

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

SEAN HARRINGTON

Plaintiff,

v.

MADELINE WILSON and the “LAW OFFICE OF MADELINE WILSON”;
CHRISTY RYAN;

BILL J. FYFE and COLUMBINE COUNSELING CENTER, P.C.;

LAURA ARCILISE, in her personal capacity;

LOUISE CULBERSON-SMITH, in her personal capacity;

JOHN GLEASON in both his personal and official capacity;

WENDELL PRYOR in his official capacity;

ROBERT EVANS, in his official capacity; and

the JEFFERSON COUNTY COMBINED COURT (a/k/a “THE FIRST JUDICIAL DISTRICT”),
by and through the COLORADO ATTORNEY GENERAL, JOHN SUTHERS, in his official Capacity.

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLORADO
HON. EDWARD W. NOTTINGHAM

**APPELLANT’S COMBINED MOTION FOR LIMITED REMAND AND FOR LEAVE TO
FILE OVERSIZED BRIEF AND/OR BIFURCATION OF THE ISSUES ON APPEAL.**

COMES NOW, the Plaintiff-Appellant, pursuant to [10th Cir. R. 27.2\(A\)\(1\)\(c\)](#) to submit the within Motion for Limited Remand and for an oversized brief and bifurcation of the Issues on Appeal.

<p>Please note: a true and correct courtesy copy of this Motion is provided in fully-hyperlinked digital form on the compact diskette accompanying this Motion, for the convenience of the court, pursuant to this Court’s October 20, 2004 Order (amended January 11, 2005)</p>

INTRODUCTION

The magistrate judge in the lower court was directed by an [Order of Reference dated September 27th 2005](#) under 28 U.S.C. § 636(b)(1)(A) and D.C.Colo.LCivR 72.1 to submit either a recommendation that would completely dispose of the case or a brief status report by March 27, 2006. Not until six months later –or about ten months after the last Motion to Dismiss had been filed– did the magistrate release his [forty-one page Recommendations](#) for the dismissal of each and all of the twenty-eight claims. Under the Federal Rules of Civil Procedure 72(b), 6(a), 6(e) and 5(b)(2)(D) and Section V(B)(1) of ver. 2 of the trial court’s [Electronic Filing Guidelines](#), Plaintiff had until midnight of September 26th 2006 to submit his objection to the magistrate’s September 7th 2006 Recommendations.

Plaintiff spent the next two weeks laboriously researching, drafting and “assembling” a fully-hyperlinked “digital brief” for the court.¹ Five days before the deadline, the trial judge signed an [order on September 21st](#) (docketed the 22nd) dismissing Plaintiff’s case, erroneously concluding that no timely objection was filed. Plaintiff moved for reconsideration and submitted his timely brief on the 22nd.

In consolidated form, Plaintiff’s hyperlinked [brief in opposition to the magistrate’s recommendations](#) was approximately sixty-eight pages of factual and legal analysis with some minimal recitation from the record. [Subsection X](#) of the court’s Electronic Filing guidelines specifically authorizes the use of hyperlinks either to another portion of the same document or to Web sites.² This Court, also, accepts fully-hyperlinked briefs. See [October 20th 2004 Emergency General Order](#) *In re: Electronic*

¹ For the convenience of the Court, Appellant has attached hereto a compact disk containing the electronic version of the brief that was made available to the trial court and the parties *via* CM/ECF. All other relevant docketed items from the record are also contained thereon.

² Plaintiff generally avoids hyperlinking to Web sites, because of the “impermanence of the internet.” See Coleen Barger, [On the Internet, Nobody Knows You’re a Judge: Appellate Courts’ Use of Internet Materials](#), [4 J. App. Prac. & Process 417](#) (2002).

Submission of Selected Documents, amended January 1st 2006 (“Briefs may contain hyperlinks to cases and authorities). The “catch,” however, with the district courts’ current version of CM/ECF (as it differs from the e-briefs submitted on compact disks to appellate courts), is that it a JavaScript suppression filter blocks documents with hyperlinks to Acrobat embedded attachments within the document or to documents outside the main document.³ Consequently, any accompanying hyperlink-reference material must be appended to the end of the pages of a given document. Section [X\(C\)](#) of the Electronic Filing Guidelines presupposes this and specifically provides that, “Neither a hyperlink, nor any site to which it refers, shall be considered part of the official record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document.”

