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.** **Defendants: NOAH BEALS, Senior Planner, City of Fort Collins, in his individual and official capacity, and JEREMY CALL, Senior Associates – Logan Simpson Design, Contractor for the City of Fort Collins, in his individual and official capacity**	DATE FILED: May 13, 2019 10:38 AM FILING ID: 4B98766426985 CASE NUMBER: 2018CV220 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	Case Number: 2018 CV 220 Courtroom: 3C
DEFENDANT BEAL'S RESPONSE TO PLAINTIFF'S MOTION FOR POST-TRIAL RELIEF PURSUANT TO C.R.C.P. 59	

COMES NOW, the Defendant, Noah Beals, by and through his counsel, Wick & Trautwein, LLC, and respectfully submits the following response to the Plaintiff's motion for post-trial relief pursuant to C.R.C.P. 59. In support hereof, Defendant Beals states as follows:

I. INTRODUCTION

Plaintiff has filed a motion under C.R.C.P. 59, asking the Court to reconsider and reverse its order dismissing her defamation claims against Defendant Beals. That order was made pursuant to C.R.C.P. 12(b)(1), finding the Court lacked subject matter jurisdiction to hear the claims under the Colorado Governmental Immunity Act ("CGIA"). Plaintiff's motion submits multiple new exhibits in support of her assertions that she has adequately pled a claim for

defamation. Plaintiff also asks the Court to hold an evidentiary hearing to determine subject matter jurisdiction if it finds that exhibits attached to her motion still fail to sufficiently plead her claim.

However, for the reasons set forth below, the Court must deny her motion. In the first instance, it is untimely, depriving this Court of jurisdiction to even consider it. Notwithstanding that fatal flaw, the motion must fail on its merits because there has been no error in the Court's findings and order that would warrant reversal or amendment under C.R.C.P. 59.

II. ARGUMENT

1. Plaintiff's Rule 59 motion is untimely filed, such that the Court lacks jurisdiction to even consider it.

Pursuant to the express terms of C.R.C.P. 59, motions made under the rule must be filed within 14 days of the ***entry of the order***. The Court's order was entered on April 3, 2019, and Plaintiff's motion was not filed until April 22, 2019. Plaintiff suggests the 14-day time for filing ran from the date the order was served upon her by mailing, which she claims was April 6th based upon the illegible postmark attached as Exhibit 1 to her motion. However, that is contrary to the express wording of Rule 59 and the other applicable rules of procedure, as now written.

Plaintiff cites *Wilson v. Fireman's Fund Ins. Co.*, 931 P.2d 523 (Colo. App. 1996) in a footnote on page 1, apparently for the proposition that the time for filing a Rule 59 motion is triggered by entry of judgment in the presence of the parties or when it is mailed to them. However, this case was decided prior to substantial revisions to the Colorado Rules of Procedure and dealt with former Rule 6(e), the rule which previously gave an additional 3 days to any deadline when something was mailed, but that part of Rule 6 has since been repealed. Likewise, Rule 59 has been amended to remove the language referenced by the *Wilson* court which

provided a different trigger of the 14-day deadline when the judgment was entered outside of their presence and mailed to the parties.

Under C.R.C.P. 58, "the effective date of entry of judgment shall be the actual date of the signing of the written judgment." Though it goes on to state that a judgment entered outside the presence of the parties shall immediately mailed or e-served to them, it does not create a different time for entry of judgment based on whether that judgment is mailed or e-served.

The plaintiff could have moved to extend the time for the filing of her Rule 59 motion, if she felt she had inadequate time to prepare and file it once she received the Court's order in the mail. She did not do so. Accordingly, because her motion was not filed within 14 days of the entry of the order, this Court lacks jurisdiction to even consider it and also lacks jurisdiction to retroactively extend the time for filing the motion. *Schuster v. Zwicker,* 659 P.2d 687, 689 (Colo. 1983); *National Account Systems, Inc., v. District Court in and for the Second Judicial Dist.,* 634 P.2d 48, 49 (Colo. 1981) (citing numerous cases for this proposition).

