

<b>First Judicial District Court</b> 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6130	↑ <b>COURT USE ONLY</b> ↑  Case Number: 99DR3717 Division 9
<b>In re the Marriage of:</b>  Petitioner: <b>CHRISTY HARRINGTON,</b> <b>n/k/a   CHRISTY RYAN</b>  and  Respondent: <b>SEAN L. HARRINGTON</b>	
Sean L. Harrington P.O. Box 351855 Westminster, CO 80035	
<b>FATHER’S POST TRIAL BRIEF</b>	

Sean Harrington (“Father”) hereby submits his post-trial brief in the above-captioned cause.

### I. INTRODUCTION

This matter is before the Court on the § 13-17-103(1) hearing held on October 8, 2009. Whereas this case has become a major test of the rights of an aggrieved party to seek redress under the First Amendment’s Petitioning Clause, and the duty of the Court to exercise its inherent powers over officers-of-the-court, the hearing represented a test on the limits this Court will impose, if any, upon exaggeration and exacerbation of fees and disregard of the Rules of Civil Procedure by attorneys appearing before it.

Madeline Wilson (Petitioner’s former counsel-of-record) said to father at the hearing, “*I have spent nearly fifty-thousand dollars on attorney fees because of you.*”<sup>1</sup> The question father asks this Court to consider is whether five years of loss of contact with one’s child — five years that can never be returned— is worth **at least** fifty-thousand dollars.

As mother testified at her September 12, 2009 deposition,<sup>2</sup> the parties to this case (mother and father) are getting along better than they have in **ten years** and father now enjoys a normal, substantive, and healthy relationship with his daughter and a positive co-parenting relationship with mother. The only factor that has changed to explain this is —as mother noted— that Madeline Wilson is no longer personally involved in this case. Shelby,

<sup>1</sup> The statement is paraphrased, as the transcript is not yet available.

<sup>2</sup> The deposition was docketed as an exhibit disclosure on or about October 5, 2009

who is now fourteen and has learned about this case from both her parents, is very angry with Wilson. She believes Wilson deprived her of a happy childhood by cutting her father out of her life for those many years and that Wilson robbed her parents of financial security and peace that would have existed, but for Wilson's personal involvement.

The register-of-actions in this case reveals that, over the last ten years, father moved this Court repeatedly to end Wilson's abuses and personal embroilment in this case. Because Judge Tidball disregarded father's requests with extreme prejudice, she was as responsible as Wilson for destroying the parent-child relationship and eroding the bonds of love and affection that once existed between father and his daughter. Judge Tidball finally recused, noting without amplification that she was disqualified from presiding over this case.

This Court's continuing support of Wilson —perhaps because she is a practicing member of the bar— has not been based on the evidence and has not advanced the interests of justice. Instead, by punishing father's attempts to obtain redress, the Court has undermined the public policy favoring resort to courts (rather than self-help), and has conveyed the clear message that attorney misconduct is permissible — so long as it is cloaked as zealous advocacy.

Wilson's "misconduct in this case goes to the very heart of our legal system and therefore mandates a substantial sanction which will not only deter the respondent but will alert all attorneys that this kind of conduct will not be tolerated." *People v. Kenelly*, 648 P.2d 1065, 1066 (Colo. 1982).

## II. STATEMENT OF FACTS / PROCEDURAL BACKGROUND<sup>3</sup>

On March 7, 2000, Wilson filed a Motion captioned, "*Petitioner's Motion for Limited Contact Between her Counsel and the Respondent.*" Although the Motion was submitted in her client's name, it was for Wilson's sole benefit. Wilson's involvement is again found in § 3.3 of the November 6<sup>th</sup> 2001 stipulated/ordered agreement ("*Stipulation*"), modifying parental responsibilities, granting father liberal parenting time, and resolving all outstanding issues. § 3.3 provided that, "Petitioner's attorney, Madeline Wilson, will dismiss the restraining order she obtained and which is currently in effect against [father]. [Father] will agree to a no-contact order between [Wilson] and [father]." Nevertheless, she obtained another restraining order,<sup>4</sup> **which she incorporated into her client's domestic relations case.**<sup>5</sup>

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<sup>3</sup> **Please note:** Because father has previously made these allegations and provided the evidentiary support, he does not resubmit that evidence. Nevertheless, father has contemporaneously submitted to the Court a fully-hyperlinked version of this brief, which contains links to the evidence.

<sup>4</sup> Since February, 2000, Wilson applied for at least five (5) restraining orders against father, all were denied on the merits, vacated or dismissed.

<sup>5</sup> Register-of-Actions 8/14/2000 minute-entry.

In the only special-advocate report adopted by this Court, the September, 2001 Van-Note Report (which formed the basis of the Stipulation) are the following findings concerning Wilson's involvement **nine years** ago:

The other central issue in this case is the parties' inability to encourage the sharing of love, affection and contact between the other parent and Shelby. The most obvious factor inhibiting contact between Shelby, her mother and father is the restraining order between Ms. Ryan and Mr. Harrington. It is this advocate's observation that the restraining order has been used as a tool to effectively eliminate contact between father and daughter. The restraining order has been relied upon by Ms. Ryan **and her attorney** to create the illusion that Mr. Harrington is somehow dangerous to Shelby, when in fact this is not the case. It is clear that the problem exists between Ms. Ryan, **Ms. Wilson**, and Mr. Harrington, and has nothing to do with any real danger to the child. While the restraining orders served a valid purpose at the time they were issued, in the sense of relieving acute animosity between Ms. Ryan, **Ms. Wilson** and Mr. Harrington, they only work against the best interest of Shelby and have been used a political tool to eliminate Mr. Harrington from his daughter's life. In addition, this advocate can find no written, verbal or behavioral evidence that any real danger exists to Ms. Ryan or **Ms. Wilson** at this time. It seems that the restraining orders are a guise to retaliate against Mr. Harrington for the litigation he has filed against Ms. Ryan and **Ms. Wilson** regarding matters outside this case.