Another limitation of CM/ECF is that individual documents cannot exceed 2MB, which is comparatively “tiny” by today’s standards. A fully-hyperlinked brief, depending on its size, can easily exceed 20Mb (or much larger, if scanned images, such as court documents scanned from microfiche, are included). For this reason, subsection [H\(2\)\(a\)](#) of the district court’s Electronic Filing Procedures provides that motions in excess of 2MB shall be broken into separate parts. Plaintiff’s brief was approximately 27Mb and, therefore, needed to be divided into multiple parts. To facilitate this, Plaintiff identified logical break-points within the arguments of his brief and, on the first page of each part, he included a clear notation that the filing was a separate part, including how many pages were argument and, which pages were hyperlink/reference material. As an example, Part B contained the following notation:

³ However, according to a bulletin from the Administrative Office of the Courts, ver. 3.1 of district court CM/ECF software will "allow users to include hyperlinks between two or more documents filed in CM/ECF." Colorado CM/ECF Coordinator Chris Vagner also spoke of such an upcoming enhancement.

Please note: This is **Part B** (of 12) of a fully hyper-linked brief pursuant to [§ H\(2\)\(a\)](#) of ver. 2 of the D.Colo. ECF Procedures and, which part consists of 6 pages. Pages appearing after page B-6 are for reference only should not be printed out or construed as if they were incorporated by reference or considered as part of a total page count. (See [§ X\(C\)](#) of ver. 2 of the D.Colo. ECF Procedures).

Plaintiff then inserted a blank page separating the argument from the reference material, as seen *infra*:

THIS PAGE INTENTIONALLY LEFT BLANK
THE PAGES THAT FOLLOW ARE FOR
HYPERLINK REFERENCE ONLY

Apparently, when the trial judge received his notification through the CM/ECF system that Plaintiff had filed *timely* objections (the hyperlinked brief) *after* the case had already been dismissed the case, he took note of the number of pages on the document history display (rather than looking at the brief) and became very cross. In his renewed Order of dismissal, he ruled:

It is hard to imagine a more frivolous, burdensome, prolix, senseless, and harassing filing than the one containing Plaintiff's objections. The objections themselves are spread over 2,610 pages, and the exhibits occupy an additional sixty pages. The bulk of the filing consists of an apparently random mixture of copies of cases and exhibits. It is impossible to follow or make sense of this heap, and any attempt to do so would require abandonment of all other cases. The assigned magistrate judge has performed yeoman service in reviewing the case and making a thorough recommendation. The objections to the recommendation are "redundant, immaterial, [and] impertinent," Fed. R. Civ. P. 12(f) and will be stricken.

[Id. at p. 2](#). From this unprovoked assailment, it is evident that the trial judge did not open or examine the PDF submissions and he mistook the brief as something other

than a hyperlinked document. For the same reason, he took no notice that all but one of the exhibits were unpublished opinions, as required by [D.C.Colo.LCivR. 7.1\(D\)](#) to be attached to a motion or brief as a formality (not requiring his review or analysis).

In adopting the magistrate’s recommendations for dismissing the case for want of jurisdiction this second time, the trial judge added that the dismissal should now be **with prejudice** — thereby contravening the adopted magistrate’s conclusion that, “The state court provides and adequate forum to hear such claims” and “Plaintiff has adequate remedies in state court.” The trial judge also added a discretionary award of costs in this second Order of Dismissal but, provided no findings of fact or conclusions of law to support either the discretionary subsequent award of costs under [§ 1919](#) or the downgrade to “with prejudice.” Thus, this appears to have been an exercise of the court’s inherent power in the nature of sanctions prompted by nothing other than Plaintiff availing himself of the timely filing of objections under [Fed.R.Civ.P. 72\(b\)](#).

