COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 Tel: 720-625-5150	
Appeal Pursuant to C.R.S. 1-11-203.5 Trial Court: Larimer County District Court Trial Judge: Thomas French Trial Court Case No.: 2016cv230	
PLAINTIFF-APPELLANT: LARRY SARNER, an individual, *pro se*, v. **DEFENDANTS-APPELLEES:** CITY OF LOVELAND; and ANGELA MYERS, in her official capacity as Larimer County Clerk and Recorder	**▲COURT USE ONLY▲** Case No. 2016SA261
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OPENING BRIEF OF DEFENDANT/APPELLEE CITY OF LOVELAND	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 4,013 words (principal brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☐ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court rules, not to an entire document.

X In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Thomas W. Snyder
Thomas W. Snyder

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court abused its discretion by dismissing this action when Larry Sarner, *pro se* contestor, failed to post a $10,000 bond that the court deemed to be necessary and sufficient to pay all costs, including attorneys' fees, as required by § 1-11-203.5, C.R.S.

STATEMENT OF THE CASE

This is a direct appeal of a district court order issued in a ballot title contest brought pursuant to § 1-11-203.5. By order dated September 30, 2016, this Court construed the appeal to be governed by § 1-11-203.5 and ordered expedited simultaneous briefing in accordance with that statute.

STATEMENT OF RELEVANT FACTS & PROCEDURAL HISTORY

On August 20, 2016, the Loveland City Council adopted Ordinance No. 6037, approving two ballot questions for the November 8, 2016 general election that would authorize debt, taxes, and revenue retention to benefit the Loveland Downtown Development Authority.

Plaintiff-Appellant Larry Sarner ("Sarner") commenced this action *pro se* in the District Court for Larimer County on August 25, 2016, with a complaint styled "A Contest Concerning The Form and Content of an Election Ballot Question, And For Enforcement of C.R.S. § 1-45-117 Prohibiting The Use of Public Funds for

Electioneering." Exhibit 1.[1] He challenged the two ballot titles pursuant to § 1-11.203.5, and also alleged that the City violated § 1-45-117, C.R.S., by publishing an article about the upcoming election in its August newsletter to utility customers.

On August 30, 2016, the City filed a Motion To Dismiss for Lack of Subject Matter Jurisdiction because Sarner had not posted a bond to pay the City's costs, including attorneys' fees, as required by § 1-11-203.5(1), C.R.S. Exhibit 2. The City asserted that its anticipated costs and attorneys' fees would likely exceed $10,000. The same day, Sarner filed a Motion To Waive Bond Requirement (Exhibit 3), which the City opposed. Exhibit 4.

On September 1, 2016, the district court ordered that Sarner post a bond or bond substitute in the amount of $10,000 "as sufficient security under C.R.S. 1-11-203.5(1)" by noon on September 6, 2016. Exhibit 5. The court reasoned:

> [S]ecurity in this case helps insure that a groundless action is not maintained, and helps insure that Plaintiff is able to pay any costs or fees that may be ordered paid by Plaintiff. This is clearly the intent of the statute as there would otherwise be no reason for the statute to refer to attorney fees among the costs the bond is conditioned to pay. The Court also finds that that the intent of the statute is satisfied by a bond in the form of a cash deposit or a surety bond.

[1] Because no record has been transmitted to this Court due to the unique and expedited nature of this appeal, citations are to the district court filings attached hereto.

Id. at 2. The court provisionally set a hearing for September 8, 2016, conditioned on the posting of the bond. *Id.*

After the district court entered its order, Sarner filed a fifty-dollar ($50) bond with the clerk of court, and filed a Motion To Deem Bond Sufficient. Exhibit 6. Sarner simultaneously filed Contestor's Motion To Amend Petition To Eliminate Collateral Issue (Exhibit 7), admitting at page 1 that his electioneering claim "is collateral to the election contest and not appropriate for decision in an expedited proceeding as this." He added: "I have no desire to continue with a matter that has no business being brought up here. . . . I seek now to excise this from the petition." *Id.* at 2.

Sarner did not post a bond on or before September 6, 2016, in compliance with the district court's order. Accordingly, on September 7, 2016, the district court entered its final judgment dismissing the action. Exhibit 8. Sarner now appeals the district court's dismissal of this action, pursuant to § 1-11-203.5(4), C.R.S.

