DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): COLORADO CROSS-DISABILITY COALITION *et al.* v. Defendant(s): COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING *et al.*	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney: Kevin W. Williams Andrew C. Montoya Colorado Cross-Disability Coalition 655 Broadway, Suite 775 Denver, CO 80203 Phone Number: 303.839.1775 Fax Number: 303.839.1782 E-mail: kwilliams@ccdconline.org E-mail: amontoya@ccdconline.org Atty. Reg. #: 28117 Atty. Reg. #: 42471	Case Number: 2009 CV 11761 Ctrm.: 280

PLAINTIFFS' MOTION FOR AMENDMENT OF FINDINGS AND JUDGMENT PURSUANT TO C.R.C.P 59

Plaintiffs, by and through undersigned counsel, hereby move this Court pursuant to C.R.C.P. 59(a)(3) & (4) to amend certain findings of fact and the judgment entered on August 10, 2011. As grounds for this motion, Plaintiffs state as follows:

CERTIFICATE OF COMPLIANCE WITH C.R.C.P. 121 §1-15(8)

On August 23, 2011, undersigned counsel conferred with counsel for the Defendants, Patricia Herron. The Defendants oppose this motion and the relief sought herein.

INTRODUCTION

As the result of the settlement agreement, the parties in this case agreed Defendants

would pay Plaintiffs' reasonable fees.[1] Defendants later breached that agreement and asserted substantially frivolous and groundless defenses in these proceedings, resulting in this Court awarding Plaintiffs' reasonable fees.[2] Plaintiffs agree with this Court's order requiring Defendants to pay fees, but seek to amend the findings and judgment in this case as follows:

- Plaintiffs submit the Court made a calculation error when arriving at its final fee amount award.

- Plaintiffs submit that the rationale for awarding fees through the date of the reply brief on Plaintiffs' Motion to Enforce apply with equal, if not greater force, to all fees incurred through final resolution of the reasonableness hearing conducted on July 21, 2011.

- Plaintiffs submit this Court made a factual error with respect to the identity of counsel in the *Rossart* case, which should be corrected.

BACKGROUND

After a mediation session on October 12, 2010, the parties to this case entered into the Settlement Agreement. That agreement provided relief applicable to all members of a proposed class of Medicaid recipients who receive home health care services under a program known as CDASS.[3] The settlement agreement also provided the Department would pay an award of Plaintiffs' attorneys' fees for "time spent in the representation."[4] The agreement set forth a specific procedure under which Plaintiffs' counsel would provide itemized billing records before a certain date, and the Department's counsel would respond to the amount claimed by a certain date.[5] If needed, the agreement suggested returning to the mediator "to determine fees."[6]

As set forth in Plaintiffs' Motion to Enforce, Department counsel engaged in a series of

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[1] The Settlement Agreement is Exhibit 5, attached to the Affidavit of Kevin W. Williams, filed in support of Plaintiffs' Motion to Enforce Settlement Agreement and Request for Issuance of Order ("Motion to Enforce" or "Mtn. to Enforce"), filed October 18, 2010.

[2] *See generally* Order, entered August 10, 2011 ("Fees Order").

[3] Settlement Agreement ¶ 4.

[4] *Id*. ¶ 6.

[5] *Id*.

[6] *Id.*

maneuvers intentionally designed to deprive Plaintiffs and their counsel of the benefit of the bargain reached in the signed settlement agreement -- payment of fees.

The maneuvering and manipulation by the Department and its counsel have been set forth repeatedly throughout the briefing in this case. *See, e.g.*, Mtn. to Enforce at 3-6; Reply Mtn. To Enforce ("Reply"), filed December 21, 2010, at 2-4; Plaintiffs' Brief in Support of Award of Attorneys' Fees ("Fees Motion" or "Fees Mtn."), filed February 7, 2011, at 3-16; Plaintiffs' Closing Argument Regarding Hearing on Reasonableness of Petition for Fees and Costs ("Ps. Closing"), filed August 1, 2011, at 16-20.

