

FIRST JUDICIAL DISTRICT, STATE OF COLORADO 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6190	
In re the Marriage of: Petitioner: CHRISTY RYAN and Respondent: SEAN HARRINGTON	▲ COURT USE ONLY ▲
Sean L Harrington P.O. Box 351855 Westminster, CO 80035	trial court case No. 99 DR 3717 Div. 9 / Hon. Jack Berryhill
FATHER’S REPLY IN SUPPORT OF HIS RULE 59 MOTION FOR RECONSIDERATION (RE 12/29/2009 ORDER RE ATTORNEY FEES)	

Sean L. Harrington, father, respectfully submits the within *Reply in Support of his Rule 59 Motion for Reconsideration*. In support thereof, father states as follows:

1. What is most noteworthy about Wilson’s Response to father’s Motion for Reconsideration is not what is included in her Response, but what was left out. *See Duke v. Pickett*, 451 P.2d 288, 290 (1969) (A party waives all defenses and objections which he does not present in his answer). Specifically, Wilson does not deny or address that this Court lacks jurisdiction to enter any findings regarding formal intervention under Rule 24, and that the attorney fee award could not have been awarded but for the Court’s pronouncement that Wilson is properly before the Court despite her non-compliance with Rule 24. Wilson’s attorney does not deny, as he did under cross-examination by father in October, that the bulk of the \$6,220 claim was not attributable to responding to father’s “motions for sanctions and punitive contempt against attorney Wilson,” as provided for in this Court’s February 24, 2009 Order at 10.

2. Non-party Wilson argues that Rule 59 “*does not appear to provide a mechanism for reconsideration of a trial court’s order awarding attorneys fees and costs.*” She is mistaken, because father has asked the trial court to vacate (*i.e.*, “amend”) the order awarding attorneys fees and costs, because, among other reasons, the trial-lacked the authority to make findings concerning formal intervention under Rule 24, and because

the Order violates the petition clause of the First Amendment of the U.S. Constitution and Colorado's Equality of Justice provision. Moreover, the law asks not whether one asks for the proper remedy, but whether under his pleadings he is entitled to any remedy. Regennitter v. Fowler, 290 P.2d 223, 225 (1955). *And see* Robertson & Gill, "Post-Trial Motions in the Civil Case: An Appellate Perspective," 32 Colo.Law. 11 (Nov. 2003) ("Motions for post-trial relief under Rule 59 and Rule 60 may be asserted separately, combined, or asserted in the alternative").

3. In addition, Rule 59 specifically provides for "Any irregularity in the proceedings by which any party was prevented from having a fair trial" as grounds for the filing of such Motion. Father has alleged that he was prevented from having a fair trial because he was afforded neither a sanctions hearing regarding his claims against non-party Wilson (*see Brown v. Silvern*, 141 P.3d 871, 875 (Colo. 2005)) nor a full hearing under Section 13-17-103, because the trial-court was circumscribed from considering the several factors under the statute that are currently on appeal.

4. In addition, Rule 59 also provides "Error in law," (C.R.C.P. 59(d)) and "Excessive damages," as grounds for filing of the Motion, and also "insufficiency of the evidence as a matter of law, or the absence of a genuine issue as to any material fact entitling the moving party to judgment as a matter of law." C.R.C.P. 59(e). Each and all of these are implicated by father's Motion.

5. Non-party Wilson misrepresents *Marriage of Ensminger*¹ as holding that § 13-17-103(1) does not require the court "to discuss the eight factors" (Response at ¶ 11) and that "the trial court is not required to make a finding on every statutory factor addressed by the parties; it need only specify the reasons for the award." *Id.* The *Ensminger* panel did hold that the court must address "those factors that are relevant to the circumstances involved in the case." 209 P.2d at 1166. In this case, the following factors are relevant to the circumstances: *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

¹ 209 P.3d 1163 (Colo.Ct.App. 2008)

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).

6. Moreover, Wilson has failed to establish that the Colorado Supreme Court's controlling precedent of *Pedlow v. Stamp*² (that "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") has been overruled or distinguished. Likewise, in *Munoz v. Measner*³ (decided one year after *Ensminger, supra*), the Court of Appeals held, "Where part of an action is alleged to be substantially frivolous or groundless, a trial court must review that part of the action in accordance with factors enumerated in section 13-17-103, C.R.S.2008 . . . We conclude a trial court should be guided by these factors, as pertinent to the case." 214 P.3d 514. Here, the trial-court could not have been guided by these factors set forth in the preceding paragraph, because the parties stipulated—and the Court agreed—that this Court did not have jurisdiction to consider those factors at this time.

7. And, because **both** parties stipulated—and the Court agreed—that this Court did not have jurisdiction to consider those factors at this time, Wilson's statement that "*a hearing was held on October 8, 2009. Harrington should not be allowed to request a second hearing due to his decision not to address everything he felt was relevant at the first hearing,*" is disrespectful of the truth. The parties' agreement on jurisdiction and this Court's acceptance of it is significant, because, in so doing, **this Court recognized**

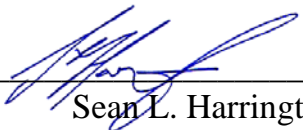
² 776 P.2d 382 (Colo. 1989).

³ 214 P.3d 510 (Colo. App. 2009). 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).

the lack of jurisdiction as a matter of law. See *Olson v. Hillside Cmty. Church SBC*, 124 P.3d 874, 878 (Colo.App. 2005) (subject matter jurisdiction cannot be conferred by consent); *Soto v. Progressive Mountain Ins. Co.*, 181 P.3d 297, 300 (Colo.App. 2007) (the parties' stipulation does not confer appellate court jurisdiction to review an otherwise unreviewable order); *Soltes v. Jarzynka*, 127 Ariz. 427, 431, 621 P.2d 933, 937 (App. 1980) (“In determining our jurisdiction, we have traditionally relied on interpreting the language of the notice of appeal to determine the subject on the appeal. Jurisdiction cannot be conferred by consent of the parties”).

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 8th day of February, 2010.


Sean L. Harrington

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of February, 2010, a true and accurate copy of the foregoing *REPLY IN SUPPORT OF 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.

