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<tr><td>FIRST JUDICIAL DISTRICT, STATE OF COLORADO
100 Jefferson County Parkway
Golden, Colorado 80401
Telephone: (303) 271-6190</td><td rowspan="2">▲ COURT USE ONLY ▲</td></tr>
<tr><td>In re the Marriage of:
Petitioner: CHRISTY RYAN
and
Respondent: SEAN HARRINGTON</td></tr>
<tr><td>Sean L Harrington
P.O. Box 351855
Westminster, CO 80035</td><td>trial court case No. 99 DR 3717

Div. 9 / Hon. Jack Berryhill</td></tr>
<tr><td colspan="2">FATHER'S C.R.C.P. RULE 59 MOTION FOR RECONSIDERATION RE 12/29/2009 ORDER RE ATTORNEY FEES</td></tr>
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Sean L. Harrington, father, respectfully submits the within RULE 59 MOTION. In support thereof, father states as follows:

1. On December 29th 2009, this Court entered an Order against father in the amount of $6,219.20 for having the temerity to exercise his right under the First Amendment's petition clause to call to this Court's attention the execrable, abominable, and continuing attorney misconduct by Madeline Wilson and in an effort to obtain declaratory relief to prevent future abuses by her. The Order and the underlying judgment (April 22, 2009) is not only contrary to prevailing Colorado appellate law, but also contravenes the First Amendment of the U.S. Constitution. *See also* Colo. Const. art. II, § 6 ("Equality of justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay"). Although these arguments were explicated in detail in father's prior briefs, this Court has declined to address them.

2. This Court also failed to address father's allegations and evidence against Wilson. *See Brown v. Silvern,* 141 P.3d 871, 875 (Colo. 2005) ("[Appellant] contends that the trial court erred by denying his request for sanctions under C.R.C.P. 11 and § 13-17-102. . . . We agree with [Appellant] that he is entitled to a hearing on his claim for sanctions under C.R.C.P. 11 and § 13-17-102 . . . the trial court should have conducted a hearing

before ruling on the motion. Accordingly, remand is required”). In the case at bar, the Court ruled on father’s Motion for sanctions against Wilson without holding a hearing or discussing any of the evidence father proffered.

3. In its December 29, 2009 Order, the Court decreed that the 35.3 hours claimed by Brett Huff, attorney for Madeline Wilson, are fair and reasonable, applying the factors set forth in *Spensieri v. Farmers Alliance Mutual Ins. Co.,* 804 P.2d 268 (Colo.App. 1990), *Tallitsch v. Child Support Services, Inc.* 926 P.2d 143 (Colo.App. 1996), and *Marriage of Pollock,* 881 P.2d 470, 472 (Colo.App. 1994). However, because the Court did not denominate those factors or discuss how they were applied to the instant case, the pronouncement was conclusory. *See, e.g., Marriage of Goodbinder,* 119 P.3d 584, 586 (Colo. App. 2005) (The trial court must include in its order findings of fact and conclusions of law sufficient to enable the appellate court to understand the basis of its order).

4. Next, the Court found that attorneys have an ethical duty to explore and encourage settlement of disputes out of court, which duty justified assessing father with Mr. Huff’s “time having been incurred in settlement negotiations, which included time spent consulting with the parties' Texas counsel,” and the Attorney Regulation Counsel, and the state Assistant Attorney General, who was defense counsel “for the judicial defendants.” Order at 1. *And see* Huff’s billing statement attached to Wilson’s March 23, 2009 Bill of Costs.

5. However, under the American Rule parties are “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. App. 2007). 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).

6. Here, the attorney fees were ostensibly awarded under Section 13-17-102(2) for certain "motions for sanctions and punitive contempt against attorney Wilson." February 24, 2009 Order at 10. However, under 13-17-102(6), "No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious." Separate findings on the issue are required before court may award attorney fees against such parties under § 13-17-102. *Artes-Roy v. Lyman,* 833 P.2d 62 (Colo. App. 1992).

7. Because the motions for sanctions and punitive contempt against attorney Wilson described in this Court's February 24, 2009 Order were not the actual and proximate cause of Mr. Huff's time having been incurred in settlement negotiations, and because the Court did not make express findings that some other of father's actions or defenses, or any part thereof, was the actual and proximate cause of Mr. Huff's time having been incurred in settlement negotiations —and— that the same actions or defenses, or some part thereof, was substantially frivolous, substantially groundless, or substantially vexatious, the attorney fee award for any conduct other than the "motions for sanctions" set out in the February 24, 2009 Order is without legal basis. *See Munoz v. Measner,* 214 P.3d 510, 513-14 (Colo. App. 2009) (A trial court should award fees only for the particular "claims or defenses" that the court deemed "lacked substantial justification").[1] *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).

[1] 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).