As a result of these maneuvers, Plaintiffs had no choice but to request the Court enforce the plain meaning of the Settlement Agreement, which was that Defendants would pay attorneys' fees.[7] Plaintiffs filed the Motion to Enforce on October 18, 2010. Plaintiffs sought to enforce the settlement agreement as written and requested the Court order payment of attorneys fees under C.R.S. § 13-7-101 *et seq*., which requires such an order when a party brings claims or defenses that are "frivolous, vexatious or groundless" as set forth in the statute.[8] Defendants opposed the motion.[9] Defendants' new Risk Management counsel, Patricia Herron, responded to the motion and denied that the settlement agreement required the Department to pay fees at all.[10] According to Ms. Herron:

> In the Settlement Agreement signed by the parties, the parties agreed to "attempt to agree" to an award of attorney fees. Failing that, the Agreement requires the parties to mediate the issue of fees. Finally, failing to reach agreement at mediation, the Agreement mandates that each party shall pay their own fees and costs. A fair reading of the terms of the Settlement Agreement, read as a whole and not reading one clause to the exclusion of others, is that the parties "agreed to attempt to agree," and failing that, to mediate (not arbitrate), and finally, failing at that stage, that each party pay their own fees and costs. Plaintiffs are not entitled to an award of attorney fees pursuant to the terms contained in the Settlement

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[7] *Id*.; Order, entered January 18, 2011 ("Enforce Order"), at 6; Fees Order at 2-3.

[8] Plaintiffs made one other argument supporting their position that fees be awarded that is not relevant to this motion.

[9] State Defendants' Response to Plaintiffs' Motion to Enforce Settlement Agreement and Request for Immediate Dismissal ("Ds. Resp. Mtn. to Enforce"), filed December 16, 2010.

[10] Ds. Resp. to Mtn. to Enforce at 9.

Agreement dated September 15, 2010 and executed by the parties . . . . [11]

Plaintiffs filed their Reply on December 21, 2010 correcting inaccuracies set forth by the Department, including a reference to a communication occurring on August 18, 2010, in which counsel for Plaintiffs "were notified . . . that attorney fees would not be paid." As set forth in the Reply, "The communication received on August 18, 2010 from Assistant Attorney General Joan Smith is Exhibit 4 to the Williams Affidavit attached to Plaintiffs' Motion. It was the Department's proposal regarding attorneys' fees, which is similar to the language of the final agreement" but specifically referenced returning to the Court if the parties could not resolve the fees issue. Reply at 3. As noted, "This provision clearly does not indicate the Department's refusal to pay fees." *Id.*

The Reply also provided the Court with the Affidavit of Julie Reiskin, CCDC's Executive Director, who had, subsequent to the fees mediation, received an e-mail message sent by Robert Douglas, Legal Director of the Department of Health Care Policy & Financing, to an individual who was not a party to this case. The e-mail message from Mr. Douglas, who participated in the September 15 and October 12 mediation sessions, stated that at the mediation, Ms. Herron withdrew any offer to pay fees.[12] The Department returned to the mediation the parties agreed to in paragraph 6 of the settlement agreement and offered nothing in fees, followed by Department counsel arguing to this Court that it was the Department's position that the agreement meant if the parties reached no agreement, "each party would bear its own fees and costs."[13]

As set forth in Plaintiffs' Reply:

> Also, the Department's argument that the parties "agreed to attempt to agree" regarding fees is ludicrous on its face and under the circumstances of the parties' negotiations. There is no reason why the parties would have returned to mediation on October 12 only to determine the amount of fees if the offer was nothing. See Motion at 16 and Reiskin Aff. ¶ 5 (attached to original Motion) & Exhibit 1 (the Department withdrew any offer to pay fees at mediation). Clearly, given the parties' ongoing negotiations, either the parties had a very different understanding of the purpose of the final mediation session with Judge Barr or

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[11] *Id.* Defendants also argued the plaintiffs could not be awarded fees under other theories not relevant to the enforcement of a private settlement agreement.

[12] *See* Amended Ex. 1 to Reiskin Aff., filed in connection with Fees Motion on February 9, 2011.

[13] Ds. Resp. to Mtn. to Enforce at 9.