Plaintiff moved for reconsideration, citing the applicable authorities relating to dismissal with prejudice for want of jurisdiction and arguing, the propriety of hyperlinked brief technology.⁴ Plaintiff also submitted, contemporaneous to his Rule 59 Motion, a non-hyperlinked version of the brief, in light of the fact that the trial judge apparently disapproved of hyperlinked briefs. The judge denied the motion without comment, in effect refusing to *de novo* review **any** version of Plaintiff’s objections.

RELIEF SOUGHT

1. The purpose of this Motion is to limit the scope of appealable issues or, in the alternative, to seek leave to bifurcate and brief those issues with legal sufficiency.

⁴ Plaintiff conferred with Chris Vagner, the trial court’s CM/ECF coordinator, who informed him that hyperlinked briefs (a/k/a “e-briefs” or “digital briefs”) were not only accepted, but encouraged.

Appellant has conferred with opposing counsel concerning the within Motion and has ascertained that all opposing parties object to the same.

2. Contemporaneous to the within Motion, Plaintiff has filed a Designation of Record for relevant parts of the record as necessary to determine this Motion, pursuant to [Fed.R.App. 11\(g\)](#). The attached CD contains the same (in electronic form).

3. [Rule 72\(b\)](#), promulgated under statutory authorization in [28 U.S.C. § 636\(b\)\(1\)\(B\)](#), provides that “a party may serve and file specific, written objections to the proposed findings and recommendations.” When a trial court deprives a litigant of the opportunity to file specific written objections under [Fed.R.Civ.P. 72\(b\)](#), it violates that litigant’s procedural due process rights. *See Rinaldi v. Yeager*, [384 U.S. 305, 310](#) (1966) (when due process does not otherwise obligate the court to establish an avenue of judicial redress (such as an appeal) but, been established by statute or rule, “these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts”).

4. The filing of objections to a magistrate’s recommendations is not to be regarded as an annoyance or a meaningless technicality. Instead, “the filing of objections advances the interests that underlie the Magistrate's Act, including judicial efficiency.” *In United States v. 2121 East 30th Street*, [73 F.3d 1057, 1059](#) (10th Cir. 1996). A plaintiff’s objections must be specific enough to enable “the district judge to focus attention on those issues - factual and legal - that are at the heart of the parties’ dispute.” *Id.*

5. When a party objects to a magistrate judge's recommended disposition, the district judge “shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made” [Fed.R.Civ.P. 72\(b\)](#). Under [28 U.S.C. § 636\(b\)\(1\)\(B\)](#) the district court must, “actually exercise its discretion, rather than summarily accepting or denying” the magistrate judge’s findings. *United States v. Howell*, [231 F.3d 615, 622](#) (9th Cir. 2000). It is reversible error for the district court to fail to conduct a

de novo review when required. See, e.g., *Hosna v. Groose*, [80 F.3d 298, 306](#) (8th Cir., 1996); *Northington v. Marin*, [102 F.3d 1564, 1570](#) (10th Cir. 1996). Although, in this Circuit, “a brief order expressly stating the court conducted *de novo* review” may suffice (*Id.*), an appellate court must be sufficiently persuaded that a district judge has exercised his non-delegable authority by actually considering the parties’ objections, “and not merely by reviewing the magistrate's report and recommendations.” *Gee v. Estes*, [829 F.2d 1005, 1008-09](#) (10th Cir.1987) (*per curiam*). Here, the trial court expressly refused to consider anything other than the magistrate’s recommendations.

6. In the instant case, the trial court’s bare declaration that it had conducted the requisite *de novo* review **before** Plaintiff had filed any objections (despite that the *de novo* review should relate to the magistrate’s recommendations “to which specific written objection has been made” under [Fed.R.Civ.P. 72\(b\)](#)), followed by the striking of Plaintiff’s objections as the obvious result of a failure to glance at even the first page, is highly suggestive that no *de novo* review occurred. Cf. *Bueno v. Pyle*, [24 Fed.Appx. 917](#) (10th Cir. 2001) (contention that the court could not have conducted a *de novo* review, because the order accepting magistrate’s recommendations was filed the day **after** the objections were filed, provides no grounds for questioning the district court’s statement that it had performed the requisite *de novo* review).

