

GILPIN COUNTY COURT, STATE OF COLORADO
2960 Dory Hill Road, Golden, Co. 80403
303-582-5522

WARREN MARTIN HERN, Plaintiff,

v.

KENNETH TYLER SCOTT, Defendant.

▲ COURT USE ONLY ▲

Civil Case No.: 95-C-132
Courtroom No. 1

MOTION TO STRIKE PLAINTIFF'S APRIL 25TH 2005 AND DECEMBER 18TH 1995 AFFIDAVITS

COMES NOW, the Defendant KENNETH TYLER SCOTT, pursuant to C.R.C.P. § 311 and under the equitable equivalent of C.R.C.P. § 12(f) and in support of his Motion to Strike Plaintiff's Affidavits. As grounds, therefore, Defendant states as follows:

I. INTRODUCTION.

1. On or about April 25th, 2005, Plaintiff filed a response in opposition to Defendant's Motion for an evidentiary hearing to modify or vacate a civil restraining order made permanent by this court 9 ½ years ago. In support of his Motion, Plaintiff attached his Affidavit. Defendant requests this court to take **Judicial Notice** of Plaintiff's April 25th 2005 Affidavit.

2. Defendant now moves this Honorable Court for an Order striking Plaintiff's April 25th 2005 Affidavit and, for the same underlying reasons, Plaintiff's Affidavit of December 18th 1995, upon which the most recent Affidavit relies.

3. The sanctions under Rule 311, which include striking a pleading or dismissing an action, serve several purposes, including: (1) deterring future litigation abuse; (2) punishing present litigation abuse; and (3) streamlining the court docket and management of the case. *White v. General Motors Corp.*, 908 F.2d 675, 683 (10th Cir. 1990) (setting forth the underlying policy considerations of Fed.R.Civ.P. § 11). Rule 311 provides that "The signature of the attorney on a pleading shall have the same effect and subject the attorney to the same penalties as provided in C.R.C.P. 11." Rule 11 is substantially similar to Fed.R.Civ.P. § 11 and "[w]hen a Colorado Rule is similar to a Federal Rule of Civil Procedure, we may look to federal authority for guidance in construing the Colorado rule." *Benton v. Adams*, 56 P.3d 81, 86 (Colo. 2002).

4. Rule 11 provides, in pertinent part:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . If a pleading is signed in violation of this Rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction.

5. Rule 11 “requires lawyers to think first and file later, on pain of personal liability.” *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 157 (3rd Cir. 1986). An inquiry under subsection (a) of Rule 11 does not turn on the outcome of the case; instead, it turns on whether attorney met the reasonable inquiry and proper purpose threshold in preparing and signing the pleading. *People v. Trupp*, 51 P.3d 985 (Colo. 2002).

6. For the reasons more fully set forth, hereinbelow, Plaintiff’s April 25th 2005 Affidavit and the preceding Affidavit of December 1995, upon which it relies, does not meet the burden under Rule 11.

II. ARGUMENT

Hern’s April 25th 2005 Affidavit does not satisfy the Requirements of an Affidavit made on Personal Knowledge

7. The Colorado Supreme Court held in *Loonan v. Woodley*, that, “The central feature of an affidavit is its assurances, pursuant to oath, that the contents of a subscribed document are, to the subscriber's personal knowledge or belief, true.” 882 P. 2d 1380, 1385 (Colo. 1994) [citation omitted]. “As a consequence, [an] omission of this pledge of personal knowledge and understanding indicates [an] affidavit has failed to achieve its purpose.” *Id.*

8. Plaintiff’s Affidavit is based almost entirely on conjecture and hearsay. In *Tooley v. District Court*, the court found that a, “the petition, and the affidavit . . . contained allegations, which largely were unsubstantiated and were based solely upon information and belief. The petitions and the affidavit were [therefore] insufficient.” 549 P.2d 772 (Colo. 1976) *Id.* at 774.” Therefore, as a matter of law, Plaintiff’s Affidavit is defective and should be stricken (*see generally* C.R.C.P. § 12(f)).

9. The only allegations averred in Hern's affidavit purported to be based on personal knowledge are events that he alleges occurred between 1994 and 1997. Of those, few have any basis in fact or corroboration in the Record. For example, Hern alleged that, "[Scott] has told law enforcement authorities that there are two things he wants to do before he dies: kill me and kill his ex-wife," yet, because no such statement was ever made by Defendant, Hern is unable to produce any evidence (including the alleged officer or other witnesses) in support of his lascivious accusation.

10. Hern's affidavit contains baseless suspicions, which are not grounded in fact or in law and, thus, have no legal merit. (*see* C.R.C.P. § 11(a)). For example, Hern alleges that signs were placed near his property in September of 2001 and he argues, by implication, that Defendant could be the only person resourceful enough to have located his address and, further, that Defendant would have kept that information to himself. He alleges that, in 2003, a similar act transpired and he claims, "I believe that Ken Scott may have posted these signs, although I do not know this for a fact." Aff. at p. 1, ¶ 8. In fact, Hern offers no evidence, either direct or indirect, that Defendant has engaged in any overt or covert acts, intent, motive, plan, preparation or communications that threaten Hern.

