

**8<sup>th</sup> DISTRICT COURT  
LARIMER COUNTY JUSTICE CENTER**

Court Address: 201 Laporte Avenue  
Fort Collins, CO 80521  
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FILED IN COMBINED COURTS  
LARIMER COUNTY COLORADO

2018 MAY -2 PM 4:12

DATE FILED: 2018 MAY 2 4:12 PM  
FILING ID: D7623EDS18MAY2018  
CASE NUMBER: 2018CV149

**Plaintiff:** Eric Sutherland, *pro se*

v.

**Defendants :** THE CITY OF FORT COLLINS, a home rule municipality in the state of Colorado; BOB OVERBECK, in his capacity as the Larimer County Assessor and all successors to 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 ▲

**Party without attorney:**  
Eric Sutherland, *pro se*  
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Case #: 2018CV149  
Division:

**MOTION TO DEEM THIS PROCEEDING *CORAM NON JUDICE* SINCE JUNE 23, 2018  
PURSUANT TO RULE 60(B)(5)**

Plaintiff, Eric Sutherland, also referred to by personal pronouns, now files this motion requesting that this court deem that this proceeding has been *coram non judice* since June 23, 2018.

**Certificate of Conferral:** Pursuant to C.R.C.P. Rule 121 §1-15(8), Plaintiff has sent several emails to counsel for the defendants requesting conference on this motion and the underlying subject. To the extent that any response has been forthcoming, and there has not been much in the way of response and nothing in the way of argument

**EXHIBIT  
H**

refuting the substance of Plaintiff's argument here, it is presumed that the relief requested here is opposed.

## **I. BACKGROUND**

This motion tackles the issue of whether or not Judge Greg Lammons had been divested of authority to hear this case by the assignment of this case to a senior judge made by the Chief Justice of the Colorado Supreme Court by and through his designees in the Office of the State Court Administrator. In a more general sense, this motion presents a question of law as to whether or not any assignment made by the Chief Justice under his constitutional authority divests all other judicial officials of authority to hear and decide a case.

It is my position that the assignment made pursuant to the constitutional authority of Article VI section 5 of the Colorado constitution divested Judge Lammons of authority and the motion seeks relief commensurate with that requested finding. This position is a new theory of law in Colorado that presents a matter of statewide interest and can easily be seen as closing ambiguity that exists in current law.

It is also my position that this is an issue like subject matter jurisdiction that may be raised for the first time on appeal.<sup>1</sup> Thus, the filing of this motion has the effect of preserving the issue for appeal, even though it is not necessary that this issue be preserved for the purposes of appellate review. Placing the substantive details of the events pertaining to the assignment of this case to a senior judge in the record of the trial court is necessary to avoid exceeding the 9,500 word limitation imposed on Opening Briefs by C.A.R. Rule 28(g)(1). No party will be prejudiced by this filing and its inclusion in the record on appeal as opposed to introducing the issue in full in the Opening Brief. Furthermore, the value of having the question of law posed by this motion outweighs any other consideration that may weigh against it.

### *A. Timeline of Prior Events*

On November 6, 2018, I obtained a letter that had been written by Mindy Masias, Chief of Staff, Office of the State Court Administrator, that clearly indicated that judges of the 8<sup>th</sup> district court had disqualified themselves or been disqualified by the Chief Judge and that Judge J. Robert Lowenbach had been assigned to hear and decide the case now on appeal. On the date of this letter,

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<sup>1</sup> It has never been clear how best to enter this issue into this proceeding or whether it is even necessary to raise the issue at all in this proceeding.

June 23, 2018, no substantive action had been taken in the matter. The timeline of significant events prior to this discovery is provided below. (indented events represent actions of OSCA, non-indented items are actions in the trial court)

4/26/18 Complaint filed

6/13/18 Judge Stephen Jouard recuses himself by issuing *Order of Recusal*

6/13/18 Senior Judge Assignment Request (Exhibit 3) is completed and transmitted to Court Service Program Administrator by the 8<sup>th</sup> judicial district court administrator. All judges of the 8<sup>th</sup> are represented to be disqualified.

