

DISTRICT COURT, MORGAN COUNTY,
COLORADO
400 Warner
Ft. Morgan, Colorado 80701

THE CITY OF FORT MORGAN COLORADO, a
municipal corporation, and ANDREA STRAND
CUSTODIAN OF RECORDS,

Plaintiff,

vs.

EASTERN COLORADO PUBLISHING COMPANY,
d/b/a , THE FORT MORGAN TIMES

Defendant.

and

Counterclaimant:
WILLIAM HOLLAND, a citizen of the State of
Colorado.

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Case Number: 08CV2

Div.: C

**CITY OF FORT MORGAN'S REPLY TO ITS MOTION TO VOLUNTARILY
DISMISS ITS PETITION FOR DECLARATORY JUDGMENT WITHOUT
PREJUDICE PURSUANT TO C.R.C.P. RULE 41**

The City of Fort Morgan, Colorado, a municipal corporation, and Andrea Strand, Custodian of Records, (hereinafter "City"), by and through their attorney, Jeffrey A. Wells, hereby files this reply to its motion to dismiss its petition for declaratory judgment, pursuant to C.R.C.P. Rule 41, and in support thereof states as follows:

INTRODUCTION

The City requests an order from this Court dismissing its claims against the Defendants (hereinafter "*Times*") in its petition for declaratory judgment, and objects to

the *Times*' request for attorney fees.¹ The City also objects to the characterization of the factual background in the *Times*' Response. The *Times* claims that it has made no "appreciable threat of litigation" with regard to future documents to be prepared under the City's policy.² The City does not agree with this factual statement. Furthermore, the *Times* fails to point out to the Court that the City has entered into an agreement with Mr. Nagy, the former City Manager, which requires the City to acknowledge and convey Mr. Nagy's departure from his position as a resignation.

The City should not be ordered to pay for the *Times*' attorney's fees for filing its answer on several grounds. First, the *Powers* test assists the Court determine whether a party is prejudiced when considering whether to award attorney's fees under Rule 41. The *Times* admits that the City has met a majority of the factors found in the *Powers* test. Second, the *Times* argument that the work done in the answer will not be useful in future litigation is without merit, unless it admits that it will not require the City to provide documents related to the City's policy for appointed official personnel evaluations in the future. Third, the City's petition was never "unduly vexatious." Finally, the *Times* motive for requesting attorney's fees is primarily to seek unwarranted punishment against the City.

ARGUMENT AND AUTHORITY

I. The *Times* admits that the City has met a majority of the factors that the Court should consider when determining whether a party has been prejudiced.

A determination whether to award attorney fees begins with the American Rule, which precludes an award of attorney fees absent a specific contractual, statutory, or procedural rule providing otherwise. See *City of Aurora ex rel. Utility Enterprise v. Colorado State Engineer*, 105 P.3d 595, 618 (Colo. 2005). The Court has discretion to award attorney's fees, under C.R.C.P. 41, where the award of those fees is not made to punish the party dismissing the action. To award attorney's fees the Court must find that the *Times* will be prejudiced by dismissal. In order to determine whether the *Times* is prejudiced the Court should apply the factors set forth in *Powers v. Professional Rodeo Cowboys Ass'n.*, 832 P.2d 1099 (Colo. App. 1992).³

¹ In dismissing its claims against the *Times* the City in no way intends to waive any defenses that it has or may have against the *Times* and Mr. William Holland's Counterclaim filed against the City.

² Mr. William Holland wrote an editorial in the *Times*, dated November 30, 2007, wherein he stated, "Let me assure the mayor and council members NOW in advance that should a future review of an appointed official be conducted in open session, The Fort Morgan *Times* will REQUIRE copies of any and all written peer review forms, documents, notes, emails, memos, etc., related to the review be supplied to the newspaper in accordance with Colorado law. . ."

³ The factors are: 1) duplicative expense of a second litigation; 2) the extent to which the current suit has progressed, including the effort and expenses incurred by the defendant in preparing for trial; 3) the adequacy of Plaintiff's explanation for the need to dismiss; 4) the Plaintiff's diligence in bringing the motion to dismiss; and 5) any "undue vexatiousness" on the plaintiff's part.

