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| DISTRICT COURT, DENVER COUNTY, COLORADO |  |  |
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| Court Address: Denver County Court  1437 Bannock St., Room 256 | F C | ILING ID: 772D9C8BDA476 ASE NUMBER: 2015CV31709 |
| Denver, CO 80202 |  |  |
| (720) 865-8301 |  |  |
| Plaintiffs: ROBERT ABRAMS and ABRAMS & |  |  |
| ASSOCIATES, LLC, a Colorado limited liability |  |  |
| company; |  |  |
| v. |  |  |
| Defendants: SHAWN BEESON |  | **COURT USE ONLY** |
| Attorneys for Plaintiffs: | |  |
|  | | Case Number: 2015CV31709 |
| Nathan Silver  Silver Law Firm, LLC 700 17th Street, Suite 650  Denver, Colorado 80202  Phone: (303) 328-8510  E-m[ail: nathan@silverlawdenver.com](mailto:nathan@silverlawdenver.com) Atty. Reg. # 28836 | | Division: 275 |
| ABRAMS & ASSOCIATES, LLC  Robert Abrams, Atty Reg. #37950  Neil S. Sullenberger, Atty Reg. # 48698 700 17th St., Suite 650  Denver, CO 80202 | |  |
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| **PLAINTIFFS’ RESPONSE TO DEFENDANT’S MOTION TO RECONSIDER ORDER RE: DEFENDANT’S BILL OF COSTS; AND, DEFENDANT’S REVISED BILL OF COSTS** | | |

COMES NOW, Plaintiffs Robert Abrams and Abrams & Associates, LLC, by their attorneys at Abrams & Associates, LLC, and hereby file their Response to Defendant’s Motion to Reconsider Order Re: Defendant’s Bill of Costs; and, Defendant’s Revised Bill of Costs. In support thereof, Plaintiffs state and allege as follows:

# INTRODUCTION

1. Pursuant to this court’s order, Defendant had until May 26, 2017 to file his Bill of Costs. Defendant timely filed same on or about May 26, 2017, wherein he sought an award of

$2,864.02. Plaintiffs objected to such sum for the reasons stated in their Response and Objection to Defendant’s Bill of Costs. Among such objections was lack of evidentiary support.

1. On June 14, 2017, the Court denied Defendant’s Bill of Costs for lack of requisite evidentiary support; specifically, failure to comply with the Rules and case law to allow the court to reason if the costs sought by Defendant are actually awardable.
2. On the same day, Defendant filed his Motion to Reconsider, alleging no legal

basis for same. It is unclear whether Defendant merely seeks relief from the Court’s order,

pursuant to C.R.C.P. 60(b), or an interlocutory motion to reconsider, pursuant to C.R.C.P. 121 § 1-15(11). Defendant’s Motion seems to indicate a request for relief under C.R.C.P. 60(b).

1. Though the Court should deny Defendant’s Motion for failure to provide legal authority supporting the relief requested, pursuant to C.R.C.P. 121 § 1-15(3), Plaintiffs highlight Defendant’s inadequate basis for such a motion under either applicable Rule herein.

# LEGAL AUTHORITY

1. C.R.C.P. 60(b) provides, “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect ….”
2. C.R.C.P. 121 § 1-15(11) provides, “Motions to reconsider interlocutory orders of the court, meaning motions to reconsider other than those governed by C.R.C.P. 59 or 60, are disfavored. A party moving to reconsider must show more than a disagreement with the court’s decision. Such a motion must allege a manifest error of fact or law that clearly mandates a

different result or other circumstance resulting in manifest injustice.” Here, Defendant cites nothing more than a litany of his own excuses as to why he failed to support his Bill of Costs in proof of same. None of the excuses arise to excusable neglect under Rule 60.