SUMMARY OF THE ARGUMENT

The district court reasonably interpreted and enforced the plain language of the ballot contest statute, which mandates that the contestor "*shall* file with the clerk of court a bond" sufficient "to pay all costs, including attorneys fees" of the City before the "district court is required to take jurisdiction of the contest . . . ." § 1-11-

203.5(1), C.R.S. (emphasis added). The statute cannot be interpreted, as Sarner would have it, to require no bond at all, or to require a *de minimis* bond of $50. Neither the district court nor this Court may read exceptions to the statute that the plain, unambiguous language does not suggest or demand.

The court did not abuse its discretion by requiring a bond of $10,000, which would sufficiently "insure that a groundless action is not maintained" and that "Plaintiff is able to pay any costs or fees that may be ordered paid by Plaintiff." Ex. 5 at 2. Indeed, the issue of Sarner's failure to maintain the action was far from "moot," as he claims. Sarner argued to the district court that aside from filing his opening petition, no further action on his part was needed to maintain the action. However, the statute provides otherwise: after the contestee answers or fails to answer, the court "shall immediately set the matter for trial on the merits and shall adjudicate it within ten days." § 1-11-203.5(2), C.R.S. Sarner's failure to attend the hearing or trial undoubtedly would have constituted failure to maintain the action. Therefore, the district court acted reasonably and did not abuse its discretion by requiring a bond, and, when such a bond was not filed, dismissing the action.

Sarner failed to show that the bond requirement placed a burden on him, because he provided no evidence of his financial condition, other than testimony that the required bond would deplete his "liquid" assets. Sarner did not show that he is

indigent or is unable to pay the bond in accordance with § 13-16-103, C.R.S. Therefore, the court did not err in following the statute.

All other issues raised by Sarner in his "Petition for Rule to Show Cause" are not properly before the Court because they were not addressed or adjudicated in the district court's dismissal order from which Sarner appeals.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion By Dismissing The Action Due To Sarner's Failure To Post A Bond As Required By § 1-11-203.5(1).

Standard of Review and Preservation. This issue was raised by Sarner in his Motion To Waive Bond Requirement (Ex. 3 at 3) and his Motion To Deem Bond Sufficient (Ex. 6 at 3–4). The district court rejected the sufficiency of Sarner's bond in its orders of September 1, 2016 (Ex. 5 at 2), and September 7, 2016 (Ex. 8 at 1). Although this Court has not addressed the standard of review for a dismissal for failure to post a bond under § 1-11-203.5(1), the district court's ruling should be reviewed for abuse of discretion. *See Hytken v. Wake*, 68 P.3d 508, 510 (Colo. App. 2002) (holding that dismissal "based on a plaintiff's neglect or refusal to file a cost bond" is "reviewed under an abuse of discretion standard"); *see also Nikander v. Dist. Court*, 711 P.2d 1260, 1262 (Colo. 1986) (reviewing for abuse of discretion a trial court's finding of indigency); *Overstreet v. Colo. Dep't of Rev.*, 178 P.3d 1259,

1262 (Colo. App. 2007) (reviewing for abuse of discretion a trial court's ruling on a taxpayer's motion to waive a surety bond requirement).

***

A. The Plain Language of the Statute Requires a Bond Sufficient To Cover All Costs, Including Attorneys' Fees.

The Court's "primary duty in construing statutes is to give effect to the intent of the General Assembly, looking first to the statute's plain language." *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004); *see also Lewis v. Taylor*, 2016 CO 48, ¶ 20. When construing statutory language, the Court "interpret[s] every word, rendering none superfluous . . . ." *Denver Pub'g Co. v. Bd. of Cnty. Comm'rs of Cnty. of Arapahoe*, 121 P.3d 190, 195 (Colo. 2005). If the statute is "clear and unambiguous on its face," the Court "need not look beyond the plain language," and "must apply the statute as written." *Vigil*, 103 P.3d at 327 (quotation marks omitted); *Colo. Motor Vehicle Dealer Bd. v. Freeman*, 2016 CO 44, ¶ 8.

Here, the ballot title contest statute provides:

> Before the district court is required to take jurisdiction of the contest, the contestor shall file with the clerk of the court a bond, with sureties, running to the contestee and conditioned to pay all costs, including attorneys fees, in case of failure to maintain the contest. The judge shall determine the sufficiency of the bond and, if sufficient, approve it.

