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| COURT OFAPPEALS, STATE OF COLORADO<br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202<br>Telephone: 303-837-3785 | |
| Trial Court:<br>COUNTY OF BOULDER, COLORADO<br>District Court, Boulder County, State of Colorado<br>1777 Sixth Street, Boulder, Colorado 80302<br>The Honorable Judith L. LaBuda<br>Case No. 2013 CV 31563 | ▲ COURT USE ONLY ▲ |
| **Appellants:** CITIZENS FOR QUIET SKIES, KIMBERLY GIBBS, TIMOTHY LIM, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER<br><br>**v.**<br><br>**Appellee:** MILE-HI SKYDIVING CENTER, INC. | Court of Appeals<br>Case Number:<br><br>2015 CA 1159 |
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| **OPENING BRIEF** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, I certify that:

The brief complies with C.A.R. 28(g). In contains 9,454[1] words.

The brief complies with C.A.R. 28(a). It contains under a separate heading placed before the discussion of each issue, statements of the applicable standard of review with citation to authority, whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*/s/ Randall M. Weiner*
Randall Weiner, #23871

[1] The Opening Brief was initially rejected because it exceeded the maximum word count. Counsel's prior representation that the original word count was below 9,500 occurred because the footnotes and Statement of Issues were not included. Footnotes were inadvertently omitted because a box was not checked within the program to include them in the word count. The Statement of Issues was not included due to a misread of the rule. The current word count includes all text from the Statement of Issues to the end, omitting signature block and certificate of service per the rule.

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## STATEMENT OF THE CASE

### A. Summary of Facts

Plaintiff Citizens for Quiet Skies, Inc. ("CQS") is a citizens' advocacy group that seeks to protect the quality of life of homeowners in the vicinity of Longmont Municipal Airport ("LMO"), also known as Vance Brand. R. Ex. X, p. 604; R. Ex. Z, p. 605-63. The individual Plaintiffs are homeowners who are representative members of CQS. R. CF 2294-95. The Plaintiffs do not object to the airport or the normal traffic of a municipal airport. R. Tr. 209:24-210:4.

However, there is one entity which operates from the airport and that flies in a unique manner which creates nuisance level noise from 7am until sunset all summer long and interferes with the local residents' quiet enjoyment of their properties. R. Tr. 210:5-25; 213:4-18.

On summer weekends, flights conducted by Mile-Hi Skydiving, Inc. ("Mile-Hi"), a private business, take off from LMO every fifteen to twenty minutes. R. Ex. 2, p. 855; R. Tr. 213:4-18. These aircraft then fly in a generally spiraling pattern (R. CF 2298 ¶39; R. Ex. 682) while climbing heavily loaded for at least fifteen minutes to a "drop altitude" of 12,500 feet above ground level (AGL). R. Ex 680. When planes reach drop altitude, the planes temporarily reduce propeller speed and release skydivers. R. Tr. 130:3-10. The planes then return to the airport.

Planes generally create the most noise while climbing. R. Tr. 982:13-16. Aircraft typically climb briefly while flying straight in one direction, and tend to fly away from the airport and the Plaintiffs' community. R. Tr. 210:5-25. In contrast, Mile-Hi's flights create far more noise than any other aircraft operating from the airport because they typically climb three to six times higher (12,500 feet). R. Tr. 1207:22. They also remain within a self-imposed confined area around the airport they call the "flight box" (R. CF 2296, ¶32), and frequently conduct repeated loops and multiple passes over the same properties on a single flight. R. CF 682.

Airport manager Tim Barth testified that close to half of the local operations that leave the airport property are Mile-Hi flights. R. Tr. 1042:19-22. Mile-Hi's flights are also concentrated in the summer months with approximately 80% occurring within six months. R. Ex. 2, p. 856. During those months 60% of the flights occur on weekends. R. Ex. 2, p. 855. Thus, Mile-Hi conducts the overwhelming majority of flights from LMO during the periods of good weather when the Plaintiffs are most likely to be outdoors on their property.

Plaintiffs began to be offended, annoyed, and inconvenienced by Mile-Hi's activities around 2006 when the company began using a particularly noisy aircraft called a DeHavilland Twin Otter, known in the case as the "Purple Otter." R. Tr.

208:21-209:2. Before 2006, Mile-Hi regularly leased only a King Air and a Cessna aircraft. *Id.*

Mile-Hi has steadily increased the regular use of the Purple Otter since it was placed in service as its principal aircraft in 2006. R. Ex. 2, p. 854. Between 2008 and 2014, the number of flights by the Purple Otter increased by over 50%. R. CF 2298, ¶43. Mile-Hi's overall flights increased by over 70% in that time period. *Id.*

The airport manager began to notice an increase in community noise complaints in 2010, when there was an increase in use of the Purple Otter. R. Tr. 978:18-979:10. The Court found him to be biased in favor of Mile-Hi. R. CF 2299, ¶47. Nonetheless, even he agreed that the increase in complaints was directly attributable to the Purple Otter. *Id.*

Mile-Hi has occasionally leased aircraft from Skydive Arizona, including a plane known in the case as the "White Otter." R. Ex. 2, p. 854. Unlike the Purple Otter, the White Otter is equipped with a four-bladed propeller that is much quieter than the three-bladed propeller on the Purple Otter. R. Tr. 977:23-978:10. Thus, it was established that Mile-Hi has access to and has used quieter equipment more appropriate for the area.

## B. Summary of Procedures

Plaintiffs brought this action in 2013 seeking injunctive relief and monetary damages to require Mile Hi operations to conform to the Longmont Noise Ordinance. To do this Plaintiffs requested an order that would halt all use of Twin Otter aircraft or at least halt use of the Purple Otter until it was retrofitted with a Quiet Kit. Plaintiffs requested a limit on the hours of operation, especially on weekends. R. CF 1958. Plaintiffs also sought monetary damages for diminution of value of to their properties and for annoyance and inconvenience.

Prior to trial, Judge LaBuda ruled on three Motions for Summary Judgment by Mile-Hi. In its Motion for Summary Judgment Regarding Claims by Plaintiff Citizens for Quiet Skies, Inc., R. CF 451-64 (hereinafter "MSJ Regarding CQS"), Mile-Hi contended that CQS had no standing to assert any claims in the case. The Court held that CQS had "organizational standing" to seek injunctive relief, but could not seek monetary damages that were individual to each defendant. Accordingly, CQS was limited to the claim for nuisance.

In its Motion for Summary Judgment Regarding Preemption of State and Local Laws, R. CF 542-53 (hereinafter "MSJ Regarding Preemption"), Mile-Hi asserted that all claims in the action were preempted by Federal law. The Court held that Plaintiffs' claims were not completely preempted, and that there were issues of disputed fact with respect to the City of Longmont noise ordinance that it

instituted as the airport operator. The Court also held that the Boulder County noise ordinance was explicitly not applicable to aircraft noise.