*Id.* at 7. [highlighting added].

An unrelated provision, § 1.14, required mother to inform father of changes in residential address or telephone. In December, 2004, mother relocated to Texas and instructed Wilson to conceal the relocation by providing father with a Colorado address. Unable to locate Shelby, father sent Wilson numerous written requests and certified mail seeking Shelby's whereabouts and school and medical records pursuant to C.R.S. § 14-10-123.8 and for telephone contact pursuant to § 1.10 of the Stipulation . Although Wilson rebuffed father, she e-mailed mother, "*Sean, as Shelby's father, is entitled to all of the information he is requesting,*" and advised how to avoid complying with the Colorado order in Texas.

Father filed for contempt. This Court issued a citation, but father couldn't locate mother.<sup>6</sup> Wilson claimed, "*mother denies avoiding service of process,*" but sent a 12/13/2004 e-mail to mother captioned, "*Has he served you yet?*" and argued that mother couldn't attend the contempt hearing because she would be, "*out of town,*" omitting that mother removed Shelby from the jurisdiction permanently.

At about the same time, a the Colorado Appeals Court opined, "[W]e do not approve of mother's attorney's apparent manipulation of the notice provisions and the rules of civil procedure" (regarding Wilson's abuse of § 14-10-

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<sup>6</sup> Then unaware of the extent of Wilson's aiding-and-abetting, father did not include Wilson in the contempt action.

129(4)).<sup>7</sup> Marriage of Harrington, (N<sup>o</sup> 03CA1825, Dec. 30, 2004) at 6. In response, Wilson e-mailed mother, “*My first reaction, was oh no, ‘what are [the appellate judges] thinking? Then I read and realized I won and [Sean] got a scrap of a bone that actually will choke him to death.’*”

In January, 2005, father accused **both** mother **and** Wilson of hiding Shelby. Although Wilson received the concealment directive, she denied it to this Court. And, to provide pretext in the event the scheme unraveled, Wilson contrived kidnapping-threat allegations, introduced by her January 31, 2005 e-mail to mother entitled, “*For your review – I think Sean has threatened to take Shelby before, right?*”, to which she attached a responsive-pleading draft containing the fabricated allegations (filed later that day). Wilson periodically reminded mother of the scheme *via* several e-mails:

“*You were/are in Texas due to kidnap threats (7/26/2005 e-mail)*

“*tell the[Texas] judge . . . that [Sean] has asked Shelby if he wants him to kidnap her . . . you can tell them you “escaped” to Texas . . . but that he has somehow stalked you to TX (3/07/2005 e-mail)*

“*you are in “hiding” due to threats to kidnap Shelby. (7/26/2005 e-mail)*

After father located Shelby with the help of a private investigator, he asked local police to conduct a welfare-check. This e-mail exchange between Wilson and mother followed:

Madeline,  
I was finally able to open the first document. It looks fine. The police came to the door and took one look at Shelby. He looked a little disbelieving, "Is THAT her?"

*facsinatng, I wonder what THAT meant. Psycho probably told them you keep her chained in the back room drooling and starving. They will get a bead on psycho because he "cries wolf" WAY too much. : )*

In other correspondence, Wilson offered to speak with Texas school officials, and she gave legal advice unrelated to Colorado matters, such as how to prevent the Texas schools from releasing information to father. Wilson advised mother to “*stop praying for him,*” and to “*light candles, burn some incense and send his spirit away*” Another was signed, “*Love, Madeline.*”

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<sup>7</sup> See 08/2009, CLE in Colorado presentation, “*A Judge’s Perspective on Civil Protection Orders and 14-10-129(4) Motions: Imminent Danger or Just a Tactic.*”

Father sued mother and Wilson in federal court. The magistrate recommended dismissal under Younger, explaining, “Plaintiff has adequate remedies in state court” (referring to this dissolution case). *Harrington v. Wilson*, 2006 WL 2724094 (D.Colo. 2006); *Harrington v. Wilson*, 242 Fed. Appx. 514, 2007 U.S. App. LEXIS 17252 (10<sup>th</sup> Cir., 2007) (*rev’d* on other grounds). Subsequently, father sought access to Shelby in Texas state court.<sup>8</sup> In her attempt to taint the proceedings, Wilson contacted the Texas court to warn of father's dangerousness and, upon learning the identify of father’s Texas attorney, she called the attorney’s brother, claiming to be “*very concerned for the safety of [the attorney’s] family,*” and warning that father is mentally ill and dangerous.<sup>9</sup>

Father sued both mother and Wilson in Texas under Tex. Fam. Code § 42.002, *et. seq.* and the common law for conspiracy to conceal a minor child. Wilson filed a special appearance, falsely swearing: “*I have not represented any Texas residents in . . . transactions in the State of Texas . . . All of my actions undertaken in Ms. Ryan's representation occurred in Colorado.*” This prompted a three-month investigation by Colorado’s 18<sup>th</sup> Judicial District Attorney, who concluded that the prosecution couldn’t then establish materiality of Wilson’s false statements (C.R.S. § 18-8-501(1)) because the Texas judge declined to set a hearing based on Wilson’s false swearing. However, the Chief Deputy D.A. noted the offense has no statute-of-limitations and, if a Texas court finds the statements “*could have been*” material, Colorado charges against Wilson will be brought. Based on the September 12<sup>th</sup> 2009 deposition, the District Attorney’s office is reconsidering the matter as of the date of this writing.

Wilson also filed a November 14, 2007 Answer to a State Bar of Texas disciplinary complaint containing other false statements:

I do not know what he is writing about regarding providing advice to a former client in Texas and concerning transactions in Texas . . . I can only assume he is guessing I am providing legal advice to his former wife . . . Ms. Ryan is represented by counsel in Texas and I am not current on Texas Family Law and would not feel comfortable providing such advice.