6/13/18 Clerk of Courts for the 8<sup>th</sup> district reassigns case to Judge Gregory M. Lammons

6/20/18 Judge Gregory M. Lammons issues *Order Setting Hearing*

6/23/18 Office of the State Court Administrator assigns this case and case no. 2018CV030567 to Judge J. Robert Lowenbach. (Exhibit 1)

7/12/18 Office of the State Court Administrator is notified for the first time that the assignment of Judge Lowenbach to hear 2018CV149 has been disregarded. (Exhibit 4)

7/16/18 Judicial Administration of the 8<sup>th</sup> district purports to supercede assignment of Judge Lowenbach made by OSCA to hear and decide 2018CV149. (Exhibit 5)

(Judge Gregory Lammons presided over the case until dismissal of all claims.)

The above timeline shows two facts: 1) Judge Lowenbach ignored and disregarded the assignment made by the Office of the State Court Administrator to hear and rule on case# 2018CV149 and 2) Judge Lammons heard and ruled on a case in which he had been disqualified and further divested of authority by the assignment made by Ms. Masias of OSCA under the authority of the Chief Justice pursuant to the Colorado constitution. Neither judicial official took any action to ensure that the administration of authority was sound.

#### B. Discovery Of Divestment Of Authority

As discussed further below, Judge Lowenbach had also been assigned by the same letter to hear and decide case# 2018CV030567, *Timmath v. Sutherland*<sup>2</sup>. That case had already become an unbelievable nightmare by Nov. 6<sup>th</sup>, 2018. *Timmath v. Sutherland* is a malicious, retaliatory

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<sup>2</sup> In both cases, there is no entry in the record of the court below showing that the assignment of Judge Lowenbach by OSCA had been made. Also, in the single case that Judge Lowenbach did end up hearing, there is no entry in the record of the judge that had previously been assigned by the clerk of the 8<sup>th</sup> District Court, Judge Jouard, had been disqualified or otherwise removed from the case.



S.L.A.P.P.<sup>3</sup> suit brought against me by Timnath and its URA as a direct consequence of the proper request for declaratory judgment in this case. Contrary to what Timnath alleged, my request for judicial review was thoughtful, proper and had a rational basis underlying every single element of my case. A claim is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim. *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo.1984). Furthermore, my petitioning activity was protected under the First Amendment to the U.S. Constitution. *Protect Our Mountain Environment v. District Court of JeffCo*, 671 P. 2d 1361(Colo.1984)

Suffice it to say, Judge Lowenbach had made it known that he would summarily adjudicate *Timnath v. Sutherland* rather than apply and follow the Rules of Civil Procedure including Rule 16. For example, Judge Lowenbach set a date for a trial on September 20<sup>th</sup>, 2018 at the very same hearing in which he directed Timnath to amend its complaint to include monetary damages. Thus a trial date was set without any understanding of what would be at issue at the trial. I had no idea whether or not I would require legal counsel because I had no idea what the claims would be. Unfortunately, Judge Lowenbach rejected each and every objection that I presented to his unique approach to adjudicating civil suits out of hand.

Thus, I discovered that Judge Lammons had been divested in the case under appeal here by accident. I was attempting to figure out how I had gotten stuck with a judge that held absolutely no regard for the Rules of Civil Procedure and the rights of citizens under our constitutions when I obtained the letter making the assignments. (Exhibit 1)

C. Procedural History of case no. 2018CV030567 Clearly Shows That Assignment of Senior Judge Divested Judge Stephen Jouard of Authority in that case.

This Court may take notice of the proceedings in 2018CV030567. In that case, the June 23<sup>rd</sup>, 2018 letter written by Ms. Masias had the effect of divesting Judge Sephen Jouard of authority to hear and decide that case. Judge Jouard did not issue an order of recusal in 2018CV030567 despite the fact that he had been assigned the case at the time the letter from OSCA had been issued. As seen in sub-section A. above, Judge Jouard had taken action to recuse himself when he had been assigned to case no. 2018CV149. The absence of a similar order of recusal in 2018CV030567 indicates that Judge Jouard considered such an order to be unnecessary considering the other events. (disqualification by the Chief Judge and assignment of a senior judge by OSCA.) The timeline

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<sup>3</sup> Strategic Lawsuit Against Public Participation

below illustrates this fact. (indented events represent actions of OSCA, non-indented items are actions in the trial court)

6/7/18 Complaint filed by Timnath

6/8/18 Judge Devin Odell disqualifies himself

6/12/18 Senior Judge Assignment Request (Exhibit 2) is completed and transmitted to Court Service Program Administrator. All judges of the 8<sup>th</sup> are disqualified in this case.

6/22/18 Clerk of Courts for the 8<sup>th</sup> District reassigns case to Judge Thomas R. French.

