DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6130	
In re the Marriage of: **Petitioner**: CHRISTY RYAN and **Respondent**: SEAN L. HARRINGTON	▲ COURT USE ONLY ▲
Sean L Harrington P.O. Box 351855 Westminster, Colorado 80035	Case No. **99 DR 3717** Division ___

FATHER'S MOTION TO STRIKE MOTHER'S RESPONSIVE PLEADING AND FATHER'S REPLY IN SUPPORT OF HIS PENDING RULE 59 MOTION

COMES NOW the Respondent, and submits the within Reply in support of his Motion for Reconsideration of January 9, 2007 Motion to Disqualify Bill J. Fyfe as Child and Family Investigator. As grounds therefor, Respondent ("father") states as follows:

APPLICABILITY OF RULE 12(f) TO MOTHER'S FEB. 13, 2007 RESPONSE

Rule 12 provides that a pleading may be stricken, where it is "redundant, immaterial, impertinent or scandalous." Colo.R.Civ.P. 12(f). Mother's February 13th 2007 response is a sham pleading devoid of substance. Throughout, she has confused or misstated the procedural posture of the case and the underlying facts of the case, creating needless work for the Court in sorting them out. The response demonstrates no inadvertent error or justifiable alternate perspective, but rather a lack of preparation and commitment to her obligations as an "officer of the court." More than two-thirds of her twenty paragraphs consist of one-sentence, are duplicative (*e.g.,* "`The Court has ruled on this issue.`" — appearing in six paragraphs), or have been cut-and-pasted from her previous February 8th responsive pleading. The responsive pleading does not address father's contentions; does not address the legal theories advanced; does not address the newly proffered evidence; and is disrespectful of the truth. In short, the responsive pleading does nothing to assist the Court to separate the wheat from the chaff and, therefore, is frivolous and is in violation of Rule 11. Indeed, there is no justification for two hours of attorney fees (under any theory) for her work product that would have taken only ten minutes to hobble together.

2. Mother's recantation of the procedural background relative to father's year-2004 motions to disqualify Bill J. Fyfe and the Appeals Court outcome is disrespectful of the truth. Mother claims that the Appeals Court essentially affirmed this Court's denial of his motions and merely, "`ruled that the Trial Court must 'enter a` [*sic.*] `specific findings`

to support its determination." That is not at all what happened. Rather, the Appeals Court concluded that, "the trial court must reconsider husband's request for disqualification of [Bill J. Fyfe] and enter specific findings to support its determination," and noting that, "the trial court did not address father's allegation that [Bill J. Fyfe] had engaged in unethical practice and should be disqualified." August 3, 2006 Opinion in 04CA1986 by Judge Loeb (Judges Plank and Nieto, concurring). The Appeals Court rejected the trial court's June 21st 2004 order (discussed in mother's response at ¶ 1), where the trial court had denied father's motions by erroneously concluding that they were not timely under Rule 59. Accordingly, the Mandate, which issued on October 3rd 2006, stated, "ORDER VACATED AND CASE REMANDED WITH INSTRUCTIONS."

MOTHER'S CONFUSION OF *RES JUDICATA* WITH LAW-OF-THE-CASE UNDERMINES HER ARGUMENT

Opposing counsel argues that, "The father is charged with the knowledge of an attorney, if he chooses to represent himself." [1] The legal discussion, *infra,* raises a poignant question: if father is charged with the knowledge of an attorney, is not mother's attorney, also charged "with the knowledge of an attorney?"

Mother's attorney confuses the preclusion doctrine of *res judicata* (apparently with law-of-the case doctrine), in urging that, because the trial judge responded to the Appeals Court mandate in 04CA1986 by paraphrasing her prior [now-reversed] Order, *res judicata* operates to prevent father from objecting to the paraphrased January 9th 2007 Order. Her assertion is misguided.

Res judicata (a/k/a "claims preclusion") generally operates to prevent a **different**, collateral and subsequent action from ensuing on the same causes of action that had been previously decided in an earlier, terminated case. *See* <u>Restatement (Second) of Judgments</u> § 24(1). In determining whether *res judicata* precludes litigation of a particular claim, the court must find, *inter alia,* whether a final judgment was entered on the merits of the earlier suit. *See Allen v, McCurry,* 449 U.S. 90, 94 (1980); *King v. Union Oil Co.,* 117 F.3d 443, 445 (10th Cir. 1997)).

