DISTRICT COURT DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, Colorado 80109 Phone: 720-437-6200	DATE FILED April 23, 2025 8:08 AM CASE NUMBER: 2023CV30656
Plaintiff(s): LORA THOMAS, in her official capacity as a Douglas County Commissioner **v.** **Defendant(s):** ABRAHAM JAROD LAYDON, in his official capacity as a Douglas County Commissioner; GEORGE TEAL, in his official capacity as a Douglas County Commissioner; and THE DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS, a subdivision of the State of Colorado.	**▲COURT USE ONLY▲** **Case Number:** 23CV30656 **Division:** 6
ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT	

THIS MATTER comes before the Court on Plaintiff Lora Thomas' ("Plaintiff") Motion for Summary Judgment and Defendants' Abraham Laydon, George Teal, and the Douglas County Board of County Commissioners' ("Defendants") Cross-Motion for Summary Judgment filed on December 20, 2024 and October 14, 2024, respectively. The Court, having reviewed the Motions, Responses, Replies, attached exhibits, pertinent law, and being fully advised as to the premises, hereby finds and orders as follows:

I. BACKGROUND

The present litigation relates to a dispute between Plaintiff Thomas when she was a Douglas County Commissioner alongside Defendants Commissioner Abraham Laydon and Commissioner George Teal.[1] Plaintiff claims that Defendants frequently challenged her efforts and willingness to share information with the public, and, as a result of these disputes, enlisted the County Attorney to investigate her actions. The crux of the issue between the parties is whether Plaintiff is entitled to reimbursement of her expenditures of attorney fees in relation to these investigations.

Defendants concur that around May 24, 2022, County Attorney Lance Ingalls was tasked with investigating an anonymous letter allegedly disparaging Douglas County Sheriff's Office that was sent to the Douglas County Board of Commissioners. Plaintiff's Exhibit 1(a) – Email from Lance Ingalls to Thomas, Laydon, and Teal. Defendants wanted to know if Plaintiff drafted or distributed the letter for her own benefit and interests. *Id*. The memorandum of the investigation was produced on July 25, 2022, and CBS News 4 reported on the document on July 29, 2024. Plaintiff's Exhibit 1(b) – the Sherman & Howard Memorandum; Plaintiff's Exhibit 2 –

[1] Ms. Thomas served as Commissioner from January 2017 until December 2024.

Ingalls Memorandum. Pursuant to an August 9, 2022, memorandum, Defendants had Ingalls investigate whether Plaintiff had released the Sherman & Howard Memorandum to the media. *Id.* The costs of these investigations were paid out of the county fund. Defendants' Cross-Motion, pg. 4. Around November 3, 2022, the Douglas County Sheriff's Office also investigated this leak to determine if the leak amounted to first-degree official misconduct. Plaintiff's Exhibit 3 – Arapahoe County Sheriff's Memorandum. The Sheriff could not establish probable cause to believe that the crime was committed. *Id.*

On or about August 17, 2022, Plaintiff hired counsel to represent her in relation to these investigations. Plaintiff's Exhibit 4 – Counsel Invoice. She paid $5,715 in legal fees. *Id.* Defendants aver that she did not inform them that she hired counsel until she requested that the attorney's fees be reimbursed through them in a letter to County Manager Doug DeBord, sent on January 3, 2023; Plaintiff did not object to this fact. *Plaintiff's Exhibits 4*, *5*. On January 31, 2023, the Commissioners met in a public session to consider Plaintiff's request and voted to not reimburse her fees. Plaintiff then brought this action on August 29, 2023. The Parties agreed to these facts and stipulated to the provenance and authenticity of the attached exhibits. The Parties eventually agreed to vacate their court deadlines and file Cross-Motions for Summary Judgment by September 20, 2024.[2]

II. STANDARD OF REVIEW

"Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339–40 (Colo. 1988); C.R.C.P. 56. The trial judge's function is not to weigh the evidence and decide what occurred, but to determine whether or not a genuine issue exists for the jury. *Anderson v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007). The Court considers the pleadings, affidavits, depositions, and admissions to determine whether there is a genuine issue as to any material fact. *Civ. Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991); C.R.C. P. 56(e).