6/23/18 Office of the State Court Administrator assigns both cases to Judge J. Robert Lowenbach. (Exhibit 1)

6/26/18 Judge Thomas R. French disqualifies himself

6/27/18 Clerk of Courts for the 8<sup>th</sup> District reassigns case to Judge Stephen Jouard

***NOTE: No Order of Recusal was made by Judge Jouard.***

7/19/18 Judge J. Robert Lowenbach issues *Order: Motion for Expansion of Time.*

### **III. ARGUMENT**

#### ***A. Applicable Law Regarding Authority of Judicial Officers***

In *People v. Sherrod* 204 P. 3d 466(Colo.2009), our Supreme Court disentangled what had previously been a conflated use of language. Judicial officers exercise authority. The courts that judicial officers preside over have jurisdiction. Authority is not a jurisdictional issue. *People v. Sherrod* at 469.

Colorado, like other jurisdictions, observes a doctrine of *de facto* authority that generally holds that a person acting under the color of authority is presumed to exercise *de facto* authority in his or her position. A bright line has, however, been established to preclude the exercise of *de facto* authority in certain circumstances. That bright line circumscribes situations where, as here, constitutional provisions operate to preclude the exercise of *de facto* authority. *People v. Torkelson* 22 P. 3d 560(Colo.App.2000) or *Torkelson II*. The *Torkelson II* court relied upon the U.S. Supreme Court finding in *Ryder v. United States*, 515 U.S. 177,115 S.Ct. 2031,132 L.Ed.2d 136(1995), which held that a trespass upon the executive power of appointment precluded *de facto* authority when the power of appointment was constitutional in nature. A similar circumstance can be seen to exist here. The executive power of appointment at work here is that of Article VI section 5(3) of the

Colorado constitution. Here as in *Ryder* and *Torkelson II*, the alleged defect of authority relates to basic constitutional protections designed in part for the protection of litigants.

B. All elements necessary to review and decide whether or not Judge Lammons had been divested of authority are present

Given the circumstances presented above and especially the strong argument to hold that Judge Lammons had been divested of all authority including *de facto* authority, this court should now decide this issue by finding the proceeding was *coram non judice*. Judge Lammons waived off an assignment made by a superior judicial official without taking any other action to ensure that there were no administrative or judicial loose ends. It is hard to reconcile how Judge Lammons might expect others to recognize and respect the binding effect of his decisions when he, himself, shows disregard for the decisions of his superiors.

C. Other issues

Upon learning of Judge Lammons disregard for the assignment of a senior judge to hear the case on appeal here, I sent a letter to the State Court Administrator and also filed that letter into the record of this proceeding.<sup>4</sup> The State Court Administrator, Christopher Ryan, then wrote a letter purporting to retroactively rescind the assignment of Judge Lowenbach *nunc pro tunc* to 10 days before the assignment had been made. This letter was also filed into the record of this proceeding. However, Mr. Ryan's action is of no effect for three reasons; 1) the State Court Administrator possesses no authority to rescind appointments whatsoever<sup>5</sup>, 2) even if the State Court Administrator did have such authority, rescinding an assignment is not the same as restoring authority to a judicial official that had been divested of authority, and 3) the *nunc pro tunc* rescission was absurd in that it purported to retroactively rescind the assignment to a date that was 10 days before the assignment had been made. (June 13 v. June 23).

## VIII. CONCLUSION

This court should now deem that this proceeding has been *coram non judice* since June 23, 2018.

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<sup>4</sup> Neither my letter to OSCA or the State Court Administrator's letter to Judge Lowenbach appear in the certified record of the proceeding as they were filed into the record of the trial court after the *Notice of Appeal* had been filed with this court.

<sup>5</sup> Mr. Ryan has tacitly admitted to the absence of his authority to rescind assignments through a response to a CORA request seeking public records that evidence his authority to rescind assignments. The CORA request returned no records responsive to this criteria.

*W. E. Sutherland*

Eric Sutherland

Dated May 2<sup>nd</sup>, 2019

I hereby certify that on this 2nd Day of May, 2019 a true and correct copy of the foregoing *Motion to Deem This Proceeding coram non judge since June 23, 2018 Pursuant to Rule 60(b)(5)* along with a proposed order was filed with the Court. Also, a true and correct copy of the foregoing will be served via email to the following no later than May 2, 2019.

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By  \_\_\_\_\_