Department's counsel was engaged in some very time-consuming hoodwinking.[14]

This Court granted Plaintiffs' Motion to Enforce in its entirety[15] and later found the argument articulated above to be "ridiculous."[16] This Court found the terms of paragraph 6 of the settlement agreement to be unambiguous:

> The clear and unambiguous meaning of ¶ 6 of the Settlement Agreement is that the parties have reached an agreement that Defendants would pay Plaintiffs' attorney fees, but were in disagreement about the reasonable amount of those fees. It twice uses the phrase "an award of attorney fees," and refers to the second mediation session with Judge Barr as a process by which the parties would attempt to "determine fees." The plain and unforced meaning of this language is that the parties had not yet agreed to the amount of the fees to be awarded, but had agreed that Plaintiffs would be entitled to their reasonable fees as part of the overall settlement. It is equally clear to me that this paragraph means that if the parties are unable to reach a mediated agreement on the amount of fees, that inability will have no impact on the balance of the settlement, and it will devolve to me to resolve the amount of those reasonable fees. This was the bargained agreement, and Plaintiffs are entitled to the benefit of that bargain.[17]

In addition to requiring Plaintiffs' counsel to submit billing records, this Court ordered the parties to submit to briefing schedule regarding "the reasonable amount of attorneys' fees."[18]

Pursuant to this Court's order, Plaintiffs submitted a very detailed brief in support of an attorneys' fees award, addressing all of the factors required under Colorado appellate decisions and Rule 1.5(a) of the Colorado Rules of Professional Conduct. This brief was far more detailed than the updated billing statement and mediation statement provided to Judge Barr at the October 12 mediation. All that was required for the mediation was the submission of a billing statement by Plaintiffs and a response by Defendants. Judge Barr did not order submissions by the parties. The only reason Plaintiffs submitted anything to Judge Barr beyond the September 15 billing statement provided to opposing counsel was to alert Judge Barr to the Department's last minute

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[14] Reply at 4-5.

[15] *See generally* Enforce Order.

[16] Fees Order at 6.

[17] Enforce Order at 3.

[18] *Id.*

change in tactics, to explain why they were wrong, and to provide an updated billing statement to address the additional, unanticipated time spent by counsel in representation on this case; under the terms of the Settlement Agreement, Plaintiffs had anticipated submitting nothing further. The agreement did not require it.

On March 8 and again on March 9, 2011, the Department filed its Opposition Brief. The Department responded to the brief and billing statement in a 21 page brief with several affidavits attached, including one submitted by Defendants' fees expert, David Brougham. The affidavits provided had more to do with Defendants' theories about settlement discussions than with the reasonableness of the fees. Like Plaintiffs, the Department never prepared or submitted such extensive documentation in connection with the fees mediation. It was not anticipated or required under the Settlement Agreement. The Department, not Plaintiffs, requested a reasonableness hearing by this Court. *See* Plaintiffs' Brief at 29 ("Plaintiffs do not believe a hearing is necessary to resolve the issue of the reasonableness of Plaintiffs' submission of attorneys' fees and costs but are prepared to present additional evidence if the Court believes doing so will be helpful.")

To address each of the factors required to be addressed when presenting an application for reasonable fees, the parties both hired expert witnesses. This also was not contemplated by the settlement agreement. The parties attended the hearing with their expert witnesses on July 21, 2011. The hearing lasted three hours and both expert witnesses testified at length.

In its Fees Order, this Court made the following conclusions of law: (1) Defendants were required to pay reasonable attorneys' fees for all of Plaintiffs' counsel's time up to and including December 21, 2010, the date of the reply brief on the Motion to Enforce (with certain deductions to be discussed) based on the language in paragraph 6 of the settlement agreement); Fees Order at 3; (2) Defendants were required to pay reasonable attorneys' fees for all of Plaintiffs' counsel's time spent preparing, filing and replying the Motion to Enforce (with certain deductions to be discussed) because Defendants' position defending that motion was substantially unjustified, frivolous and groundless; *id*. at 6-7; (3) Defendants were not required to pay costs; *id*. at 3, 5-6;[19] (4) Plaintiffs are not entitled to recover fees for any time after the

[19] Plaintiffs are actually entitled to costs, despite C.R.C.P 54(d)'s prohibition, because C.R.S. § 13-17-102(1) permits such an award ("Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees"). It does not prohibit the assessment of such costs against the state of Colorado. Nevertheless, to avoid further argument and extensive briefing on this issue, Plaintiffs withdraw and abandon any claim for costs for purposes of this motion only without prejudice to re-raise the issue on appeal, if needed. Plaintiffs' counsel's argument regarding costs in this case has been admittedly inarticulate and inconsistent.