Wilson denied knowledge of mother’s location, referred to father as a “*terrorist*” and “*homicidal*” and claimed father “*has sent me letters/e-mails/faxes that I believe threatened my life and that of my family . . . As a result of Mr. Harrington’s threats, I have encouraged my children to change their names and move out of state.*” *Id.* She urged father’s “*outrageous claims*” were all the product of a “*self-proclaimed mental illness.*”<sup>10</sup> *Id.*

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<sup>8</sup> In re the interest of S.H., 271<sup>st</sup> Judicial District Court, Texas, N<sup>o</sup> 07-04-274.

<sup>9</sup> Coincidentally, Wilson attended law school with the Texas attorney’s brother.

<sup>10</sup> In *Harrington I, II, and III*, Wilson’s principal arguments were based on this alleged mental illness. In her *Harrington IV* Answer Brief, she urged, “*This information regarding the father's mental ill-*

Wilson wrote mother several e-mails detailing a scheme to imprison father and seeking mother's permission to use the dissolution proceedings to pursue her vendetta. In May, 2007, she obtained a contempt citation regarding § 3.3 of the Stipulation, writing in one e-mail to mother, "*I would like to see him go into lock-down for 180 days.*" Although Wilson intended to serve father at 5/02/2007 appearance in Texas court, she was unable to obtain the citation in time.

After Texas assumed the custody portion of the case under the UCCJEA, mother and father stipulated to an injunction in May, 2007, prohibiting mother from instituting any other custody action. In July, when it became apparent father would be granted access to Shelby in Texas, Wilson filed an "Emergency Motion Regarding Jurisdiction" in this Court, even though mother hadn't lived in Colorado for nearly four years and father hadn't resided there in seven), which omitted mention of the Texas injunction. To deceive this Court, she claimed father was, "*a resident and domiciliary of Colorado*" (*Id.*), though she had argued in federal court that, "*[father] is a nonresident of the State of Colorado.*"

On October 13, 2008 (before father the e-mail evidence was produced), the Texas trial-judge granted Wilson's special appearance, commenting to counsel in chambers: "*I'm just not going to find jurisdiction over a Colorado attorney. If he wants to sue her, he needs to do it in Colorado.*" In November, father obtained e-mail evidence through discovery in the Texas case.

After the Harrington IV remand, this Court ordered father to issue a Notice to Set. Wilson called this Court's division clerk, Juliet Berzsenyi Byerly, complaining that § 3.3 of the Stipulation prohibited father from e-mailing Wilson to clear her calendar. Yet, previously she complained, "*father has failed to confer with the mother's counsel regarding this alleged hearing. The mother's counsel of record was never contacted for the purpose of clearing any dates on her calendar.*" Thus, father sought a declaratory judgment and provided the newly-assigned trial-judge with some factual background. Based on newly-discovered e-mail evidence, father also filed for contempt, which was denied because the magistrate could not locate the relevant order because of a single typographical error in the Motion.<sup>11</sup> Consequently, Wilson was not served (*see* C.R.C.P. 107(c)).

In October, 2008, Wilson retained outside counsel, who entered his appearance in the dissolution matter. Father objected because it codified Wilson's improper role as complaining-witness and no Motion to Intervene had been filed. Nevertheless, Wilson responded to father's Motion for Declaratory Judgment **42 days later** (without leave of the court). All of the motions, responses, and pleadings filed by Huff on behalf of Wilson were disrespectful of the truth, containing numerous materially statements (such as that father had sued Judge Tid-

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*ness is highly relevant in that the Court needs to understand what drives the father so hard.*" The appeals court was not persuaded.

<sup>11</sup> 12/19/2008 minute-order in the register-of-actions.

ball, that father “lost” each and all of his cases against Wilson, *inter alia*). In February, 2009, the trial-court granted Wilson’s January, 2009 Motion to Withdraw, yet Wilson retained “*Petitioner’s Counsel of Record*” on her filings subsequent (and did not serve mother with these).

In a February 24, 2009 Order, this Court denied father’s Motions for declaratory judgment and contempt, concluding the requests were prohibited by a “limited remand,” father’s allegations were “devoid of merit,” the Texas court has jurisdiction, and that father’s filings did not demonstrate fraud or malicious conduct. The Court declined to address the allegations or undisputed evidence, and awarded Wilson’s outside counsel fees, C.R.S. § 13-17-102(6) notwithstanding.

### III. DISCUSSION

#### A. Rule 24 Requirement of a Motion to Intervene

The Court has directed opposing counsel to submit a memorandum of law within thirty days on the requirement of a Motion and pleading under Rule 24. However, because this issue is presently on appeal, the matter should be held in abeyance until the Court of Appeals issues its opinion in 09CA0379 or unless it grants the Motion for Limited Remand that is now pending.

#### B. First Amendment Petitioning Clause and SLAPP

Under the so-called American rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them. It is based upon the high priority accorded free access to the courts and a desire to avoid placing barriers in the way of those desiring judicial redress of wrongs.

As more fully set forth below, because the purpose of father’s Motions was to request this Court to exercise its supervisory authority over Wilson, an officer-of-the-court, the Court’s award of fees under § 13-17-102(2) is unconstitutional, as applied. Further, as father noted in his opening arguments, Wilson is seeking fees for conferring with the Colorado Office of Attorney Regulation whether it was possible to enjoin father from filing any future grievances against Wilson<sup>12</sup> and for conferring with an assistant Colorado Attorney General “*representing the judicial defendants regarding status, outstanding motions and defense strategy.*”

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<sup>12</sup> Huff’s billing records state, “Telephone call to co-defense counsel for Attorney Regulation Counsel regarding contacting her client to determine if we could enter into binding agreement with Harrington for no future grievances against [Wilson]. Telephone call to [malpractice claims adjuster] regarding same.”