By contrast, in an **ongoing** case, the law-of-the-case doctrine "is a discretionary rule that generally requires prior relevant rulings made in the same case to be followed. It applies to decisions of law, rather than to the resolution of factual questions, and discourages reconsideration only of the ruling itself, not of a court's preliminary opinion on questions of fact or law related to the ruling." *Marriage of McSoud,* 131 P.3d 1208 (Colo.App. 2006) (citing *DeForrest v. City of Cherry Hills Village,* 990 P.2d 1139 (Colo.App.1999)). Law-of-the-case also applies where an appellate court has ruled on a legal issue and has remanded the case to a district court for further proceedings. In the instant case, for example, the Appeals Court ruled

[1] Father points out that the reason his attorney filed her motion to withdraw on January 22nd **[event ID # 438]** was because she erroneously believed that there were no pending issues. She believed this, because the Court mailed its latest Order on January 12th 2007 **[event ID # 437]** to father's obsolete address in Massachusetts, rather than to father's counsel-of-record. Her motion to withdraw has not yet been ruled on. Therefore, father has not chosen to represent himself.

that the trial court abused its discretion in permitting Bill Fyfe to violate the order of appointment and the law of contract. **March 11, 2006 opinion in Case N$^{\underline{0}}$ 04CA1161.** Accordingly, the trial court's May 4th 2004 Order was vacated. **[event ID # 431].**

The trial court has yet to comply with that mandate. This is where the mandate rule, a corollary to law-of-the-case, applies: The mandate rule precludes reconsideration of a claim previously rejected and affirmed on appeal. "[A] lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid to rest." *Federal Commc'n Comm'n v. Pottsville Broad. Co.,* 309 U.S. 134, 140 (1940)). "An inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R.,* 334 U.S. 304, 306 (1995)). After an appellate court has decided a case and remanded to a lower court, the latter court "is bound by the decree as the law of the case; and must carry it into execution . . . . That court cannot vary it, or examine it for any other purpose than execution; . . . . or review it, even for apparent error, upon any matter decided on appeal." *In re Sanford Fork &Tool Co.,* 160 U.S. 247, 255 (1895)). *See also In re Roberts,* 846 F.2d 1360, 1363 (Fed. Cir.1988) ("Unlike the authority to reconsider its own rulings, a district court is without choice in obeying the mandate of the appellate court."); *Exxon Corp. v. Untied States,* 931 F.2d 874, 877n.7 (Fed. Cir. 1991) (mandate constitutes law of the case on issues that were either explicitly or implicitly decided by the appellate tribunal).

A trial court acting on a remand order, may not reexamine any issues that were addressed either explicitly or implicitly by the appellate court. The only exceptions to this are (1) a dramatic change in controlling legal authority; (2) significant new evidence that was not earlier obtainable through due diligence but has since come to light; or (3) if blatant error from the prior decision would result in a serious injustice if uncorrected. *Grigsby v. Barnhart,* 294 F.3d 1215, 1219 n.4 (10th Cir. 2002).

Neither Bill Fyfe nor mother has demonstrated that any of these exceptions are present to justify the trial court's failure to comply with the mandate in 04CA1161. The balance of the issues have not been fully decided, because the trial judge has not yet addressed the specific ethical allegations against Bill J. Fyfe by applying the applicable law to the facts of the case, as the Appeals Court had instructed in 04CA1986.

MOTHER'S ATTEMPT TO CONFUSE THE AUGUST 2003 RECUSAL MOTION WITH THE AUGUST 2004 MOTION FOR SUBSTITUTION OF JUDGE SHOULD NOT BE WELL TAKEN

In order to avoid repetition as much as possible, father hereby incorporates his Reply in Support of Special Appearance and would direct the Court to that Reply for the bulk of arguments by father. Specifically, father's August 16, 2004 Motion for Substitution of Judge **[ICON event ID # 357]** containing facts not previously alleged and containing new evidence under Rule 59(d) has not been denied, has not been ruled upon, has not been appealed and has not been affirmed and, therefore, is not bound by *res judicata,* law-of-the-case, collateral estoppel or any other preclusion doctrine.

MOTHER'S ATTEMPT TO OBFUSCATE THE APPEALS COURT'S THREE (3) MANDATES AND INSTRUCTIONS SHOULD NOT BE WELL TAKEN

In order to avoid repetition as much as possible, father hereby incorporates his Reply in Support of Special Appearance and would direct the Court to that Reply for the bulk of

arguments by father. Specifically, mother attempts to mislead the court into believing that there were only two (2) appeals. In fact, there were three (3), as follows:

(1) 03CA1825 (affirmed in part; reversed in part; dismissed in part; and remanded with instructions). The mandate appears in the Register of Actions as Event # 420, and father requests that the Court take judicial notice of the same.

