

DISTRICT COURT, JEFFERSON COUNTY,
COLORADO
100 Jefferson County Parkway
Golden, CO 80401

In re the Marriage of:

**CHRISTY HARRINGTON, a/k/a CHRISTY RYAN,
n/k/a CHRISTY RYAN,**

Petitioner,

and

SEAN HARRINGTON,

Respondent.

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Case Number: 99-DR-3717

Div. 9 Ctrm: 5F

**SPECIAL ADVOCATE WILLIAM J. FYFE, ED.D'S RESPONSE TO RESPONDENT
SEAN HARRINGTON'S MOTION FOR SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, JUDGMENT ON THE PLEADINGS**

Special Advocate William J. Fyfe Ed.D, through his attorneys, Jaudon & Avery LLP, respectfully submits his response to Respondent Sean Harrington's Motion for Summary Judgment or, in the Alternative, Judgment on the Pleadings, and in support states as follows:

INTRODUCTION

In its unpublished opinion issued in *In re Marriage of Harrington*, No. 07CA0379 (Colo.

App. May 29, 2008), the Court of Appeals remanded this case for: (1) reconsideration of Respondent's motion to disqualify the Special Advocate; and (2) a determination of whether the Special Advocate's fees have been allocated equally per the Court of Appeals' ruling in *In re Marriage of Harrington*, No. 04CA1161 (Colo. App. Mar. 6, 2006). On September 17, 2008, this Court entered an order consistent with the Court of Appeals' opinion ordering Respondent to set a hearing on his motions to reconsider filed on May 18, 2004, June 9, 2004, and July 30, 2004.

Though this Court already ordered a hearing regarding Respondent's motions to reconsider, on October 2, 2008, Respondent filed a Motion for Summary Judgment or, in the Alternative, Judgment on the Pleadings (the "Motion for Summary Judgment"). In his Motion for Summary Judgment, Respondent contends that he is entitled to judgment as a matter of law because Petitioner and the Special Advocate never responded to his various motions to reconsider. *Motion for Summary Judgment at 11-12*. He also contends that it is undisputed that Dr. Fyfe breached an enforceable contract between himself and the Respondent regarding the payment of fees, *Id. at 12-13*, that Dr. Fyfe's report had inappropriate references to the fee dispute and Respondent's grievance, *Id. at 13*, that the report lacked support for its conclusions about Respondent's mental health and parenting skills, *Id. at 13-15*, that Dr. Fyfe asked Respondent to waive his claims in exchange for a favorable recommendation, *Id. at 15-16*. Based on this purportedly unethical conduct, Respondent seeks sanctions including a return of fees paid to Dr. Fyfe, and payment of Respondent's expert costs and attorney fees. *Id. at 16*. Respondent also seeks declaratory judgments that Dr. Fyfe's conduct violated Chief Justice Directive 04-08, the APA Code of Conduct Standards, and C.R.S. § 12-42-222(1)(g), that Dr. Fyfe's report is inadmissible under *Daubert*, and that Fyfe's conduct was beyond the scope of his appointment.

Dr. Fyfe agrees with Respondent in one respect, that is, that no hearing is necessary to resolve Respondent's claims against Dr. Fyfe. Those claims all fail as a matter of law. Accordingly, the Court should enter judgment as a matter of law, not in favor of the Respondent, but in favor of the Special Advocate.

FACTUAL BACKGROUND

The current dispute in this case, at its most basic level, boils down to an argument over an \$845 dollar charge that was assessed against Respondent by the Special Advocate, which Respondent, by his own admission, paid only half of. The remaining allegations raised by Respondent are all secondary to this fee dispute.

