DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100 **Plaintiff: STACY LYNNE** **v.** **Defendant: THE CITY OF FORT COLLINS; DARIN ATTEBERRY; CARRIE DAGGETT; CHRISTOPHER HALL**	COURT USE ONLY
Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC P.O. Box 2166 Fort Collins, CO 80522 Phone: (970) 482-4011 Email: kschutt@wicklaw.com John R. Duval, #10185 FORT COLLINS CITY ATTORNEY'S OFFICE P.O. Box 580 Fort Collins, CO 80522 Phone: (970) 221-6520 Email: jduval@fcgov.com	Case Number: 2018 C 172 Courtroom: 4C

DEFENDANTS' RESPONSE TO PLAINTIFF'S RULE 60 MOTION; and DEFENDANTS' REQUEST FOR AWARD OF ATTORNEY'S FEES

COMES NOW, the Defendants, City of Fort Collins ("City"), Darin Atteberry, Carrie Daggett and Christopher Hall, by and through their counsel, the Fort Collins City Attorney's Office and Wick & Trautwein, LLC, and respectfully submit the following response to what Plaintiff has labeled a motion made pursuant to C.R.C.P. 60. Defendants further request the Court sanction Plaintiff and award them their attorney's fees incurred in responding to this frivolous, groundless and vexatious motion. In support thereof, the Defendants state as follows:

1. Plaintiff brought this action under the Colorado Open Records Act (CORA"), C.R.S. §24-72-201, et seq. contending that the City unlawfully denied her full access to certain

public records and denied her a detailed privilege log of the documents withheld by the City on the grounds of attorney-client privilege. The City denied the allegations and asserted that it properly withheld certain documents in response to Plaintiff's CORA request, consistent with the exception for items protected by attorney-client privilege under C.R.S. §24-72-204(3)(a)(IV). The City also denied that CORA required compilation of a detailed log for items withheld from production pursuant to this privilege.

2. The Court held a hearing in the matter on October 1, 2018, taking several hours of testimony from the seven witnesses called by the Plaintiff, in addition to her own testimony.[1] The Court thereafter issued a detailed 12-page order on October 11, 2018, finding that the City properly withheld the documents on grounds of attorney-client privilege and rejecting the Plaintiff's claims that she was entitled to a detailed privilege log. The Court's order was well-reasoned, supported by the controlling legal authority cited therein and by the testimony given at the hearing.

3. The Plaintiff did not file a motion to amend the findings/judgment or for a new trial within the 14 days required by C.R.C.P. 59. Nor did the Plaintiff file an appeal of the order within 49 days, as required by C.A.R. 4. Rather, more than 4 months after the entry of judgment, she has filed what she labels as a Rule 60(b)(2) motion seeking a new hearing on grounds of

[1] Specifically, the Plaintiff subpoenaed testimony from six employees of the City of Fort Collins, including Defendant City Manager Darin Atteberry; Defendant City Attorney Carrie Daggett; Defendant Assistant City Attorney Christopher Van Hall; Boards and Commissions Coordinator Christine Macrina; Noah Beals, Senior City Planner; Laurie Kadrich, Director of Planning, Development and Transportation; and Tom Leeson, the Director of Community Services and Neighborhood Development. The Plaintiff also subpoenaed the testimony of Jeremy Call of Logan Simpson.

alleged fraud, misrepresentation or other misconduct of an adverse party. For the reasons discussed further below, the motion is improper and wholly without merit, justifying not only denial, but also a finding that it is frivolous, groundless and vexatious so as to warrant sanctions against the Plaintiff.

4. Rule 60(b) provides, in pertinent part, as follows:

> "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) fraud…misrepresentation, or other misconduct of an adverse party; or (5) any other reason justifying relief from the operation of the judgment."

