

DISTRICT COURT, LARIMER COUNTY,  
COLORADO

Court Address: 201 La Porte Avenue  
Fort Collins, CO 80521  
Phone Number: (970) 494-3500

DATE FILED: September 5, 2019 2:08 PM  
FILING ID: 1762C51049BBD  
CASE NUMBER: 2018CV149

**Plaintiff:** ERIC SUTHERLAND, *pro se*

v.

**Defendants:** 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.

▲ COURT USE ONLY ▲

*Attorneys for Defendant City of Fort Collins:*

John W. Mill (#22348)  
Rosemary A. Loehr (#52559)  
Sherman & Howard L.L.C.  
633 17th Street, Suite 3000  
Denver, CO 80202  
Phone Number: (303) 297-2900  
[jmill@shermanhoward.com](mailto:jmill@shermanhoward.com)  
[rloehr@shermanhoward.com](mailto:rloehr@shermanhoward.com)

Case No.: 2018CV149

Courtroom/Division: 5B

Carrie M. Daggett, #23316  
John R. Duval, #10185  
Fort Collins City Attorney's Office  
300 LaPorte Avenue  
Fort Collins, CO 80522-0580  
970-221-6520  
[cddaggett@fcgov.com](mailto:cddaggett@fcgov.com)  
[jduval@fcgov.com](mailto:jduval@fcgov.com)

**CITY OF FORT COLLINS' RESPONSE TO PLAINTIFF'S MOTION FOR A  
HEARING**

The City of Fort Collins (the “City”) filed its Second Motion for Attorneys’ Fees and Costs (the “Fee Motion”) to recover the fees and costs it incurred responding to Mr. Sutherland’s post-dismissal conduct that unnecessarily expand the scope of this proceeding. Mr. Sutherland now requests a hearing on the City’s Fee Motion. *See 8/6/19 Plaintiff’s Motion for a Hearing of Defendant City of Fort Collins’ Second Combined Motion for Attorneys Fees and Costs* (the “Motion for a Hearing”). The City agrees that Mr. Sutherland is entitled to an evidentiary hearing on its second Fee Motion. However, the hearing should be limited to the post-dismissal conduct that gave rise to the requested fees and the reasonableness of the fees requested.

### **RESPONSE**

An evidentiary hearing on attorney fees is not an opportunity to re-litigate issues the court has already decided. Instead, the right to a hearing on a motion for attorneys’ fees is narrowly circumscribed. A party is entitled to an evidentiary hearing on a motion for attorneys’ fees to challenge the limited issues of the “reasonableness and necessity of attorney fees.” *In re Marriage of Mockelmann*, 944 P.2d 670, 672 (Colo. App. 1997); *see also Roberts v. Adams*, 47 P.3d 690, 700 (Colo. App. 2001) (“if the reasonableness of such fees is challenged, the challenging party is entitled to a hearing”).

In his Motion for a Hearing, Mr. Sutherland listed the following issues to be addressed at the hearing:

- 1) The division of the requested expenses between the various activities complained of in the Second Motion for Fees. (No assignment of line item costs to individual activities, i.e. hearing, *coram non judice* motion, etc. was made.)
  
- 2) All factual matters pertaining to the new theory of law I advanced to support my claim of standing in this matter; the Uniform Declaratory Judgment Act must be interpreted liberally to allow for judicial review of a request for declaratory judgment made in advance of time bar to future inquiry imposed by a non-claim statute so long as there is

possibility of future injury regardless of how indirect that possibility may be at the time of filing.

3) All factual matters pertaining to the causation of the activities complained of by the City of Fort Collins in their Second Motion.

Hearing Motion at 2-3.

Only issues one and three relate to the reasonableness and necessity of the City's requested fees. Mr. Sutherland can address the "factual matters" of his post-dismissal conduct and put forth evidence of the merits of his positions (issue three) and he can also contest the structure of the City's requested fees (issue one). These issues relate to the subject and substance of the City's second Fee Motion.