Dr. Fyfe was appointed Special Advocate in this case in 2003. Both the Court's appointment order and a subsequent contract executed by the parties indicated that Dr. Fyfe's fees were to be split 50-50. During the performance of his responsibilities as a Special Advocate, Dr. Fyfe reviewed several documents at Respondent's request. *See Exhibit A, Letter from Dr. Fyfe to Judge Tidball dated 4/22/2004 at 3-5, Appendix A.* Because Dr. Fyfe spent substantial time reviewing these documents at the Respondent's request, he felt that Respondent should be responsible for the additional charges incurred to review the materials. *Id. at 1.* On May 4, 2004, Judge Tidball issued an order requiring Respondent to pay the \$845.00 in fees incurred for reviewing documents submitted by Respondent along with all future fees for reviewing documents submitted by Respondent. *Exhibit B, Order dated May 4, 2004.*

Thereafter, Respondent filed several motions to reconsider the Court's May 4, 2004 order and to disqualify Dr. Fyfe and a grievance against Dr. Fyfe. The motions were filed on May 18, 2004, June 9, 2004, and July 30, 2004. They argued, *inter alia*, that Dr. Fyfe engaged in unethical

conduct by assessing fees solely against Respondent and by allegedly leaving an inappropriate voicemail for Respondent, and that Dr. Fyfe should be disqualified, that the monies paid to Dr. Fyfe by Respondent (totaling \$1,422.50) should be refunded, and that Dr. Fyfe or the Petitioner should also reimburse Respondent for costs. *See Motion for Reconsideration of May 4th Order and Disqualification of Bill Fyfe as Special Advocate (May 18, 2004), Motion for Reconsideration of May 4th Order in Light of Newly Discovered Evidence and for Disqualification of Bill Fyfe as Special Advocate (June 9, 2004), and Amended Motion for Reconsideration of May 4th Order in Light of Newly Discovered Evidence and for Disqualification of Bill Fyfe as Special Advocate (July 31, 2004) (Attached as Exhibit C).*¹ Notably, the certificates of service reflect that none of these motions were served on Dr. Fyfe. *See Exhibit C.* Judge Tidball denied these motions.

On June 11, 2004, Dr. Fyfe submitted his report to the Court. At the end of that report, Dr. Fyfe stated: “[w]ith this report the SA has completed his court appointment and resigns effectively today.” *See also Respondent’s Reply in Support of Entry of Appearance of Counsel on Behalf of CFI Bill Fyfe at 2.* Dr. Fyfe has had no further involvement in this case, with the exception of the current proceedings for sanctions against him.

Subsequently, Respondent allegedly filed a Motion to Reduce Fees to Judgment and also filed a pleading entitled “Father’s Exhibit Supplement to Pending Motion to Reduce Fees to Judgment.” *Supplement Attached as Exhibit D.* The Supplement (and presumably also the motion) requested that the Court enter judgment on the pleadings in favor of Respondent for (1) fees paid to Dr. Fyfe; (2) fees paid to expert witness Dana Cogan; (3) attorney fees paid to Karen Renne, Ph.D.;

¹ Counsel for Dr. Fyfe downloaded these pleadings from Respondent’s website (<http://www.knowyourcourts.com/Harrington/99DR3717.htm>) (last visited on 10/20/08) after Respondent filed his Motion for Summary Judgment on October 2, 2008.

and (4) attorney fees for prevailing on two appeals. *Id.* This was Respondent’s first request for attorney fees. The certificate of mailing reflects that the Supplement was not served on Dr. Fyfe. *Id. at 2.*²

On May 29, 2008, the Court of Appeals issued its opinion vacating the Court’s orders denying Respondent’s motions for reconsideration and to disqualify Dr. Fyfe and remanding the case for: (1) reconsideration of Respondent’s “motion to disqualify under C.R.C.P. 60(b)(5);” and (2) determination of whether the Court had divided the Special Advocate fees equally between the parties. *In re Marriage of Harrington*, No. 07CA0379 (Colo. App. May 29, 2008) (*Harrington IV*) at 7-8. The Court of Appeals noted that the remainder of the case had been transferred to Texas under the Uniform Child Custody Jurisdiction Enforcement Act, C.R.S. § 14-13-101, *et seq.* This Court subsequently ordered a hearing to deal with the issues remanded by the Court of Appeals.