§ 1-11-203.5(1), C.R.S. The language of the statute could not be plainer: in order for a bond to be sufficient, the bond must be large enough "to pay all costs, including

attorneys fees" of the contestee. *Id.* In the absence of a sufficient bond, the district court may decline to exercise jurisdiction of the contest. *Id.* The statute does not direct the district court to conduct a preliminary analysis of the contest on the merits before ruling on a bond's sufficiency, or to weigh evidence as to the likelihood of the contestor's failure to maintain the contest. The statute simply requires the judge to determine if the bond is sufficiently conditioned "to pay all costs, including attorneys fees," in the event that the contestor would fail to maintain the action. *Id.*

As reflected in the text of the statute, the General Assembly made a policy determination that a meaningful bond sufficient to cover "all costs, including attorneys fees" "shall" be filed before the court is required to take jurisdiction. Although Sarner questions the wisdom of that policy, the duty of this Court is recognize and enforce the policy choices of the General Assembly, as expressed through a valid statute. *See Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994) ("We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate."); *see also Amaya v. Dist. Court in and for Pueblo Cnty.*, 590 P.2d 506, 507 (Colo. 1979) (interpreting the plain language of bond requirements and inviting the General Assembly to expressly require "attorneys' fees" when setting bond requirements related to election contests). Requiring the district court to accept a bond that, on its face, could not

possibly cover "all costs, including attorneys fees," would render the "attorneys fees" language superfluous and thwart the General Assembly's intent and chosen legislative scheme, which violates the traditional principles of statutory interpretation. *Denver Pub'g Co.*, 121 P.3d at 195.

The General Assembly's decision to require a meaningful bond is reinforced by an examination of bond requirements for post-election contests, which make no reference to attorneys' fees. *See* § 1-11-213(3), C.R.S. (requiring a bond conditioned "to pay all costs" in case of failure to maintain the contest, without reference to attorneys' fees); § 1-11-205(1), C.R.S. (same); § 1-11-208(2), C.R.S. (same); § 1-13.5-1402(2), C.R.S. (same). By omitting attorneys' fees in post-election contest statutes, but including them in the pre-election contest statute § 1-11-203.5(1), the General Assembly clearly intended the bond requirement in § 1-11-203.5(1) to have a stronger gatekeeper effect than the bond requirements in post-election contests. *See BP Am. Prod. Co. v. Colorado Dep't of Revenue*, 2016 CO 23, ¶ 19 (stating that including a term in one statute when omitting it in another is evidence of legislative intent, and citing cases).

The plain language also reveals that the district court cannot be required to take jurisdiction over a ballot title contest until the contestor has posted a sufficient bond. § 1-11-203.5(1). The General Assembly did not create an unlimited cause of

action when it provided a mechanism to challenge ballot titles. *Cf. Cacioppo v. Eagle Cnty. Sch. Dist. RE-50J*, 92 P.3d 453, 460 (Colo. 2004) (holding that § 1-11-203.5 sets out the exclusive procedure for contesting ballot titles in local elections and permissibly limits actions to those filed within five days). Rather, jurisdiction of the courts to hear a ballot title challenge may be lacking in situations in which the district court finds that the contestor failed to post a bond sufficient to cover the contestee's costs, including attorneys' fees.

B. The District Court Did Not Abuse Its Discretion By Requiring a Bond or Dismissing The Action.

An "abuse of discretion occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair." *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008) (citing *Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242, 1251 (Colo. 1994)). In assessing the trial court's ruling, the reviewing court need not "agree with the trial court's decision"; rather, the "trial court's decision simply must not exceed the bounds of rationally available choices." *Liebnow ex rel. Liebnow v. Boston Enters. Inc.*, 2013 CO 8, ¶ 14 (quotation marks and alterations omitted); *see also Churchill v. Univ. of Colo.*, 2012 CO 54, ¶ 74 (same).

In general, when considering the sufficiency of bonds, courts have "broad discretion" to determine "the amount sufficient to protect" the opposing party's

interest. *Cf. Muck v. Arapahoe Cnty. Dist. Court*, 814 P.2d 869, 871–72 & n.8 (Colo. 1991) (analyzing the sufficiency of a supersedeas bond under C.R.C.P. 62(d)). Here, the ballot title contest statute expressly gives the district court judge wide discretion to determine the sufficiency of the bond. The statute does not specify criteria by which the bond's sufficiency is to be measured. § 1-11-203.5(1) ("The judge shall determine the sufficiency of the bond and, if sufficient, approve it."). Accordingly, the district court judge must exercise discretion to determine whether the bond is sufficient to cover "all costs, including attorneys fees" of the defendant governmental entity. *Id.*

The district court properly reasoned that any bond must be of an amount sufficient to cover attorneys' fees, because "there would otherwise be no reason for the statute to refer to attorney fees among the costs the bond is conditioned to pay." Ex. 5 at 2. The district court determined that a bond of $10,000 would "insure that a groundless action is not maintained, and helps insure that Plaintiff is able to pay any costs or fees that may be ordered paid by Plaintiff." *Id.* When Sarner did not post a bond in accordance with the court's order, the court dismissed the action, pursuant to § 1-11-203.5(1). The district court's ruling is within "the bounds of rationally available choices." *Liebnow*, 2013 CO 8, ¶ 14.