But, Mr. Sutherland's second issue is improper. As an initial matter, Mr. Sutherland already received a half-day hearing on the merits of his complaint and his "new theory of law." Issue two is word-for-word the same issue presented in Mr. Sutherland's request for hearing on the City's first motion for attorneys' fees. *See 10/18/18 Plaintiff's Motion for a Hearing of Defendant City of Fort Collins' Combined Motion for Attorneys Fees and Costs* at 2. At the March 15, 2019 hearing, Mr. Sutherland received a fair and full opportunity to present evidence on his theory of standing. After that hearing, this Court issued its order granting the City's fees and costs. *See 4/2/19 Order Granting Fort Collins's Motion for Attorneys' Fees and Bill of Costs* ("Order"). In that Order, this Court determined that his theory of standing was frivolous. Order at 4 ("Plaintiff's argument that he asserted a novel theory of law is also not persuasive. . . There is no properly pled claim setting forth Plaintiff's novel legal theory regarding standing."). This Court has repeatedly held that Mr. Sutherland's novel theory of standing is frivolous. Permitting Mr. Sutherland to continually re-litigate his theory of standing simply opens the door

to additional fee awards. *E.g., Rose L. Watson Revocable Tr. v. BP Am. Prod. Co.*, 2014 COA 11, ¶ 25 (awarding fees on appeal for re-litigating arguments previously deemed frivolous by the trial court: “And it is still quite another [thing] to continue to assert frivolous arguments even after courts have repeatedly declared that those arguments are frivolous.”).

The City’s second Fee Motion is tailored to post-dismissal conduct that unnecessarily expanded the scope of the proceeding. Therefore, Mr. Sutherland’s requested hearing is properly limited to the post-dismissal conduct that is the subject of the City’s Fee Motion. Mr. Sutherland’s “new theory of law” is no longer at issue and he is not entitled to another opportunity to litigate the merits of his dismissed complaint. *See E-470 Pub. Highway Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001) (trial court did not err in denying fees without conducting a separate hearing, because the court had already presided over a hearing on the substantive issues in the case and had heard evidence from which the court could decide whether the claims were frivolous and groundless), *aff’d*, 49 P.3d 1151 (Colo. 2002). Because fee hearings are not an opportunity to re-litigate substantive issues that have already been decided, trial courts can restrict an attorney fees hearing if a litigant is attempting to go beyond the scope of the reasonableness and necessity of the requested fees. For example, in *Rose L. Watson Revocable Tr. v. BP Am. Prod. Co.*, the Colorado Court of Appeals found that the trial court properly restricted the cross-examination of an attorney witness at the attorney fees hearing because “the attempted cross-examination was merely an attempt to relitigate the motion for summary judgment.” 2014 COA at ¶ 23 n.6.

Similarly, because Mr. Sutherland’s second issue is an attempt to re-litigate the motion to dismiss and subsequent dismissal, like the trial court in *Rose L. Watson Revocable Tr.*, this Court

should narrow the scope of the hearing to the reasonableness and the necessity of fees related to Mr. Sutherland's post-dismissal conduct.

### **CONCLUSION**

Mr. Sutherland is not entitled to a boundless and protracted hearing to re-litigate the merits of his original complaint. Therefore, Mr. Sutherland should receive a one-hour evidentiary hearing on the City's second Fee Motion that is limited to Mr. Sutherland's post-dismissal conduct and the reasonableness and necessity of the post-dismissal fees.

Dated this 5th day of September, 2019.

SHERMAN & HOWARD L.L.C.

s/ Rosemary A. Loehr  
Rosemary A. Loehr (#52559)  
John W. Mill (#22348)  
Sherman & Howard L.L.C.  
633 Seventeenth Street, Suite 3000  
Denver, Colorado 80202  
(303) 297-2900  
rloehr@shermanhoward.com  
jmill@shermanhoward.com

**CERTIFICATE OF SERVICE**

I certify that on the 5th day of September, 2019, a true and correct copy of the foregoing **CITY OF FORT COLLINS' RESPONSE TO PLAINTIFF'S MOTION FOR A HEARING** was filed via Colorado Court's E-Filing system, and was served on the following:

Eric Sutherland, *pro se*  
3520 Golden Currant Boulevard  
Fort Collins, CO 80521  
(*By email and US Mail*)

Eric R. Burris, Esq.  
Jesse Daniel Sutz, Esq.  
Chloe Mickel, Esq.  
Brownstein Hyatt Farber Schreck, LLP  
410 Seventeenth Street, Suite 2200  
Denver, CO 80202  
(*By Colorado Court's E-Filing*)

*/s/ Nancy Hedges*  
Nancy Hedges, Legal Secretary