On October 2, 2008, Respondent filed a Motion for Summary Judgment or, in the Alternative, Judgment on the Pleadings. That motion states *inter alia* that Respondent is entitled to sanctions including \$8,795.00 from Dr. Fyfe, “including return of the fees father paid to [Dr.] Fyfe, reimbursement for father’s expert costs and attorney fees necessitated by [Dr.] Fyfe’s conduct...” *Motion for Summary Judgment at 7.* It also states that Respondent is entitled to a declaratory judgment against Dr. Fyfe.

ARGUMENT

I. RESPONDENT’S REQUEST FOR DISQUALIFICATION IS MOOT.

Among the relief requested in Respondent’s May 18, 2004, June 9, 2004 and July 31, 2004

² The Motion to Reduce Fees to Judgment is not available on Respondent’s website, however, upon information and belief, Dr. Fyfe was not served with a copy of that motion.

motions is that Dr. Fyfe be disqualified from this case. *Exhibit C*. The Court should deny this request for relief because Dr. Fyfe has already withdrawn from the case and the request is therefore moot.

“The mootness doctrine prevents a court from deciding a case when there is no actual or existing controversy.” *Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008) (citation and internal quotation omitted). “When issues presented in litigation become moot because of subsequent events, an appellate court will [generally] decline to render an opinion on the merits of an appeal.” *Archibold v. PUC*, 58 P.3d 1031, 1036 (Colo. 2002) (quotation omitted). “A case is moot when the relief sought, if granted, would have no practical legal effect.” *State Bd. of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 970 (Colo. 1997). Thus, where a party has already been awarded the relief that party seeks, the party’s request for relief is moot. *Id.* at 971 (request for injunction to stop board from denying license was moot where license had already been restored); *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 427 (Colo. 1990) (appeal of dissolution order and order appointing receiver mooted where, by the time case was heard in the Court of Appeals, corporation was already in the process of dissolution).

Here, Respondent’s request for Dr. Fyfe’s disqualification from this case is moot because Dr. Fyfe resigned from his role as Special Advocate in this case when he issued his report on June 11, 2004. In fact, as the Court of Appeals found, the domestic relations proceeding has been transferred to Texas under the Uniform Child Custody Jurisdiction Enforcement Act. *Harrington IV* at 4. An order by the Court disqualifying Dr. Fyfe from this case “would have no practical legal effect.” *State Bd. of Chiropractic Examiners*, 935 P.2d at 970. Indeed, Respondent has, in essence, already been granted the relief requested because Dr. Fyfe resigned four years ago and the case has

been transferred to Texas. Therefore Respondent's request that Dr. Fyfe be disqualified is moot and should be denied.

II. RESPONDENT'S REQUEST FOR RELIEF BASED ON BREACH OF CONTRACT AND REQUEST FOR EQUAL ALLOCATION OF DR. FYFE'S ADDITIONAL FEES IS MOOT.

Respondent discusses, at some considerable length, Dr. Fyfe's charge to Respondent of \$845 for work performed reviewing several documents submitted by Respondent. *Motion for Summary Judgment at 3-4*. Among other things, Respondent contends that this bill constituted a breach of contract and the Court's order of appointment. *Motion for Summary Judgment at 12-13*.

Here, however, it is undisputed that Respondent only paid half of the \$845, as ordered by the Court of Appeals. *Motion for Summary Judgment at 3-4* ("Father, relying on the August 21, 2003 order and on [Dr.] Fyfe's contract for services, which specified that he would pay fifty percent of 'any additional fees,' paid one-half of the outstanding \$845 on May 7, 2005."). Therefore, any claim that Dr. Fyfe breached the contract or the order of appointment by billing Respondent for the full amount (in conformity with Judge Tidball's order) is moot because Respondent never paid the full amount. Further, to the extent Respondent's other requests for relief, such as his request for sanctions based on unethical conduct, are based upon Dr. Fyfe's bill to Respondent for the full \$845, those requests are likewise moot because Respondent, by his own admission, never paid the full amount. Moreover, this Court should not sanction Dr. Fyfe for billing Respondent in conformity with Judge Tidball's order of May 4, 2004, which ordered Respondent to pay the full \$845, even if that order was subsequently reversed by the Court of Appeals. *See Exhibit B*.

