

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

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Civil Action N<sup>o</sup> 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

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**PLAINTIFF’S OBJECTION TO DEFENDANT RYAN’S PROPOSED BILL OF COSTS**

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COMES NOW, Plaintiff, Sean Harrington, for the purpose of submitting the within Objection:

1. Pursuant to D.C.Colo.LcivR. 7.1, the undersigned has conferred with Defendant Ryan’s opposing counsel regarding this matter over the last several days.
2. On September 21<sup>st</sup> 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 25<sup>th</sup> of September, the Court entered another Order of dismissal. Docket # 80. None of these three Orders included any award of costs.

### **Dismissal under § 1919, rather than § 1920**

3. This case was dismissed pursuant to 28 U.S.C. § 1919, which allows for a discretionary award of costs (“Whenever any action or suit is dismissed in any district court”). Unlike the situations covered by § 1920, there is no presumption that costs will be awarded under § 1919. “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. *Callicrate v. Farmland Indus., Inc.*, 139 F.3d 1336, 1339 (10<sup>th</sup> Cir. 1998). 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. *Id.* 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. Defendant Ryan is not a “prevailing party” entitled to costs: In any action where, as here, dismissal is attributable to alleged lack of subject matter jurisdiction, a defendant is not a “prevailing” party. *See e.g., Keene Corp. v. Cass*, 908 F.2d 293, 298 (8<sup>th</sup> Cir. 1990) (“Where a complaint has been dismissed for lack of subject matter jurisdiction, the defendant has not prevailed over the plaintiff on any issue central to the merits of the litigation”); *Hidahl v. Gilpin County Dep’t of Social Servs.*, 699 F. Supp. 846, 849 (D. Colo. 1988) (“When a complaint is dismissed for lack of jurisdiction, the defendant cannot be a ‘prevailing party.’ Defendant has not ‘prevailed’ over the plaintiff on any issue central to the merits of the litigation”); *Sellers v. Local 1598, Dist. Council 88, Am. Fed’n of State, County, & Mun. Employees*, 614 F. Supp. 141, 144 (E.D. Pa. 1985), *aff’d*, 810F.2d 1164 (3<sup>rd</sup> Cir. 1987) (same); *Hygienics Direct Co. v. Medline Industries, Inc.*, 33 Fed.Appx. 621 C.A.3 (Pa.), 2002 (same).

### **Computerized Research Fees**

5. Attorneys requesting fees bear the burden of establishing the amount of compensable expenses to which they are entitled. *Case v. Unified School Dist.*, 157 F.3d 1243, 1258, 10<sup>th</sup> Cir. 1998). Ryan’s attorney is seeking \$646.52 in unspecified “Computer research costs” but, has not established that, “Westlaw charges are expenses normally itemized and billed in addition to the hourly rate..” *Id.*; *see also Ortega v. City of Kansas City*, 659 F. Supp. 1201 (D. Kan. 1987)

(computer assisted research costs are not recoverable because they are included in a firm's overhead); *Aloha Tower Associates Piers v. Millennium Aloha*, 938 F. Supp. 646 D. Hawaii 1996) (same). Computer-aided research, like any other form of legal research, is a component of attorneys' fees and cannot be independently taxed as an item of cost. See *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 695 (8<sup>th</sup> Cir. 1983); see also *Haroco v. American National Bank & Trust*, 38 F.3d 1429 (7<sup>th</sup> Cir. 1994) (computer assisted legal research is not an expense taxable as costs, but is recoverable as part of an attorney fee award because computerized legal research costs are not included under the definition of costs contained in 28 U.S.C. §1920); *Jones v. Unisys Corp.*, 54 F.3d 624, 633 (10<sup>th</sup> Cir., 1995) ("We note that costs for computer legal research are not statutorily authorized").