In its Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims, R. CF 663-82 (hereinafter "MSJ Regarding Remaining Claims"), Mile-Hi argued that all other claims should be dismissed. The Court held that Plaintiffs' claims for unjust enrichment and trespass failed, but denied the Motion with respect to nuisance, negligence and negligence *per se*. Plaintiffs proceeded to trial on these three claims.

Following a five-day bench trial, the Court determined that it would conduct a site visit at two of the Plaintiffs' homes. Plaintiffs objected that Mile-Hi would not and did not conduct representative flights, and that the site visit was therefore prejudicial. Closing arguments were held following the site visit, and a bench verdict was issued on May 21, 2015, R. CF 2292-304 (hereinafter the "Bench Trial Order").

Following the verdict, Mile-Hi filed a Motion for Attorney Fees. The Court found, in error, that the claim for unjust enrichment was not substantially justified and that the claim for *respondeat superior* had been abandoned. The Court also improperly sanctioned Plaintiffs for referring to medical injuries in their Complaint, for asserting damage claims by CQS, and for the assertion that the Boulder County noise ordinance applied.

Following the Order granting attorney fees, Plaintiffs timely sought reconsideration of the amount of the awards pursuant to C.R.C.P. 59. Judge LaBuda improperly refused to review the Motion and again issued an award of attorney fees.

## ARGUMENT

The principal issue raised in this appeal is federal preemption. According to the Trial Court, the FAA has exclusive jurisdiction over every airplane operation regardless of whether a restriction would have any impact on the national aviation system or whether any common carriers fly freight or passengers from that airport, i.e. impacts interstate commerce. If Judge LaBuda is correct, then the Colorado public has absolutely zero control over what occurs at airports after they are constructed. If the decision is upheld, even the airport operators could place no restrictions on the volume of flights, type of operations, type of aircraft or the hours of operation at the airport, which contradicts the Colorado Supreme Court's approach in *Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998).

On behalf of their citizens, Colorado courts should resist this federal overreach. The FAA's agenda is the promotion of aviation and it does not represent or protect any interests of the public that might interfere with aviation. The only action that the FAA will take with respect to airport noise is to

occasionally pay for noise mitigation in homes. Unsurprisingly, the standards for such funding are set at levels where only residential properties around the busiest commercial airports would ever be eligible. FAA regulations contain no protection whatsoever for the rural communities surrounding smaller scale airports that are typical in Colorado.

The Trial Court did recognize that local landowners can bring nuisance claims for diminution of their property values as a result of airport noise. However, the Court erroneously used the "Schultz Curve" that the FAA uses to evaluate noise mitigation funding. As Mile-Hi's airport noise expert explicitly agreed, the standards for funding under the Schultz Curve are narrower than the standards for nuisance under state law.

The Trial Court was wrong to dismiss claims for trespass and unjust enrichment. The noise from Mile-Hi had the physical effect of shaking the homes, which is the type of physical impact from an intangible invasion that should be sufficient for trespass. Unjust enrichment is an equitable claim that exists to serve justice for circumstances not covered by other legal doctrines.

Plaintiffs were particularly disturbed to find themselves sanctioned over claims presented in good faith. The Plaintiffs were sanctioned simply for seeking reconsideration in a Rule 59 motion, and amount of the sanctions had no rational connection to time spent. R. CF 2785-87 ("a court need not entertain new

arguments or theories asserted for the first time in a motion to reconsider…[and thus] awards defendant attorneys fees").

## I. The Trial Court erred in finding that federal law completely preempts local control of the defendant's activities.

### A. Federal law does not preempt Longmont's noise ordinance and noise abatement procedures.

***De Novo* Standard of Review.** Under Colorado law, "[f]ederal preemption is a question of law" that Colorado appellate courts "review *de novo.*" *Timm v. Prudential Ins. Co.*, 259 P.3d 521, 525 (Colo.App. 2011); *People v. Crouse,* 2013 Colo.App. Lexis 1971 *15 (Colo.App. Dec. 9, 2013)(" "Whether a federal statute preempts state law is an issue of federal law…. This issue is reviewed *de novo*.").

**Preserved:** Plaintiffs' Response to MSJ Regarding Preemption, R. 792-93.

**Ruling:** Bench Trial Order, R. CF 2302, ¶60.

In its final order, the Court held that local governments are *prohibited* by federal law from regulating the noise of aircraft using local airports, without permission from the Federal Aviation Administration. *Id.* at ¶¶37, 56, 60, 68, 69, 70, 72, 73. Thus, the Appellants' claims of negligence and nuisance were rejected to the extent they were based on Mile-Hi's failure to comply with Longmont's noise ordinance and noise abatement procedures. *Id.* at ¶¶62, 67.

It is notable that in taking this extreme position, the Court abruptly reversed itself from its summary judgment order on preemption from only five months

earlier, when it explicitly held that Longmont's municipal noise ordinance was *not* preempted by federal law. R. CF 1001.[1]

In its final order, the Trial Court cited to only two cases in support of its ruling, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), Bench Trial Order, R. CF 2303, ¶68, and *Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693, 697 (7th Cir. 2005). R. CF 2303, ¶75.

The Court also found that the federal regulatory procedure set forth in FAA regulations at 14 C.F.R. 150 served as "the exclusive and comprehensive process" for limiting airport noise. R. CF 2303, ¶¶70, 71. No case law supporting this interpretation was cited by the Trial Court.

In reaching such extreme conclusions to limit state and local authority over airport and airplane activities, the Trial Court greatly erred.

*1. Airport proprietors may regulate noise.*

In the most recent aviation-preemption case decided by the Colorado Supreme Court, in 2001, the Court stated that, "[t]he exercise of federal supremacy must be respected but is not lightly presumed." *Sky Fun 1 v. Schuttloffel*, 27 P.3d 361, 368 (Colo. 2001). In relying solely on *City of Burbank* and *Hoagland*, the

[1] Specifically, the Court found:

> "…that federal law does not preempt the municipal regulations in this matter as both the Longmont Municipal Code 10.20.100 and Boulder County Ordinance 92-28, section 1.10.050(C) and (3) are general noise regulations provision." R. CF. 2444.

Trial Court made a critical error broadly *favoring* federal preemption to invalidate Colorado laws, instead of "not lightly presuming" it. [2]

First, *City of Burbank* did not involve a situation where, as here, a noise restriction had been adopted by the local proprietor of the airport. Accordingly, the Supreme Court did not decide "what limits, if any, apply to a municipality as a proprietor" in the enactment of noise restrictions. 411 U.S. 363, n.14.

Significantly, the Supreme Court cited the Secretary of Transportation's advisement that:

> ….the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

*Id. See also, British Airways Bd. v. Port Auth. of N.Y.,* 558 F.2d 75 (2d Cir. 1977) (Port Authority of New York properly barred supersonic transport from using JFK International Airport due to noise issues).

