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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ANSWER 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 1,679 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.

☒ **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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SUMMARY OF THE ARGUMENT

In Petitioner's Opening Brief, Appellant Larry Sarner ("Sarner") generally complains that it was unfair for the district court to apply the standard of § 1-11-203.5, C.R.S., which clearly requires the court to require a bond for costs and attorneys' fees before the Court must accept jurisdiction. Sarner specifically claims that a bond for attorneys' fees was unfair because his claims are not frivolous. Even if that were true (which the City does not concede), § 1-11-203.5 does not require a showing of frivolity before requiring an attorneys' fees bond and, in fact, allows an attorneys' fees bond to be set simply to protect the defendant from incurring expenses in situations where the action may be abandoned.

Sarner argues that the attorneys' bond violated due process because he is "of ordinary means." However, there is no basis in the statute for excusing an attorneys' fees bond where a party claims to be of ordinary means. There are mechanisms, of course, that allow indigent parties to proceed without paying costs and bonds that might otherwise be required. Sarner chose not to employ these mechanisms, probably because he is not indigent.

Sarner further complains that the $10,000 bond requirement was unfair because it was excessive. However, it clearly was not an abuse of discretion for the

district court to have determined that a proceeding culminating in a hearing would cause $10,000 in attorneys' fees.

Sarner further invokes Colo. Const. art. X, § 20 (TABOR), and the absence of a requirement for a plaintiff to post an attorneys' fees bond in a TABOR enforcement action. However, it was Sarner who framed this action as one under § 1-11-203.5—not TABOR—and sought expedited treatment and summary adjudication of his claims. TABOR has no application to the procedural requirements of the claims as they were presented to the district court. If Sarner believed TABOR provides him a cause of action, he should have brought his claims under TABOR and should not have invoked the expedited procedures in the district court, and in this Court, of § 1-11-203.5.

The General Assembly adopted § 1-11-203.5 as a limited cause of action for challenging ballot titles in an expedited time frame. To ensure that suits were not brought merely to try to disrupt elections by those who may oppose certain initiatives, the General Assembly provided, as part of this limited cause of action, the ability for district courts to decline jurisdiction where adequate security for attorneys' fees was not posted. The district court followed the statute to the letter by requiring an attorneys' fee bond, and Sarner did not seek relief by proving indigence,

probably because he is not indigent. The district court did not abuse its discretion, and the judgment should be affirmed.

ARGUMENT[1]

A. The City Would Be Entitled To Costs And Attorneys' Fees If Sarner Failed To Maintain The Contest.

Sarner errantly argues that "no fees or costs, absent frivolity, can be awarded to the contestee City of Loveland," citing Colo. Const. art. X, sec. 20(1), and § 1-11-203.5(3), C.R.S. Sarner Opening Br. at 3. However, frivolity is not the only predicate for the awarding of costs and attorneys' fees to the City under § 1-11-203.5. The City would be entitled to costs and fees in the event Sarner failed to maintain the contest. *See* § 1-11-203.5(1).

Section 1-11-203.5(1) specifically provides that contestees in ballot title challenges are entitled to costs and attorneys' fees "in case of failure to maintain the contest" by the contestor. This award operates independently of any provision allowing costs and fees to a successful plaintiff or a successful defendant after the

[1] Because Sarner did not provide statements of the issues, a statement of the case, a statement of the standards of review, or citations to where the issues were preserved in his Opening Brief, the City cannot respond pursuant to C.A.R. 28(b). Sarner's brief does not comply fully the requirements of C.A.R. 28 or 32. While "courts may take into account the fact that a party is appearing pro se, pro se parties are 'bound by the same rules of civil procedure as attorneys licensed to practice law.'" *Cornelius v. River Ridge Ranch Landowners Ass'n*, 202 P.3d 564, 572 (Colo. 2009).

matter is adjudicated on the merits, such as § 1-11-203.5(3).[2] Because § 1-11-203.5(1) expressly provides for costs and fees, the general attorneys' fees statute, § 13-17-102, C.R.S.—which limits the award of attorneys' fees against *pro se* plaintiffs or in actions seeking to establish new theories of law, among other things—does not apply. *See* § 13-17-106 ("This article shall apply in all cases covered by this article unless attorney fees are otherwise specifically provided by statute, in which case the provision allowing the greater award shall prevail."). Section 1-11-203.5(1) allows for a greater fee than would be available under § 13-17-102, because the ballot contest statute provides for the award of attorneys' fees upon the constestor's failure to maintain the contest, regardless of contestor's *pro se* status or whether his claims are substantially frivolous, groundless, or vexatious. Therefore, even if Sarner's petition presented non-frivolous claims, he *still* could be liable for the City's attorneys' fees if he failed to maintain the contest, under § 1-11-203.5(1).