7. In addition, to these procedural due process errors, the trial judge’s manner of dismissal was clearly erroneous: Dismissals for want of jurisdiction must be without prejudice. See *Brereton v. Bountiful City Corp.*, [434 F.3d 1213, 1216](#) (10th Cir.2006) (“A longstanding line of cases from this circuit holds that where the district court dismisses an action for lack of jurisdiction, as it did here, the dismissal must be without prejudice”). The Order of dismissal “with prejudice” is inconsistent with the trial court’s adoption of the magistrate’s findings, where the magistrate concluded that, “Plaintiff has adequate remedies in state court.” Plaintiff cannot pursue any of these allegedly “adequate remedies” if the dismissal is “with prejudice,” because judgment dismissing “the previous suit 'with prejudice' bars a later suit on the same cause of action.” *Lawlor v. Nation Screen Serv. Corp.*, [349 U.S. 322, 327](#) (1955); see also *Frederiksen v. City of Lockport*, [384 F.3d 437, 438](#) (7th Cir. 2004)

“A suit dismissed for lack of jurisdiction cannot also be dismissed ‘with prejudice’; that’s a disposition on the merits, which only a court with jurisdiction may render. ‘No jurisdiction’ and ‘with prejudice’ are mutually exclusive. . . .A jurisdictional disposition is conclusive on the jurisdictional question: the plaintiff cannot re-file in federal court. But it is without prejudice on the merits, which are open to review in state court to the extent the state’s law of preclusion permits”). When a court finds that it lacks subject matter jurisdiction, the court has not decided the case on the merits. *Ray v. Eyster*, [132 F.3d 152](#), [155](#) (3rd Cir. 1997).

8. The trial judge’s abdication of his duty to conduct a *de novo* review and provide meaningful findings of facts and conclusions of law and the manner in which he hastily and carelessly dismissed the case in his apparent zeal to move his docket along has needlessly multiplied the issues on appeal,⁵ creating more work for the Court of Appeals and all parties involved. This contention is especially plausible in light of the fact that Judge Nottingham should have been the *least* likely judge to have failed to recognize or appreciate the technology and convenience of an “e-brief,” because he oversaw the implementation of CM/ECM in the Colorado district court and also has been a past Chairman of the Committee on Automation and Technology of the Administrative Office of the U.S. Courts.

9. Every reputable appellate advocate recommends limiting issues on appeal to not more than two or three. *See, e.g.*, M. Fontham, Written and Oral Advocacy, (John Wiley & Sons, 1985) (“In most cases, no more than one or two questions are neces-

⁵ The Order of Dismissal of Plaintiff’s suit, alone, created several immediate and obvious issues on appeal: whether the trial court abused its discretion in dismissing the case on the mistaken premise that no timely objection had been filed; whether the trial judge abused its discretion in striking Plaintiff’s timely objections based on his apparent failure to examine the PDF document; whether the trial court abused its discretion in dismissing the case for want of jurisdiction “with prejudice;” whether the trial court should have stayed, rather than dismissed, claims for monetary relief only that could not be redressed in state courts; and whether a punitive award of costs under § 1919 was an abuse of discretion. Because the trial court did not conduct a *de novo* review and, instead, adopted the recommendations *in toto* without providing any conclusions of law or factual findings to help distill the issues, the scope of appeal now necessarily includes all bases and alternate bases cited by the magistrate in his 41-page recommendations, including the many that the magistrate raised *sua sponte*.

sary to describe the issues”); Bentele & Cary, Appellate Advocacy – Principles and Practice, 3rd (Anderson, 1998) (“Once a comprehensive list of possible issues has been made [in preparation for writing the brief], the next step is to cross most of them off. A useful rule of thumb for the good appellate brief writer is that less is often more.”); Handbook of Appellate Advocacy, (West, 1986) (“[T]he goal is to achieve a certain judgment, not to discuss every issue touched upon by the facts of the case”); *And see State v. Pelletier*, [552 A.2d 805](#), [807](#) (1989) (“Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one [issue] . . . [M]ultiplying assignments of error will dilute and weaken a good cause and will not save a bad one . . . Most cases present only one, two or three significant questions . . . if you cannot win on a few major points, the others are not likely to help. . . The effect of adding weak arguments will be to dilute the force of the stronger ones”).