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[2]Plaintiffs do not read the Court's order as holding that state tort remedies are completely preempted by federal noise enactments, and such a holding would be incorrect. *E.g,. Paredes v. Air-Serv Corp.,* 251 P.3d 1239 (Colo.App. 2010). 49 U.S.C. §40120(c)("A remedy under this part is in addition to any other remedies provided by law."); *CTS Corp. v. Waldburger,* 134 S.Ct. 2175, 2188-89 (2014)("there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit.")

After *City of Burbank* was decided, the airport "proprietor's exception" attained additional recognition from courts as an exception to preemption, and Congress explicitly recognized it in the Airline Deregulation Act of 1978, which specifically provided that:

> This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

49 U.S.C. §41713(b)(3).

> [Courts] have recognized federal preemption over the regulation of aircraft and airspace, subject to a complementary though more 'limited role for local airport proprietors in regulating noise levels at their airports.'…. Known as the 'proprietor exception,' it permits a local municipality, acting in its proprietary capacity, as opposed to its police power, to adopt 'reasonable, nonarbitrary and non-discriminatory' regulations of noise and other environmental concerns at the local level.'…. The rationale for the proprietor exception is that since airport proprietors are liable for compensable takings from excessive aircraft noise, […*citing Griggs v. Allegheny Cnty.*, 369 U.S. 84 (1962)], fairness dictates that they should have the power to limit their liability by restricting access to their airports…."

*Friends of the E. Hampton Airport, Inc,. v. Town of E. Hampton,* 2015 U.S. Dist. Lexis 83422 *36, *37 (E.D.N.Y. 2015)(most citations omitted). This is seen as a "cooperative scheme" under which Congress has "consciously delegated to state and municipal proprietors the authority to adopt regulations with respect to the permissible level of noise created by aircraft in order to protect the local population." *Id.*

Colorado has mirrored this approach. The Colorado Supreme Court, recognized and endorsed a broad interpretation of the "the scope of the proprietor's exception in two significant areas," in *Centennial,* 956 P.2d at 595[3], noting that the, "most extensive of these areas concerns an airport proprietor's ability to regulate airport noise." As the owner of LMO, Longmont is clearly a "proprietor." *Id.* at 595, n.10., *citing, San Diego Unified Port Dist. v. Gianturco,* 651 F.2d 1306, 1317 (9th Cir. 1981). The Court stated that "airport proprietors may restrict aircraft operations to accommodate permissible noise levels under the proprietor's exception," specifically "because they may be held liable for excessive noise." *Id.* Similarly, in *Banner Advertising v. City of Boulder ex rel. State*, 868 P.2d 1077, 1083 n.6 (Colo. 1994), the Supreme Court stated that an exception to federal preemption, "has been carved out for state and local governments who own airports."

Not once does the Trial Court discuss the proprietor exemption. Rather, the Court erroneously relied upon the *Hoagland* case, which ironically *upheld* a local ordinance against claims of federal preemption on the grounds that it was a land-use regulation, and in the process generally distinguished away the noise and safety cases. 415 F.3d. at 697. Additionally, cases cited in *Hoagland—Pirolo v. City of*

[3] *citing*, *City of Burbank,* 411 U.S. at 635-36 n.14; *Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100, 104 (9th Cir. 1981); and, *British Airways,* 558 F.2d at 84.

*Clearwater*, 711 F.2d 1006 (11th Cir. 1983) and *San Diego Unified Port Dist. v. Gianturco,* 651 F.2d 1306 (9th Cir. 1981)—do not limit the proprietor exception. In one of those cases, the party seeking to regulate noise was not an airport proprietor, and in the other, the proprietor had contracted away its right to regulate noise, resulting in a straightforward application of *City of Burbank* preemption.

Accordingly, the trial court's finding that Longmont's noise restrictions are preempted under federal law should be vacated.

*2. FAA noise control regulations expressly reserved the airport proprietors' ability to regulate noise.*

The Trial Court's conclusion that the FAA's 14 CFR 150 regulations are the exclusive means for an airport proprietor to regulate aircraft noise, R. CF 2302-04, ¶¶70-75, conflicts with Congressional intent in enacting the legislation and the FAA's statements when promulgating these specific rules.

The regulations were adopted by the FAA on Dec. 18, 1984, and were based on the authority of the Aviation Safety and Noise Abatement Act of 1979 (ASNA). 49 Fed.Reg. 49260, 49260 (Dec. 18, 1984).

In enacting ASNA, Congress intended to reaffirm the authority of local airport proprietors to regulate noise. For example, the Senate Report on the bill stated:

> A new airport noise compatibility planning program … is established to assist eligible airport operators to prepare noise impact maps and noise compatibility program. This planning program is ***voluntary*** ….

> It is important to bear in mind ***that nothing in the bill is intended to alter the respective legal responsibilities of the Federal Government and local airport proprietors for the control of aviation noise***. ***This bill recognizes that there are two tiers of responsibility and authority in the area of aviation noise abatement.*** The bill provides only grant-in-aid authority; .... It is intended to encourage airport noise abatement efforts, and ***does not limit in any way the airport operator's proprietary rights.***

S.Rep. No. 96-52, at 11, 13 (1979), *reprinted in* 1979 U.S.C.C.A.N. 89, 100-02. (emphasis added).

In accordance with this intent, courts that have addressed the question of whether ASNA preempts local noise regulations adopted by an airport proprietor have found that ASNA does not preempt all such local noise regulations. *E.g., Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth.,* 162 F.Supp.2d 1343 (M.D.Fla. 2001); *Global International Airways Corp. v. Port Authority*, 727 F.2d 246 (2d Cir. 1984).

In concluding that ASNA-based regulations established the "exclusive" means of regulating airport noise, the Trial Court here cited *no* authority, and clearly erred.

### B. The Trial Court erred in finding that Longmont's ordinance did not apply to airport noise.

***De Novo*** **Standard of Review:** Under Colorado law, "[i]nterpretation of a municipal ordinance involves a question of law" that Colorado appellate courts "review *de novo.*" *Expedia, Inc. v. City & County of Denver*, 2014 Colo. App.

LEXIS 1129 *10, *11 (Colo.App. July 13, 2014); *Wells v. Lodge Props., Inc.,* 976 P.2d 321, 325 (Colo.App. 1998).

**Preserved:** Plaintiffs' Response to MSJ Regarding Preemption, R. CF 792-93.

**Ruling:** Bench Trial Order, R. CF 2303, ¶69.

Longmont's ordinance 10.20.110 establishes general daytime and nighttime noise limits for residential, commercial and industrial zones of the city, but includes specific exemptions for a number of activities including refuse collection/loading, truck/rail loading, homeowners' outdoor equipment, construction activities, alarm devices and public activities such as parades and sporting events. None of the exemptions applies to aircraft or airport activities.