Wherefore, the Court can and must deny the Plaintiff's Rule 59 motion as being untimely, without even getting to any of the other further grounds for denial discussed below.

2. Plaintiff's motion to reconsider the Court's order must fail on its merits due to the lack of any error in the Court's application of the law in its order of dismissal.

Plaintiff's motion asks the Court to "reconsider" and reverse its order of dismissal. Motions to reconsider are generally discouraged, but are typically treated as a motion to alter or amend a judgment under C.R.C.P. 59. *Gold Hill Dev. Co., L.P. v. TSG Ski & Golf, LLC*, 378 P.3d 816, 830 (Colo. 2015). A motion to reconsider is addressed to the sound discretion of the district court. *W. Colorado Motors, LLC v. Gen. Motors, LLC*, 411 P.3d 1068, 1074 (Colo. App.

2016); *Hytken v. Wake*, 68 P.3d 508, 512 (Colo.App.2002). To the extent the Court even reaches the merits of the Plaintiff's motion here, it would be a sound exercise of its discretion to find there is no error warranting alteration or amendment of its prior order of dismissal, such that the Plaintiff's Rule 59 motion must be denied.

First, Plaintiff's motion is premised on a misunderstanding of the standard of review applicable to the Court's determination of Mr. Beal's motion to dismiss for lack of subject matter jurisdiction. In discussing the "legal foundation" for her motion, she starts by asserting on that "a motion to dismiss is looked upon with disfavor, and a complaint should not be dismissed unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief." The balance of her motion is thus framed in arguing that she has sufficiently pled her claim for defamation under this standard, attaching a number of exhibits not previously part of her Complaint.

However, Plaintiff is basing her motion on the standard of review applicable to a motion to dismiss made under Rule 12(b)(5), for failure to state a claim upon which relief can be granted. That is not the standard of review applicable to a motion to dismiss made under Rule 12(b)(1) for lack of subject matter jurisdiction, as was made by Mr. Beals here. It is an important distinction. As set forth in Mr. Beals' motion, under Rule 12(b)(1), the Court is not to give the plaintiff the benefit of all reasonable doubts, but rather is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Further, the Court must place the burden of proving subject matter jurisdiction on the plaintiff, as the party bringing the action against the public entity or employee. *Delk v. City of Grand Junction*, 958 P.2d 532, 533 (Colo. App. 1998). The Court correctly applied this standard to the Plaintiff's insufficient

allegations to find, without the need for an evidentiary hearing, that the Plaintiff failed to meet her burden to establish subject matter jurisdiction.

Further, notwithstanding the fact that the Plaintiff is operating under a misunderstanding of the applicable standard of review, her attempt to cure her insufficient pleading through the attachment of numerous exhibits not previously part of her Complaint is improper, and cannot be considered by the Court on a motion for reconsideration under Rule 59. *Ogunwo v. American Nat'l Ins. Co.,* 936 P.2d 606, 611 (Colo. App. 1997); *Bally Export Corp. v. Balicar, Ltd.,* 804 F.2d 398, 404 (7th Cir. 1986) ("a motion for reconsideration is an improper vehicle to introduce evidence previously available or to tender new legal theories").[1]

Finally, notwithstanding Plaintiff's many assertions of alleged "widespread shame and humiliation" she claims was brought upon her by Mr. Beals (which he denies), the fact of the matter is that this is not the type of injury contemplated by the Supreme Court of Colorado in its definition of "willful and wanton" for purposes of waiving immunity for a public employee under the CGIA. Again, as discussed in Mr. Beals' motion to dismiss, in *L.J. v. Carricato*, 413 P.3d 1280, 1288 (Colo. App. 2018), the Supreme Court emphasized that, a plaintiff must sufficiently allege facts to support a finding of conduct that involved a conscious disregard of *danger or risk to health or safety of others. See, also, Martinez v. Estate of Bleck*, 379 P.3d 315, 322-23 (Colo. 2016) (declining to choose one definition of "willful and wanton" conduct, but indicating they all share a common feature - a conscious disregard of danger to others).