III. THERE IS NO LEGAL BASIS FOR RESPONDENT'S REQUEST FOR A REFUND OF FEES OR AN AWARD OF ATTORNEY FEES AND EXPERT WITNESS COSTS BASED ON DR. FYFE'S ALLEGEDLY UNETHICAL CONDUCT.

Respondent also requests that the Court refund all of the fees paid to Dr. Fyfe, and require Dr. Fyfe to pay Respondent's expert witness fees and attorney fees. There is no legal basis for those requests.

Colorado follows the American Rule which makes parties "responsible for their own costs of litigation." *Kuhn v. State*, 924 P.2d 1053, 1057 (Colo. 1996); *Sotelo v. Hutchens Trucking Co.*, 166 P.3d 285, 287 (Colo. Ct. App. 2007). Under the American Rule, litigants may not recover legal expenses, including attorney fees, in the absence of a "specific contractual, statutory, or procedural rule providing otherwise." *City of Aurora v. Simpson (In re Water Rights of Park County Sportsmen's Ranch)*, 105 P.3d 595, 618 (Colo. 2005); *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1191 (Colo. 2001); *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 150 (Colo. App. 2003).

Here, Respondent has not identified any contractual provision, statute, or procedural rule which authorizes an award of his litigation expenses or attorney fees. Accordingly, he may not recover his litigation expenses or fees. *City of Aurora*, 105 P.3d at 618.

In support of his request for a refund, fees, and costs, Respondent relies heavily on an inaccurate interpretation of the holding in *In re Marriage of Redmond*, 131 P.3d 1167 (Colo. App. 2005). In that case the parties stipulated to the appointment of Smith as a special advocate. *In re Marriage of Redmond*, 131 P.3d at 1168. A crucial fact that Respondent fails to mention is that Smith was an attorney. *Id.* Subsequently, one of the parties asked the court to disqualify Smith and appoint a new Special Advocate based upon Smith's alleged alteration of dates on medical releases. *Id.* In response to the motion, Smith withdrew. *Id.* During a hearing, Smith admitted that she had changed the dates without requesting permission, but refused to disclose any further information.

Id. The court “lost confidence” in Smith, and had the parties file briefs regarding whether Smith should be required to refund her fees. *Id.* Subsequently the court determined Smith engaged in unethical conduct and, based upon that, the court ordered Smith to refund her fees and declined to read Smith’s report. *Id.* On appeal, contrary to Respondent’s recitation of the case, the Court of Appeals *vacated* the trial court’s refund of fees. *Id.* at 1172. In its analysis, the Court noted:

Nothing in the former § 14-10-116, the current § 14-10-116.5, or CJD 97-02 expressly mentions a court’s power to deny a special advocate his or her fees if the court determines that it has lost confidence in the special advocate or that the special advocate’s report is of no value.

Id. at 1169. However, the Court of Appeals also noted that trial courts have “inherent supervisory powers over **attorneys** as officers of the court.” *Id.* (emphasis added). Relying on case law from other jurisdictions permitting a court to deny or refund attorney fees when an attorney violates rules of professional conduct, the Court concluded “that a court may order **an attorney special advocate** to refund his or her fees, in whole or in part, under its inherent powers for violation of the Colorado Rules of Professional Conduct.” *Id.* at 1170 (emphasis added). Because it could not determine from the record whether Smith violated a rule of professional conduct, the Court remanded the case to the trial court for an evidentiary hearing on that issue. *Id.*

Respondent’s attempt to apply *In re Marriage of Redmond* to this case fails because the case simply does not support the relief Respondent requests. A crucial distinction is that Dr. Fyfe is not an attorney and, as a result, *In re Marriage of Redmond* does not authorize the imposition of sanctions against him. *In re Marriage of Redmond* did not hold that a non-attorney special advocate (like Dr. Fyfe) may be required to pay one party’s expert witness costs or attorney fees as a sanction, nor did it hold that a non-attorney special advocate may be required to refund fees. Indeed, the only basis the Court of Appeals found for an order to refund Special Advocate fees was

the trial court's inherent supervisory authority over attorneys. Accordingly, *In re Marriage of Redmond* does not entitle Respondent to a refund of Dr. Fyfe's fees, payment of Respondent's expert witness costs, or payment of Respondent's attorney fees.