Despite this very limited list of exemptions, the trial court held that the ordinance was not "intended" to apply to aircraft or airport activities, and did not apply to them, without offering any explanation for this anomalous result other than the Court's assertion that such noise limits are prohibited by federal law. R. CF 2302-03, ¶65.

There is no merit in this finding by the Trial Court. The Court has rewritten the city code to suit the Court's findings instead of reading the ordinance to carry out the plain meaning of the drafters of the ordinance.

In assessing legislative intent, "Courts may not assume a legislative intent which would vary the words used by the general assembly." *Jones v. People*, 393 P.2d 366, 369 (Colo. 1964). "Court should not interpret a statute or ordinance to mean that which it does not express." *Sandomire v. Denver,* 794 P.2d 1371, 1372 (Colo.App. 1990).

While a Court may depart from the literal meaning of a statute if the reading "would lead to absurd results," *Delta Sales Yard v. Patten,* 870 P.2d 554, 559 (Colo.App. 1993), there is nothing absurd about a general noise ordinance that covers airport activities as well as other urban activities. The Trial Court did not see any absurd results or describe any in its order, but read the Longmont ordinance in an unusual way, diverting from its plain meaning, based solely on the Court's extreme acquiescence to federal preemption over state law.

### C. Mile-Hi's operations are not part of interstate commerce.

The Court erred in ruling that Mile-Hi's "skydiving operations" are part of interstate commerce. R. CF. 2301, ¶54. It is undisputed that Mile-Hi's parachute operations all occur in a narrow "flight box" above and around LMO, completely within Colorado. R. Tr. 132:19-23; 133:21-23; 195:18-21. The fact that Defendant's customers may come from other states does not make Defendant's local activities a matter of interstate commerce, which is established by the transportation of goods or services across state lines. *See* 49 U.S.C.

40102(a)(24)(defining "interstate air commerce" as aircraft transportation "between" states). *See also SeaAir NY Inc. v City of New York*, 250 F.3d 183, 186, n.1 (2d Cir. 2000) (sightseeing company could not benefit from federal preemption because it did not engage in "interstate air transportation" since it returned passengers to where they came from). Contrary to the trial court's ruling, Mile-Hi's skydiving operations are not a part interstate commerce. This is critical to the evaluation of federal overreach. The restrictions sought on Mile Hi's activities would have no impact whatsoever on the national aviation system, passenger traffic or freight. Thus, there is no basis for the FAA to preclude local control of a local recreational activity.

## II. The Trial Court erred in disregarding Plaintiffs' damage evidence as speculative.

***De Novo* Standard of Review.** Under Colorado law, whether a trial court applied the correct legal standard to a damages issue in a case is a question of law reviewed *de novo. Wal-Mart Stores, Inc., v. Crossgrove,* 276 P.3d 562, 564 (Colo. 2012); *Bonidy v. Vail Valley Ctr. For Aesthetic Dentistry, P.C.*, 232 P.3d 277, 283 (Colo.App. 2010)(correct formula for determining damages is a question of law reviewed *de novo).*

**Ruling:** Bench Trial Order, R. CF 2302, ¶63.

The Trial Court held that even had Plaintiffs prevailed in this case, damages would have been inappropriate because the range of estimated damages prepared

by Plaintiffs' expert were "based on speculation." *Id*. at ¶65. Because the Court found Plaintiffs' expert less credible than Defendants' expert, the court found his estimates were not "credible evidence" that Plaintiffs were damaged. *Id*.

However, there was other undisputed evidence in the case that the plaintiffs *were* in fact damaged by Mile-Hi's operations and the noise and vibrations they caused, for example: Plaintiff Robert Yates testified that Mile-Hi's planes made his house shake, R. Tr. 661:8-22; Plaintiff Carla Behrens testified that the droning noise caused by Mile-High's operations penetrate her home and her body and "[e]arplugs do not work," R. Tr. 435:18-25; Plaintiff Timothy Lim described the loss of enjoyment of his home, including disruption in using his basement for engineering work caused by Mile-Hi's operations, R. Tr. 225:2-226:1; and Plaintiff Suzanne Webel has lost income related to her horse boarding business due to the noise caused by Mile-Hi's operations, R. Tr. 713:21-714:21.

Under Colorado law, "the lack of mathematical certainty in computing … damage will not justify failure to award any damages." *Nelson v. Lake Canal Co.,* 644 P.2d 55, 59 (Colo.App. 1981). "The rule which precludes the recovery of uncertain and speculative damages applies only to situations where the fact of damages is uncertain, not where the amount is uncertain." *Id.*

As the Colorado Supreme Court has put it, "[e]ven though it may be difficult or even impossible to ascertain such damages with mathematical certainty, the trier

of the facts, knowing that greater damages than awarded were suffered, must, by utilizing all the evidence and the reasonable inferences emanating therefrom, devise a fair method for assessing such damages." *Peterson v. Colo. Potato Flake & Mfg. Co.*, 435 P.2d 237, 240 (Colo. 1967). "Any other rule would result in rewarding a wrongdoer." *Id.* at 239.

Here, the Court erred by applying the wrong legal rule. Speculation as to amount of damages does not bar or preclude an award of *any* damages where, as here, the fact of damages was established by undisputed testimony.

## III. The Trial Court erred by using federal standards to evaluate state law nuisance claims.

***De Novo* Standard of Review; Clear Error Standard of Review.** The Court's findings with regard to nuisance are a mixed question of law and fact. When an issue is a mixed question of law and fact, the reviewing court may review the findings of fact for clear error, and review the legal conclusions that the trial court drew from those factual findings de novo as the legal conclusions. *Valdez v. People*, 966 P.2d 587, 598 (Colo.1998)*; see also E-470 Public Highway Authority v. 455 CO.*, 3 P.3d 18 (Colo. 2000).

**Preserved:** Plaintiffs' Response in Opposition to MSJ Regarding Remaining Claims, R. CF 880-83.

**Ruling:** Bench Trial Order, R. CF 2301, ¶56.

The standards for nuisance are not set by federal regulation. The tort arises under Colorado law and is explicitly established by reference to local community standards. The Court misapplied the law pertaining to nuisance by grafting federal standards onto an incompatible state law claim.

All parties in the action and the Trial Court agreed that the standards for a nuisance claim in Colorado were set forth in *Pub. Serv. Corp. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001). Nuisance law prohibits unreasonable interference with the use and enjoyment of another person's property. *Id.* "Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Id.* (emphasis added).

Defendant took the position that its noise output could not be considered a nuisance unless it exceeded a 65 db threshold in what is known as the Day-Night Level ("DNL"). R. CF 2299, ¶45. This is when a "significant portion" of urban populations are "highly annoyed" by aircraft noise. R. Tr. 1369:14-18; R. Tr. 1371:8-11.