Motion to Enforce "fees CCDC incurred in preparing for and conducting the reasonableness hearing;" *id*. at 7; (5) Andrew Montoya's hourly rate should be reduced from $200/hour to $160/hour; *id*. at 10;[20] and (6) Plaintiffs' fees should be reduced by $13,746 based on the Court's findings regarding the factors under Rule 1.5(a) and four particular reasons identified in the Order, *id*. at 13-14.

ARGUMENT

I. Applicable Legal Standards

"Within 15 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow, a party may move for post-trial relief including:. . . (3) Amendment of findings; or (4) Amendment of judgment." C.R.C.P. 59(a). Motions for post-trial relief may be combined or asserted in the alternative. The motion shall state the ground asserted and the relief sought. *Id*. The term "judgment" includes an appealable decree or order as set forth in C.R.C.P. 54(a). C.R.C.P. 58(a); C.R.C.P. 54(a).

II. Plaintiffs' Requested Amendments

A. This Court's Order Should Be Modified Based on a Calculation Error.

To the extent that this Court's final award of attorneys' fees was based on what appears to be a calculation error, it must be amended. Prior to making any other reductions and looking at Plaintiffs' billing statement,[21] this Court determined that the amount of Plaintiffs' fees through December 21, 2010 were $55,996.00, and the total amount of fees for work done after December 21, 2010 was $38,865. Footnote 2 of the Fees Order states:

> I derive this figure from the bills attached to the motion for fees. Those bills, attached as Exhibit 2 to the motion, show total fees through February 7, 2011, of $94,861. Of that total, $38,865 was for work done after December 21, 2010, the

[20] Plaintiffs believe the record in this case establishes Mr. Montoya's rate change to $200.00/hour was reasonable based on, *inter alia*, the following factors: (1) This Court's decision in the *Rossart* case awarding Ari Krichiver, an attorney who had been practicing a similar amount of time; (2) Mr. Montoya's skill and experience level at the time he entered the profession; (3) the fact that Mr. Montoya had prior experience in the complicated field of disability rights; and (4) the expert witness testimony of Timothy P. Fox concluding that Mr. Montoya's rates pre- and post-admission to the bar were reasonable. Nevertheless, for purposes of this motion only, Plaintiffs will accept this Court's reduction from $200/hour to $160/hour.

[21] Exhibit 2 to Plaintiffs' Fees Mtn. filed February 7, 2011.

> date Plaintiffs filed their reply in support of their motion to enforce settlement. The difference between these two amounts is $55,996, which therefore represents the fees billed for work from the beginning of this case through December 21, 2010.[22]

For the reasons explained below, these calculations are inaccurate.

Looking at each time entry in the billing statement, Plaintiffs agree the total fees through February 7, 2011, are $94.861. However, the total for fees for work done after December 21, 2010, and through the date of the submission on February 7, 2011, was only $7,401, not $38,865 as set forth in the Court's order. Therefore, the resultant starting point lodestar figure should be $87,460,[23] not $55,996, as set forth in the Order.[24]

B. Colorado's "Frivolous, Groundless, or Vexatious" Statute, C.R.S. § 13-17-101 *et seq*, Requires Awarding All Fees Sought After the Second Mediation.

In its order regarding the Motion to Enforce, this Court determined that the parties entered into a contract and that the "clear and unambiguous" meaning of ¶ 6 of that agreement was that Defendants are required to pay Plaintiffs' fees.[25] The only remaining question was the *amount* Defendants would pay. *Id*. Also in ¶ 6 of the agreement, the parties agreed to a very plain and simplified way of reaching agreement regarding the amount of fees: (1) on September 15, 2010, Plaintiffs would submit a billing statement;[26] (2) Defendants had up to and including September 27, 2010 to respond; and (3) if the parties could not reach agreement, they would return for one more mediation session to resolve the issue.[27] That was the actual "bargained

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[22] Fees Order at 8, n. 2.