Because these activities had nothing, whatever, to do with this Court's Order on Remand, and because opposing counsel is seeking fees either in response to father's petitioning activities or to prevent him from petitioning in the future, Wilson's request for fees is tantamount to reprisal in the form of punitive sanctions for father's lawful application for redress regarding Wilson's misconduct. This Court should be foreclosed, as a matter of law, from participating in any way that would have that effect.

Strategic Lawsuits Against Public Participation, or "SLAPPs" are actions filed in response to or retaliation for citizen communications with government entities and employees. SLAPP suits come in many forms camouflaged as ordinary actions. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl L Rev 3, 9 [1989]. The conceptual thread binding them is that they are actions that are brought by private interests to "stop citizens from exercising their political rights or to punish them for having done so." *Id.* at 5-6. Citizens have been sued for testifying before city councils about building permit and zoning change applications, for expressing concerns to school board members, and for reporting violations of environmental laws to regulatory agencies, to name a few of thousands of examples. These citizens were sued for doing exactly what the Constitution encourages them to do.

The provision of the First Amendment implicated by SLAPPs is the Petition Clause (Congress shall make no law abridging the right of the people to petition the Government for a redress of grievances). George Pring and Penelope Canan, the authors of the leading work on the topic, *SLAPPs: Getting Sued for Speaking Out* (and the originators of the acronym), have dubbed the Petitioning Clause "the unknown soldier of the Bill of Rights." Without the right to petition, no other rights are redeemable.

In a representative democracy, public participation is the cornerstone; it is a bedrock principle that connects government to the governed. It legitimizes the system and helps to make government (and, in this case, officers-of-the-court) accountable. Public participation in government is a creed by which our nation lives. Public participation (petitioning) ranges from the sublime to the messy, but is authorized and encouraged by procedures and forms at every level of every branch of our government. Thus, being sued for engaging in petitioning activities is antithetical to our constitutional democracy.

The phenomenon of suing an individual who communicates with or tries to influence the government is common. Pring and Canan's national study in the early 1990's found thousands of examples of SLAPPs. Their study also found countless additional examples of threats of lawsuits that had the same desired effect: causing citizens to rethink and retreat from their public participation for fear of costly and time-consuming litigation.

Typically, a "SLAPPer" brings causes of action for defamation, conspiracy, abuse of process, interference with contract, attorney fee actions, and other common-law claims. As Pring and Canan point out, **the first — and sometimes least obvious — hurdle for a judge presiding over a SLAPP is recognizing that what may appear to be a claim is not, and that such a claim may be effectively foreclosed if it targets speech to any branch of government.**

The U.S. Supreme Court, the lower federal courts, and many state courts have found that the Petitioning Clause provides an immunity to citizens who exercise the right to petition. This immunity is sometimes known as *Noerr-Pennington* immunity, because it has its roots in a line of antitrust cases that hold that efforts to influence public officials through lobbying, publicity, and other contact are protected by the Petitioning Clause (and are not a violation of antitrust law) even when the petitioning activity is undertaken for a disfavored motive, such as eliminating competition. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

Later Supreme Court decisions also make clear that *Noerr-Pennington* immunity is synonymous with First Amendment immunity and applies to petitioning and to claims outside the antitrust context. See, e.g., *NAACP v. Claiborne Hardware*, 458 U.S. 958 (1982); *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993); *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991).

Under the test first articulated in *Omni*, a defendant is entitled to immunity unless a plaintiff can demonstrate that defendant’s petitioning was “a sham.” This requires SLAPPer to prove that a defendant used government processes as a “weapon.” This inquiry looks not at the defendant’s intent or purpose, but at whether the defendant’s efforts were not genuinely aimed at procuring favorable government action at all. So long as the defendant acts to obtain a government outcome — a decision, action, or refusal to act — the defendant’s petitioning is not a sham and enjoys immunity under the petition clause.<sup>13</sup> **The standard the court must apply is an objective one that looks to the outcome of the process defendant engaged in, not a subjective one that looks to defendant’s intent.** This result is consistent with the petition-clause goal of encouraging and protecting speech directed to the government.

*Professional Real Estate Investors* presented the question of Petitioning Clause immunity as applied to counterclaims in litigation and set forth a two-part definition of “sham.” The first prong requires a plaintiff to show that a citizen’s communications with government agencies were “objectively baseless.” The second prong, which a court need not even consider if a plaintiff cannot satisfy the first, is the test articulated in *Omni*: whether the defendant’s communications were not genuinely aimed at procuring favorable government action. **The SLAPPer bears the burden of proof on both prongs** and must meet that burden at the motion-to-dismiss or summary-judgment stage of the case.

Many state courts have fashioned similar tests under the petition clauses of their state constitutions, or have applied First Amendment petition-clause immunity to claims arising in state courts, including *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d

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<sup>13</sup> A winning petition — e.g., a successful lawsuit, or a request to an administrative agency that is acted upon favorably — by definition is not “a sham.”

1361 (Colo., 1984), which held that, when the process alleged to have been abused entails, as here, petitioning the court or state agencies, an additional showing is required: The party asserting the abuse-of-process claim must show that father's claims were "devoid of factual support or if supportable in fact, [has] no cognizable basis in law." See also *James H. Moore Realty v. Arrowheat at Vail*, 892 P.2d 367, 373 (Colo.App. 1994).

Here, opposing counsel's Motions and answers (for which he now seeks fees from father) contained no discussion of father's allegations or the relief that he sought. He failed to argue, let alone prove, that father's claims were devoid of factual support or had no cognizable basis in law. Wilson has never disputed any of the allegations, facts, or evidence father has proffered (her Motion to strike did not deny any of the allegations, but merely sought to have them stricken).

Further, Wilson cannot show that the outcome father sought, either from the OARC, or in his federal suit or in the case at bar was not aimed at procuring a favorable government action at all.