The movant bears the burden of showing the absence of any genuine disputes of material fact. *Cont'l Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Once this initial burden has been met, the burden shifts to the non-moving party to establish that there is a triable issue of fact. *Id*. at 713. The non-moving party is afforded all favorable inferences that may be reasonably drawn from the undisputed facts; all doubts as to the existence of a triable factual issues are resolved against the moving party. *Churchey*, 759 P.2d at 1339-40 (citing *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1276 (Colo. 1985)). However, "an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response . . . must set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e); *City & County of Denver v. Ameritrust Co*., 832 P.2d 1054 (Colo. App. 1992). A material fact is a fact that will affect the outcome of the case. *See W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). In determining whether a fact is material, the court must turn to the nature of the legal basis for the claims. *Id*.

[2] After extensions, Plaintiff's Amended Motion for Summary Judgment ("Plaintiff's Motion") was filed on December 20, 2024. The Defendants' re-filed their Response with amendments on December 27, 2024. Plaintiff filed her Reply on January 10, 2025. Defendants filed their Cross-Motion for Summary Judgment ("Defendants' Motion") on October 14, 2024. Plaintiff filed her Response on November 12, 2024. The Defendants filed their Reply on November 26, 2024

III. ANALYSIS

a. Summary of Plaintiff's Claim

Plaintiff's Motion argues that the underlying dispute was over the Parties' respective powers of their offices. Plaintiff argues that as an independently elected constitutional officer and member of the Douglas County Board of County Commissioners ("BOCC" or "Board"), she had the right to unilaterally release information to the public, including the privileged Sherman & Howard Document. She asserts that the Defendants were obligated to reimburse her for her attorney's fees and costs because the Defendants used the County Attorney, who represented all three commissioners, to investigate her for these actions and paid him through the county's public fund, while denying her separate representation. Plaintiff is seeking a declaration that the BOCC is required to reimburse Plaintiff for her attorney's fees and costs incurred in relation to the three investigations and the instant case, to which Plaintiff argues she is entitled under Colorado common law.

Plaintiff relies upon Colorado case law to support her argument, including:

- *Wadlow v. Kanaly*, 511 P.2d 484 (Colo. 1973): Over objection by the county's board of commissioners, the Colorado Supreme Court granted reimbursement of attorney fees to the county treasurer, where the treasurer's fees were incurred while seeking approval by the board of commissioners of a staff salary schedule prepared by the county treasurer in her official capacity. The *Wadlow* court noted, "…when the question of the respective powers of two governmental bodies is at issue, it would be inequitable to require one official, acting in his official capacity, to personally bear the burden of attorneys' fees and costs generated in this suit." *Wadlow*, 511 P.2d at 487.
- *Adams Cnty. v. Culpepper*, No. 2022SA256 (Colo. Oct. 10, 2022). The Supreme Court enforced an agreement made between county treasurer and the related board of county commissioners, in which the board agreed to cover the treasurer's attorney fees where the board had pursued litigation against the treasurer. In its determination of this matter, Culpepper relied upon the same reasoning as the *Wadlow* court as outlined above.

