

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

**REPLY IN SUPPORT OF MOTION TO STRIKE AND MOTION FOR EVIDENTIARY HEARING FOR
MODIFICATION OF RESTRAINING ORDER**

COMES NOW, the Defendant KENNETH TYLER SCOTT, pursuant to County Court R.Civ.P. § 365 and C.R.S § 13-14-102 17.5(d) and moves this Court for an evidentiary hearing on the matter of permanent restraining order and also in support of Defendant's prior Motion to Strike Plaintiff's Affidavits, upon which Plaintiff's contentions rely. As grounds, therefor, Defendant states as follows:

1. This Court entered, in Plaintiff's favor, a permanent restraining order imposing a one-mile prohibition on travel through the heart of a major Colorado metropolitan area, the City of Boulder.¹ This Order was granted at the behest of Plaintiff and on the basis of an affidavit that Defendant now moves to strike, as more fully set forth in Defendant's July 10, 2005 Motion.
2. In April, Defendant filed a motion arguing, *inter alia*, that it was inequitable for the permanent restraining order to have any prospective application.
3. On May 16, 2005, this Court entered an Order directing Defendant to comply with the, "nine relevant factors" of the "statutory prerequisites" of §§ 13-14-102(17.5)(e)(I) through (IX) C.R.S. 2004. Defendant has considered the guidance contained the Court's Order and has further reviewed Rule 365 and section 13-14-102 in its entirety and now moves this Court for an evidentiary hearing on the matter.

¹ Irrespective of the Appellate outcome, the fact remains that this Order was entered in the absence of Defendant, attributable solely to his confinement by the State, which failed to afford him the Constitutional due process protection of appearance, presentation of evidence in his defense and confrontation of his accuser. Hence, all motions filed by Defendant thereafter have been for post-deprivation remedies.

4. On July 10, 2005, Defendant requested this court to strike Plaintiff's legally defective affidavits upon, which the permanent restraining had been granted nearly ten years ago and upon, which Plaintiff continues to rely. This included Plaintiff's most recent April 25th 2005 Affidavit.

5. On July 13, 2005, Plaintiff provided a one-sentence, one-paragraph response, arguing, "There is currently no matter pending before the Court. Defendant's Motion is essentially moot. Plaintiff prays that this Court deny Defendant's Motion." *Id.* at ¶ 1.

6. Plaintiff's July 13th 2005 responsive pleading offers no denial of any of Defendant's claims, statements of fact or conclusions of law contained in his original Motion. As such, Defendant's factual allegations are deemed confessed. *See generally* C.R.C.P. 8§(d) ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."); *see also Duke v. Pickett*, 168 Colo. 215, 451 P.2d 288 (1969) ("A party waives all defenses and objections which he does not present in his answer"); *Tovrea v. Denver & Rio Grande Western R.R. Co.*, 693 P.2d 1016 (Colo. App. 1984) (If the issue raised by the pleadings is not objected to, the parties' consent is implied).

7. Plaintiff's argument [that this matter is moot] is with out merit. An issue becomes moot only when the relief granted by the court would not have a practical effect upon an existing controversy. *Grossman v. Dean*, 80 P.3d 952, 957 (Colo. App. 2003). Because Defendant is seeking to vacate or modify the permanent restraining order and because Plaintiff is relying on his two affidavits in support, there exists a controversy over which this Court retains jurisdiction. Additionally, Plaintiff's affidavits contain statements which, not only sully the reputation of Defendant, but also violate Colorado law (as more fully set forth in Defendant's July 10, 2005 Motion to Strike) and bring disrepute to the medical profession.

8. As per C.R.S. §13-14-102 (17.5)(b), Defendant has been convicted of no misdemeanor, the underlying factual basis of which has been found by a court on the record to include an act of domestic violence, as that term is defined in section 18-6-800.3 (1), C.R.S., or of any felony.

9. Pursuant to C.R.S. §13-14-102(b)(I)(B), Defendant has attached, hereto, a copy of the results of a fingerprint-based criminal history record check of Defendant that was conducted within ninety days prior to the filing of the instant motion and, which includes a review of the state and federal criminal history records maintained by the Colorado Bureau of Investigation and Federal Bureau of Investigation. The copy is incorporated by reference, herein, as "Exhibit A."

WHEREFORE, Defendant respectfully requests an Order setting an evidentiary hearing for modifying or vacating the permanent restraining order and for an Order striking Plaintiff's Affidavits from the Record for the reasons more fully set forth in Defendant's July 10, 2005 Motion to Strike.

Dated: July 22, 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 and Motion for Evidentiary Hearing for Modification of Restraining Order** 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
