

<p>Larimer County, Colorado, District Court Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500</p>	<p>DATE FILED: October 12, 2018 4:41 PM FILING ID: 2E738F89DB033 CASE NUMBER: 2018CV149</p>
<p>Plaintiff:</p> <p>ERIC SUTHERLAND,</p> <p>v.</p> <p>Defendant:</p> <p>THE CITY OF FORT COLLINS, a home rule municipality in the State of Colorado; STEVE MILLER, in his capacity as the Larimer County Assessor and all successors in this office; IRENE JOSEY, in her capacity as the Larimer County Treasurer and all successors to this office; and Indispensable Parties: THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.</p>	<p>Court Use Only</p>
<p>Jeannine Haag, Reg. No. 11995 David P. Ayraud, Reg. No. 28530 George H. Hass, Reg. No. 897 Larimer County Attorney's Office 224 Canyon Ave., Suite 200 Post Office Box 1606 Fort Collins, Colorado 80522 Telephone (970) 498-7450 jeanninehaag@larimer.org wressue@larimer.org gass@larimer.org</p>	<p>Case No. 18 CV 149</p> <p>Courtroom 5B</p>
<p style="text-align: center;">DEFENDANTS MILLER AND JOSEY'S VERIFIED MOTION FOR AWARD OF ATTORNEY FEES</p>	

Defendants Steve Miller and Irene Josey (County Defendants) move for an award of attorney fees pursuant to C.R.S. Section 13-17-101 et. seq. As grounds for this motion, County Defendants show the court as follows:

Certificate of Compliance with C.R.C.P. 121 Section 1-15(8)

The undersigned certifies that he has conferred with Plaintiff via email communication and explained the basis for this motion and the amount of fees requested. Sutherland objects to the motion.

I. Introduction

The relevant background to this motion is as follows:

Plaintiff (Sutherland) filed his complaint against the County Defendants and others on April 26, 2018. Sutherland essentially sought injunctive and other relief against the County Defendants to prohibit the collection and distribution of certain taxes Sutherland sought to have declared improper for various reasons he alleged in the complaint.

On July 11, 2018, this court granted the motion to dismiss of Defendants, Timnath Development Authority (TDA) and Compass Mortgage Corporation primarily on the basis of Sutherland's lack of standing to make the claims.

Thereafter, on August 3, 2018, the County Defendants moved to dismiss Sutherland's claims arguing *inter alia* that since Sutherland's claims against the County Defendants was derivative of his claims against TDA and Compass, and those were dismissed, he had no viable claim against the County Defendants. Sutherland refused to dismiss his claims against the County Defendants seeking an injunction against collecting and distributing tax revenue notwithstanding his direct knowledge that Sutherland had no standing to challenge the underlying tax.

On September 5, 2018, this court granted a motion to dismiss the claims against these Defendants and his claims against the City of Fort Collins.

II. Basis for award of fees

C.R.S. § 13-17-102 (4) provides:

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 . . . (emphasis added)

Colorado law adds an additional “know or should have known” requirement in the case of a *pro se* litigant:

No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious; § 13-17-102(6)

In this case, Sutherland knew that the court found and ordered that he had no standing to pursue his claims **on or before** the County Defendants filed their motion to dismiss. Any claim that Sutherland thought he plausibly had was erased when the Court issued the July 18, lack of standing order. Sutherland must also be held to the understanding that since he had no basis to contest the tax, he certainly had no basis to seek to enjoin the collection and distribution of the revenue deriving from said tax. Instead of accepting the July 18, Order, Sutherland instead persisted with his baseless claims thereby requiring the County Defendants to prepare and file its Motion to Dismiss.

The Colorado Court of Appeals in *Bockar v. Patterson*, 899 P.2d 233 (Colo. App. 1994) considered an attorney’s fees award against a *pro se* litigant and observed:

§13–17–102(6). It provides that attorney fees may not be assessed against a party appearing without an attorney unless the court finds that the party “clearly knew or reasonably should have known that the action or defense, *or any part thereof*, lacked substantial justification.”

In *Artes–Roy v. Lyman*, 833 P.2d 62 (Colo.App.1992), a division of this court held that a

judgment for attorney fees could not stand against the plaintiffs, who had appeared without an attorney, because the trial court failed to find that the plaintiffs clearly knew or reasonably should have known that filing of the suit lacked substantial justification. However, we do not read the case as supporting the proposition that an award of fees against a party appearing without an attorney can never stand unless the action or defense itself lacks substantial justification. No claim of vexatious conduct was made in *Artes–Roy*, and the court had no occasion to address it. A vexatious claim is one brought or maintained in bad faith to annoy or harass. It may include conduct that is arbitrary, abusive, stubbornly litigious, or disrespectful of truth. *Cf. Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo.1984); *Stegall v. Stegall*, 756 P.2d 384 (Colo.App.1987). Here, the record supports the trial court's finding that plaintiff clearly knew or reasonably should have known that his action was substantially vexatious.