[23] A copy of the billing statement this Court used to evaluate reasonableness is attached, *See* Affidavit of Kevin W. Williams ("Williams Aff.") ¶ 5 & Ex. 1. The attached version shows a page-by-page total of fees, demonstrating that Plaintiffs' attorneys' fees through December 21, 2011 total $87,460 (not $55,996) and that, at the date of this specific billing statement, fees for work completed after December 21, 2011 are less than $38,865.

[24] Fees Order at 14.

[25] Enforce Order at 3.

[26] Plaintiffs submitted a billing statement at the end of the September 15, 2010 mediation, just as the parties signed the agreement.

[27] Settlement Agreement ¶ 6.

agreement" and expectation.

Instead, Defendants and their counsel engaged in conduct and employed defenses to the Motion to Enforce that have been the subject matter of three subsequent briefing cycles in this case. The upshot was Defendants' client representative Robert Douglas, who was involved in the two prior mediations and multiple settlement agreement drafts, and new counsel for the Risk Management Division, Patricia Herron, who was never involved publicly in this case until October 6, 2010, came to the mediation and withdrew any offer to pay fees.[28] Ms. Herron has explained to this Court why they did so. According to Defendants, despite the clear and unambiguous meaning of ¶ 6, entered into as it was during mediation by two Assistant Attorneys General and the Department's Legal Director, Ms. Herron later determined that the Plaintiffs were not entitled to recover any fees. More importantly, Department counsel has made it unequivocally clear to this Court the Department never intended to pay fees.[29] Ms. Herron made that determination before the parties ever went to mediation. In a letter, dated October 6, 2010, six days before the fees mediation, Ms. Herron informed undersigned counsel, "I have also reviewed the Settlement Agreement. The Agreement does not obligate Risk Management or the Agency to pay fees in this matter."[30]

This Court held that this defense is not only "substantially groundless and frivolous," but also "utterly ridiculous."[31] At the reasonableness hearing, the Court provided Department counsel with an opportunity to explain the Department's position. This Court concluded counsel's explanation "itself [was] frivolous and groundless."[32]

Nevertheless, this Court held that the Department was responsible for paying Plaintiffs' attorneys fees only through the finalization of the reply brief on the Motion to Enforce.[33] This Court arrived at this conclusion, a "closer call," based on a determination that the time and effort it took for parties to battle over the reasonableness of the fees was not frivolous because the

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[28] Amended Exhibit 1 to the Affidavit of Julie Reiskin submitted with Fees Motion.

[29] Ds. Resp. to Mtn. To Enforce, Argument Section B. "Fees by Contract/Settlement Agreement" at 5-9.

[30] Exhibit 10, Mtn. to Enforce, at 2.

[31] Fees Order at 6.

[32] *Id.*

[33] Fees Order at 6-7.

Department was, in part, successful in that battle.[34] In doing so, this Court also rejected Plaintiffs' argument that the Department's agreement to pay Plaintiffs' fees "for the representation" as set forth in Paragraph 6 of the settlement agreement, provided an appropriate vehicle for ordering Defendants pay fees for the remaining efforts of this litigation.[35]

Plaintiffs respectfully request this Court reconsider the latter determination. Plaintiffs bargained for an expeditious means of resolving a fees dispute, recognizing that prior to the September mediation, Defendants' counsel had not seen a billing statement. They got it that day at the mediation. What Plaintiffs got, instead, was a massive, very time-consuming, run-around that protracted this litigation and continues to protract this litigation.

Nothing in the settlement agreement subjected or conditioned payment of fees on having a different Risk Management attorney's approval of the settlement. Yet, apparently, the two Assistant Attorneys General at the mediation were confused and needed Risk Management's help. Ms. Herron does not like to be cast as (to use her words) "an unscrupulous henchman lying in wait,"[36] but Plaintiffs respectfully submit to this Court that the planned duping from the date of the September 15 mediation through today's proceedings contrived by Joan Smith, Jennifer Weaver, Robert Douglas and Patricia Herron, all seasoned attorneys, should be obvious. They never intended to pay fees. It was a marvelous charade and a ruse, but it was foiled because, as this Court recognized, the language of the settlement agreement actually <u>does</u> obligate the Department to pay fees. Plaintiffs submit this was not a case of counsel not reading the agreement they signed;[37] instead, they knew exactly what they were doing.