It is Plaintiff's contention that, under *Wadlow*, she is entitled to judgment as a matter of law, and that *Wadlow* was affirmed by *Culpepper*. Defendants argue that Plaintiff misinterprets and misapplies *Wadlow*, and that Plaintiff neglects to properly consider the caselaw following *Wadlow* wherein the Supreme Court provided further clarification. The Parties agree that their Motions for Summary Judgment "turn largely—if not entirely— on questions of law." Joint Motion to Vacate Trial and All Pretrial Deadlines, filed January 3, 2025. Accordingly, the Court proceeds with an analysis of the relevant legal authority, addressing each in turn.

b. Case Law Analysis of Attorney Fee Award

In its April 11, 2024, order dismissing Plaintiff's claim under the Colorado Government Immunity Act, the Court analyzed *Wadlow* and *Culpepper.* The Court also reviewed *Schroeder*, which was decided ten years earlier, and the three cases that came afterward: *Tisdel*, *Johnson*, and *Sullivan*. Pursuant to these progeny cases, the Court determined that the relief available in *Wadlow* was limited to cases where there is existing statutory authority for attorney's fees.

The general rule is that "each party in a lawsuit is required to bear its own legal expenses in the absence of an express statute, court rule, or contract to the contrary." *Fort Lyon Canal Co.*

v. High Plains A & M, LLC, 167 P.3d 726, 727 (Colo. 2007); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247 (1975). The "American Rule" is also generally applied to mandamus actions, like the majority of the discussed cases. *See Commodore Min. Co. v. People*, 257 P. 259, 260 (Colo. 1927). Colorado courts "have [also] been particularly vigilant in requiring an explicit authorization for attorney fees where the fees are sought against the State." *Waters v. Dist. Ct. for the Seventeenth Jud. Dist.,* 935 P.2d 981, 990 (Colo. 1997) (citing *People v. Dist. Ct., City & Cty. of Denver*, 808 P.2d 831 (Colo.1991)). This is because "[a]n award of attorney's fees to be payable from public funds implicates sensitive budget and funding considerations, and authority to intrude into these areas is not to be lightly implied." 808 P.2d at 835. Statutes and court rules that authorize a court to require a party to pay an opposing party's attorney's fees usually do so expressly." *Id.* The Colorado Supreme Court has plainly decided that these rules continue to apply in litigation between government officials; the only scenario in which a public official can be awarded attorney fees when challenging another public official is if there is a statute expressly authorizing the award.

Wadlow and *Schroeder* were brought under C.R.S. 1963, § 56-2-10, but at the time, there was no provision for expenses or attorney fees for the enumerated officials in that statute. The subsection allowing attorney fees out of the county general fund was added to C.R.S. 1963, § 56-2-10 through an amendment that was approved by the General Assembly three days before *Wadlow* was decided; the statute was recodified into the 1973 Colorado Revised Statutes as § 30-2-104. *See* Colo. Sess. Laws. 1973, ch. 178, p. 629, § 1. Subsection (2) stated, "[c]osts of any litigation instituted by an elected official shall be paid out of the county general fund." C.R.S. 1973, § 30-2-104(2) (approved on June 22, 1973, effective July 1, 1973). The *Tisdel* court determined that *Wadlow* and *Schroeder* granted attorney fees under C.R.S. 1963, 56-2-10 despite the attorney fee section appearing later. *Tisdel v. Bd. of Cty. Comm'rs of Bent Cty.,* 621 P.2d 1357, 1362 (Colo. 1980). The Court is unclear why the *Tisdel* court determined this; perhaps it was because the amendment was approved before the case was decided and they assumed the General Assembly was aware of *Schroeder* and *Kanaly v. Wadlow*, 502 P.2d 83 (Colo. App. 1972), *rev'd*, 511 P.2d 484 (1973), and aimed to clarify these holdings or instill a concrete statute reflecting the ability of such officials to be reimbursed their attorney fees through the county fund. *Vigil v. Franklin*, 103 P.3d 322, 327–28 (Colo. 2004) ("[W]hen it chooses to legislate in a particular area, the General Assembly is presumed to be aware of existing case law precedent." (citing *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1219 (Colo. 2002)). Regardless, the holding in *Tisdel* ultimately solidified the intent of *Wadlow*, expressly allowing attorney fees to an official that institutes litigation regarding compensation or classification. *Tisdel v. Bd. of Cty. Comm'rs of Bent Cty.*, 621 P.2d 1357, 1362 (Colo. 1980).