Respondent cites two other authorities which he argues support his request for a refund, costs and attorney fees: C.R.S. § 14-10-116.5(3) and Chief Justice Directive 04-08. The Court of Appeals expressly concluded that the language of C.R.S. § 14-10-116.5(3) which provides that "[t]he court shall enter an order for costs, fees, and disbursements in favor of the child's legal representative appointed pursuant to subsection (1) of this section" did not permit a court to deny a special advocate's fees. *In re Marriage of Redmond*, 131 P.3d at 1169. The other, Chief Justice Directive 04-08 does not authorize a court to refund a special advocate's fees, nor does it authorize the imposition of other sanctions. *See Chief Justice Directive 04-08*. Additionally, that Directive is inapplicable to this case because it became effective on September 1, 2004, months after Dr. Fyfe completed his report and resigned. *Id.* Indeed, under the prior version of C.R.S. § 14-10-116.5, special advocates were required to comply with Chief Justice Directive 97-02, not Chief Justice Directive 04-08. *See Colo. Sess. Laws 2005, ch. 244 at 958*. There is no indication that Chief Justice Directive 04-08 applies retroactively to conduct that took place prior to its effective date, and Respondent offers no other explanation as to how it applies to this case.

To the extent that Respondent requests an award of attorney fees for work he has done on this case, he is not entitled to such an award. Colorado law provides that: "a nonattorney pro se litigant is not entitled to recover attorney fees..." *Wimmershoff v. Finger*, 74 P.3d 529, 530 (Colo. App. 2003). Similarly, federal courts have held that a pro se party (even an attorney who represents himself) cannot recover attorney fees because Rule 11 authorizes recovery of only attorney fees that

the party actually incurred. *Massengale v. Ray*, 267 F.3d 1298, 1303 (11th Cir. 2001); *Committee v. Dennis Reimer Co., L.P.A.*, 150 F.R.D. 495, 502 (D. Vermont 1993); accord *Pickholtz v. Rainbow Technologies, Inc.*, 284 F.3d 1365, 1375-76 (Fed. Cir. 2002) (interpreting Fed.R.Civ.P. 37 that contains similar language as that which is contained in Rule 11, the court found that a pro se party who was an attorney and a computer consultant could not recover attorney fees because he did not incur those fees). Therefore, notwithstanding his other requests, Respondent is not entitled to an award of attorney fees for his own work because he is not an attorney and is pro se. *Wimmerstaff*, 74 P.3d at 530.

Finally, to the extent that Respondent seeks to impose tort liability on Dr. Fyfe, Dr. Fyfe is immune. In *Awai v. Kotin*, 872 P.2d 1332, 1336 (Colo. App. 1993), the Court held that “[c]ourt-appointed therapists have been afforded immunity for their evaluations and recommendations.” The Court noted in *Awai*, this immunity exists because “[a]nything less than absolute immunity for making evaluations and recommendations could make psychologists and other experts reluctant to accept appointments or, if accepted, could inhibit full disclosure of pertinent information and taint recommendations.” 872 P.2d at 1336. The legislature recognized this quasi-judicial immunity when it amended the statute governing special advocates. Colo. Sess. Laws 2005, ch. 244, p. 960, § 3 (“The general assembly hereby finds and declares that, due to the need to continue to encourage court appointments of persons to serve the best interests of children in domestic relations proceedings involving the allocation of parental responsibilities, it is the intent of the general assembly that quasi-judicial immunity continue to be granted for a child and family investigator acting within the course and scope of an order of appointment pursuant to existing Colorado case law.”).

IV. THE COURT SHOULD NOT GRANT SUMMARY JUDGMENT ON THE BASIS OF WAIVER BECAUSE RESPONDENT FAILED TO SERVE DR. FYFE WITH HIS MAY 18, 2004, JUNE 9, 2004, AND JULY 31, 2004 MOTIONS.