10. The challenge here is that a failure to brief any one issue raised by the magistrate –his reasons for disposing of the case– may be a forfeiture of that issue, regardless of whether the issue was preserved in the trial court proceedings. Yet, it is impossible to brief these issues meaningfully in 14,000 or less words and it isn’t helpful to the reviewing Court for Plaintiff to merely mention each issue in passing. *See, e.g., United States v. Zannino*, [895 F.2d 1](#), [17](#) (1st Cir. 1990) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones. . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation ‘to spell out its arguments squarely and distinctly, or else forever hold its peace’”).

11. Moreover, because the State is exempt from having to file a consolidated brief with the other parties ([10th Cir. R. 31.3 \(D\)](#)), the appellees in the instant case will have a combined total of 28,000 words (or 60 pages) to address the court, whereas appellant is limited to 14,000 (or 30 pages) for all issues, unless leave is otherwise granted.

12. Appellant believes that one way to eliminate some issues on appeal may be found in how the Court handled *Martinez v. Heyer-Schulte, Inc.* 1998 10CIR 331, [141 F.3d 1185](#) (unpublished),⁶ which is similar in that the district court adopted the magistrate judge's proposed recommendations without considering one of the parties' objections to those recommendations. The Court vacated the district court's Memorandum Opinion and Order and remanded the case to the district court for a *de novo* review of the timely filed objections to the magistrate judge's Proposed Findings and Recommendations (thereby declining to reach the other issues on appeal).

13. In view of *Heyer-Schulte*, Plaintiff-appellant requests that the Court remand this matter back to the trial court and, preferably, on reassignment to another division, with directions to conduct a *de novo* review of Plaintiff-appellant's timely objections and provide meaningful findings of fact and conclusions of law upon, which this Court may review the basis of the trial court's decision. *See Seeley v. Chase*, [443 F.3d 1290, 1293](#) (10th Cir. April 11th 2006) ([W]e order a limited remand for the district court to explain its decision on the record. As such, we need not resolve [the remaining] issues at this time"); *United States v. Gonzalez-Huerta*, [403 F.3d 727, 762](#) (10th Cir. 2005) (Lucero, dissenting) ("we can fulfill our obligation . . . only by availing ourselves of the full information a limited remand to the district court would provide. Not only is a limited remand the most pragmatic approach, I would agree with the Second Circuit that it is within our appellate power").

14. Plaintiff-appellant also proposes that a "staggered" bifurcation of the issues on appeal will relieve the potential burden placed on the Court and the parties in addressing the numerous issues relating to dismissal: Plaintiff request that the Court grant him leave to file a half-sized brief on the preliminary and immediate issues raised by the manner of dismissal (if the Motion for Limited Remand is denied) and a secondary oversized brief of 20,000 words relative to the issues included in the magistrate judge's recommendations for dismissal. If the Court decides to vacate and remand with directions for the trial court to review Plaintiff's objections *de novo* and to pro-


⁶ Pursuant to [10th Cir. R. 36.3\(C\)](#), a copy of the *Heyer-Schulte* opinion is attached hereto and made part hereof by reference as, "**Exhibit A.**"

vide findings of fact and conclusions of law thereon, the Court need not reach the issues raised in the secondary brief.

15. Plaintiff is willing to participate in an appeal conference for the purposes of addressing matters that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. *See generally* [Fed.R.App. 33](#).

WHEREFORE, for the reasons more fully set forth hereinabove, Plaintiff-appellant respectfully request a limited remand to the trial court to conduct a *de novo* review of the objections and afford opposing parties to tender answers, if any; to provide meaningful findings of fact and conclusions of law, thereon, to enable this Court to have a basis for review; and for leave to file an oversized brief and bifurcation of the issues on appeal.

Respectfully submitted this 5th day of October, 2006


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CERTIFICATE OF SERVICE

I hereby certify that on *October 5th 2006* I sent a copy of the within Motion by way of United States mail (service provided by <http://www.usps.com/netpost/>) or by electronic means, as designated hereinbelow, and affixed hereto:

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