1. “[A] motion for reconsideration is appropriate where the court has misappre- hended the facts, a party’s position, or the controlling law.” *Servants of the Paraclete v. Does*,

th

204 F.3d 1005, 1012 (10 Cir. 2000). Courts have distilled the following three major grounds

justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest prejudice. *Shields v. Shelter*, 120 F.R.D. 123, 126 (D.Colo. 1988). Defendant’s counsel basis his Motion on none of these elements and requests relief from his own negligence. Accordingly, the court should deny Defendant’s motion as pled. “A motion for reconsideration is not a license for a losing party's attorney to get a ‘second bite at the apple’ by using a word processor to move around the paragraphs from a previously submitted brief, and file a retread of the old brief disguised as a motion for reconsideration.” *Id.*

1. C.R.C.P. 121 §1-22 provides, “The Bill of Costs shall itemize and total costs being claimed. Taxing and determination of costs shall be in accordance with C.R.C.P. 54(d) and Practice Standard § 1-15.”
2. C.R.S. § 13-16-122(1) provides that items includable as costs are:
   1. Any docket fee required by article 32 of this title or any other fee or tax required by statute to be paid to the clerk of the court;
   2. The jury fees and expenses provided for in article 71 of this title;
   3. Any fees required to be paid to sheriffs pursuant to section 30-1-104, C.R.S.;
   4. Any fees of the court reporter for all or any part of a transcript necessarily obtained for use in this case;
   5. The witness fees, including subsistence payments, mileage at the rate authorized by section 13-33-103, and charges for expert witnesses approved pursuant to section 13-33-102(4);
   6. Any fees for exemplification and copies of papers necessarily obtained for use in the case;
   7. Any costs of taking depositions for the perpetuation of testimony, including reporters' fees, witness fees, expert witness fees, mileage for witnesses, and sheriff fees for service of subpoenas;
   8. Any attorney fees, when authorized by statute or court rule;
3. Any fees for service of process or fees for any required publications;
4. Any item specifically authorized by statute to be included as part of the costs.
5. The party seeking an award of costs bears the burden of proof on the issue of reasonableness. *Brody v. Hellman*, 167 P.3d 192, 206 (Colo. App. 2007). Hence, the requesting party “must provide the court with sufficient information and supporting documentation to allow a judge to make a reasoned decision for each cost item presented.” *Id*. (emphasis added); see also *City of Aurora v. Simpson (In re Water Rights of Park County Sportsmen's Ranch),* 105 P.3d 595, 627 (Colo. 2005). Defendant had, per court order, until May 26 to put up his Bill of Costs with supporting evidence thereto. Defendant failed to do so and the court rightfully denied his Costs for failure to allow the court to award costs under a reasoned decision, citing *Brody, supra.*

# ARGUMENT

1. The Court should deny Defendant’s Motion to Reconsider for failing to state the legal authority under which he seeks relief, pursuant to C.R.C.P. 121 § 1-15(3).
2. Additionally, the Court should deny Defendant’s Motion because Defendant’s request for relief is inappropriate under both C.R.C.P. 60(b) and 121 § 1-15(11).
3. The Court correctly noted Defendant’s failure to support its Bill of Costs in its order denying same. Defendant fails to plead an adequate basis for the Court’s reconsideration in

his Motion. Thus, the Court should deny Defendant’s Motion.