Even if the district court were required to weigh the likelihood of Sarner's failure to maintain the contest when considering the sufficiency of the bond, the district court was justified in requiring a meaningful bond here. Sarner represented to the district court that, aside from filing his opening papers, he did not need to participate further in the proceeding in order to receive a favorable ruling. Ex. 3 ¶ 5 ("Since the matter is to be *summarily adjudicated*, the parties [sic] pleadings must necessarily be all of their participation"; "*maintenance* of the contest by the Contestor was accomplished with the initial act of petitioning, and is not dependent upon subsequent responses, motions or other actions") (emphasis in original). But the ballot title contest statute directs the court to conduct a "trial on the merits," at which the court would receive evidence relevant to the ballot title challenge. § 1-11-203.5(2), C.R.S. Sarner recognizes this requirement (Ex. 3 ¶ 5 ("the very filing of the petition launches an expedited proceeding with very short time frames for answer, *hearing*, and decision") (emphasis added)), but ignores its implication that Sarner must do more than merely file a petition to "maintain the contest." Sarner's failure to participate in the trial would certainly constitute "failure to maintain the contest." § 1-11-203.5(1), C.R.S. Sarner suggested that his participation at trial would not be necessary, thereby signaling a plausible risk of his failure to maintain the contest (Ex. 3 ¶¶ 5, 7; Ex. 6 ¶¶ 5, 8), and the district court acted well within its

discretion to require a bond "in case of failure to maintain the contest." § 1-11-203.5(1), C.R.S. The record supports the district court's ruling as reasonable, and not an abuse of discretion.

C. Sarner Failed To Take Advantage of Existing Procedures To Waive The Bond Requirement, And Therefore No Due Process Violation Occurred.

Standard of Review and Preservation. This issue was raised by Sarner in his Motion To Waive Bond Requirement (Ex. 3 ¶ 17) and his Motion To Deem Bond Sufficient (Ex. 6 ¶ 17). The district court rejected Sarner's argument in the orders of September 1, 2016 (Ex. 5 at 2), and September 7, 2016 (Ex. 8 at 1). The district court's ruling on Sarner's ability to post the bond is reviewed for abuse of discretion. *Nikander*, 711 P.2d at 1262 (reviewing for abuse of discretion a trial court's finding of indigence).

* * *

Sarner asserts that the bond requirement violates due process, but such an argument fails where Sarner failed to take advantage of procedures available to him if he could not pay the bond.

The statutory scheme provides accommodation for indigent plaintiffs who cannot afford the costs and expenses associated with commencing litigation. *See* § 13-16-103, C.R.S. The statute gives courts discretion to permit indigent plaintiffs

to proceed without the payment of costs, including cost bonds. *Id.*; *see also Walcott v. Dist. Court*, 924 P.2d 163, 167–68 (Colo. 1996) (holding that § 13-16-103 provides judges with the authority to waive cost bond requirements).

Sarner did not invoke this statutory provision, nor did he provide a financial affidavit or other evidence of his financial status. He did not seek a waiver of court costs; he paid the filing fees without protest. Nevertheless, he asserted, in conclusory fashion, that he has "ordinary" means and meeting a large bond requirement would "drain Contestor of all his liquid assets." Ex. 3 ¶ 17; Ex. 6 ¶ 17. Sarner did not support these statements with specific evidence. Sarner filed an affidavit claiming that posting a $10,000 bond was "beyond [his] ability to pay" because it would "empty [his] accounts of all liquid assets." (Aff. of Larry Sarner (Exhibit 9) ¶ 2.) Again, he provided no evidence or details to support his statements. He did not file a financial affidavit, or provide the court with information, under penalty of perjury, regarding his income, monthly expenses, savings and investment account values, and *non*-liquid assets such as vehicles or real property. *See* JDF 205 Form (providing a mechanism to seek waiver of fees or other costs by providing financial information under penalty of perjury).

Even accepting Sarner's testimony about his liquid assets as true, such testimony is insufficient to show Sarner's inability to post a bond. "In determining

indigency, the trial judge must consider the defendant's *complete financial situation* by balancing assets against liabilities and income against basic living expenses. Factors to be considered include . . . income from all sources, *real and personal property owned*, extent of any indebtedness, necessary living expenses, and the Eligibility Income Guidelines which reflect the current Federal Poverty Guidelines." *Nikander*, 711 P.2d at 1261 (emphasis added). Therefore, Sarner's *non*-liquid assets are also relevant to his ability to post a bond.