In *Tisdel*, a district attorney brought a mandamus and declaratory judgment action against his county's board of commissioners. The district attorney began his four-year term making $33,000 annually. *Id.* at 1359. His salary was included in that year's budget, but the board claimed that they were unaware of his salary amount when the budget was adopted. *Id.* After the board discovered the pay increase from the statutory minimum, they continued to pay him that amount until the next year. *Id.* The board then set his salary to the statutory minimum for the next year. *Id.* The court reiterated its holding from *Wadlow* and *Schroeder*, that once a board pays or assents to a salary, they have ratified the salary and are without power to reduce the salary during the official's term. *Id.* at 1362.

The district attorney similarly had to retain private counsel to prosecute the action against the board, but the court did not award his attorney fees as he requested under *Wadlow*. First, the

district attorney did not bring his case under C.R.S. § 30-2-104; he wanted their rights determined under C.R.S. 1973, § 20-1-301 and Article XII, Section 11 of the Colorado Constitution, neither of which contained authority for the payment of attorney fees. *Id.* Second, the court found C.R.S. § 30-2-104 inapplicable because that statute dealt with the compensation of deputies and assistants of county clerks, recorders, treasurers, assessors, and superintendents. *Id.* at 1361. The court interpreted "[c]osts of any litigation instituted by an elected official shall be paid out of the county general fund" of Subsection (2) to mean "if litigation relating to compensation or classification is instituted *by one of the enumerated elected officials*, the costs of any litigation shall be paid out of the county general fund." *Id.* at 1362 (emphasis added). The Court held that there was no statutory authority for a district attorney to receive attorney fees when seeking to protect their salary from a reduction in violation of the constitution, and that C.R.S. § 30-2-104(2) only applies to the enumerated officials in the statute. *Id.*

The same was held for a sheriff who sought a declaratory judgment and injunctive relief against a board of county commissioners that exempted certain personnel from overtime cash payments, the majority of which were sheriff's office personnel. *Johnson v. Bd. of Cty. Comm'rs of Eagle Cty.*, 676 P.2d 1263, 1264 (Colo. App. 1984). The court held that the relevant statutes did grant the board the discretion to compensate employees either in cash or in compensatory time and that the plaintiffs were not entitled to attorney fees. *Id.* at 1265. The trial court had relied on *Wadlow* to originally award the sheriff attorney fees. *Id.* at 1266. However, the defendants appealed the award and the appellate court affirmed *Tisdel's* rationale. The court reiterated that *Tisdel* interpreted C.R.S. § 30-2-104(2) as "referring only to litigation instituted by one of the above enumerated county officials." *Id.* The plaintiffs argued that Subsection (2) should have been interpreted more broadly to apply to all elected officials, but the court rejected this contention, stating "the Supreme Court has spoken otherwise, and we are bound thereby. Therefore, *Tisdel*, and not *Wadlow*, is dispositive here." *Id.* at 1267. The court further noted that the statute pertaining to sheriffs and their deputies does not contain any provision for the county to pay the costs of any litigation instituted by a sheriff and so there was no alternative authority to award attorney fees. *Id.*

In *Sullivan*, a sheriff challenged a county board of commissioners for determining that a deputy sheriff was wrongfully terminated and for paying him two months of pay from the sheriff's budget. The court ruled that the court lack jurisdiction because the sheriff should have brought the action under C.R.C.P. 106 within the timeframe to file an appeal of the board's decision. *Sullivan v. Bd. of Cty. Comm'rs of Arapahoe Cty.*, 692 P.2d 1106, 1110 (Colo. 1984). The court also determined that the trial court erred by relying on *Wadlow* to award the sheriff attorney fees. *Id.* The court stated, "[w]e have subsequently noted [] that the award of attorneys' fees in *Wadlow* was statutorily authorized under section 30–2–104, 12 C.R.S. (1977)." *Id.* Since the facts of the case did not fit under C.R.S. § 30-2-104 and there was no other statutory authority for an award of attorney fees, the court vacated the award. *Id.*