As explained in the City's Opening Brief, at pages 10–12, the record before the district court provided ample justification for the concern that Sarner would fail

[2] Colo. Const. art. X, sec. 20(1) provides that "[s]uccessful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous." This provision creates a limitation on the award of attorneys' fees to a successful defendant in a TABOR action, but does not contemplate, let alone prohibit, attorneys' fees in the event that a party challenging a ballot title fails to maintain the contest. Therefore, this provision does not prohibit the attorneys' fees provided in § 1-11-203.5(1).

to maintain the contest, because he informed the court that no action was necessary on his part to maintain the contest, aside from filing the initial papers. *See also* City Opening Br., Ex. 3 ¶¶ 5, 7, Ex. 6 ¶¶ 5, 8 (Sarner suggesting that participation at the hearing would not be necessary to maintain the contest). In light of these disclosures, the district court did not abuse its discretion in requiring a meaningful bond to protect the City's interests.

Sarner further complains that the amount of the bond was unjustified in relation to the fees that would be expected to be incurred. However, attorneys charging between $200 and $400 per hour would only need to spend 25 to 50 total hours drafting papers, and preparing for and attending the trial on the merits before amassing a bill of $10,000 in attorneys' fees. In addition, the City anticipated presenting an expert at trial to explain the technical operation of tax increment financing, which has a direct bearing on Sarner's ballot title claims, to aid the district court's timely resolution of this matter. *See* City's Opening Br., Ex. 1, at ¶¶ 30–40 (Sarner's original petition to the district court, arguing that the ballot title is misleading because of how tax increment financing and the Loveland Downtown Development Authority operate). Far from being an "improbable sum" (Sarner Opening Br. at 4), the $10,000 figure represents a realistic calculation of the City's anticipated costs and attorneys' fees.

The district court did not abuse its discretion in setting a meaningful bond, based on the record before it.

B. The Bond Requirement Does Not Violate Due Process.

Sarner is mistaken that the bond requirement makes it "impossible" for a citizen of ordinary means to challenge a ballot title. Sarner Opening Br. at 4. As explained in the City's Opening Brief, at 12–15, Colorado law provides a mechanism for plaintiffs, such as Sarner, to prove, through evidence and specific statements made under penalty of perjury, that they cannot afford costs, such as bonds, in light of their income, expenses, and assets, including real estate and other personal property. *See, e.g.*, § 13-16-103, C.R.S.; *Walcott v. Dist. Court*, 924 P.2d 163, 167–68 (Colo. 1996); *Nikander v. Dist. Court*, 711 P.2d 1260, 1261 (Colo. 1986); JDF 205 Form. Sarner did not provide the district court with information regarding his "complete financial situation" sufficient to warrant a waiver of the bond requirement. *Nikander*, 711 P.2d at 1261. Based on the record before it, the district court did not abuse its discretion in requiring a meaningful bond.

Additionally, Sarner did not file this as a TABOR action, but instead brings this under § 1-11-203.5. The expedited procedure available under that statute is for challenging the order of the ballot or the form or content of the ballot title. Sarner

did not bring a TABOR enforcement action, and if he had, he would not have been required to post a bond to cover attorneys' fees.

C. This Court Should Not Address The Merits of Issues Not Properly Presented On Appeal.

Much of Sarner's petition, and his Opening Brief, concerns issues not ripe for appeal, because the issues either were not raised before the district court, not adjudicated by the district court, or not properly part of an action challenging a ballot title. *See* City Opening Br. at 15–17. The Court should not address the merits of issues not properly before the Court, which have not had the benefit of briefing or argument, and for which a record has not been developed. *See Radil v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 233 P.3d 688, 691 n.2 (Colo. 2010); *Cnty. of Adams v. Hibbard*, 918 P.2d 212, 222 (Colo. 1996); *see also* C.A.R. 1(a) (defining matters reviewable on appeal). Contrary to Sarner's continued suggestion, this action is not an original proceeding before this Court. *See* Sarner Opening Br. at 8–9; *see also* Order of Court (Sept. 30, 2016) (construing this action as an appeal pursuant to § 1-1-11-203.5).

CONCLUSION

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

Submitted this 18th day of October, 2016.

KUTAK ROCK LLP

s/ Thomas W. Snyder
Thomas W. Snyder, #33106

Attorneys for Defendant/Appellee City of Loveland

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2016, a true and correct copy of the foregoing **ANSWER BRIEF OF DEFENDANT/APPELLEE CITY OF LOVELAND** was served as indicated below on the following:

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