By stating, in conclusory fashion, that posting a bond would drain his liquid assets, Sarner failed to prove his inability to pay the bond, and thus failed to show that the bond requirement burdens him. Because Sarner did not take advantage of procedures available to him to waive the bond requirement, he has failed to show a constitutional deprivation of due process. *See Tarbox v. Tax Comm'n*, 695 P.2d 342, 344–46 (Idaho 1984) (bond requirement did not violate due process where the claimants made no showing of indigence or that "they could not have obtained the bond money by procuring a loan on the equity in their home"); *Bolles v. City of Milwaukee*, 49 N.W.2d 748, 750 (Wis. 1951) (bond requirement did not violate due process when the statutory scheme provided a mechanism to have the bond requirement waived due to poverty); *Lecates v. Justice of Peace Court No. 4*, 637 F.2d 898, 911–12 (3d Cir. 1980) (suggesting that a bond requirement subject to a

waiver procedure would not be subject to constitutional challenge); *Brown v. Dist. of Columbia*, 115 F. Supp. 3d 56, 71 (D.D.C. 2015) (bond requirement was not facially unconstitutional when indigent claimants could seek a waiver or reduction). The district court did not abuse its discretion in setting the bond requirement on the record before it.

II. Sarner's Other 'Issues Presented' Are Not Properly Before This Court, Because They Were Not Addressed Or Adjudicated By The District Court.

Sarner's third through sixth issues presented[2] (*i.e.*, the substantive challenges to the ballot questions) are not properly before the Court for three reasons.

First, this appeal seeks review of the district court's order dismissing the action for failure to post a sufficient bond. Ex. 8 at 1. That order did not address the

[2] These issues are: (3) "may a home-rule city set a ballot question seeking voter approval under TABOR, which contains provisions which except the spending and other limitations of TABOR, or other limitations found in 'any other law'?"; (4) "may a home-rule city set a ballot question seeking voter approval for increasing the debt of the city by a vote of just a few of the registered electors of the city, the 14th Amendment assurance of equal protection of the laws notwithstanding?"; (5) "may a home-rule city set a ballot question seeking voter approval for increasing the debt of the city while persons not constitutionally permitted to vote in TABOR elections—such as non-citizens, non-resident land-holders, and proxies for corporate land-holders—*are* being allowed to vote thereon, even if otherwise allowed by law?"; and (6) "may a home-rule city set a ballot question where tax revenues are diverted from other taxing entities (districts)—and in some cases automatically raised—and those voting are not informed by the ballot question itself of the source and amount of these diverted revenues?" (Petition at 10–11.)

merits of Sarner's ballot contest and did not reach these issues presented. Nor could it have addressed these substantive issues, as the statutorily required hearing had not occurred. Therefore, the record has not been developed, and the issues are not properly before this Court. *Radil v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 233 P.3d 688, 691 n.2 (Colo. 2010) (because "[t]he trial court has not yet decided the merits," the "issue is not before us" and must be determined by the trial court in the first instance); *Cnty. of Adams v. Hibbard*, 918 P.2d 212, 222 (Colo. 1996) ("this court may consider only issues that have actually been determined by another court or agency and have been properly presented for our consideration") (quotation marks omitted).

Second, most if not all of the issues raised by Sarner (other than the bond issues) are not framed as ballot title challenges. *See* note 2, *supra*. They thus are not properly included in this ballot title contest. *See In re Title, Ballot Title, & Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 579 (Colo. 2012) ("[O]ur limited role in this process prohibits us from addressing the merits of a proposed initiative, and from suggesting how an initiative might be applied if enacted.").

Third, and finally, the resolution of these matters is not necessary to the disposition of the issues properly presented on appeal. *Pedlow v. Stamp*, 776 P.2d

382, 384 (Colo. 1989) (declining to address the substantive issue, based on disposition of the procedural issue).[3]

CONCLUSION

Defendant-Appellee City of Loveland respectfully requests that the Court affirm the district court's dismissal of this action.

Respectfully submitted this 12th day of October, 2016.

KUTAK ROCK LLP

s/ Thomas W. Snyder
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Attorneys for Defendant/Appellee City of Loveland

[3] In the event that this Court desired to address the substantive issues on which the statutorily mandated hearing was not conducted, and on which the district court did not rule, the City would request leave to file a supplemental brief addressing those issues.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2016, a true and correct copy of the foregoing **OPENING BRIEF OF DEFENDANT/APPELLEE CITY OF LOVELAND** was served as indicated below on the following:

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