### **C. Reasonableness and Necessity**

In awarding attorney fees, the court must consider both the reasonableness of the hourly rate and the necessity for incurring the hours billed. *Marriage of Yates*, 148 P.3d 304 (Colo.App. 2006). A party seeking attorney fees bears the burden of proving, by a preponderance of the evidence, entitlement to the award. *Hamon Contractors v. Carter & Burgess*, 2009 Colo. App. LEXIS 715 (April 30, 2009).

As father demonstrated at trial, both the reasonableness and the necessity of attorney fees are directly impacted by an attorney's lack of preparedness or familiarity with the case or the law governing the case. As a prime example, opposing counsel brought another attorney (Anderson) to the hearing, based on his mistaken belief that he (Huff) could not make argument and also testify on the limited issue of attorney fees. This mistake, alone, doubled the attorney fees for the travel to and from the courthouse and the hearing.

In addition, opposing counsel devoted significant time to researching the applicable of Rule 11 and ethics rules to *pro se* parties, inadvertent disclosure of privileged information, and waiver of the attorney-client privilege. Because he discovered that none of these issues applied, he omitted them from any of his Motions or defense to father's Motions. Therefore, not only did he not prevail on any of these theories, but his research wasn't essential to the defenses to which the Court awarded fees.

As father demonstrated early in the cross-examination, opposing counsel was unable to describe with any specificity the individualized response or responses to which he believed this Court authorized an award of fees. Instead, he requested compensation for the entirety of legal services he provided Wilson from October 15, 2008 (his Entry of Appearance) until March 22, 2009, including many hours he testified were devoted to research in

preparation of settlement or conferring with others for the purposes of settlement (*e.g.*, father's Texas attorney, the Colorado Office of Attorney Regulation Counsel, an assistant Colorado Attorney General). This Court did not award Wilson fees for settlement negotiations or preparation.

Also, it should not be overlooked that, because Huff has been Wilson's attorney for at least seven years, father's Motion for Sanctions and Motion for Contempt was not the proximate cause of his capacity as her attorney between October, 2008 and March, 2009.

By asking the Court to require father to compensate him for the entirety of his legal services between October, 2008 and March, 2009, opposing counsel has knowingly imposed upon this Court the heavy lifting —*i.e.*, to parse his billing records to ascertain which billing activities should be attributed to his defense of the Motions for Sanctions and Punitive Contempt and which were not essential to that defense.<sup>14</sup>

In fact, as the testimony revealed, opposing counsel did not respond to a contempt Motion, and he filed only one response (actually, a Motion to Strike, dated 12/08/2008, which was denied) regarding father's November 21, 2008 Rule 11 Motion for Sanctions. Nevertheless, opposing counsel asserted this ambiguity at trial, in his effort to recoup all of the billable hours of his representation of Wilson between October, 2008 and March, 2009.

Not only did he assert the ambiguity, but he also urged that, to avoid malpractice claims, all of the supporting and incidental activities set out in his March 23, 2009 Bill of Costs were, in the abstract, essential to and contributed to the defense of the Motion[s] contemplated by this Court's Order on Remand. If this argument is followed to its logical end, father should be responsible for paying opposing counsel's annual attorney registration fees and his office rent for the periods of October 2008 through March, 2009, because those, too, were required for him to provide a complete and adequate representation of Madeline Wilson.

It should not be overlooked that this is not opposing counsel's first time asserting fees and costs in bad faith, tantamount to throwing something up to the ceiling to see what sticks, in his hope that the court wouldn't notice: In *Harrington v. Wilson* (D.Colo., 2005), Huff asserted a Bill of Costs (father's hearing **Exhibit D**) consisting of firm overhead and computer research fees that were firmly established in caselaw as prohibited. Despite father's written objection, opposing counsel refused to withdraw his inept claims and, only after a hearing (which resulted in more attorney fees for Wilson), did the court reduce his Bill of Costs to zero (*see* father's hearing **Exhibit E**).

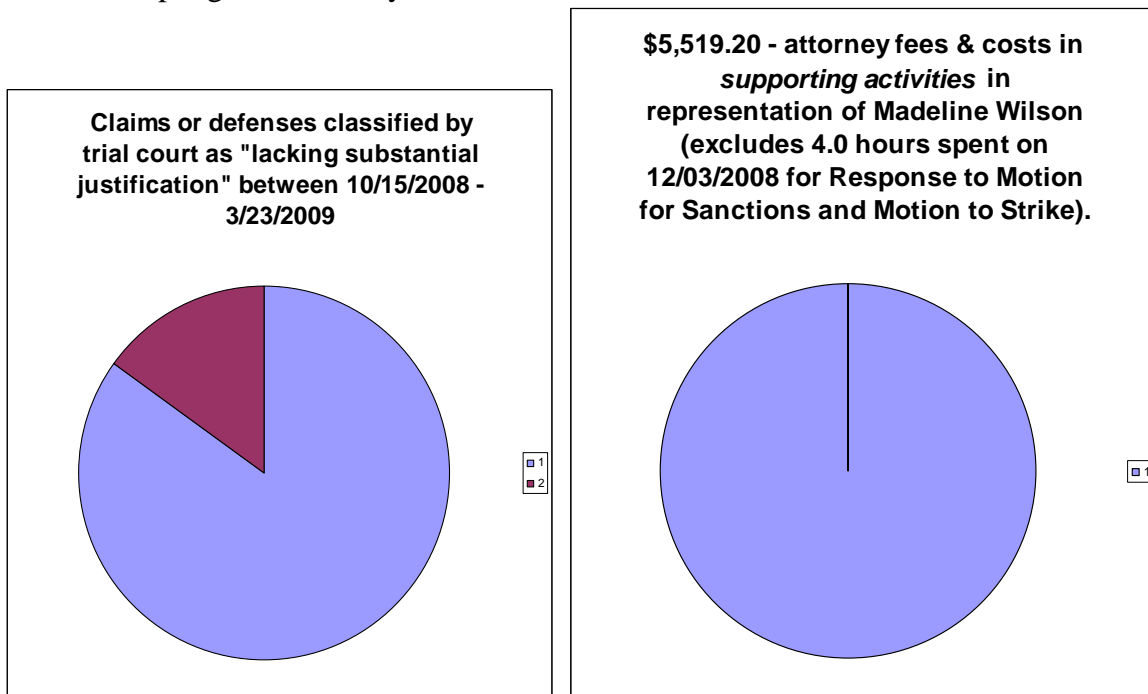
Because the legislative declaration preceding Section 13-17-102 indicates the General Assembly's intent to provide attorney fees to parties forced to litigate against only those particular claims or defenses that "lacked substantial justification" (even where other