In support of his Motion for Summary Judgment, Respondent relies on an argument that Dr. Fyfe waived his ability to respond to Respondent's May 18, 2004, June 9, 2004 and July 31, 2004 Motions, *Motion for Summary Judgment at 11-12*. However, this argument makes no sense because Respondent did not serve Dr. Fyfe with any of those motions.

A request for sanctions against Dr. Fyfe implicates his due process rights and requires, among other things, notice of the charges against him.³ *Eisenberg v. University of New Mexico*, 936 F.2d 1131, 1134 (10th Cir. 1991); *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987). Colorado law requires that all parties be served with "every written motion other than one that may be heard ex parte." C.R.C.P. 6(a). C.R.C.P. 121 § 1-15(1) further requires that "one original and one copy of all motions and briefs shall be filed with the court, and a copy served as required by law." (emphasis added). Indeed, a response to a motion is not due until 15 days after the responding party is served with a motion. C.R.C.P. 121 § 1-15(1).

Here, the certificates of mailing attached to each motion reflect that the motions were served on the Jefferson County District Court, the Law Office of Madeline Wilson, and Jefferson County D.S.S. *See Exhibit C*. Dr. Fyfe's name and address, and his counsel's name and address, do not appear on any of the certificates of mailing. *Id.* Because Dr. Fyfe was never served with the motions, he was never obligated to respond to them. C.R.C.P. 121 § 1-15(1). Accordingly, the

³ The authorities for this proposition are set forth in more detail in Dr. Fyfe's Response to Respondent's Objection to Entry of Appearance by Counsel on Behalf of the Court's Appointed Child and Family Investigator which is incorporated herein by reference.

Court should reject Respondent's argument that Dr. Fyfe waived his opportunity to respond to Respondent's May 18, 2004, June 9, 2004 and July 31, 2004 Motions (and any other motions not served on Dr. Fyfe that Respondent claims he waived his ability to respond to).

In fact, a failure to serve a motion on a party at whom the motion is directed justifies denial of the motion. *See Davila v. Secure Pharm. Plus*, 329 F. Supp. 2d 311, 314 (D. Conn. 2004) (motion for prejudgment relief denied where *pro se* inmate failed to serve motion on defense counsel). This is particularly true of a motion for sanctions. *See e.g., Cadle Co. v. Pratt (In re Pratt)*, 524 F.3d 580, 588 (5th Cir. 2008) (bankruptcy court properly denied Cadle Co's motion for sanctions against opposing counsel where Cadle Co. failed to serve opposing counsel with motion as required by the rules). Further, where a party fails to serve pleadings as required by Rule 5, those pleadings may not provide the basis for a motion for summary judgment. *See Thorne v. Lelles*, 463 F. Supp. 2d 760, 770 (S.D. Ohio 2006), *rev'd in part on other grounds*, 243 Fed. Appx. 157 (6th Cir. 2007) (party could not use exhibits attached to pleadings not served on adverse party in response to motion for summary judgment). Indeed, where an individual's due process rights require that they be notified of civil proceedings, a failure to properly serve that individual may even deprive the court of jurisdiction. *See Gilford v. People*, 2 P.3d 120, 128 (Colo. 2000) (where due process required service of petition on respondent to long-term civil commitment proceeding and service did not take place, court lacked jurisdiction over respondent). Because Respondent never served Dr. Fyfe with the motions for reconsideration and disqualification dated May 18, 2004, June 9, 2004 and July 31, 2004, those motions should be denied.

V. RESPONDENT IS NOT ENTITLED TO A DECLARATORY JUDGMENT.

Respondent also requests that the Court enter several declaratory judgments in his favor that

are outside of the Court of Appeals' directions. Respondent should not be able to pursue declaratory relief in this proceeding.