Therefore, although *Wadlow* appeared to award attorney fees under a policy of equity, the cases that followed distinctly held that the attorney fees in *Wadlow* were authorized by C.R.S. 1963, § 56-2-10 and that attorney fees in any comparable case would only be awarded if a statute authorized them, further carving out the American rule.

c. Application to Plaintiff's Claim

Here, it is undisputed that Plaintiff was investigated at the insistence of the Defendants and through use of the County Attorney, who was paid out of the county fund. Plaintiff's

Exhibits 1(a), 2-5. It is undisputed that Plaintiff hired an attorney after the Sheriff's investigation commenced and that she incurred legal fees. Plaintiff's Motion, pg. 5; Plaintiff's Exhibit 4. It is also undisputed that no official action was taken to agree to reimburse Plaintiff her attorney fees through the county fund. Plaintiff's Exhibit 5.

The circumstances of Plaintiff's claims are dissimilar to the facts in *Schroeder*, *Wadlow*, *Tisdel*, *Johnson*, and *Sullivan*. The majority of the cases were mandamus proceedings to force the various county boards to act pursuant to the parties' rights as dictated in statutes. It was under these statutes that attorney fees were either allowed or disallowed. Plaintiff did not bring a mandamus action or seek a declaratory judgment regarding the respective rights or powers of the parties to release privileged information or to investigate a party for releasing privileged information pursuant to any statutory authority. Plaintiff's claim is based only on her demand for her attorney fees to be covered pursuant to *Wadlow*. Therefore, as a matter of law, the Court cannot declare that the Defendants violated *Wadlow* by refusing to reimburse Plaintiff her attorney fees that she incurred for hiring counsel before any litigation had been instituted. The dispute over whether Plaintiff released the anonymous letter and whether she could publicly share privileged information culminated into several investigations and this lawsuit; neither matter was related in any way to the compensation and classification of Plaintiff's official role, nor was her role an enumerated position in the statute pertinent to the *Wadlow* decision. Plaintiff did not institute litigation over any statutory rights of her office or duties, nor of the Board's office or duties, and so she has not incurred attorney fees in a dispute of the respective powers of these offices, as addressed in *Wadlow*, *Tisdel*, and *Johnson*.

d. Application to Plaintiff's Interpretation of *Wadlow*

Plaintiff argues that *Tisdel*, *Johnson*, and *Sullivan* are exceptions to the rule provided in *Wadlow* and that the elements of a *Wadlow* claim are: 1) there was a dispute, 2) between a board of county commissioners and an independently elected constitutional officer, 3) regarding the respective powers of their offices, 4) where the county attorney represents the commissioners at public expense, and 5) the dispute is not related to fiscal issues such as budget, pay, or staffing. Plaintiff relies on this interpretation of *Wadlow*, arguing that *Wadlow* was decided on public policy grounds that would place a board of county commissioners and an independently elected constitutional officer on equal footing when there is a dispute about their respective powers.

Plaintiff's argument that *Wadlow* can be distinguished from its progeny cases based on whether or not the dispute was fiscal in nature incorrectly characterizes the bases of these cases. Plaintiff labels the progeny cases' fiscal character as "budget (*Tisdel*), pay (*Johnson*), or staffing (*Sullivan*)," but *Wadlow* was about a treasurer who fixed her employees' salaries per the statute and a board that refused to approve the salaries. Plaintiff's Motion, pg. 15. In each case, the respective powers in question were those enumerated in the relevant statutes. In *Wadlow* the treasurer had the right to appoint its employees and fix their salaries, but this right was subject to approval by the board of county commissioners. 511 P.2d 484; C.R.S. 1963, § 56-2-10. In *Tisdel*, the district attorney had the right to set his salary above the statutory minimum, but this right was subject to approval by the board of county commissioners, within the limits of the state constitution. 621 P.2d 1357; C.R.S. 1973, § 20-1-301. In *Johnson*, the court found that the board had the discretion to determine how overtime compensation would be paid pursuant to C.R.S. §§ 8–13–104 to –105 *and* C.R.S. § 30–2–104(1)(b)(IV) (1982). 676 P.2d 1263. Finally, in *Sullivan*, the claims similarly involved the discretionary powers of the board and how they related to the budgetary rights and decisions of the board and sheriff's office, pursuant to statute.