Plaintiffs also submit that it was not entirely clear then that this Court would exercise jurisdiction to enforce the settlement agreement. That is why Plaintiffs had to file an opposed motion pursuant to Dispute Resolution Act.[38] Otherwise, and if Defendants' counsel were acting in good faith, the parties would have simply moved jointly to have the agreement enforced pursuant to the settlement agreement. This Court did, despite Defendants' counsel's best efforts, grant the Motion to Enforce, and that decision can only be overturned for an abuse of discretion.

Defendants' counsel's opposition to the Motion to Enforce clearly explains what they

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[34] *Id*. at 7.

[35] *Id*.

[36] Resp. to Fees Mtn. at 18-19.

[37] *See* Fees Order at 7.

[38] C.R.S. § 13-22-301, *et seq*.

were up to: "For this Court to award fees to Plaintiffs, the Court would have to supply additional substantive terms into the Settlement Agreement that the Settlement Agreement does not contain, or to interpret the Agreement in a strained and distorted manner contrary to the plain language contained in the Agreement."[39] Fortunately, this Court, like Plaintiffs, did not feel it needed to strain or distort anything when it read the "clear and unambiguous" language of Paragraph 6. As noted, Defendants' counsel goes on in a lengthy argument under the heading, "B. Fees By contract/Private Settlement Agreement," that the so-called "purported contract," should not be "converted" into an order of this Court pursuant to the Dispute Resolution Act because the parties (read clever defense counsel) did not insert magic words "prevailing party" into the settlement agreement. Defendants' counsel plotted this from the time of the second mediation, if not before. The problem for them is they agreed to language that still clearly and unambiguously requires the Department to pay fees.

Nevertheless, even if the Court rejects this request, Colorado's statute denouncing "Frivolous, Vexatious and Groundless" litigation is clear:

> The court *shall assess* attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct . . . . As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.[40]

In enacting the "Frivolous, Groundless or Vexatious Actions" statute, the general assembly recognized "that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice."[41] In response to this, the statute "sets forth the provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious."[42] The general assembly directs, "All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply

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[39] Ds. Resp. to Mtn. to Enforce at 1.

[40] C.R.S. § 13-17-102(4) (emphasis added).

[41] C.R.S. § 13-17-101 (Legislative declaration).

[42] *Id.*

with the intent set forth in this section."[43]

This Court did not mince words in telling Defendants their counsel's actions and arguments in opposing the Motion to Enforce violated this statute. In fact, Defendants' and counsel's violations served as one of the two alternative grounds for awarding fees from the date of the September mediation through December 21, 2011, the finalization of the Motion to Enforce.

Opposing that motion for the "substantially groundless" and "ridiculous" reasons Defendants did also was clearly "interposed for delay," and perhaps "[for] harassment." Obviously delay in this case is of great benefit to the State. It cannot be denied that counsel's substantially frivolous and groundless defense "unnecessarily expanded the proceedings." It also cannot be denied that counsel's purpose in opposing the Motion -- whether characterized as the intentional "perpetra[tion] of a scam" by "unscrupulous henchman lying in wait"[44] or as a "unilateral and wholly unreasonable mistake" by counsel at mediation who did not read the agreement[45] was improper, requiring an award of fees for <u>all</u> time related to ongoing litigation resulting from it.

Every minute of time Plaintiffs' counsel spent <u>after</u> the October 12 mediation concluded was an expansion of these proceedings beyond that for which the parties bargained -- agreement on fees themselves or by the mediator later. Admittedly, counsel for Defendants had a duty to its client to argue the reasonableness of Plaintiffs' fees they had agreed upon, simplified means for doing so and a time frame in which to do it:

> [On] September 15, 2010, Plaintiffs' counsel . . . provide[d] itemized billing records reflecting time spent in the representation. The Department [did not] respond by September 27, 2010. [T]he parties [did not] agree on an award of attorney fees on September 27, 2010, [so the] Parties . . . return[ed] to mediation with Judge Barr to determine fees. Settlement Agreement ¶ 6.