The pronouncement of an appellate court on an issue in a case presented to it along with all [r]ulings logically necessary to the holding of the appellate court" constitute the law of the case. *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983). "The law of the case as established by an appellate court must be followed in subsequent proceedings before the trial court." *Id.* Where "an appellate court remands a case with specific directions to enter a particular judgment or to pursue a prescribed course, a trial court has no discretion except to comply with such directions." *Musgrave v. Industrial Claim Appeals Office*, 762 P.2d 686, 687-688 (Colo. App. 1988). If a trial court makes findings on issues not remanded by the appellate court, it exceeds the scope of the remand. *Young v. Golden State Bank*, 41 Colo. App. 480, 481-83, 589 P.2d 1381, 1382-83 (1978) (where case was remanded to trial court for findings on two issues and trial court made findings on another issue, that finding was outside the scope of the mandate and trial court's findings were reversed)

Here, the Court of Appeals specifically remanded this case for further proceedings to (1) "reconsider father's motion to disqualify under C.R.C.P. 60(b)(5);" and (2) to determine whether special advocate fees have been "allocated equally between the parties." *In re Marriage of Harrington*, No. 07CA0379 at 7-8. These are the only issues before the Court. As the Court of Appeals noted the remainder of the case has actually been transferred to Texas under the Uniform Child Custody Jurisdiction Enforcement Act, C.R.S. §§ 14-13-101, *et seq.* *Id.* at 4. Given the opinion of the Court of Appeals, this Court should only consider the remanded issues and should not permit Respondent to assert declaratory judgment claims or other claims for relief. Permitting him to do so would exceed the scope of the remand, which did not include determination of

Respondent's requests for declaratory judgment.

Further, Respondent has not demonstrated that he has standing to assert claims for declaratory relief. To be entitled to declaratory relief, a claimant must first demonstrate an injury in fact to a legally protected interest. *Community Tele-Communications, Inc. v. Heather Corp.*, 677 P.2d 330, 334 (Colo. 1984). Where a claimant alleges a speculative or indirect injury, that claimant does not have standing. *See Cloverleaf Kennel Club, Inc. v. Colorado Racing Com.*, 620 P.2d 1051, 1057 (Colo. 1980).

Here, Respondent does not allege that he has suffered any direct injury from Dr. Fyfe's conduct. Indeed, the only injury that Respondent raises which is in any way attributable to Dr. Fyfe's allegedly unethical conduct is wholly indirect and speculative. Respondent alleges that:

While the record does not indicate that the trial court adopted—or was asked to adopt—[Dr.] Fyfe's recommendations, mother has relied on his report to justify her continuing refusal to facilitate any contact between the child and father. Thus, it cannot, therefore, be presumed that [Dr.] Fyfe's report has not affected father's ability to resume relations with his child.

Motion for Summary Judgment at 17. Respondent's allegation makes clear that any injury attributable to Dr. Fyfe's conduct is both speculative, in that Respondent is not sure whether or not the Court accepted Dr. Fyfe's recommendations, and also indirect, in that Respondent's injury is caused by Petitioner's reliance on Dr. Fyfe's report. Accordingly, because the only injury alleged is speculative and indirect, Respondent lacks standing to request a declaratory judgment. *Cloverleaf Kennel Club, Inc.*, 620 P.2d at 1057.

Additionally, Respondent's specific requests for declaratory judgment are without legal basis. First, Respondent seeks a declaratory judgment "[t]hat [Dr.] Fyfe's conduct violated Chief Justice Directive 04-08." *Motion for Summary Judgment at 17.* However, as discussed above, that

Chief Justice Directive became effective on September 1, 2004, months after Dr. Fyfe completed his report and resigned, and Dr. Fyfe was required by statute to comply with a different Chief Justice Directive, 97-02. *See Chief Justice Directive 04-08*; Colo. Sess. Laws 2005, ch. 244 at 958. Because there is no indication that Dr. Fyfe's was required to follow Chief Justice Directive 04-08 while executing his court-appointed functions in this case, he could not have violated that Directive. Therefore, Respondent is not entitled to a declaratory judgment.