The Court notes that Plaintiff did not make any argument for *Schroeder*, which was cited by the *Wadlow* court in its attorney fees holding. *Schroeder* was a superintendent's mandamus action against a county board to enforce its rights under the same compensation statute to hire assistants and fix their salaries after the board unilaterally refused the salary amounts. It was a case about the powers of each governmental body to act pursuant to their statutory duties *of* compensation, budgets, and staffing—factors that are inextricably tied together under the statute and the county government infrastructure. Attorney fees were not awarded to the superintendent out of equity of governmental bodies questioning their respective powers; they were awarded because C.R.S. 1960, §123–2–7 authorized the fees as an office expense. 381 P.2d at 823.

Consequently, the Court fails to understand how *Wadlow* was a "non-fiscal" case, but *Tisdel*, *Johnson*, and *Sullivan* were "fiscal." In each case, the parties argued the rights of their respective offices under statute because their claims were about officials attempting to staff their offices and set their employees' salaries and the respective boards intervening—either within their own rights or not. Thus, *Wadlow* was plainly about budget, pay, and staffing too. For the enumerated officials in C.R.S. § 30-2-104, a handful of official positions that routinely hire and fix employees' salaries, instituting any litigation shall be paid out of the county general fund. For sheriffs and district attorneys, there is no such provision. It is not the Court's duty to decipher why the legislature allows some officials to recover but not district attorneys or sheriffs when litigating compensation issues. However, it is clear that when the *Wadlow* court held that two public entities are in litigation over a question of their respective powers, it was specifically discussing the respective powers of the entities under a statute, not just any question of power and not only if the question is nonfiscal. The progeny cases later clarified and held that, even in instances of two government bodies litigating their respective powers, in which one party's counsel is not paid by county general fund, attorney fees will only be awarded if a statute authorizes the award. Therefore, this Court is bound by *Tisdel*, which is dispositive here. *Johnson*, 676 P.2d at 1264.

Here, Plaintiff has not brought this lawsuit under a question of respective powers of her office and the Board's. Her remaining claim is for a declaratory judgment that the Defendants violated common law, *Wadlow*, by using the county attorney at no personal expense, to act against her, but requiring her to bear her own legal expense to defend against this action. This claim, and the investigations themselves, are dissimilar to the power disputes in *Wadlow* and the progeny cases. In these cases, the acting official had to pursue litigation against boards for violating or impeding their statutory rights to hire employees and fix their salaries (*Schroeder* and *Wadlow*), maintain a ratified salary of their own (*Tisdel*), set overtime compensation for their employees (*Johnson*), and discipline or fire an employee and thus discontinue payment of their salary (*Sullivan*). Here, Plaintiff is pursuing litigation against the Defendant commissioners for not reimbursing her attorney fees that she incurred during the investigations. Plaintiff is not litigating the investigations themselves or seeking a declaration that the Defendants did not have the right to investigate her or that any of the actions for which she incurred legal fees were a violation of a statutory procedure or right. Because Plaintiff's claim is not brought under any statute that delineates rights or duties of the parties, it is wholly outside the provisions of *Wadlow* and the progeny cases. And because she has not incurred legal fees for bringing a lawsuit to enforce such rights, the attorney fee awards in these cases are inapplicable.