When considering any attorney fees award, §13-17-103 requires the court to consider the following factors:

- (a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;
- (b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;
- (c) The availability of facts to assist a party in determining the validity of a claim or defense;
- (d) The relative financial positions of the parties involved;
- (e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;
- (f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;
- (g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;
- (h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

Here, Sutherland had received the Court Order holding that he had no standing to pursue the challenge to the tax prior to the County filing its motion. This obvious personal knowledge that he had no standing to bring a challenge to the underlying tax should have caused Sutherland to also voluntarily dismiss his claims against the County Defendants for collection and distribution of the tax revenue. He stubbornly persisted with his claims with full knowledge that he had no standing to do so. This actual knowledge compels the conclusion that not only did he

know his claims lacked any justification, let alone substantial justification, but that pursuit of those claims was vexatious. These circumstances on their face compel applying each of the above factors against Sutherland, except for (h) which is not applicable.

This entitles the County Defendants to an award of attorney fees.

III. Amount of Fees sought

The County Defendants request fees as follows:

For the undersigned George H. Hass's time:

<i>Date</i>	<i>Action</i>	<i>Rate/hour</i>	<i>Hours</i>	<i>Amount</i>
July 27, 2018	Review Sutherland Complaint, case file and Exhibits	\$300	1.0	\$300
7/30/2018	Westlaw research re motion to Dismiss; draft motion to dismiss and forward to paralegal	\$300	4.5	
8/1/2018	Additional research, review and revise final draft motion to dismiss. Forward to Paralegal	\$300	1.5	
TOTAL				\$2,100.00

For paralegal time:

<i>Date</i>	<i>Action</i>	<i>Rate/hour</i>	<i>Hours</i>	<i>Amount</i>
7/9/2018	Email and phone call to Irene Josey re: service of Complaint	\$100	.2	\$20
7/9/2018	Draft Motion and Proposed Order for Extension of Time to Respond to Complaint; finalize, e-file and mail to Plaintiff	\$100	1.2	\$120
7/10/2018	Review Order granting Extension for Response; calendar deadline	\$100	.1	\$10
7/11/2018	Download and save previously-filed pleadings into case folder; index into pleadings file	\$100	1.8	\$180
7/12/18	Review, print and save e-filed pleading	\$100	.1	\$10
7/18/2018	Review, print and save e-filed pleading	\$100	.7	\$70
7/19/2018	Review, print and save e-filed pleading	\$100	.1	\$10
7/24/2018	Emails to/from clients re: Complaint	\$100	.2	\$20
7/30/2018	Phone call and email to client re: case status	\$100	.2	\$20
8/2/2018	Review and finalize Motion and draft proposed Order to Dismiss	\$100	1.8	\$180
8/3/2018	E-file Motion and proposed Order to Dismiss; mail to Plaintiff	\$100	.4	\$40
8/7/2018	Email to clients	\$100	.1	\$10

8/13/2018	Review, print and save e-filed pleading	\$100	.1	\$10
8/15/2018	Review, print and save e-filed pleading	\$100	.1	\$10
8/27/2018	Email from Attorney Hass re: pleadings; print pleadings	\$100	.1	\$10
8/30/2018	Review, print and save e-filed pleading	\$100	.1	\$10
8/31/2018	Emails to/from client	\$100	.1	\$10
9/5/2018	Review, print and save e-filed pleading; emails to/from client	\$100	.2	\$20
TOTAL				\$760.00

Total claim: \$2,860.00

IV. Method by which fees are calculated

The undersigned attorney and the paralegal working on this case are salaried employees of Larimer County, Colorado. When calculating an award of attorney fees for in-house salaried attorneys and staff, the Colorado Court of Appeals in *Ravenstar LLC v. One Ski Hill Place*, 405 P.3d. 298 (Colo. App. 2016) held that such fees are to be calculated using the lodestar method.

The lodestar method means:

Where statute authorizes award of attorney fees, lodestar amount carries strong presumption of reasonableness, but attorney must be held to reasonable standard of competency in preparing and trying case and must consider economic aspects involved in controversy; if attorney provides reasonable and rational basis for work done, attorney should be compensated accordingly, but if attorney fails to establish such basis, limiting award is appropriate. *Dahl v. Young*, (Colo App.1993) 862 P.2d 969, certiorari denied.

The undersigned has more than 45 years' experience representing public entities including Larimer County government. He has substantial experience in all aspects of litigation concerning public entities. The amount of time spent drafting and filing the subject motion are reasonable and necessary. The paralegal assigned to this case has 17 years' experience with litigation being her primary area of responsibility. There is a rational basis for all of the work done. Based upon the undersigned's knowledge of hourly rates for attorneys and paralegals with similar levels of experience, the hourly rate of \$300.00 is a reasonable rate and the paralegal rate is based upon the hourly compensation.

WHEREFORE, the County Defendants request an award of attorney fees in the amount of \$2,860.00.

Dated: October 12, 2018

LARIMER COUNTY ATTORNEY'S OFFICE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing DEFENDANTS MILLER AND JOSEY'S VERIFIED MOTION FOR AWARD OF ATTORNEY FEES was served on the following using the Colorado Courts E-Filing System or by placing in the U.S. Mail, postage prepaid, on the 12th day of October, 2018:

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