(2) 04CA1161 (Order Reversed and Case Remanded with Directions) The mandate appears in the Register of Actions as Event # 431, and father requests that the Court take judicial notice of the same.

(3) 04CA1986 (Order Vacated and Case Remanded with Directions) The mandate appears in the Register of Actions as Event # 432, and father requests that the Court take judicial notice of the same.

Contrary to mother's protestations to the contrary, these mandates were not "simply minor remands."

MOTHER'S REQUEST FOR ATTORNEYS FEES UNDER § 13-17-102(2)

Rule 11 and Section 13-17-102 have similar purposes —both impose sanctions against a party or its attorney for pursuing groundless or frivolous claims. *In re Application of Water Rights of Park County Sportsmen's Ranch,* 105 P.3d 595 (Colo. 2005). These rules are not mutually exclusive —a party may be subject to both Rule 11 and an award of attorneys fees pursuant to § 13-17-102(2). *Id.* A claim is substantially frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense, whereas meritorious actions that prove unsuccessful and good faith attempts to extend, modify, or reverse existing law are not. *W. United Realty, Inc. v. Isaacs,* 679 P.2d 1063, 1069 (Colo. 1984).

Mother has presented no "rational argument" based on either the evidence or the law in support of her claims and, consequently, her request for attorney fees should not be well taken. Her response constitutes a sham pleading replete with confusion of legal principles and distortion of real facts and events and, which is an embarrassment to those, who endeavor to bring dignity and esteem the practice of law. Moreover, mother has not argued anything in her response to overcome the presumption of Section 13-17-102(6), circumscribing awards of attorney fees on *pro se* parties, who, in good faith, apply to the Court for relief under cognizable legal principles. Instead, the responsive pleading prepared by opposing counsel has been interposed for the improper purposes of harassment and to create needless increases in the cost of litigation for her financial gain. (Grotman and Thomas, 1990).

First, father requests that mother's attorney be required by the court to attend at least eight (8) CLE credit-hours of training on civil procedure and preclusion doctrines as an appropriate sanction under Rule 11. Second, father may be entitled to attorney fees for addressing the substance of mother's frivolous response. Father is a para-professional member of several state bar associations, professional paralegal associations and legal technology associations. Father specializes in electronic discovery consulting, computer forensics, law practice management software, digital briefs, computer animations for trial support and other specialized legal technology services. Although attorney fees are ordinarily not available to *pro se* persons (*Smith v. Furlong,* 976 P.2d 889 (Colo. App. 1999)), paraprofessional fees are recoverable as costs and/or attorney fees. *See Robinson v. Colo. State Lottery Comm'n,* __P.3d__ (Colo.App. No. 04CA1785, May 4, 2006) ("a division of this court has specifically approved of such an award [of fees for paralegal services]. Similarly, we note that the supreme court has also allowed for the

recovery of time charged for paralegal services. Thus, we conclude that the trial court did not err in allowing these charges") (citing *Newport Pac. Capital Co. v. Waste,* 878 P.2d 136 (Colo. App. 1994); *Am. Water Dev., Inc. v. City of Alamosa,* 874 P.2d 352 (Colo. 1994)).

Father requests that, after the Court addresses the pending Special Appearance and Motions under Rules 97 and 98, that the Court rule on the issues of law concerning the applicability of Rule 11 and Section 13-17-102 to the responsive pleading signed and submitted by mother's attorney. If the Court determines that these authorities apply, father will submit an Affidavit of Fees.

WHEREFORE, father respectfully requests that Bill J. Fyfe be disqualified from his role as child and family investigator; **that Bill J. Fyfe be removed from the court's list of approved experts** (child and family investigators, parenting coordinators, mediators, arbitrators, *etc.*); for judgment against Bill J. Fyfe and in favor of Sean L. Harrington in the amount of $8,797.50 (exclusive of pre and post judgment interest) and for both pre and post judgment interest, thereon. Father further requests that the standards of Rule 11 and Section 13-17-102 be applied against the responsive pleading prepared and signed by opposing counsel, Madeline Wilson; that the response be stricken pursuant to Rule 12(f); and for an award of costs and attorneys fees in favor of father.

Respectfully submitted this 18th day of February, 2007.

Sean L. Harrington, respondent

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of February 2007, I mailed a true and accurate copy of the foregoing Reply via pre-paid first class mail addressed as follows:

Jefferson County District Court
100 Jefferson County Parkway
Golden, CO 80401

and by facsimile to: Law Office of Madeline Wilson at: 303-321-3196