8. The Court states that Mr. Huff should be lauded for not including his own time incurred in the October hearing, "which he might well have legitimately claimed." Order at 2. This statement is also conclusory, because the Court did not enter any findings that father's arguments or any portion thereof at the hearing was substantially frivolous, substantially vexatious, or substantially groundless. "Absent a finding that the defense to a motion for fees under § 13-17-102, lacks substantial justification, it is error to award fees and costs incurred in challenging that defense." *Boulder County Board of County Commissioners v. Kraft Building Contractors,* 122 P.3d 1019, 1022 (Colo.App. 2005). Indeed, if this Court believed father's arguments were substantially frivolous, substantially vexatious, or substantially groundless, it would not have directed Mr. Huff to expend additional time preparing a memorandum of law addressing them.

9. The Court states that the balance of father's arguments in his post-trial briefs (*e.g.,* such as Wilson's failure to mitigate) is "without merit." Because the Court did not enter any specific findings with regard to these legal arguments or even identify which legal arguments were "without merit," this finding is also conclusory. *See Morris v. Belfor USA Group, Inc.,* 201 P.3d 1253 (Colo.App. 2008) ("The trial court must include in its order findings of fact and conclusions of law sufficient to enable the appellate court to understand the basis of its order and to determine whether the trial court abused its discretion").

10. Next, the Court states that, with regard to the C.R.C.P. 24 issue that the Court directed the parties to brief, "I find Ms. Wilson's legal memorandum persuasive and that formal intervention is not necessary to award fees in favor of the party's attorney against whom sanctions and injunctive relief were sought unsuccessfully and frivolously by Mr. Harrington, who is a party." Order at 2. Because this statement is a conclusion of law that is wholly unsupported by any legal authority or reasoning, it is conclusory. "The purpose of the requirement of specific findings of fact and conclusions of law is to give the appellate court a clear understanding of the grounds for the trial court's decision." *Financial Management Task Force, Inc. v. Altberger,* 807 P.2d 1230 (Colo.

App. 1990). Even Mr. Huff conceded in his brief that the Court found "persuasive" that, "*The undersigned has conducted exhaustive research to find cases that are factually similar to the present matter,*" but found none. November 7, 2009 brief at 4.

11. This Court lacked jurisdiction to issue any ruling on the matter of intervention, because father has raised that issue on a perfected appeal, now pending. *See Anstine v. Churchman,* 74 P.3d 451, 452 (Colo. App. 2003) ("Generally, once an appeal is taken, a trial court is divested of jurisdiction to determine substantive matters that directly affect the judgment being appealed unless the appellate court has issued a remand order"). Because the Court lacked jurisdiction to rule on this issue, the Order should be vacated.

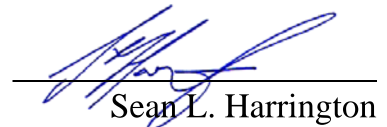
12. "Section 13-17-103(1) provides that '[w]hen granting an award of attorney fees, the court shall specifically set forth the reasons for said award' and requires the trial court to consider eight factors." *Pedlow v. Stamp,* 776 P.2d 382 (Colo. 1989). Father has not yet had the opportunity for a full and fair hearing, because the parties, with the Court's agreement, abstained from addressing several of the eight factors, as this Court lacked jurisdiction regarding them while they are pending appeal. They include subsections: *a* (the extent of any effort made to determine the validity of any action or claim before said action or claim was asserted); *b* (the extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action; *c* (the availability of facts to assist a party in determining the validity of a claim or defense; *e* (whether or not the action was prosecuted or defended, in whole or in part, in bad faith); and *f* (whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict).

13. When a party requests a hearing regarding the award of attorney fees and costs, the trial court must conduct an evidentiary hearing. *Marriage of Eggert,* 53 P.3d 794, 796 (Colo. App. 2002). *See also Zarlengo v. Farrer,* 683 P.2d 1208 (Colo. App. 1984) (When a party places a claim for attorney fees in issue, the trial court has a duty to conduct a hearing upon that claim); *Alessi v. Hogue,* 689 P.2d 649 (Colo. App. 1984) ("trial court failed to hold a hearing on the award and did not set forth any findings in

granting the award of attorney fees"); *Pedlow, supra* (When fees are awarded, the court is required to make evidentiary findings and must provide the opportunity for a hearing.); *Little v. Fellman,* 837 P.2d 197 (Colo. App. 1991) (same). Because father has not yet had the opportunity of an evidentiary hearing to address these factors, and because the trial court has not yet reached the merits of father's claims and evidence regarding Madeline Wilson, the Order re Attorney Fees should be vacated.

WHEREFORE, for the foregoing reasons and based on the foregoing authorities, the trial court should vacate its December 29, 2009 Order re Attorney Fees.

Dated this 11th day of January, 2010.



Sean L. Harrington

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of January, 2010, a true and accurate copy of the foregoing *RULE 59 MOTION* has been mailed, first class postage prepaid, to the following:

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

by electronic mail to: David H. Yun (DYun@jalegal.com) and
Brett N. Huff (bhuff@huffandleslie.com).

Petitioner, Christy C. Ryan, has requested not to be served with filings unless they appear to affect her interests. At her request, the undersigned has not served her with a copy of this brief.