Defense Expert John Freytag testified that, "the FAA has taken the position that they will attempt to mitigate noise for those above 65 DNL." R. Tr. 1376:13-17. "Those below 65 D&L they pretty much leave it up to their own responsibility to deal with the noise problem." *Id.*; R. Tr. 1377:4-5 (primarily used to determine

when the FAA may issue funding for sound mitigation in homes). "I don't think the FAA meant to say that there was no problem [for areas below the 65 DNL]. I think that they meant to say that this was the most feasible solution they were able to provide." R. Tr. 1376:24-1377:1.

Mr. Freytag admitted that the Schultz Curve (used to determine the 65 DNL) did not seek to measure when people were offended, annoyed, or inconvenienced. R. Tr. 1415:13-1416:10. He agreed that people in rural areas typically react more strongly to noise than people in urban areas, and that the Schultz Curve did not differentiate between urban and rural communities. R. Tr. 1418:1-13. Thus, it is incompatible with a "normal person in the community" standard. *Van Wyk*, 27 P.3d at 391.

Mr. Freytag admitted the Schultz Curve did not measure particular tones that cause interference with conversation. R. Tr. 1419:4-1420:6. He agreed that a painful noise level sustained for fifteen minutes once a day would be a nuisance in a residential community (R. Tr. 1420:14-20) and admitted that this nuisance event would not cause a "significant" difference in a DNL because the metric uses a 24 hour average. R. Tr. 1422:8-10. Thus, Mr. Freytag's testimony clearly established that the 65 DNL would not necessarily detect tones or high volumes that cause inconvenience and annoyance.

The Trial Court clearly relied upon the Schultz Curve in its determination that the noise from Defendants' operations was not a nuisance. R. 2298-99, ¶¶44, 45, 49, 67, 70-72. As a matter of law, this was the wrong standard. Moreover, the standard clearly had a prejudicial impact on the Courts' evaluation of whether the Plaintiffs were "normal" people in the community. Fifteen people (the six Plaintiffs and nine other non-party community members) testified that they were offended, annoyed, or inconvenienced by Mile Hi's activities. R. 2295, ¶ 20. Only three people testified that they were not. *Id.* at ¶21. Defendant presented complaint data that indicated 22 people regularly complained about Mile-Hi to the airport manager. An additional 89 people complained 328 times about airport noise in one year (R. Tr. 1095:7), and 70% of those complaints were about Mile-Hi. R. Tr. 1110:21-1111:1.

The evidence showed that the noise from Mile-Hi regularly exceeded the normal 55 db limit for residential communities found in state, county and local law. R. Tr. 138:13-21. Yet, the Court found the Plaintiffs were abnormal for reacting to typically prohibited sound levels in residential communities. The only evidence that might suggest a particular sensitivity was the Schultz Curve and improper expert testimony from lay witness Don Dolce (see below).

Since the Court used a measure for nuisance that did not match the Colorado legal standard of "offended, annoyed or inconvenienced," its

determination that the noise from Defendant's operations was not a nuisance should be vacated as a matter of law.

## IV. The Trial Court erred in admitting undisclosed expert testimony.

**Abuse of Discretion Standard of Review.** Under Colorado law, evidentiary rulings are reviewed for abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo.2002); *People v. Huckleberry*, 768 P.2d 1235, 1242 (Colo.1989). This issue was preserved by each item as identified below.

The Court improperly accepted and relied upon reports from a statistician, technical testimony from a pilot and a report from a non-testifying third-party expert.

"If a witness is not testifying as an expert, the witness testimony … is limited to those opinions or inferences which are … not based on scientific, technical or other specialized knowledge." C.R.E. 701. In evaluating whether testimony is considered expert, "the critical inquiry is whether a witness's testimony is based upon 'specialized knowledge.'" *People v. Veren*, 140 P.3d 131, 136-37 (2005). Specialized knowledge is contrasted with opinions or inferences that "could be reached by any ordinary person." *Id.* "In assessing whether an opinion could be reached by any ordinary person, courts consider whether ordinary citizens can be expected to know certain information or to have had certain experiences." *Id.* "[C]ourts should also consider whether the opinion results from

'a process of reasoning familiar in everyday life,' or 'a process of reasoning which can be mastered only by specialists in the field.' *See* Fed.R.Evid. 701 advisory committee note." *Id.* "[T]estimony becomes objectionable when what is essentially expert testimony is improperly admitted under the guise of lay opinions." *Id.*

**A. Don Dolce.**

**Preservation:** Prior to trial, Plaintiffs objected to testimony from Don Dolce, a member of the Airport Advisory Board. R. CF 2098-2102. At trial, Plaintiffs objected to both his testimony and his reports. R. Tr. 1068:19-20 & 1079:19.

Mr. Dolce conducted a statistical analysis of data collected by the LMO Airport Manager regarding complaints sent to him by phone or email about the activities of Mile-Hi and other aircraft operating from LMO. Mr. Dolce then created spreadsheets that the Court relied upon. R. CF 2298, ¶42.

Pursuant to the Court pre-trial order, he was permitted to "provide an explanation of the methodology used for creating the spreadsheet." R. CF 2097. Mr. Dolce testified to his professional experience as a statistician. R. Tr. 1068:17, 1069:19. He admitted that he relied upon his professional background to create the spreadsheets. R. Tr. 1079:12-16. The spreadsheets use a variety of technical terms (R. Tr. 1076:17-1077:11) and techniques which required technical

knowledge. R. Tr. 1077:23-25. The spreadsheets were effectively an expert report that was not disclosed pursuant to C.R.C.P. 26(a)(1) requirements. They were used by Defendant on the critical issue of defining a "normal person" in the community. R. Tr. 1094:9, 1095:4, 1096:19, 1097:5, 1098:7-12, 1116:8.

**B. Nikolai Starrett.**

**Preservation:** Plaintiffs objected throughout the testimony. R. Tr. 1227:14, 1228:23, 1229:18, 1235:23, 1236:12, 1237:15.

The Court improperly accepted and relied on testimony from Nikolai Starrett, a pilot for Mile Hi. R. CF 2298, ¶40. The Court oddly reasoned that Mr. Starrett was not an expert witness because he was testifying regarding his job as a professional pilot. R. Tr. 1236:1. Mr. Starrett provided technical information on the proper procedures for flying, the capabilities of the aircraft, and the Defendant's capacity to mitigate noise using different procedures. R. Tr. 1224:2-2, 1224:22-1225:2, 1228:20. He was directly used to rebut testimony from Plaintiffs' expert. R. Tr. 1235:9-10, 1236:8-1237:14.

**C. Terracon Report.**

**Preservation:** Motion in Limine (R. CF 2003-06) and Order (R. CF 2001). Trial objection. R. Tr. 1405:18-24.

The Court admitted an expert report by Terracon, a company that was hired to do noise analysis by the city of Longmont. R. Tr. 1406:4. No expert disclosure

was done as to the authors, and it was admitted without their testimony. Mr. Freytag published from the report extensively at trial (R. Tr. 1412:10-1413:19) and adopted the opinions. R. Tr. 1414:2; R. Ex. KK, p. 692-93.

