Plaintiffs' own sound expert, conducted a sound study which was consistent with Mr. Freytag's findings. (CF, p. 2299, ¶ 50.)

The District Court also based its finding that Mile-Hi's skydiving activities do not create nuisance-level noise based upon personal site visits by the Court to

two of the individual Plaintiffs' homes. Weighing this evidence, the sound studies by Plaintiffs' and Mile-Hi's experts, and the testimony from numerous witnesses who also reside within the "flight box," the Trial Court found the noise produced by Mile-Hi's operations is not offensive, annoying, or inconvenient to a degree significant enough that a normal person in the community would consider it unreasonable. (CF, p. 2301, ¶ 58; p. 2302, ¶ 64.)

The District Court stated that "simply because a certain noise level is irritating or frustrating to a small group of people" does not make it significant enough to rise to the level of a nuisance in these circumstances. (CF, p. 2301, ¶ 58.) Further, the court stated, "Though the Individual Plaintiffs may at times find the noise to be irritating or frustrating, the Court finds the gravity of harm to Plaintiffs in this matter is not significant or severe." (CF, p. 2301, ¶ 58.) The Trial Court found the utility of Mile-Hi's "legitimate business" that "complies with FAA regulations and provides tax revenue and recreational and other services to the community outweighs Plaintiffs' concerns of noise, particularly when Plaintiffs moved into an area known to have an airport in close proximity…" (CF, p. 2301, ¶ 58.)

There is no credible evidence to support that the Plaintiffs have been damaged in any way by Mile-Hi's skydiving operations. (CF, p. 2302, ¶ 63.) The evidence presented at trial was more than sufficient to support the Trial Court's

finding that Mile-Hi's operations do not create a private nuisance, which decision was affirmed by the Court of Appeals. (Appx. 1, p. 5, ¶ 13 - p. 10, ¶ 20.)

B. The Court of Appeals correctly held that Longmont's general noise ordinance, Longmont Municipal Code 10.20.110, exempts aircraft and airport activities.

The City exercised its right as the Airport proprietor and adopted the federal noise limit for the Airport. A narrow exception to federal preemption in the area of regulation of air travel and airplane noise "has been carved out for state and local governments who own airports." *Banner Advertising v. City of Boulder*, 868 P.2d 1077, 1083 n.6 (Colo. 1994). The "proprietor exception" permits a local municipality, in its proprietary capacity, to adopt "reasonable, nonarbitrary and non-discriminatory regulations of noise and other environmental concerns at the local level." *Nat'l Helicopter Corp. of Am. v. City of N.Y.*, 137 F.3d 81, 88 (2d Cir. 1998) (internal citations omitted). "Courts have, however, recognized that local proprietors play an extremely limited role in the regulation of aviation." *Arapahoe Cnty. Public Airport Auth. v. FAA*, 242 F.3d 1213, 1222 (10th Cir. 2001) (citations omitted).

Plaintiffs cite this Court's opinion in *Arapahoe Cnty. Public Airport Auth. v. Centennial Express Airplanes, Inc.*, 956 P.2d 587 (Colo. 1998) to support their airport proprietor argument. Following this Court's decision in *Centennial Express*, however, the Tenth Circuit held the airport's ban on scheduled passenger

service at issue in that case was preempted by federal statute and the Supremacy Clause. *See Arapahoe Cnty. Public Airport Auth.*, 242 F.3d 1213 (10th Cir. 2001). The Tenth Circuit noted that this Court's decision in *Centennial Express* "was seriously divided … as evidenced by its plurality opinion three of seven justices participated in the majority, one justice concurred, two justices dissented, and one justice abstained." *Id*. at 1219.

As the airport proprietor, the City adopted the 65 dB noise limit in its Airport Master Plan, approved by the FAA, as the noise restriction for the Airport's activities. (CF, p. 2299, ¶ 46.) This limit, not the Longmont noise ordinance of 55 dB, applies to Mile-Hi's skydiving activities. If the Longmont ordinance was applied to the Airport's activities, it would preclude any airplane from flying in or out of the Airport, and would, therefore, be an impermissibly unreasonable noise regulation. In fact, all aircraft at the Airport exceed the Longmont general noise ordinance limit on takeoff and landing. (R. Tr. (4/17/15) p. 1384, l. 14-24.)

Jack Freytag testified that every airport in the country would have to be closed if noise at the 55 dB level was found to create a nuisance, as all aircraft exceed 55 dB on takeoff and landing. (R. Tr. (4/17/15) p. 1384, l. 24-24.) Thus, applying the Longmont noise ordinance to the Airport's activities would create an absurd result. There is no evidence that the City intended the Longmont noise ordinance, which limits noise created by ground activities, to be applied to the

Airport's operations, especially considering that specifically adopted the 65 dB limit in the Airport Master Plan. Nor has the City ever sought to enforce the Longmont general noise ordinance on the Airport's activities.

Finally, Plaintiffs argue that the 65 dB limit contained in the Airport Master Plan is not an actual noise limit but a "metric" used by the FAA to measure noise impacts. (Petition at p. 14.) This argument misstates the testimony at trial that several federal agencies do, in fact, employ 65 dB as a noise limitation on airplane noise. (*See* R. Tr. (4/17/15) p. 1286, l. 2 - p. 1288, l. 23.) (Mile-Hi's real estate expert, William Kamin's, testimony regarding the Federal Housing Administration's and the FAA's adoption of the 65 dB noise limitation and its effect on lending practices and real estate valuations).) By its inclusion and adoption into the Airport Master Plan, this limitation is applicable to aircraft activity at the Airport.

The City, with the FAA's approval, determined that 65 dB limit used by several federal agencies is the noise limit applicable to the Airport's activities. (CF, p. 2299, ¶ 45.) The District Court correctly held that it is this restriction, not the Longmont noise ordinance, that applies in this case. (CF, p. 2303, ¶ 69.) This is not, as the Plaintiffs argue, a deviation from the established law. (Petition at p. 12.) In actuality, the holdings of both the District Court and the Court of Appeals

are in accord with state and federal law and the "proprietor exception." Accordingly, Plaintiffs' request for certiorari review on this issue should be denied.

C. The court below properly did not address Plaintiffs' contention that Mile-Hi systematically exceeded the Longmont general noise ordinance.

In light of the fact that it is the 65 dB limitation, not the Longmont general noise ordinance of 55 dB, that applies to Mile-Hi's skydiving activities, Plaintiffs' argument that Mile-Hi's operations systematically violate the Longmont ordinance is moot. With the appropriate standard applied, the evidence presented at trial is more than sufficient to support the District Court's finding that Plaintiffs' negligence *per se* claim fails as a matter of law. This holding was affirmed by the Court of Appeals.

VI. Conclusion

For the foregoing reasons, the Court should deny certiorari review.

Respectfully submitted this 16th day of March, 2017.

ROBINSON WATERS & O'DORISIO, P.C.

s/Anthony L. Leffert
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2017, I served a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** via the *Colorado Courts E-filing* system on the following:

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