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<sup>14</sup> In it's February, 2009 Order on Remand, the Court ruled that "father's motions for sanctions and punitive contempt against attorney Wilson are DENIED, and that Wilson's motion to strike is accordingly DENIED AS MOOT. Wilson is awarded reasonable attorney fees and related costs for having to respond to and defend against those motions."

claims brought had merit),<sup>15</sup> it follows that the supporting and incidental activities between October, 2008 and March, 2009 also applied to father’s claims that the court did **not** find were without substantial justification. *See Munoz v. Measner*, 2009 Colo. App. LEXIS 209 (Colo. Ct. App. Feb. 19, 2009) (A trial court should award fees only for the particular “claims or defenses” that the court deemed “lacked substantial justification”).<sup>16</sup> *See also Parker v. Davis*, 888 P.2d 324, 327 (Colo. App. 1994) (a party is not automatically entitled to recover the expenses incurred in successfully pursuing a motion for sanctions, because such fees may be awarded only if the trial court determines that the defense to that motion, too, lacked substantial justification).

One way to illustrate the point is with the diagrams below. On the left is a pie-chart, which might represent all claims or defenses father asserted between October 15, 2008 and March 22, 2009 and the portion of those claims or defenses that this Court deemed as lacking “substantial justification.” On the right, is the \$5,519.20 in fees and costs of Huff’s activities **other than** reviewing and responding to father’s “Motions for sanctions and punitive contempt against attorney Wilson.”



If these two charts are superimposed on the other, the percentage of supporting activities that corresponds to the approximate percentage of claims or defenses the Court found were “lack-

<sup>15</sup> For the purposes of this determination, any claim that the Court did not specifically find as “lacking substantial justification,” carries the rebuttable presumption that they do **not** lack substantial justification and, therefore, are not subject to liability under Rule 11 or § 13-17-102(2).

<sup>16</sup> Although the Colorado Supreme Court has granted certiorari on the question of *whether the court of appeals properly reversed the trial court’s denial of attorney fees pursuant to section 13-17-102(4), C.R.S. (2008), because the trial court did not use the factors laid out in section 13-17-103(1), C.R.S. (2008), to assess whether attorney fees were warranted, the certiorari petition was DENIED as to all other issues. Munoz v. Measner*, 2009 Colo. LEXIS 794 (Colo. Aug. 17, 2009).

ing substantial justification” is about \$830. Add back in only two of the four hours devoted to Wilson’s 12/02/2008 Response to Father’s Motion for Sanctions, and Motion to Strike (because the Motion to Strike was not granted), and the total comes to \$1180. Subtract out those hours spent on settlement negotiations and work on other cases (*e.g.*, consulting with Wilson’s Texas counsel and father’s Texas counsel), which were clearly could not have contributed in any way to the defenses the Court authorized in its Order on Remand, and the amount is reduced further still.

In the end, the “reasonable attorney fees and related costs for having to respond to and defend against those motions” (father’s “Motions for Sanctions and Punitive Contempt”) comes out to **less than ten percent** of what Wilson has requested.

#### **D. Lack of Adequate Foundation**

Although Huff brought with him another attorney (Anderson) for the ostensible purpose of making arguments or testifying, he failed to offer an expert to provide adequate foundation for the reasonableness and necessity of the fees charged in this domestic relations case. Although Huff claimed that he was an expert on this topic, he later testified that he had only worked two domestic relations cases in his 8-year career.

Because both Huff and Wilson had a pecuniary interest in the outcome of the litigation, the probative value and weight of their testimony is lessened. *See generally* Michelle Morgan Ketchum, *Experts: Witnesses for the Persecution? Establishing an Expert Witness's Bias Through the Discovery and Admission of Financial Records*, 63 UMKC L. REV. 133, 157-59 (1994) (discussing the legal community's general distrust of expert witnesses based on bias or prejudice arising from their financial interest in the outcome of the litigation).

Moreover, the quality of Huff’s testimony, the weakness in his arguments, the lack of clarity in his recollection of facts and circumstances, and his misapprehension of the Court’s Order on Remand all demonstrate that he was not only unqualified as an expert to opine about the reasonableness or necessity of fees, but also casts serious doubt on the propriety of his entire representation (*i.e.*, it appears that he is requesting father to pay fees for ineffective assistance of counsel).

#### **E. Failure to Mitigate and Bad Faith Disregard of Extrication Opportunities**

In *Ruffing v. Lincicome*, the Colorado Court of Appeals held that an attorney fee award may be limited based on finding that a party did not act reasonably to extricate itself from litigation. 737 P.2d 440, 442 (Colo. App. 1987).

At the October 8<sup>th</sup> 2009 hearing, Wilson testified that she would “love” to see this case brought to a resolution. Her actions demonstrate otherwise:

On September 8, 2006, father extended an offer to resolve all disputed matters between father and Wilson by **father dismissing any and all claims against Wilson in exchange for Wilson withdrawing her legal representation and personal involvement in**

**this case.** A copy of opposing counsel's receipt of father's communication is attached hereto and made part hereof by reference as, "**Exhibit A.**" Father never received a response, which can only mean that Wilson instructed her attorney (opposing counsel) to disregard the offer.