Plaintiff's Affidavit Violates Colorado Medical Practice Laws and Ethical Guidelines

11. Hern testified in his April 25th 2005 affidavit, in pertinent part:

it appears to me that [Scott] is still suffering a serious mental disorder, and this has not changed from 1995 [sic]. In particular, it appears to me that he has many paranoid delusions and that these could lead him to violent action, particularly against me.

Id. at p. 2.

12. Section 9.01(a) of the Ethical Principles of Psychologists and Code of Conduct 2002, promulgated by the American Psychological Association states, "Psychologists base the opinion contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings."

13. Section 9.01(b) of the Ethical Principles of Psychologists and Code of Conduct 2002 states, "Except as noted in 9.01(c), psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements and conclusions." The American Academy of Psychiatry and the Law's Ethical Guidelines for the Practice of Forensic Psychiatry state, "Honesty, objectivity and the adequacy of the clinical evaluation may be called into question when an expert opinion is offered without a personal examination." The American Psychological Association's Specialty Guidelines for Forensic Psychologists, Guideline VI. H, requires that, "Forensic psychologists avoid giving written or oral evidence about the psychological

characteristics of particular individuals when they have not had an opportunity to conduct an examination of the individual.”

14. Defendant is informed and believes and, thereon, alleges that Dr. Hern is neither a psychologist nor a psychiatrist. As such, Hern is not qualified to make axis I or axis II psychiatric or psychological diagnostic statements or to otherwise provide opinions of the psychological characteristics of Defendant.

15. Hern’s conduct is specifically proscribed by C.R.S. § 12-43-202 (Practice outside of or beyond professional training, experience, or competence) and C.R.S. § 12-43-222(h).

16. The conduct complained of, herein, is precisely the same conduct that Hern engaged in when he produced his earlier affidavit in support of his Petition for Mental Health hold in December 1995. Then, Hern averred that he obtained medical records, including psychiatric evaluations and other diagnostic findings, from unnamed “law enforcement officials.” *Id.* at ¶ 8, 13, 14 & 15. Defendant herewith asks this Court to take **Judicial Notice** of Plaintiff’s December 1995 Affidavit in support of mental health hold, a copy of which is attached hereto and made part hereof by reference as, “**Exhibit A.**”

17. Dr. Hern, who is a licensed practitioner in Colorado, both in 1995 and today, is aware of the ethical and legal implications of **confidentiality of medical records**, irrespective of whether the patient is his *vel non*. The fact that Hern is at political odds with defendant is not a legally valid reason for him to violate this most fundamental tenet of modern medical practice.

18. Although the “theft” of these medical records (*See* generally C.R.S. § 18-4-412)), as described in Hern’s 1995 affidavit, implicates unnamed “law enforcement officials,” Hern is equally culpable for the receipt of unauthorized medical records.

19. Further, upon information and belief, these mental health records were subsequently provided by Hern to the media (*see* p. 16 ~ 17 of the Westward February 1997 article, attached hereto and made part hereof by reference as, “**Exhibit B.**”).

Plaintiff’s Attorney’s Submission of the April 25th 2005 Affidavit is a Violation of the Rule 1.2

20. Rule 1.2 (Scope and Objectives of Representation) provides, in pertinent part:

In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person’s race, gender, religion, national origin, **disability**, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Id. at para. F. [emphasis added]

21. Defendant's alleged mental illness, as contemplated in Plaintiff's affidavits, is a disability. *See* 42 U.S.C. § 10802 (4); *See also* Colorado Supreme Court Chief Justice Directive 04-07 ("A person with a disability is defined as an individual who has a physical or mental impairment that substantially limits one or more of the major life activities, has a record of such impairment or is **regarded as** having such impairment"). [emphasis added].

22. The language, "regarded as," reflects Congress' intent, under the Americans with Disabilities Act, to extend the protections afforded thereunder, not only to those with an actual qualifying disability (or record of qualifying disability), but also to those regarded as having a disability that substantially limits one or more major life activities. (*See* generally 42 U.S.C. 12102(2)); *and see Doe v. New York University*, 666 F.2d 761, 775 (2d Cir. 1981).

23. As such, Plaintiff alleges (and Defendant does not dispute) that Plaintiff *regards* Defendant as having a psychiatric disability, yet at the same time, Plaintiff's counsel's scurrilous pleadings are calculated to, "appeal to or engender bias against [Defendant] on account of [his] . . . disability," and, therefore, should be stricken as a matter of law.

CONCLUSION

24. For the reasons more fully set forth hereinabove, Defendant respectfully requests an Order striking the Affidavits of Warren Hern.

WHEREFORE, Defendant respectfully requests an Order striking Plaintiff's Affidavits from the Record because they violate medical practice standards, are scurrilous and are devoid of any basis in fact or law.

Dated: July ____, 2005

KENNETH TYLER SCOTT
P.O. Box 351685
Westminster, Colorado 80035-1685

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of July 2005, a true and correct copy of the above and foregoing **Motion to Strike** was placed in the U.S. Mail, first-class postage prepaid and addressed hereto:

Howard Bittman
1406 Pearle Street, Suite 200
Boulder, CO 80302

Clerk of the Gilpin County Combined Court
2960 Dory Hill Road
Golden, Co. 80403