The provision in C.R.E. 703 which permits experts to rely on hearsay does not permit them to testify as to the contents of the hearsay. An "expert's opinion cannot be based upon the opinions of others, whether expert or lay." *People v. District Court*, 647 P.2d 1206, 1211 (Colo. 1982). Mr. Freytag was not permitted to testify to the contents of the Terracon report for the purpose of asserting that the statements therein were true and accurate, which he clearly did. *People v. Williams*, 183 P.3d 577, 579 (Colo. 2007). The Court's reasoning that Plaintiffs could have deposed the authors (R. CF 2001) runs directly in conflict with the principle that, "[o]ne purpose of C.R.C.P. 26 is to avoid having to take depositions in the interest of judicial economy and cost reduction." *Carlson v. Ferris*, 58 P.3d 1055, 1059 (2002).

**D. Exclusion was required.**

Failure to properly or timely endorse an expert's opinions should result in the exclusion of that expert's opinion or report. *See* C.R.C.P. 26 and 37; *Freedman v. Kaiser Foundation Health Plan of Colorado*, 849 P.2d 81 1, 815 (Colo. App. 1992); *Conrad v. Imatani*, 724 P.2d 89 (Colo.App. 1986). The purpose of these sanctions authorized by C.R.C.P. 37(c) is to protect each party from undue surprise

and to give each the opportunity to prepare adequately for trial. *Id.* It is impossible to balance reliability with C.R.E. 403 factors if there is no fair chance to evaluate the expert's opinions or the basis therefore. *See Schultz v. Wells*, 13 P.3d 846 (Colo.App.2000); *Colwell v. Mentzer Investments, Inc*., 973 P. 2d 631 (Colo.App. 1998).

In sum, the Court admitted undisclosed prejudicial expert testimony from two witness, and a hearsay expert report that severely skewed the determination in this case. Therefore, the verdict should be vacated.

## IV. The Court erred by granting summary judgment on claims for trespass.

***De Novo* Standard of Review.** Under Colorado law, a trial court's grant of a motion to dismiss or a motion for summary judgment is reviewed *de novo*. *McIntyre v. Bd. of County Comm'rs*, 86 P.3d 402, 406 (Colo.2004).

**Preserved**: Plaintiffs' Response in Opposition to MSJ Regarding Remaining Claims, R. CF 876-89.

**Ruling:** Order Re: Defendant's MSJ Regarding Plaintiffs' Remaining Claims, R. CF 1010.

Plaintiffs' trespass claim was dismissed based on the determination that the noise from Defendant's activities was an intangible invasion. "The Colorado Supreme Court [has] recognized the viability of trespass claims involving invasions that are intangible, such as noise, radiation, or electromagnetic fields."

*Cook v. Rockwell Intern. Corp.*, 618 F. 3d 1127, 1148 (10th Cir. 2010) (*citing Van Wyk*, 27 P.3d at 390). Plaintiffs acknowledged that an intangible trespass claim requires proof that "physical damage to the property [was] caused by such intangible intrusion." *Van Wyk*, 27 P.3d at 390. The "'annoyance and discomfort' for which damages may be recovered on nuisance and trespass claims generally refers to distress arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, **noise**, and the like." *Webster v. Boone*, 992 P.2d 1183, 1185-86 (Colo.App.1999) (emphasis added). *See Burt v. Beautiful Savior Lutheran Church,* 809 P.2d 1064 (Colo.App. 1990)(annoyance caused by smell); *Miller v. Carnation Co.,* 1564 P.2d 127 (Colo. 1977).

Plaintiff pointed out that expert testimony supported their claim that the noise from Defendant's aircraft had a physical "pushing" effect felt on eardrums, that the noise exceeded the background by as much as 30 dB, and that Plaintiffs have stated that the noise from Defendant's operations physically vibrate their homes. *See* §II. above.

Judge LaBuda held that "[t]he physical shaking of windows and walls in a home, without evidence of actual physical damage to the home, is speculative damage at best and thus insufficient to sustain a trespass claim." (R. CF 1006). Plaintiffs contend that the vibrations themselves are physical damage to the

Plaintiffs' properties, because just like a flood or fire, the homes are unfit for their intended purpose when this physical condition exists.

This Court is in a position to establish policies that favor the public interest by recognizing that a physical condition which diminishes the use of property is physical damage, regardless of whether the damage is intermittent. Accordingly, the summary judgment on trespass should be reversed, and the judgment vacated.

## VI. The Trial Court erred in granting summary judgment on Plaintiffs' claims of unjust enrichment.

***De Novo* Standard of Review.** Under Colorado law, a trial court's grant of a motion to dismiss or a motion for summary judgment is reviewed *de novo*. *McIntyre*, 86 P.3d at 406.

**Preserved:** Plaintiffs' Response in Opposition to MSJ Regarding Remaining Claims, R. CF 876-889.

**Ruling:** Order Re: Defendant' Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims, R. CF 1010.

The ability to enjoy outdoor activities in a person's own back yard is a commodity that can normally be enjoyed by multiple neighbors without diminishing the value to each. In their claim for unjust enrichment and in response to the MSJ Regarding Remaining Claims, Plaintiffs asserted that this value is effectively conveyed from one party to another when one party's activities exclude the others.' In this case, the Defendant's activities had appropriated exclusive use

of the outdoors by creating offensive, annoying and inconvenient noise that drives the Plaintiffs indoors. (R. CF 885-86).

Unjust enrichment "is broad, cutting across both contract and tort law, with its application guided by the underlying principle of avoiding the unjust enrichment of one party at the expense of another." *Cablevision of Breckenridge v. Tannhauser Condominium Ass'n,* 649 P.2d 1093, 1097 (Colo. 1982). It is a "wide and imprecise idea." *Ninth Dist. Prod. Credit v. Ed Duggan, Inc.,* 821 P. 2d 788, 801 (Colo 1991).

The trial court's determination that the claim for unjust enrichment failed as a matter of law hinged on the element identified in *Dove Valley Bus. Park Assocs., Ltd. v. Bd. F Cnty. Comm'rs of Arapahoe Cnty.*, 945 P.2d 395, 403 (Colo. 1997) that the Plaintiffs must have "conferred a benefit" to the Defendant. (R. CF 2542). However, the idea that a benefit is conveyed where one parties activities exclude another is well supported at law. In *Tannhauser*, 649 P.2d at 197-98, the defendants retransmitted cable television signal. Though the retransmission did not diminish the signal as a resource, the defendants' retransmission excluded Cablevision from providing the same service to the end users. *Id.*

Conferring a benefit does not exclusively mean conveying currency, and does not require that the conveyance be voluntary. "The word 'benefit'… denotes any form of advantage." *Duggan*, 821 P.2d at 801. It can occur when a party,

"saves the other from expense or loss." *Id*. Instead of incurring the cost of sound mitigating equipment, Mile-Hi passes on this cost to local residents. This is the type of "enrichment of one party at the expense of another" (*Tannhauser*, 649 P.2d at 197) which unjust enrichment is designed to remedy.