# The Court Should Deny Defendant’s Motion for Failure to Meet the Requirements of C.R.C.P. 60(b)

1. The gist of a Motion to Reconsider under C.R.C.P. 60(b) is that one may request such relief by pleading excusable neglect. While Defendant’s Motion is replete with excuses, such a litany does not amount to excusable neglect.
2. In defining excusable neglect, Courts have said, “A party’s conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty. Common carelessness and negligence do not amount to excusable neglect.” [*In re Weisbard,* 25 P.3d 24, 26 (Colo. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2001441226&amp;pubNum=4645&amp;originatingDoc=I66f537f1fea111de8bf6cd8525c41437&amp;refType=RP&amp;fi=co_pp_sp_4645_26&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)&amp;co_pp_sp_4645_26) (quoting [*Tyler v. Adams County Dep’t of Soc. Servs.,* 697 P.2d 29, 32 (Colo.1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1985114239&amp;pubNum=661&amp;originatingDoc=I66f537f1fea111de8bf6cd8525c41437&amp;refType=RP&amp;fi=co_pp_sp_661_32&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)&amp;co_pp_sp_661_32). The court of appeals similarly characterized excusable neglect as involving “unforeseen circumstances which would cause a reasonably prudent person to overlook a required act in the performance of some responsibility.” [*Colo. Dep’t of Pub. Health & Env’t v. Caulk,* 969 P.2d 804, 809(Colo.App.1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1998240924&amp;pubNum=661&amp;originatingDoc=I66f537f1fea111de8bf6cd8525c41437&amp;refType=RP&amp;fi=co_pp_sp_661_809&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)&amp;co_pp_sp_661_809).
3. Here, defendant had over a year to get all of his records from his prior counsel and elected not to do so. Defendant shows no basis as to why a reasonably careful person (here current counsel) would neglect a duty. Further, defendant fails to state any “unforeseen circumstances” that would cause him to overlook his “required act in the performance of some responsibility.” *Colo. Dep’t of Pub. Health* at 809.
4. Defendant claims, despite repeated efforts to obtain records from prior counsel, Defendant’s counsel was unable to do so prior to the filing deadline for bill of costs. These were records for costs incurred early on in this lengthy litigation, and it is not excusable to neglect to attempt to keep such records until the bill of costs filing deadline.
5. Interestingly, the day the Court denies Defendant’s bill of costs is the day

Defendant comes into possession of the evidence necessary to support his bill of costs. Such convenient timing undermines Defendant’s argument for reconsideration and evidences Defendant’s inexcusable neglect to file documentary evidence with his bill of costs.

1. Even the exhibits attached to Defendant’s Motion evidence an ability to have amended as early as the evening of May 26, the day of the deadline and two hours before close of business. *See Defendant’s Exhibit A.* Other exhibits demonstrate that the records were created approximately two years ago, providing Defendant with no excuse for waiting until the 11th hour to compile them. *See Defendant’s Exhibits C, F.*
2. While Defendant throws his prior counsel under the bus, many of the records necessary to support claimed costs are the type that would have been in Defendant counsel’s possession since the beginning of his representation. These documents also were not filed with the bill of costs, and Defendant has no excuse for such lack of support.
3. As evidence, Defendant’s *Exhibit A* contains a time stamp noting that it was printed on May 26, 2017. Oddly, Defendant’s *Exhibit B*, a document from the same source, contains no such time stamp. Further, Defendant’s *Exhibit B* appears to be cropped at the top of the page where a time stamp might be found, as the heading and ICCES logo sits higher on the page in *Exhibit B* than *Exhibit A*, and the margin at the top of page 2 in *Exhibit B* is missing. The court should note these apparent discrepancies offered by defense counsel in support of his motion.
4. Defendant’s counsel merely seeks a “second bite at the apple,” alleging no changed circumstances, excusable neglect, or law upon which he could base his Motion.
5. Finally, Defendant claims his reservation to supplement his bill of costs affords him the opportunity to provide all of his support for same after the deadline. Defendant fails to

cite legal authority to support such a position, and his own language “requests the Courts [sic] permission to supplement” in his initial bill of costs. Taken to its logical extreme, such an interpretation would undermine C.R.C.P. 6, as reserving the right to amend would amount to an indefinite extension of any deadline. Here, the court ordered Defendant to request his Bill of Costs by May 26. He did so defectively, without excusable neglect, and the Court properly denied his bill of costs.

1. Defendant contends that he timely filed his bill of costs, and Plaintiffs agree.

Plaintiffs also do not dispute Defendant’s citation to C.R.C.P. 121 for the proposition that the Court may allow an extension to file the bill of costs. Plaintiffs merely aver that no documentary support for any cost was supplied with the initial bill of costs, and the extension provision of

C.R.C.P. 121 does not apply to supplementation. It merely permits a Court to order a deadline beyond 21 days to file the initial bill of costs.