[1] Both of these cases were cited for the same proposition in the Colorado Court of Appeals' recent case of *Rinker v. Colina-Lee,* 2019 WL 1284887, 2019 COA 45 (Colo. App. 2019), which has not yet been released for official publication.

As the Supreme Court of Colorado has articulated this test, it is clear it contemplates a public employee's conscious disregard for danger or risk to one's health or safety, not the type of harm to reputation caused by an alleged defamation. Again, as discussed in Mr. Beals' reply in support of his motion to dismiss, this definition is consistent with the exceptions to immunity for a public entity found in C.R.S. § 24-10-106(1), all of which embody some act on the part of a public entity that creates a danger or risk to a person's health or safety. This interpretation is also consistent with the definition of "dangerous condition" found in C.R.S. § 24-10-103(1.3), which defines it to mean "either a physical condition of a facility or the use thereof that constitutes an *unreasonable risk to the health or safety of the public*..." [Emphasis added].

The Court correctly concluded the Plaintiff failed to sufficiently plead facts to meet that definition here, and properly dismissed her Complaint for lack of subject matter jurisdiction. Nothing in her Rule 59 motion, which only continues to argue alleged damage to her reputation, merits a reconsideration or reversal of that decision. Nor does it warrant the holding of an evidentiary hearing given her clear failure to allege facts which would fall within the applicable definition of willful and wanton conduct under this standard. Again, the Court need not hold such a hearing where, as here, there is no evidentiary dispute as to jurisdiction to warrant one. *See, Finnie v. Jefferson County Sch. Dist. R-1,* 79 P.3d 1253, 1260 (Colo. 2003); *Tidwell v. City and County of Denver*, 83 P.3d 75, 86 (Colo. 2003).

III. CONCLUSION

The Court's order of April 3, 2019, applied the correct standard of proof and conducted a thorough analysis to conclude that the Plaintiff failed to meet her burden of establishing subject matter jurisdiction here. Indeed, given the nature of her allegations, she has not and cannot

allege sufficient facts to establish that Mr. Beals's alleged conduct involved a conscious disregard for danger to her safety. The Court would thus be exercising sound discretion to deny her motion for reconsideration under C.R.C.P. 59.

The Court should further enter an award of attorney's fees in favor of Mr. Beals and against the Plaintiff in the amount of $6,049.50, as supported by the affidavit timely submitted to the Court on April 18, 2019. There is no merit to the Plaintiff's objection, in which she acknowledges that the Court is required to enter an award of attorney's fees upon dismissal of a case under Rule 12(b). She does not contend that the fees are unreasonable, nor submit any evidence in support of such a contention. Rather, she simply argues that the Court should wait to enter such an award until after she has exhausted her legal remedies through appeal or otherwise, but that request is contrary to the rules of procedure. Awarding attorney's fees in this instance is part of taxing costs and does not preclude her from pursuing an appeal. Further, she submits no authority whatsoever for the proposition that the Court should not award any attorney's fees incurred by Mr. Beals after the filing of the motion to dismiss. To the contrary, any fees so incurred are part of the defense and are rightfully awarded pursuant to the authority cited in the Defendant's attorney fee submission. The Plaintiff was given the opportunity to voluntarily dismiss this case and failed to do so, necessitating the filing of the motion and all subsequent further action taken in defense of this matter.

WHEREFORE, for the reasons set forth above, Defendant Noah Beals respectfully requests the Court deny the Plaintiff's Rule 59 motion for reconsideration, and instead affirm its judgment in favor of the Defendant and against the Plaintiff, with an award of attorney's fees in the amount of $6,049.50.

Respectfully submitted this 13th day of May, 2019.

WICK & TRAUTWEIN, LLC

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

[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 **DEFENDANT BEAL'S RESPONSE TO PLAINTIFF'S MOTION FOR POST-TRIAL RELIEF PURSUANT TO C.R.C.P. 59** was filed via the Colorado Courts E-Filing System and served this 13th day of May, 2019, on the following:

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

s/ Jody L. Minch

[The original certificate of electronic filing signed by Jody L. Minch is on file at Wick & Trautwein, LLC)