The Court also did not account for a change in the law in 2000 that dropped the "conferred" language from the elements of unjust enrichment. *Salzman v. Bachrach*, 996 P. 2d 1263, 1266 (Colo. 2000). This *en banc* decision of the Supreme Court stated that, "a plaintiff seeking recovery for unjust enrichment must prove: (1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying." Plaintiffs' claim was appropriate because the benefit was "received" regardless of whether they took some action to "confer" it.

## VII. The Trial Court erred in awarding attorney fees.

**Abuse of Discretion Standard of Review.** An award of attorney fees will not overturned "if supported by the evidence." *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P. 3d 282, 299 (Colo.App. 2009); *see also, City of Aurora v. Colo. State Engineer*, 105 P.3d 595, 618 (Colo.2005).

Following the trial, Defendant sought and was awarded attorney fees associated with the claim for (1) unjust enrichment, (2) a description of damages in

the Complaint, and (3) a claim for *respondeat superior*. These awards were not supported by the evidence and must be reversed.

In addition, the Court awarded fees for (4) claims asserted by the citizens' advocacy group, CQS, and (5) a claim alleging violation of the Boulder County noise ordinance. Though Plaintiffs disagree with the awards themselves, they primarily challenge the amount of those awards in this appeal.

### A. The Trial Court erred in finding that Plaintiffs' claim for unjust enrichment was substantially frivolous or groundless.

**Preserved:** Plaintiffs' Response to Defendant's Motion for Attorneys Fees, R. CF 2417.

**Ruling:** Judge LaBuda stated:

> Plaintiff was entitled to argue for an expansive definition of this term. However, Plaintiffs or Plaintiffs' counsel knew or reasonably should have known such an argument for an expansive definition of the term, in the fashion in which Plaintiff sought it, was frivolous and lacked substantial justification.

R. CF 2542.

Judge LaBuda's threshold for good faith is entirely unclear. She stated that Plaintiffs' interpretation of "conferred" was not "reasonable." *Id.* However, this essentially means that counsel is charged with the duty of predicting a particular judges' view of reasonableness. This is an impossible burden that law does not seek to impose. The standard is not whether an argument is subjectively reasonable; it is whether it is objectively "rational." *SaBell's, Inc. v. City of*

*Golden*, 832 P.2d 974, 978 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

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, "[b]y 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. When a subjective standard is used, experience of counsel provides only limited guidance because rulings are inconsistent. *Id.* at 1113.

As discussed further below, the present case includes a stark example of how divergently two judges can view similar or even the exact same set of facts.

### B. The Trial Court erred in its finding that Plaintiffs pursued damages for medical injuries and improperly reversed the findings of the discovery magistrate.

**Preserved:** Plaintiffs' Motion to Reconsider Award of Attorney Fees, R. CF 2569-71.

**Ruling:** R. CF 2539-40.

There was a dispute in this case as to whether Plaintiffs had asserted claims for medical injuries. In the Complaint, Plaintiffs described medical injuries in the request for relief. On that basis Defendant sought Independent Medical Exams (IMEs) under C.R.C.P. 35. Plaintiffs opposed (R. CF 261-64), citing *Tyler v. Dist. Court*, 561 P.2d 1260, 1262 (Colo. 1977).

The discovery dispute was resolved by Magistrate Robert Gunning, who ruled on September 23, 2014 that:

> 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.

R. CF 423-24. The Magistrate also noted that Rule 35 examinations are not typically sought until a plaintiff makes his or her C.R.C.P. 26(a)(2) expert disclosures, which had not occurred. Defendant demanded that Plaintiffs file an unnecessary "Notice of Withdrawal," and agreed that it "would not seek fees for the dismissal" if Plaintiffs did so. R. CF 2569. Plaintiffs complied with the demand on November 3, 2014. Post-trial, Defendant sought fees for the dismissal anyway and was not held bound by its prior waiver.

Magistrate Gunning's ruling and Defendant's agreement regarding dismissal should have concluded this issue. Defendant had two weeks in which to challenge the Magistrate's findings and did not do so. *See* Colo.R.Mag. 7(a)(5).

"Findings of fact made by the magistrate may not be altered unless clearly erroneous." Colo.R.Mag. 7(a)(9).

Eight months after Magistrate Gunning described the demand for Rule 35 exams as "premature," Judge LaBuda awarded the Defendants the attorney fees incurred for these exact same premature efforts. R. CF 2540. She held that Plaintiffs engaged in misconduct by "refusing to dismiss their groundless claims for mental and physical damages earlier in this litigation," but did not state when this "refusing to dismiss" occurred. *Id.* In reality, Plaintiffs clarified they were not seeking to recover medical expenses as soon as the issue was raised.

Magistrate Gunning made a specific finding that "No showing has been made that Plaintiffs are seeking to recover damages for specific medical expenses." Judge LaBuda was bound by the finding because it was not timely submitted for review or clearly erroneous. Accordingly, The Court could not issue an award based on the opposite finding, and the award of fees associated with medical expense claims must be reversed.

It is difficult enough to predict how different judges will react in different cases. If two judges can reach such wildly different conclusions about conduct <u>in the same case</u>, attorneys have no hope of reasonably navigating the shoals of sanctions.

### C. The Trial Court erred in awarding fees for claims of *respondeat superior*.

Defendant asserted that Plaintiff had abandoned its claim for *respondeat superior* because it was not listed in the Trial Management Order. As a corporate entity, Defendant could only act through its agents and Plaintiffs clearly sought to hold the Defendant liable for the flights conducted by its independent contractor pilots. R. CF 1120:22-24. Judge LaBuda did not analyze whether the claim for *respondeat superior* was frivolous or groundless. Even if it was abandoned, there was a clear factual and legal basis. Accordingly, the award must be reversed.

### D. The Trial Court erred in the amount of fees awarded.

***De Novo* Standard of Review; Abuse of Discretion Standard of Review.** The reasonableness of the amount of fee awards is reviewed for abuse of discretion. *Spring Creek Ranchers Ass'n v. McNichols*, 165 P.3d 244, 246 (Colo.2007).

**Preserved:** Plaintiffs' Motion to Reconsider Award of Attorney Fees, R. CF 2567-74.

**Ruling:** Order Re: Plaintiffs' Motion to Reconsider Award of Attorney Fees, R. CF 2786-87.

Though Plaintiffs also disagree with the additional awards for claims by CQS and claims based on the Boulder County ordinance, they acknowledge that the determination that those claims were unjustified was at least colorable within

the law. However, Plaintiffs object to the amount of all the attorney fee awards.