5. It is well-established that the party seeking relief under this rule has the high burden of establishing the grounds for relief from judgment by "clear, strong, and satisfactory proof." *Justi v. Rho Condominium Ass'n*, 277 P.3d 847, 851 (Coo. App. 2011); *Sebastian v. Douglas County, Colorado*, 370 P.3d 175, 177-78 (Colo. App. 2013) (movant bears the burden of establishing by clear and convincing evidence that the Rule 60(b) motion should be granted); *In re Goodman Associates, LLC v. WP Mountain Properties, LLC*, 222 P.3d 310, 315 (Colo. 2010). Moreover, the decision whether to grant relief under the rule is committed to the court's sound discretion. *Id.*, at 314; *Sebastian*, 277 P.3d at 851.

6. The Court would be exercising sound discretion here in denying the Plaintiff any relief under Rule 60(b). In the first instance, as expressly stated in the rule, it is designed to *relieve* the Plaintiff from a final judgment based upon the grounds set forth in the rule; it is not designed to provide another opportunity to move for a new trial or hearing when the Plaintiff has failed to seek such relief in a timely manner under Rule 59. The case cited by the Plaintiff, *Sharma v. Vigil*, 967 P.2d 197 (Colo. App. 1998) does not stand for the proposition that Rule 60

can be used as another means to obtain a new trial on the merits; rather, it simply states that a trial court *may* hold an evidentiary hearing on the Rule 60 motion, if it decides there is a disputed issue regarding the existence of fraud, misrepresentation or other grounds raised in the motion. The *Sharma* court emphasized that such a hearing is *not* required on a Rule 60 motion; it is simply discretionary if the court determines a hearing would assist it in reaching a just determination of the issues raised in the motion. *Id.*

7. No such hearing is required here. Indeed, the Plaintiff has failed to adequately articulate, let alone demonstrate with clear, strong and satisfactory proof, any grounds for relief under the rule. Rather, the motion is comprised largely of unsupported and misguided accusations against the court, defense counsel and the witnesses who testified at the hearing.

8. Further, as reflected in the Plaintiff's motion, she has since filed another lawsuit against two of the witnesses who testified at the hearing in this case, namely Noah Beals and Jeremy Call, bringing claims of defamation against them. That case is currently pending before Judge Stephen Jouard as Larimer County District Court Case No. 2018 CV 220. As the Court may recall, Mr. Beals is an employee in the City's Planning Department, and Mr. Call is an employee of Logan Simpson, an independent contractor who provided consulting services to the City in developing changes to its sign code. The Plaintiff's motion, which mischaracterizes the proceedings of October 1, 2018 in the first instance, seems to suggest that there was some misrepresentation made at the hearing regarding Jeremy Call's relationship to the City as an independent consultant and the fact that communications he had with Mr. Beals and outside counsel for the City for purpose of developing sign code provisions would be subject to the

attorney-client privilege. Plaintiff's accusations appear to be premised on the fact that Mr. Call has separate legal counsel and insurance in the later defamation case she filed against him.

9. Plaintiff's assertions are apparently based on a blind refusal to recognize the distinction between Mr. Call's participation in discussions about sign code revisions with employees of the City and their outside counsel being subject to the City's attorney-client privilege for purposes of her CORA request, as supported by *Alliance Const. Solutions, Inc. v. Dept. of Corrections,* 54 P.3d 861 (Colo. 2002)[2], and the separate legal issue of whether the City has a contractual or other legal obligation to defend and indemnify him (as an employee of the City's independent contractor) against the Plaintiff's defamation claims in her other lawsuit.

10. Plaintiff previously made similar assertions in the defamation action, and the City filed the attached response (***Exhibit 1*** hereto[3]) *already clarifying this valid legal distinction for her*. Yet, without any effort to confer with defense counsel on this issue as required by Rule 121, she filed this meritless Rule 60(b) motion making unsupported accusations of fraud, misrepresentation and misconduct.

[2] Plaintiff asserts on page 4 of her motion that defense counsel allegedly blurted out a citation to the *Alliance* case as a last-minute attempt to react to an alleged waiver of attorney-client privilege by Jeremy Call and/or Noah Beals. Plaintiff fails to produce any transcript from the hearing to support such an assertion. Suffice it to say that the Defendants very much dispute the Plaintiff's characterization of what occurred at the hearing, and deny that any such waiver of the privilege occurred.