The Department had 14 days to "object[] to the *amount* of the requested fees" *see* Fees Order at 7 (emphasis in original), and another 15 days to do so before the October 12 mediation. They also could have made any objections to the *amount* known to the mediator and Plaintiffs at the mediation. Instead, at that mediation, "the defendants (Mr. Douglas) and the state Risk

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[43] *Id.*

[44] Resp. to Mtn. to Enforce at 18-19.

[45] Fees Order at 7.

Manager" (Ms. Herron) withdrew any offer of fees.[46] They have since very unambiguously told this Court why: They believe the settlement agreement did not require them to pay fees if no agreement was reached at the mediation. As a result, to the great dismay of Plaintiffs and their counsel, Judge Barr did not "determine fees" at the mediation.

Under C.R.S. § 13-17-102(4), this Court "shall assess" attorneys fees under these circumstances. Respectfully, Plaintiffs request this Court award Plaintiffs' fees for all time devoted to the unnecessary expansion of these proceedings. Frankly, this Court should and could keep the meter running. Plaintiffs' counsel continue to engage in "the representation," all of which continues to be an unnecessary expansion of these proceedings based on Defendants' counsel's substantially frivolous and groundless defense.[47] Nevertheless, Plaintiffs' respectfully request this Court award Plaintiffs' additional fees for time spent between December 22, 2011, and the date of the submission of the written closing arguments, August 1, 2011.[48]

VI. This Court Should Remedy a Technical Error in Its Order Regarding the Identity of Counsel in the *Rossart* Case.

In its Fees Order, this Court identifies undersigned counsel, Kevin W. Williams, as Plaintiffs' counsel in *Rossart v. Developmental Pathways, Inc.*, Case No., 06CV4479 (Denver Dist. Ct.), a different case over which this Court presided.[49] Plaintiffs' counsel in that case was actually Timothy P. Fox, of Fox & Robertson, P.C., who also served as the expert witness testifying for Plaintiffs in the case at bar, not Kevin Williams. Undersigned counsel was not involved in that case. Plaintiffs respectfully request this Court correct that error and indicate whether it contributed it any way substantively to the Court's decision regarding fees, and, if so, by what specific amount.

CONCLUSION

At a minimum, Plaintiffs respectfully request this Court adjust the fees awarded based on the calculation error identified in Section I of this motion. Starting with the corrected beginning lodestar rate of $87,460, then subtracting the $13,746 this Court determined were appropriate

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[46] Ds. Resp. Mtn. Enforce at 8; Ex. 1 to Reiskin Aff. Ps. Reply Mtn. To Enforce.

[47] Once this Court has had an opportunity to rule on this motion, if appropriate, Plaintiffs will submit a final billing statement consistent with the Court's decision.

[48] *See* Williams Aff. ¶ 6 & Ex. 2.

[49] Fees Order at 11.

reductions in this case,[50] the result is an award of $74,714.

Plaintiffs also respectfully request this Court find and determine that the Department must pay all of Plaintiffs' counsel's reasonable fees through written closing argument in this case. Attached as Exhibit 2 hereto is a statement of Plaintiffs' fees beginning December 22, 2010 through August 1, 2011. *See* Williams Aff. ¶ 6 & Ex. 2.[51]

Plaintiffs respectfully request this Court amend its order to correct the technical error regarding the identity of plaintiffs' counsel in the *Rossart* case.

Plaintiffs respectfully request this Court make any additional findings and order all other relief this Court deems proper and just.

Dated: August 25, 2011

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION
LEGAL PROGRAM

/s/ Kevin W. Williams
Kevin W. Williams
Andrew C. Montoya

Attorneys for Plaintiffs

[50] Fees Order at 14.

[51] This statement is the same as what Plaintiffs provided with their written closing argument on August 1, 2011 with three exceptions: (1) It begins with fees incurred beginning December 22, 2011; (2) Mr. Montoya's rate has been changed from $200/hour to $160/hour; and (3) costs have been removed.

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2011, I electronically filed the foregoing using the Lexis Nexis Court Link which will provide service upon the following:

Patricia Herron, Esq.
Patricia.Herron@state.co.us

/s/ Briana McCarten
Briana McCarten
Legal Program Assistant

Duly Authorized Signature on file at the Colorado Cross-Disability Coalition.