e. Discussion & Application of *Culpepper*

Plaintiff urges the Court to find that the unpublished Colorado Supreme Court case *Adams County v. Culpepper* affirmed her public policy interpretation of *Wadlow*. The *Culpepper* case was discussed in this Court's April 11, 2024, order dismissing Plaintiff's Colorado Government Immunity Act claim. The Court stated that it did find the *Culpepper* court's statement that the attorney fee paragraph from *Wadlow* continues to apply today as persuasive. *Adams Cnty. v. Culpepper*, No. 2022SA256 (Colo. Oct. 10, 2022) (citing 511 P.2d at 487). The Court also noted that the supreme court expressly limited its holding to the facts of that case, explaining that "[g]iven the unique facts and the lengthy procedural history of this case (and a related case filed by [Adams] County), the court concludes that the issues raised by the petition are not amendable to providing broadly applicable guidance as to governing legal principles" and emphasized "that the court's ruling is limited to the specific circumstances presented here." *Id*. at 1-2; *see also* Defendants' Exhibit A-4. The Court stated then what it holds now, that *Tisdel*, *Johnson*, and *Sullivan* do limit the relief available in *Wadlow* to cases where there is existing statutory authorization for attorney's fees. The court discussed how C.R.S. § 13-51-114 could potentially provide the required statutory basis for an award of her pre-litigation attorney's fees. However, Plaintiff did not argue in her Motion or in her Response to Defendants' Motion, that she should be awarded fees under C.R.S. § 13-51-114. Plaintiff did not provide any additional evidentiary support or legal authority than was alleged in her December 20, 2023, Response to Defendant's Motion to Dismiss. Plaintiff instead relied and expanded on her policy argument, stating that *Culpepper* upheld the public policy expressed in *Wadlow*.

In *Culpepper*, a complicated case with a convoluted procedural history, the county treasurer of Adams County was sued by the Adams County Board of County Commissioners for failing to perform her official duties. The Adams County board complained that the treasurer was statutorily obligated to perform the duties set out in C.R.S. §§ 30-1-113, 30-10-709(1), and 39-10-107(4), and that she had not performed these duties. *See* Defendants' Exhibit A-5 The case is similar in that the board prosecuted the treasurer by way of the county attorney, who otherwise would have represented her, leaving her to hire outside counsel. However, that is the only factual similarity to the present case, and even then, it is not completely alike because here, the Board investigated Plaintiff, but did not institute litigation against Plaintiff. The investigation and dispute over the actions of Plaintiff were not pursuant to statutory rights as seen in *Culpepper*, *Wadlow*, and the progeny cases. The parties in *Culpepper* also agreed that the board would cover the treasurer's legal fees due to the conflict. *Id.*, pg. 7-8. The district court ordered the board to appropriate funds for her defense and the board paid these fees out of the county fund until they decided to file a motion for clarification to remove themselves from this obligation; the district court, in a related case, allowed them to do so. Defendants' Exhibit A-4, pg. 2. The supreme court ultimately held it was an abuse of discretion for the board to refuse to appropriate funds for the treasurer's defense and for the district court to effectively affirm that determination . *Id.* at 3.

Without litigation pursuant to statutory rights, a statute authorizing an attorney fee award, or an agreement that the Board would pay for Plaintiff's attorney fees, the Court cannot declare that the Defendants violated the law by refusing to reimburse Plaintiff's attorney fees.

f. Defendants' Cross-Motion for Summary Judgment

"When a party moves for summary judgment on an issue upon which the party would not bear the burden of persuasion at trial, the moving party's initial burden of production may be satisfied by showing an absence of evidence in the record to support the non-moving party's

case. The burden then shifts to the non-moving party to establish a triable issue of fact and failure to meet that burden will result in summary judgment in favor of the moving party. *Casey v. Christie Lodge Owners Ass'n, Inc.*, 923 P.2d 365, 366 (Colo. App. 1996) (citing *Continental Air Lines, Inc. v. Keenan,* 731 P.2d 708 (Colo.1987)).