[3] Defendant Beal's Response to Plaintiff's Case Status Report Regarding Service was filed in Larimer County District Court Case No. 2018 CV 220 on January 24, 2019, and served upon the Plaintiff by email and U.S. Mail. Exhibit 1 to that Response, which was a copy of this Court's October 11th Order in this case, is not included here for the sake of brevity, since that Order is already part of the record in this case.

11. There is no other way to characterize the Plaintiff's motion other than frivolous, groundless and vexatious. Not only is it wholly lacking merit for the reasons set forth above, it is most certainly "stubbornly litigious" and abusive. *See, In re Estate of Becker*, 68 P.3d 567, 569 (Colo. App. 2003) ("A vexatious claim or defense is one brought or maintained in bad faith. Bad faith may include conduct that is arbitrary, vexatious, abusive, or stubbornly litigious, and it may also include conduct that is aimed at unwarranted delay or is disrespectful of truth and accuracy"). Indeed, Plaintiff has a long history of engaging in such relentless, abusive litigation without underlying merit to her claims, as reflected in the February 7, 2019 appellate order in *Lynne v. Field*, attached hereto as ***Exhibit 2***. It is fully expected that the Plaintiff will stubbornly continue going down these unwarranted legal rabbit holes, causing the City to incur further attorney's fees defending against her filings and draining the Court's resources, unless such conduct is sanctioned.

12. Accordingly, the Court must deny the Plaintiff's request for relief under Rule 60 as being wholly without merit, and do so without holding a hearing; this would be a sound exercise of the Court's discretion here, given the Plaintiff's complete failure to demonstrate entitlement to the relief she is requesting by clear, strong and satisfactory proof. The Court would also be properly exercising its discretion under C.R.S. §13-17-102 in awarding the City its reasonable attorney's fees incurred in defending this motion which clearly lacks substantial justification. That statute provides, in pertinent part:

> "(4) The court ***shall*** assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct… As used in this article, '***lacked substantial***

justification' means substantially frivolous, substantially groundless, or substantially vexatious." [Emphasis added].

13. It is a well-accepted tenet of statutory construction that the word "or" in a statute is presumed to be used in the disjunctive sense. *Armintrout v. People*, 864 P.2d 576, 581-582 (Colo. 1993); *Lombard v. Colorado Outdoor Educ. Center*, 187 P.3d 565, 571 (Colo. 2008). Thus, the Court need not make findings as to all three bases in order to justify an award of attorney's fees under the statute; a finding of any one of these criteria will support a conclusion that an action or motion lacks substantial justification. *See, e.g.*, *Mitchell v. Ryder*, 104 P.3d 316, 321 (Colo. App. 2004). Such a finding is certainly warranted here.

WHEREFORE, the Defendants respectfully request the Court summarily deny the Plaintiff's Rule 60 motion and award the Defendants their reasonable attorney's fees and costs related to the defense of this frivolous, groundless and vexatious motion. The Defendants can submit an affidavit outlining the fees incurred within 10 days of this Court's order providing for such an award.

RESPECTFULLY SUBMITTED this 21st day of February, 2019.

WICK & TRAUTWEIN, LLC

By: *s/Kimberly B. Schutt*
Kimberly B. Schutt, #25947
Attorneys for Defendant

And

FORT COLLINS CITY ATTORNEY'S OFFICE

By: *s/John R. Duval*
John R. Duval, #10185
Attorneys for Defendant

[This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original pleading signed by defense counsel is on file at the offices of Wick & Trautwein, LLC and the Fort Collins City Attorney's Office]

CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFF'S RULE 60 MOTION; AND DEFENDANT'S REQUEST FOR AWARD OF ATTORNEY'S FEES** was filed via the Colorado Courts E-Filing System and served this 21ST day of February, 2019, on the following:

Stacy Lynne
305 W. Magnolia Street #282
Fort Collins, CO 80521

A courtesy copy was also emailed to Ms. Lynne at *stacy_lynne@comcast.net*

s/ Kimberly B. Schutt

[The original certificate of electronic filing signed by Kimberly B. Schutt is on file at Wick & Trautwein, LLC)