1. Defendant’s citation to *Borquez v. Ozer*, 923 P.2d 166, 179 (Colo. Ct. App. 1995), supports Plaintiffs’ argument. In that case, the prevailing party filed its initial bill of costs after the deadline provided by rule, and the Court accepted the bill of costs. The Court of Appeals upheld the late filing as timely, because the Court allowed such an extension essentially by waiving the deadline in the Rules. Here, the Court set the deadline in its Order and Defendant timely filed a deficient bill of costs. Defendant’s case law is clearly distinguishable. To undersigned counsel’s knowledge and research, none of Defendant’s case law supports his position that a reservation of amendment permits correcting a timely-filed, deficient bill of costs.
2. This Court ordered Defendant to produce his bill of costs by May 26, 2017, not to reserve costs, arguably incurred two years ago, for submission at a later date.
3. Defendant’s counsel is an experienced and successful trial attorney who has

undoubtedly filed many bills of costs in his career. Defendant’s counsel was aware of his burden of proof and opted not to supply a scintilla of evidence in support of his bill of costs.

1. For the foregoing reasons, the Court cannot find excusable neglect to relieve Defendant of the Court’s Order under C.R.C.P. 60(b).

# The Court Should Deny Defendant’s Motion for Failure to Meet the Requirements of C.R.C.P. 121 § 1-15(11)

1. The plain language of C.R.C.P. 121 § 1-15(11) states that motions pursuant to this Rule are “disfavored.”
2. A motion under this Rule “must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice.” Defendant’s Motion does not allege that the Court’s order is a manifest error of fact or law, that a different result is clearly mandated, or that the result is manifest injustice.
3. As stated above, Defendant’s counsel blames prior counsel for failing to timely provide his records of costs and does not acknowledge why he provided no support for costs incurred during his representation.
4. Absent such mandatory allegations, the Court must deny Defendant’s motion to reconsider, pursuant to C.R.C.P. 121 § 1-15(11).

# Defendant’s Amended Bill of Costs Should be Stricken

1. Defendant’s inclusion of an amended bill of costs in his Motion to Reconsider is procedurally improper and a violation of the Court’s Pre-Trial Order. *See Pre-Trial Order, filed October 17, 2016,* ¶ VII(6).
2. A motion to reconsider should not be used as a “second bite at the apple” where Defendant failed to meet his initial burden. *See Shields v. Shelter*, 120 F.R.D. 123, 126 (D.Colo.

1988).

1. In Defendant’s initial, timely-filed bill of costs, none of the claimed costs were supported by an invoice, bill, or affidavit. The entries are vague and fail to satisfy Defendant’s burden. *See Brody v. Hellman*, 167 P.3d 192 (Colo. App. 2007). The Court correctly ruled that such lack of support is fatal to an award of costs under *Brody*.
2. Now, Defendant attempts to amend and/or supplement his bill of costs, which the Court already denied. The Court should strike or deny Defendant’s improper inclusion of an amended bill of costs, because the underlying bill of costs was properly denied before any extension was granted.

WHEREFORE, Plaintiffs respectfully request this Court deny Defendant’s Motion for Reconsideration and strike his Amended Bill of Costs. Plaintiffs further request their attorney’s fees and costs, pursuant to C.R.S. § 13-17-102, incident to responding to this frivolous, groundless, and vexatious motion lacking in legal and factual foundation and for any other relief the Court deems fair and just under the circumstances.

RESPECTFULLY SUBMITTED this 20th day of June, 2017.

ABRAMS & ASSOCIATES, LLC

*/s/ Neil S. Sullenberger*

Neil S. Sullenberger, Attorney at Law

*(Original signature on file at Abrams & Assoc., LLC, pursuant to C.R.C.P. 121 § 1-26)*

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have this 20th day of June, 2017, via ICCES, served a true and correct and correct copy of the foregoing PLAINTIFFS’ RESPONSE TO DEFENDANT’S MOTION TO RECONSIDER ORDER RE: DEFENDANT’S BILL OF COSTS; AND, DEFENDANT’S REVISED BILL OF COSTS upon:

Wadi Muhaisen Amanda Becker

Muhaisen & Muhaisen, LLC 1435 Larimer Street, Suite 203

Denver, Colorado 80202

*Attorney for Defendant*

*/s/ Michael A. Gubiotti*

Michael A. Gubiotti

*(Original signature on file at Abrams & Assoc. LLC pursuant to C.R.C.P. 121 § 1-26)*