The *Times*' will not be prejudiced by the dismissal as the City has met a majority of the factors in the *Powers* test. The *Times* states in its Response that it, "does not contest the plaintiffs' showing under factors (2), (3), and (4) of the *Powers* test." See *Times*' Response p. 4. By admitting this the *Times* concedes that the City has taken steps to prevent prejudice by dismissing its claims. The Court should not award the *Times*' attorney's fees where the *Times* admits that the City's dismissal complies with a majority of the elements set forth in the *Powers* test.

II. The *Times*' argument that it was forced to answer the petition, and that the work in the answer will never be useful in future litigation is without merit.

The *Times*' contention, that future litigation will not remedy what it has paid for the current litigation, is not part of the analysis this Court must undertake. If the court finds that the work done to prepare the answer will assist in future litigation then the *Times* is not entitled to its attorney's fees. See e.g., *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 556 (Colo. 2000), See also, *FSDW, LLC v. First Nat. Bank*, 94 P.3d 1260, 1265 (Colo. App. 2004). The *Times*' Response lacks a demonstration of how the work performed in this litigation will not be useful in future litigation. Instead, the *Times* argues that it is prejudiced because there is no time certain when the City will be re-filing its petition. The *Times* also provides no legal authority that states attorney's fees should be awarded if filing of a future action is speculative.

The *Times* avoids the issue that the City's evaluation policy establishes the framework for the litigation, not any given employee. The *Times* Response focuses on the fact that the person who insisted on an open session review has now resigned. This does not change the policy under which the documents are created, which is the underlying basis for this litigation. The *Times* could, if it wished, solidify its argument that the City was permanently deprived of its ability re-file its petition, if it would admit that it will not seek the disputed records in the future. With the *Times* admission the Court could be certain that the *Times*' work would not be useful in future litigation. The *Times* has not stated it will not seek records related to the policy in the future. This fact, coupled with the statement in the November 30, 2007 editorial, supports the City's assertion that there is a probability that future litigation will occur. The natural consequence of this probability is that the work performed in this litigation will be useful in future litigation. If the Court agrees with the *Times*' argument that its work will not be useful in future litigation because conditions will never again exist for such a lawsuit, the dismissal will be more akin to a dismissal with prejudice, for which attorney's fees cannot be awarded. See *Groundwater Appropriators of South Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22, 25 (Colo. 2003)(Rule 41(a)(2) cannot be understood to authorize attorney fees as a condition of dismissal with prejudice).

There are other reasons why the *Times*' argument lacks merit. First, the *Times* relies on cases from other jurisdictions, not binding on this Court, to try and persuade the Court that an imposition of fees should be to "compensate the defendant for the unnecessary expense that the litigation has caused" and "for prosecuting a notice of removal from state court to federal court." See *Times*' Response p. 5, citing, *Cauley v.*

Wilson, 754 F.2d 769, 772 (7th Cir. 1985) and *Galva Union Elevator Co. v. Chicago N. Western Transportation Co.*, 498 F. Supp. 26 (N.D. Iowa 1980). These cases do not embody the standards set by Colorado Courts, and the reference from the *Galva* case does not apply to facts in this case. Second, the Colorado case cited by the *Times* only reinforces the City's argument above. The *Times* argues that "fees should be awarded as a condition of a voluntary dismissal when the defendant has been **forced** to expend time for legal work **that would not be useful to the defendant in future litigation.**" See *Times'* Response p. 5, citing, *FSDW*, 94 P.3d at 1265. (Emphasis Added). As stated above the *Times* fails to demonstrate that future litigation will not reoccur. Where the probability for future litigation exists, the work the *Times* performed in this litigation will be useful when future litigation occurs. Finally, the *Times'* insistence that it was forced to expend time for legal work ignores the fact that the City did not serve the *Times* with the petition.

III. The City's claims against the *Times* were not "unduly vexatious."

The *Times'* argues that the City's case was unduly vexatious from the outset because it was not ripe for adjudication. *Times'* Response pp. 4-5. In other words the *Times* asserts that this Court lacked jurisdiction to hear the City's petition when it was filed on January 4, 2008. This argument is not substantiated by the *Times'* conduct in this litigation. The *Times'* answer states that, "the *Times* affirmatively admits that it does not contest subject matter jurisdiction or venue in this Court with respect to the limited case or controversy specified in Paragraph 3 of this Answer." When it answered the City's petition the *Times* believed that the City's petition was in part justified thereby establishing jurisdiction in this Court. Now the *Times* argues that the petition established no basis for the Court to assert jurisdiction over the City's claims for relief in the petition. Based upon its position in its answer the *Times* should be estopped from asserting that this Court lacked jurisdiction from the outset of this litigation, which assertion is made to support the *Times'* contention that the City's petition was vexatious and has caused prejudice.