Second, Respondent seeks a declaratory judgment “[t]hat [Dr.] Fyfe’s conduct violated the applicable APA code of conduct standards and C.R.S. § 12-43-222(1)(g).” *Motion for Summary Judgment at 17*. Respondent’s request for a declaratory judgment that Dr. Fyfe violated the APA code of conduct standards is contrary to the declaratory judgment statute. C.R.S. § 13-51-106 (2007) provides that:

Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

The declaratory judgment statute does not permit a person to request a declaration that an individual violated standards imposed by a professional association, such as the APA. Those standards are not an “instrument, statute, ordinance, contract, or franchise” under the statute. C.R.S. § 13-51-106.

And, Respondent is not a person whose rights are affected by the APA code of conduct, so even if it falls within the declaratory judgment statute, he may not request a declaratory judgment.

Further, the portion of Dr. Cogan’s report upon which Respondent relies in support of his argument does not state that Dr. Fyfe violated the APA Code of Conduct. *See Motion for Summary Judgment at 14*. Even if it did, Dr. Cogan’s report may not be used as a basis for summary

judgment because “[u]nsworn expert witness reports are not admissible to support or oppose a motion for summary judgment.” *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008). Nor may the Court, as Respondent requests, take judicial notice of Dr. Cogan’s report because that report is not “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” C.R.E. 201.

With regard to C.R.S. § 12-43-222(1)(g), Respondent does not even explain why Dr. Fyfe’s conduct violated that provision. The question of whether Dr. Fyfe may be subjected to discipline for violating that provision must be determined pursuant to that section by the Board, not this Court. *See* C.R.S. § 12-43-224 (2008).

Third, Respondent seeks a declaratory judgment “[t]hat [Dr.] Fyfe’s Report is inadmissible under the *Daubert* (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) principles.” *Motion for Summary Judgment at 17*. This request is also contrary to C.R.S. § 13-51-106 because that provision does not authorize a court to declare whether a Special Advocate’s report is inadmissible under a flexible court-created test like *Daubert*. While C.R.S. § 13-51-106 permits a court to issue a judgment declaring a party’s rights under an “instrument, statute, ordinance, contract, or franchise,” C.R.S. § 13-51-106 it does not permit a court to issue a declaratory judgment as to a party’s rights in a judicial proceeding. There is also no requirement that a special advocate’s report be admissible evidence; indeed, to the contrary, the report is generally filed under seal. And, Colorado does not require courts to consider or apply the *Daubert* factors. *People v. Shreck*, 22 P.3d 68, 83 (Colo. 2001) (“The factors mentioned in *Daubert* and by other courts may or may not be pertinent, and thus are not necessary to every CRE 702 inquiry.”). Therefore, Respondent is not

entitled to a declaratory judgment.

Finally, Respondent seeks a declaratory judgment “[t]hat [Dr.] Fyfe’s conduct was outside the scope of his court appointment.” *Motion for Summary Judgment at 17*. Again, Respondent’s request is contrary to C.R.S. § 13-51-106 because that provision does not authorize a court to declare whether a Special Advocate has acted outside the scope of another judge’s order. Therefore, Respondent is not entitled to declaratory relief.

CONCLUSION

For all of the reasons set forth above, Dr. Fyfe requests that the Court deny Respondent’s Motion for Summary judgment and deny Respondent’s motions to reconsider and to disqualify Dr. Fyfe filed on May 18, 2004, June 9, 2004, and July 30, 2004. The Court should also specifically deny Respondent’s request for a refund of Dr. Fyfe’s fees, for an award of expert witness costs, and for attorney fees.

Dated this 20th day of October, 2008.

JAUDON & AVERY LLP

By: /s/ David H. Yun

In accordance with C.R.C.P. 121 §1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing ***SPECIAL ADVOCATE WILLIAM J. FYFE, ED.D'S RESPONSE TO RESPONDENT SEAN HARRINGTON'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, JUDGMENT ON THE PLEADINGS*** was electronically filed and served via E-Filing with LexisNexis File and Serve on October 20, 2008, to:

Brett N. Huff
Huff & Leslie, LLP
2480 Gray Street
Denver, Colorado 80214

Sean Harrington
P.O. Box 351855
Westminster, CO 80035

A correct copy of the foregoing was also e-mailed to the Respondent, per his request, at the following e-mail address:

esoxlucios@msn.com

/s/ Jared Ellis _____