6. The Tenth Circuit in *Case v. Unified School Dist.*, *supra*, considered Westlaw fees to the extent that "(1) [the district court] was not able to separate research related to the appellants' prevailing claims from research on claims which they lost; and (2) [the district court] determined that Westlaw was not the most cost effective research method." 157 F.3d at 1258. In this case, Defendant Ryan hasn't prevailed on **any** claims, as noted above, because the Court concluded that it lacks jurisdiction. Only if the Court had jurisdiction could it decree that Ryan had prevailed. As to the second point, "costs requested for computerized legal research must be reasonable." *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341, 349 (Colo.App. 1999). This case consisted of no discovery and only one Motion to Dismiss; one Reply and One Motion to Stay Discovery. A full use subscription to Westlaw for All States, federal and treatises is only about \$160 per month and, in any event, should be incidental to operating a law practice. "Hours spent familiarizing oneself with the general area of law should be absorbed in the firm's overhead and not be billed to the client." *Case, supra* at 1253. Neither should Plaintiff absorb this cost. \$650 of "research costs" is unreasonable.

### **Copying Costs**

7. "Costs fall into two categories: 1) those incidental to litigation ...; and 2) those arising from the structural costs of maintaining a judicial system...." *Roget, supra*, 5 P.3d at 348. Costs must be those necessarily incurred in the action. Upon information and belief, the entirety of Ryan's copying costs was generated by counsel's volitional printing (and mailing) of electroni-

cally 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](http://www.co.uscourts.gov/forms/cm_flyer.pdf) ("ECF provides the following benefits: . . . reduction in overhead costs"). Counsel's election to print copies of electronic documents, even if at the request of his client, was incidental, rather than "essential," to the litigation and runs counter to the purpose of ECF. Plaintiff has previously corresponded with Defendant Ryan (and opposing counsel)<sup>1</sup> by electronic mail and her divorce attorney (co-Defendant Wilson) has made a judicial admission in a collateral proceeding that Ryan communicates almost exclusively through email.<sup>2</sup> \$284.00 of costs for volitional printing of electronic files is excessive, unreasonable and unnecessary. *See In re Bristol-Meyers Squibb Sec. Litig.*, 205 F.R.D. 437, 443 (D.N.J. 2002) (Plaintiffs need not pay for hard copies of documents that already existed in digital form).

WHEREFORE, Plaintiff respectfully request an Order directing the Clerk to amend the Entry of Judgment *nunc pro tunc* to reflect the Court's September 25<sup>th</sup> 2006 Order, thereby denying defendants an award of costs in any amount.

Submitted this 6<sup>th</sup> day of October, 2006:

/s/ Sean Harrington  
**Sean Harrington**  
P.O. Box N<sup>o</sup> 351855  
Westminster, Colorado 80035  
(888) 800-0771  
[esoxlucios@msn.com](mailto:esoxlucios@msn.com)

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<sup>1</sup> In fact, counsel for both Defendants Ryan and Fyfe have expressly consented to receive service in the Tenth Circuit case *via* electronic mail in PDF format.

<sup>2</sup> In Defendant Wilson's April 25<sup>th</sup> 2006 Response to an attorney disciplinary proceeding initiated by the Texas State Bar (a proceeding, which opposing counsel and Defendant Wilson waived confidentiality by revealing on p. 5 of docket # 62 and their Exhibit C attached thereto), Wilson wrote, "In no way did I 'aid or abet' the mother in 'concealment' of the child, as alleged by the Complainant. First, I do not have my client's physical address. We communicate primarily by e-mail" *Id.* at 4.

**CERTIFICATE OF SERVICE**

I hereby certify that on October 6<sup>th</sup> 2006, I served the foregoing Objection *via* electronic mail to the following ECF participants.

David H. Yun  
JAUDON & AVERY LLP  
[dyun@jalegal.com](mailto:dyun@jalegal.com)

Randolph S. Dement  
[rdement@dementlaw.com](mailto:rdement@dementlaw.com)

Christine K. Wilkinson  
Ass't Attorney General  
[ck.wilkinson@state.co.us](mailto:ck.wilkinson@state.co.us)

Brett N. Huff  
WHITE & STEELE, P.C.  
[bhuff@wsteele.com](mailto:bhuff@wsteele.com)

/s/ Sean Harrington