In addition to its admission of jurisdiction the *Times* took minimal action to challenge this Court's jurisdiction to hear the City's petition. The *Times* had the ability to challenge this Court's jurisdiction by filing a motion under C.R.C.P. Rule 12 to dismiss the petition before it filed its answer. However, the *Times'* first real challenge to this Court's jurisdiction to hear the City's petition was made in its objection to the City's motion to voluntarily dismiss the petition. The *Times'* only reason for objecting is to obtain an award of \$957.00 in attorney's fees. The City's behavior in this matter was not vexatious, but a real attempt at obtaining an anticipatory declaratory judgment to resolve a dispute that that was positioned to take place had the City Manager remained with the City.

Finally, the *Times'* is requesting the Court to make factual determinations as to whether there was in fact a case ripe for adjudication on January 4, 2008. The *Times'* disputes the City's assertion that the *Times* intended to request privileged documents from the City, by litigation if necessary, when the City Manager held his review in open

session at his one year evaluation. This issue cannot be resolved on the pleadings alone, and it appears that the Court may need to hear testimony from the former City Manager on his intent to hold all future evaluations in open session, and to determine the intent of Mr. William Holland's statement in his November 30, 2007, editorial.

IV. The *Times*' insistence on the City's payment of \$957.00 in attorney's fees is solely for punitive purposes.

The Court may not award attorney fees under C.R.C.P. Rule 41 to sanction the plaintiff for its conduct in litigation. See *FSDW, LLC v. First Nat. Bank*, 94 P.3d 1260 (Colo. App. 2004). Despite this rule, the *Times*' insists on focusing on the only part of the *Powers* test that is similar to language found in C.R.S. §13-17-102. This statute provides the Court with discretion to punish a party that litigates a frivolous, vexatious or groundless claim. However, the standards for imposing attorney's fees under this statute are very different from the standards the Court is to apply to this motion. See e.g., *Groundwater Appropriators of South Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22, 25 (Colo. 2003). The Court must weigh the factors of the *Powers* test to determine whether the *Times* has been prejudiced. From the City's perspective the *Times* has failed to establish it will be prejudiced by the Court's dismissal of the City's petition.

The *Times*' motive for objecting to this motion is to have the Court impose unwarranted sanctions on the City. The *Times*' intent is demonstrated by the fact that the cost of litigating this motion will likely cost it more money in attorney's fees than what its answer cost. Mr. Beall, counsel for the Defendants and Counterclaimant, stated to undersigned counsel that his hourly fee is \$290.00 per hour, and that he worked on the answer portion of his responsive pleading 3.3 hours. The Answer did not incorporate any case law, and cited limited statutory authority. The time spent to read, analyze, and research this motion undoubtedly has cost his client more than 3.3 hours of work. Additionally, the Response Brief was reviewed by senior partner, Thomas B. Kelley, who signed the pleading. Why would the *Times*' object to dismissal of the City's petition and seek an award of attorney's fees, when the cost of objecting and seeking those fees will cost more than the fees sought in the award, if not for the purpose of punishment?

WHEREFORE, the City of Fort Morgan and Andrea Strand respectfully request that this honorable Court schedule a hearing on this motion, and then after receiving the information necessary to rule on this motion, order the City's petition dismissed without prejudice, and order the parties to pay for their own fees and costs associated with this action.

Respectfully Submitted,

/s/ Original Signature on File
Jeffrey A. Wells, #34132
Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of April, 2008, a true and correct copy of the foregoing **CITY OF FORT MORGAN'S REPLY TO ITS MOTION TO VOLUNTARILY DISMISS ITS PETITION FOR DECLARATORY JUDGMENT WITHOUT PREJUDICE PURSUANT TO C.R.C.P. RULE 41** was served by:

- U.S. Mail, first class postage prepaid (unless otherwise noted)
- Lexis Nexis File and Serve
- Telefax
- Hand delivery

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/s/ - Original Signature on File
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