

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

Civil Action N^o 05-cv-01858-EWN-MJW

SEAN HARRINGTON

Plaintiff,

v.

MADELINE WILSON and the “LAW OFFICE OF MADELINE 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 TO SUBSTITUTE HIS RULE 59 MOTION WITH THE WITHIN RULE
60(A) MOTION TO AMEND CLERICAL ERROR IN ENTRY OF JUDGMENT AND
OBJECTION TO DEFENDANT FYFE’S PROPOSED BILL OF COSTS**

COMES NOW, Plaintiff, Sean Harrington, pursuant to Fed.R.Civ.P. 60(a) for the purpose of submitting the within Motion:

1. Pursuant to D.C.Colo.LcivR. 7.1, the undersigned has conferred with Defendant Fyfe’s opposing counsel regarding this matter over the last several days.

2. On September 21st 2006 this Court signed an Order of Dismissal, which was docketed the following day. Docket # 74. That Order was amended to correct the date signed. Dockets 78~79. On the 25th of September, the Court entered another Order of dismissal. Docket # 80. None of these three Orders included any award of costs.

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 § 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). Unlike the situations covered by § 1920, 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)).

4. Plaintiff mistakenly believed that this Court had, in fact, order costs. Accordingly, he filed a Rule 59 Motion for reconsideration. Docket # 93. Plaintiff now moves to withdraw that Motion.

5. Plaintiff called the Clerk’s office to learn why the Entry of Judgment (docket # 85) awards defendants costs and orders them to submit a bill of costs within twenty days when the Court did not authorize the same (*i.e.*, it is not contained in any of the Orders). Judge Nottingham’s clerk noted that this Judgment, which was prepared by a courtroom deputy, was one of the very few that had not been personally approved by the trial Judge. The discrepancy between the judgment and the latest Order (docket # 80) appears to be a clerical error.

6. Although Plaintiff has filed a Notice of Appeal, the Court’s jurisdiction to entertain the within Rule 60(a) motion to correct a clerical error is available, regardless of the procedural status of this case. *International Ass’n of Machinists & Aerospace Workers v. Eastern Air Lines, Inc.*, 847 F.2d 1014, 1017 (2nd Cir. 1988) (“once a notice of appeal has been filed, a district court may take actions only in aid of the appeal or **to correct clerical errors**, and may not adjudicate substantial rights directly involved in the appeal”) [emphasis added]; *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 Technology Corp.*, 164 F.3d 887, 889 (4th Cir. 1999); *Smith v. Lujan*, 558 F.2d 1304, 1307 (9th Cir. 1979).

7. Plaintiff objects to Defendant Fyfe’s proposed Bill of Costs. Costs must be those “necessarily incurred in this action.” Based on discussions with opposing counsel, the entirety of costs was generated by counsel’s **optional** printing of electronically filed PDF documents. One of the primary purposes of CM/ECF is to reduce the use of paper and ameliorate overhead costs (*see, e.g.*, ECF flyer available at the Court’s Web site at: http://www.co.uscourts.gov/forms/cm_flyer.pdf (“ECF provides the following benefits: . . . reduction in overhead costs”). Counsel’s decision to optionally print copies of documents, even at the direction of his client[s], for mailing Defendant Fyfe or Fyfe’s insurance carrier or for his own filing purposes runs counter to the purpose of ECF and was not “essential” to the litigation. Plaintiff has previously corresponded with Defendant Fyfe (and opposing counsel) by electronic mail and attests that both are able to receive and view Adobe PDF files. \$324.00 of costs for optional printing of electronic files in a case that had no discovery and only one Motion to Dismiss is excessive, unreasonable and unnecessary.

WHEREFORE, Plaintiff respectfully request an Order withdrawing his Rule 59 Motion (docket # 93) and directing the Clerk to amend the Entry of Judgment *nunc pro tunc* to reflect the Court’s September 25th 2006 Order, without the award of costs.

Submitted this 5th day of October, 2006:

/s/ Sean Harrington
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CERTIFICATE OF SERVICE

I hereby certify that on October 5th 2006, I served the foregoing Rule 60(a) Motion *via* electronic mail to the following ECF participants.

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