

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Civil Action N^o 05-cv-01858-EWN–MJW

SEAN HARRINGTON

Plaintiff,

v.

MADLINE WILSON and the “LAW OFFICE OF MADLINE WILSON”;
CHRISTY RYAN;
BILL J. FYFE and COLUMBINE COUNSELING CENTER, P.C.;
LAURA ARCILISE, in her personal capacity;
LOUISE CULBERSON-SMITH, in her personal capacity;
JOHN GLEASON in both his personal and official capacity;
WENDELL PRYOR in his official capacity;
ROBERT EVANS, in his official capacity; and
the JEFFERSON COUNTY COMBINED COURT (a/k/a “THE FIRST JUDICIAL DISTRICT”),
by and through the COLORADO ATTORNEY GENERAL, JOHN SUTHERS, in his official Capacity.

Defendants

PLAINTIFF’S MOTION FOR RECONSIDERATION ON THE MATTER OF COSTS

COMES NOW, Plaintiff, Sean Harrington, for the purpose of requesting reconsideration of the award of costs in this case. As grounds therefor, Plaintiff states as follows:

1. Pursuant to D.C.Colo.LcivR. 7.1, the undersigned has contacted opposing counsel to confer regarding the filing of Motion[s] for Reconsideration regarding the magistrate’s recommendations and the dismissal of this suit. Defendants oppose the motions.
2. Although Plaintiff has filed a Notice of Appeal, the Court’s jurisdiction to entertain the within Rule 59 motion is available, regardless of the procedural status of this case. *Herring v. Kennedy-Herring Hardware Co., Inc.*, 261 F.2d 202 (6th Cir. 1958) (authority to grant relieve a party from a final judgment under Rules 59 or 60, “rests with the District Court, not the Court of Appeals.”). *See also Browder v. Dir. Dept. of Corrections of Illinois*, 98 S.Ct. 556 (1978); *Fobian v. Storage Tech-*

nology Corp., 164 F.3d 887, 889 (4th Cir. 1999); *Smith v. Lujan*, 558 F.2d 1304, 1307 (9th Cir. 1979).

3. This case was dismissed pursuant to 28 U.S.C. § 1919 (“Whenever any action or suit is dismissed in any district court . . .for want of jurisdiction, such court may order the payment of just costs”). The taxing of costs under Section 1919 rests in the sound judicial discretion of the district court and is reviewed for an abuse of discretion. *Callicrate v. Farmland Indus.,Inc.*, 139 F.3d 1336, 1339 (10th Cir. 1998). The district court commits an abuse of discretion only if it bases its decision on an erroneous conclusion of law or if there is no rational basis in the evidence for the finding. *Id.*

4. Unlike the situations covered by § 1920 or Rule 54(d), there is no presumption that costs will be awarded under § 1919. In *Callicrate*, the Tenth Circuit noted, “While Rule 54(d)(1) provides that “costs . . . shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ,” § 1919 instead states that the court “may order the payment of just costs” when a jurisdictional dismissal occurs. It has been noted that unlike costs awarded under Rule 54, costs awarded under § 1919 are not subject to a presumption that they shall be awarded to a prevailing party. 139 F.3d at 1340 n.8 (citing *Edward W. Gillen Co.v. Hartford Underwriters Ins. Co.*, 166 F.R.D. 25, 27 (E.D. Wis. 1996)). The awarding of costs under § 1919 turns on whether such an award is “just.” *Gillen*, 166 F.R.D. at 28.

5. In this case, Plaintiff contends that costs should not be awarded to defendants because Plaintiff had plausible grounds for asserting the existence of federal jurisdiction and Plaintiff did not act in a “vexatious or frivolous” manner, attempt to delay or multiply the proceedings, disobey any orders of this Court or demonstrate any lack of respect for the tribunal.

WHEREFORE, for the reasons more fully set forth hereinabove, Plaintiff requests an Order denying defendants costs.

Respectfully submitted this 2nd day of October, 2006:

/s/ Sean Harrington
P.O. Box N^o 351855
Westminster, Colorado 80035
(888) 800-0771
esoxlucios@msn.com

CERTIFICATE OF SERVICE

I hereby certify that on October 2nd 2006, I served the foregoing Rule 59 Motion *via* electronic mail to the following ECF participants.

David H. Yun
JAUDON & AVERY LLP
dyun@jalegal.com

Randolph S. Dement
rdement@dementlaw.com

Christine K. Wilkinson
Ass't Attorney General
ck.wilkinson@state.co.us

Brett N. Huff
WHITE & STEELE, P.C.
bhuff@wsteele.com

/s/ Sean Harrington