On July 2<sup>nd</sup>, 2007, father's Texas counsel, Thomas O'Brien, traveled from Texas to Colorado and had an appointment to meet with Wilson for the purposes of reaching a resolution mutually acceptable to both parties. **Wilson stood him up** and later explained, by telephone, that she felt such a meeting would be "inappropriate."

At trial, father demonstrated that he sent opposing counsel five (5) separate e-mails, inviting Wilson to stipulate to reasonable fees. Opposing counsel admitted that, because, "*I didn't want to deal with you,*" he didn't reply. He attempted to attribute his non-response to his assertion that he had spoken once or twice with father's Texas attorney regarding settlement (despite the fact that father's e-mails made clear that father was awaiting a response and despite the fact that father's Texas attorney is **not** licensed to practice law in Colorado, never communicated that he represented father in Colorado, and never entered his appearance *pro hac vice* in the case at bar). In truth, opposing counsel's explanation doesn't pass the straight-face test and opposing counsel knew or reasonably should have known that father's Texas attorney was not authorized to conduct settlement negotiations concerning Colorado litigation.

An assertion that the party claiming attorney fees should have mitigated may be considered in determining reasonableness of the amount of fees sought, even though a failure to mitigate is not a complete bar. *Colorado Citizens for Ethics in Gov't v. Committee for the American Dream*, 187 P.3d 1207, 1222 (Colo.App., 2008).

Based, not only upon Wilson's undisputed failure to mitigate, but also on her exacerbation of the fees in this matter, her request for fees should be denied in its entirety.

## **F. Double-standard Compliance with the Rules of Civil Procedure**

Father requests the Court to take **Judicial Notice** concerning the following allegations, and to make findings of fact on the accuracy thereon, and conclusions of law as to their legal effect:

- On March 7<sup>th</sup> 2000, Madeline Wilson filed a Motion in her client's name but for her behalf, captioned, "*Petitioner's Motion for Limited Contact Between her Counsel and the Respondent.*" The Motion contained no Certificate-of-Service and was not served on father, as required by C.R.C.P. Rule 5.
- On March 28, 2000, Magistrate Norton granted Madeline Wilson's March 7<sup>th</sup> 2000 "*Petitioner's Motion for Limited Contact Between her Counsel and the Respondent,*" writing on the last page of her Motion, "No objection filed – Motion granted," failing to note or care that Wilson did not serve father.

■ On June 20, 2000, this Court denied father's June 19, 2000 Motion for Evidentiary hearing, writing, "DENIED - Motion not in form required by CRCP 7(b) . . . James Zimmerman, duty judge."

■ In June through September of 2000, father had been confined in a mental hospital on the petition of his former spouse, who was an employee of the Jefferson Center for Mental Health, and whose supervisor, Tom Olbrich, had been delegated the civil commitment (00MH243, First Judicial District). Wilson personally instructed hospital staff to convey to father that he must cease from copying her on any documents (under C.R.C.P. Rule 5) and that there a Denver arrest warrant was awaiting his release, based on her allegations that father had violated of her restraining order.<sup>17</sup> No such warrant existed. Nevertheless, because of her threats, father filed a Motion captioned, "Respondent's Request of Clerk to Forward Visitation Request with Child to Opposing Counsel Because of No Contact Order."

Judge Tidball responded to father's Motion by Order dated 7/27/2009, writing, "Respondent failed to comply with C.R.C.P. 121, § 1-15, which requires a copy of all motions and briefs to be served on all other parties."

■ On March 22, 2002 in 01CV1376 (*Harrington v. Ryan, Wilson, et al.*, First Judicial District), Judge Zimmerman included, in his Order of Dismissal:

No timely responsive brief has been filed by [Mr. Harrington,] the Plaintiff. The plaintiff has not filed any contradictory evidentiary information to this motion.

However, once again, **father never received a copy of the defendants' Motion to Dismiss** (despite their Certificate of Mailing). When father filed a Motion to Reconsider (requesting an opportunity to respond, consistent with the Due Process Clause). Judge Zimmerman denied father's request on April 25, 2002 ("The Court finds proper service on Plaintiff by [defendant]").

■ On October 29, 2003, Judge Tidball entered an Order denying another of father's Motions, writing:

The Respondent in this case has chosen to represent himself and in do so, he must comply with the Rules of Civil Procedure when filing his documents. Under Rule 11(a), every pleading must be signed . . . all documents filed with the Court must be the original document. The Motion is a facsimile copy and not the original. The Respondent's signature is not an original and

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<sup>17</sup> N<sup>o</sup> 00C08748 (Jefferson County District Court), which was made permanent without allowing father to appear at the hearing, in violation of the Due Process Clause and Confrontation Clause of the U.S. and Colorado constitutions)

therefore the Court cannot accept the Motion as an original pleading.

Regarding the Petitioner's Response to the Respondent's Motion, the Court will grant the Petitioner's request for attorney fees. Time was expensed by the Petitioner's attorney on a motion that did not comply with the Rules of Civil Procedure.

- And, on June 21, 2004, Judge Tidball denied father's Motion, writing in the register-of-actions, "Motion is outside the time period and thus . . . [is] . . . DENIED as untimely"

In each of the above examples, father has been held to a strict application of the Rules over the last ten years and has even been fined attorney fees for allegedly failing to comply with the Rules. Whether it was intentional or not, this Court has applied a very different standard to members of the bar appearing before it, permitting them to disregard the Rules with impunity and to father's disadvantage (resulting in default judgments or dismissal of the cause). This practice not only runs afoul of the Equal Protection Clause, but it also undermines the *pro se* party's right of access to the courts and renders as a sham the judiciary's rhetoric of fealty to principles of access-to-justice and granting *pro se* parties wide latitude.