The Motions focus more on legal argument over presenting a genuine issue for trial, due to the parties presenting an agreed upon set of material facts. In their Cross-Motion for Summary Judgment, Defendants have provided the same arguments that the Court has concluded regarding the effect that *Tisdel*, *Johnson*, and *Sullivan* have had on the precedent previously set in *Wadlow.* The Defendants have argued how Plaintiff has not provided any evidence to support her claims under *Wadlow*, most pertinent being any statute or authority that recognizes the facts that made up their dispute—and with that, a lack of any statutory authority for attorney fees. Thus, the Court finds that the Defendants' initial burden of production has been satisfied.

Plaintiff focuses on her argument for her interpretation of *Wadlow*, the progeny cases, and *Culpepper*. She argues that the Defendants' interpretation is incorrect, that the only legal question for the Court is to harmonize these cases, and that *Culpepper* is "persuasive for the premise that the previous interpretation of *Tisdel*, *Johnson*, and *Sullivan* by the Bar and the District Courts was incorrect." *Plaintiff's Response*, pg. 5. The Court is not persuaded by this interpretation. *Tisdel*, *Johnson*, and *Sullivan* did not just limit *Wadlow*. *Tisdel* recognized the basis for *Wadlow*'s attorney fee holding and the legislature amended the law to reflect the proper basis for an attorney fee award as seen in *Wadlow*. *Powell v. City of Colorado Springs*, 131 P.3d 1129, 1132 (Colo. App. 2005), *aff'd*, 156 P.3d 461 (Colo. 2007) (citing *Douglas County Bd. of Equalization v. Fidelity Castle Pines, Ltd.*, 890 P.2d 119 (Colo.1995) ("There is [] a presumption that, when the legislature amends a statute, it intends a change in the existing law."). Thus, the courts and the legislature made it very clear that an attorney fee award in litigation brought between two government officials would only be awarded in specific circumstances.

Plaintiff argues that she was acting in her official capacity when taking the actions that were investigated and that the dispute was about the respective powers of her office to release information to the public, and the Board's power to prohibit her from doing so. However, Plaintiff still does not present under what authority these powers were granted, nor a record indicating where she officially requested to take this action in her capacity as a county commissioner. In fact, the release of the letter and memorandum were done anonymously. The Court does not find the fact, as described by Plaintiff, that an official was acting in their official capacity, material to the claim and question presented through Plaintiff's Complaint and these Motions. *Wadlow* was not decided on whether the treasurer was acting in her official capacity, it was decided on whether she was acting under the authority delineated under the compensation statute. Here, the Parties did have a dispute while they were all acting Commissioners, but these facts do not equate to actual litigation over their respective rights delineated under statute. *See supra* Subsection d.

Thus, although these Motions are argued and determined by the relevant cases, to overcome her burden, Plaintiff still must present a triable issue—or here, facts that would support her claim under the precedent set by the progeny cases and as determined in this Court's April 11, 2024, order. "A 'genuine issue' cannot be raised by counsel simply by means of argument." *Sullivan v. Davis*, 474 P.2d 218, 221 (Colo.1970). Therefore, without evidence that Plaintiff's alleged actions were delineated as official in a statute, or that there was an agreement in place that the Board agreed to cover her legal fees, or the support of a statute authorizing attorney fees under the presented circumstances, Plaintiff's repeated argument that the Court

should harmonize and interpret *Wadlow*, *Johnson*, *Sullivan*, and *Culpepper* as she views them is not enough to meet her burden and she cannot prevail as a matter of law. *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 360 (Colo. 1994). Therefore, the Court must grant Defendants' Cross-Motion for Summary Judgment.

IV. Conclusion

Plaintiff's Motion for Summary Judgment is **DENIED**.

Defendants' Cross-Motion for Summary Judgment is **GRANTED**.

DATED April 23, 2025

Robert R. Lung
District Court Judge