C.R.S. §§ 13-17-102 and 13-17-103 require that an award of attorneys' fees must be reasonable. The reasonableness of an award of attorneys' fees "must be determined in light of all the circumstances, based upon the time and effort reasonably expending by the prevailing party's attorney." *Crow v. Penrose-St. Francis Healthcare System*, 262 P.3d 991, 998 (Colo.App. 2011)(quoting *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143, 147 (Colo.App. 1996)).

On its face, the fee awards in this matter were not reasonable.

*1. Claims by CQS for negligence and trespass.*

The trial court awarded Defendant three-fourths of the fees spent on the Motion for Summary Judgment associated with this issue. Defendant sought a complete dismissal of claims by CQS and the Court held that the organization had standing to seek injunctive relief for nuisance. The Court dismissed CQS's claims for negligence, negligence *per se* and trespass, and reasoned that this was a victory on three of four issues. The award is facially unreasonable because it has no rational relationship to the time spent on the issues in the brief.

The vast majority of the relief sought by the brief was denied. Defendant challenged the organizational standing of CQS to assert <u>any</u> claims. Unlike the Court's Order, the brief did not seek to differentiate between injunctive and monetary relief. All of the fees incurred were part of the failed effort to dismiss

claims for injunctive relief. There was no evidence of any additional or separate work with respect to claims for monetary damages on which it prevailed.

*2. The Boulder County ordinance claim.*

In a brief dedicated principally to preemption, Defendant asserted that the Boulder County ordinances did not apply. Court agreed and later made an award of for half the cost of the brief. Defendant dedicated one paragraph of this eleven page brief to the Ordinance, and stated that the Boulder ordinance issue required a "minimum amount of legal research." R. CF 551. Breaking down fees according to the number of ordinances at issue in a brief principally about preemption was completely arbitrary and had no rational relationship to the amount of time spent. Accordingly, the award must be vacated.

*3. Unjust enrichment and respondeat superior claims.*

The awards for unjust enrichment and respondeat superior claims should be reversed entirely, but the amounts awarded were also arbitrary. Defendant's brief on this matter was twenty pages long, and the comment or facts on unjust enrichment consisted of a single page (5%) with two legal citations. Defendant did not dedicate any substantive time arguing the issue of *respondeat superior*. Awarding Plaintiff two-thirds of the briefing costs was arbitrary in view of the volume of space dedicated to each issue. Accordingly, the award must be vacated.

### E. The Trial Court erred in refusing to consider a motion pursuant to Rule 59 regarding the amount of fees awarded.

#### *1. The motion for reconsideration and the appeal regarding attorney fee awards were timely filed.*

The Court awarded fees in an Order dated July 28, 2015. Entry of Judgment for that award was issued on July 30, 2015 and the Clerk entered the judgment on the Register of Actions that day. Rule 59(a) states that motions are due, "[w]ithin 14 days of entry of judgment as provided in C.R.C.P. 58." An "entry of judgment is a purely ministerial act." *Joslin Dry Goods Co. v. Villa Italia, Ltd*., 539 P.2d 137 (Colo.App. 1975). The Clerk's entry of the judgment into the Register of Actions pursuant to C.R.C.P. 79(a) and (d) sets the date. See C.R.C.P. 58(a). The Motion for Reconsideration filed on August 13, 2015 was therefore timely.

Also, the 14-day time limit should not be strictly enforced against a late filing "if a party reasonably relies and acts upon an erroneous or misleading statement or ruling by a trial court regarding the time for filing post-trial motions." *Converse v. Zinke*, 635 P.2d 882, 886 (Colo.1981).

In the alternative, the Trial Court had discretion to enlarge the time for filing motions pursuant to Rule 59(a) "with or without a motion or notice," (C.R.C.P. 6(b)(1)) and effectively did so. The Trial Court acted within two days of the "final judgment" to enter an order pursuant to Rule 58(a), which represents a decision by the Trial Court to enlarge the time allowed for a Rule 59 motion.

This Court may extend the deadline for filing the Notice of Appeal by up to 35 days. C.A.R. 4(a). The Notice of Appeal was filed October 20, which is 34 days after the date the appeal would have expire without a Rule 59 Motion. Relief pursuant to the "excusable neglect" provision is appropriate.

*2. The Trial Court improperly sanctioned plaintiffs for filing their Rule 59 Motion.*

Judge LaBuda stated, "The Court … declines to consider new arguments on a motion to reconsider…. [It] awards Defendant attorney fees." R. CF 2786-87).

Defendant asserted that Plaintiffs' Motion would not be permitted under the Federal Rule 59, citing eight cases that do not mention or cite Colorado case law or C.R.C.P. 59, or have ever been cited by a Colorado court. R. CF p.2710-11. Judge LaBuda determination that Plaintiffs Motion was groundless relied entirely on two of these federal cases. *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Judge LaBuda stated that, "While not binding law, the Court finds persuasive the reasoning from the United States District Court." R. CF p.2786. With due respect, finding a violation of a state rule based on federal law is questionable. Issuing a sanction based on non-binding law is fully inappropriate.

Judge LaBuda can use federal law to inform an area when Colorado cases have not spoken to an issue, but there is abundant Colorado law on Rule 59 motions and none of it supports the narrow federal approach to the equivalent

federal rule. In *Jensen v. Runta*, 80 P.3d 906, 907 (Colo. App. 2003), for instance, the court held that, "a timely C.R.C.P. 59 motion requesting reconsideration of the trial court's completed post-trial ruling on an attorney fees issue—either a denial of attorney fees or a grant of attorneys fees that is reduced to a sum certain—will toll the time for filing the notice of appeal." The case indicates that Plaintiffs' Motion was recognized and proper use of Rule 59. Accordingly, the Plaintiffs' seek an Order of Remand reversing the award of attorney fees associated with the Motion for Reconsideration, and directing the trial court to review the Motion.

## VIII. Relief Requested.

Plaintiffs-Appellants seek an order vacating the judgments as described above, and directing the Court to hold a new trial upon remand.

Because reversal is required on the merits, as described above, the trial court's award of costs to the defendants must also be reversed. *Bainbridge, Inc., v. Douglas County Bd. of Comm'rs*, 55 P.3d 271, 274 (Colo.App. 2002); *Rossman v. Seasons at Tiara Rado Assocs*., 943 P.2d 34, 38 (Colo.App. 1996).

RESPECTFULLY SUBMITTED this 15th day of March, 2016.

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*//s// Matthew B. Osofsky*

_____

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_____

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**CERTIFICATE OF SERVICE**

I certify that on this this 15th day of March, 2016, the foregoing was sent via ICCES, as follows:

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***This document was filed electronically pursuant to C.A.R. 30. The original signed pleading is on file and available for inspection at the Boulder offices of The Law Offices of Randall M. Weiner, P.C.***