In his October 5<sup>th</sup> 2009 response, opposing counsel put forth the false claim that father had failed to confer under Rule 121, § 1-15(8). In ¶ 14 of that response, he argued "*Harrington's failure to comply with the rules is a proper basis to deny his motion and it should be denied.*" And on p. 3 of his April 1<sup>st</sup> 2009 answer, he asserted the same false claim and also argued, "*Not only did Harrington fail to confer . . . but he does not even include a certificate of conferral on his Motion . . . Harrington's motion should be denied on these procedural grounds.*" Yet, in his December 19<sup>th</sup> 2008 Reply, Huff argued that he is exempt from the duty to confer because father is not "counsel."

Although—as the Court stated at the hearing on October 8<sup>th</sup> 2009—it did not countenance Huff's duty-to-confer arguments, that is not enough: **because this Court has characterized one or more of father's claims or defenses as lacking substantial justification and has penalized him therefor, the Court should be willing to make no exceptions for licensed members of the bar, especially when absurd arguments (such as those Huff has advanced, above) are submitted to this Court.** *See, e.g.,* Appleman, *The Written Argument on Appeal*, 41 Notre Dame Law. 40, 48 (1965) ("[An] attorney is an officer of the court. This capacity obligates the lawyer to be accurate and avoid unbecoming conduct"); *Howell v. State Bar of Tex.*, 843 F.2d 205, 207 (5th Cir. 1988) ("[A]s officers of the court, attorneys owe a duty to the court that far exceeds that of lay citizens").

As father demonstrated at the hearing, one of Huff's responses, for which he is seeking fees, was submitted **42 days late**, without leave of the Court. Based on the standard that has been applied to father by this Court and based on the arguments of opposing counsel, himself, father's Motion should have been granted on counsel's failure to file a timely an-

swer and Wilson should be denied attorney fees for any time expended on that Motion, including allegedly related incidental and supporting activities.

**G. Lack of Candor Toward the Tribunal**

Finally, this Court should not award any attorney fees to Wilson or her counsel, because their motions, responses, and pleadings contain factual numerous misrepresentations that they both knew to be materially false at the time they were offered.

**CONCLUSION**

Based on the foregoing reasons and foregoing authorities, father requests an Order from this Court denying Wilson's request for attorney fees in its entirety.

Respectfully Submitted this 13<sup>th</sup> day of October, 2009.

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Sean L. Harrington

**CERTIFICATE OF MAILING**

I hereby certify that on the 13<sup>th</sup> day of October, 2009, a true and accurate copy of the foregoing *POST-TRIAL BRIEF* has been mailed, first class postage prepaid, to the following:

**First Judicial District Court**  
Division 9  
100 Jefferson County Parkway  
Golden, CO 80401

and by electronic mail to: David H. Yun (DYun@jalegal.com); Brett N. Huff (bhuff@huffandleslie.com); and Christy C. Ryan (cryan72@msn.com).

**RE: settlement offer**

From: **Brett Huff** (BHuff@wsteele.com)

Sent: Fri 9/08/06 3:03 PM

To: Sean Harrington (esoxlucios@hotmail.com)

Sean:

Thank you for your email and settlement offer. I will convey to my client and provide you a response as soon as practicable.

Brett

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**From:** Sean Harrington [mailto:esoxlucios@hotmail.com]

**Sent:** Friday, September 08, 2006 1:00 AM

**To:** Brett Huff

**Cc:** Randy Dement; Amy Colony; karen renne

**Subject:** settlement offer

Brett:

Here's the offer, which is very simple: Madeline walks away; I walk away; No more complaints to attorney regulatory authorities; no posting of commentary on the web; no contacting of clients, colleagues or neighbors for information gathering or other purposes; both parties to pay their own attorneys' fees and costs for all past and present litigation; no more restraining orders; Madeline acquiesces to transfer of the case to Texas jurisdiction under the UCCJEA; Madeline forgets about me; and me about her; I file my normal objection next week to the magistrate's recommendations, followed by a stipulated confidential/private settlement agreement, which I will draft; I abandon all appellate remedies to the Tenth Circuit; I do not pursue any claims on these issues either in federal court, Colorado state courts or Texas court[s].

The alternative: (1) I pursue an appeal with the Tenth Circuit and, if reversed, I pursue this case in federal court; (2) if the case is dismissed on jurisdictional grounds (*Younger, Rooker-Feldman, etc.*), I pursue all claims against Madeline in Denver District Court, relying, *inter alia*, on *Hall v. Hall-Stradley* (\$60K award against the mother; \$200K against the attorney) and I obtain the email correspondence between Christy and Madeline under the civil fraud exception. If the emails aren't produced during discovery, I move for spoliation sanctions; (3) I possibly pursue a similar complaint in Texas (primarily under Tex.Fam.Code 42.003), asserting minimum contacts; (4) I continue to pursue disciplinary action with the OARC and the supervising committee; (5) I continue contacting as many people as I can in an effort to obtain information (I have an updated and new list of clients and opposing parties for Madeline); (6) I post my factual findings (pleadings, filings, depositions, transcripts, letters and emails from others (excepting defamatory content) on [www.knowYourCourts.com](http://www.knowYourCourts.com), which is continually mirrored (once information is posted, I cannot remove it from the Web (see, e.g., [www.archive.org](http://www.archive.org)). The purpose of this is solely to share information (not to spread defamatory innuendo); (7) I file a petition for the Denver D.A. show cause why they won't prosecute criminal charges for attempting to influence a public servant, perjury and filing of a false claim (that is, unless they've finally decide to go forward with an indictment --I haven't heard back from them in some time, and they had promised they would provide an answer (a yes or a no)).

The bottom line is that I miss my daughter and she needs me. These considerations override any other considerations for "justice," accountability, damages. My offer is, thusly, simple and consistent with that objective. One agreement and signatures by both parties and everything goes away.

Sean