

**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

**VERIFIED MOTION FOR RECONSIDERATION OF RULINGS DATED “7 – 19 - 2005” AND “8 – 12 – 2006”**

**COMES NOW**, the Defendant KENNETH TYLER SCOTT, pursuant to County Court R.Civ.P. § 359 (3) & (7) and moves this Court for reconsideration of the above-captioned rulings denying his motions. As grounds, therefor, Defendant states as follows:

1. The purpose of filing an application for relief under Rule [3]59 (such as the within Motion) is to give a trial court an opportunity to correct any errors. *Walter v. Walter*, 136 Colo. 405, 318 P.2d 221 (1957); *Minshall v. Pettit*, 151 Colo. 501, 379 P.2d 394 (1963); *Rowe v. Watered Down Farms*, 195 Colo. 152, 576 P.2d 172 (1978).
2. Defendant, above-named, filed two Motions under the authorities of Rules 311, 360 and 365 seeking a hearing to vacate a permanent restraining order, for sanctions against opposing counsel and for two Affidavits to be stricken from the Record. These Motions were denied by this Court without comment.
3. The above-captioned Orders denying Defendant’s motions were entered by this court on “7 – 19 – 2005” and “8 – 12 – 2006 [sic].” The clerk’s stamp indicates that the motions were received by the Court on July 12<sup>th</sup> and July 26<sup>th</sup>, respectively.<sup>1</sup>
4. Neither of the Court’s rulings were mailed by the clerk to the Defendant until \_\_\_\_\_ . The within Motion is, therefore, timely. *See, e.g., Littlefield v. Bamberger*, 10 P.3d 710 (Colo. App. 2000) (Period for filing a Rule [3]59 motion begins when notice of entry of judgment is mailed to the parties).

<sup>1</sup> A copy of the front page of each of the two Motions, bearing the Court’s rulings, is attached hereto for the Court’s convenience.

5. The above-captioned rulings did not include any findings of fact, conclusions of law or other commentary. A trial court's ruling of this nature that is not adequately supported by findings of fact or conclusions of law must be vacated. *Marriage of Goodbinder*, 2005 Colo.App. LEXIS 1010

6. Defendant has previously argued (with prolixity) that the permanent restraining, now ten years in effect, has imposed a one-mile prohibition on travel through the heart of a major Colorado metropolitan area, the City of Boulder. This Order was granted *ex parte* at the behest of Plaintiff and on the basis of affidavits that Defendant moved to strike, as more fully set forth in Defendant's July 10, 2005 Motion. Defendant has further argued, *inter alia*, that it was inequitable for the permanent restraining order to have any prospective application.

7. On May 16, 2005, this Court entered an instructive 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. The order, which denied Defendant's motion as defective, implied that the Motion was subject to correction. *Cf. Harris v. Municipal Court*, 123 Colo. 539, 234 P.2d 1055 (1951) (failure to sign a complaint is not jurisdictional, but is subject to correction.)

8. Defendant adopted the guidance contained the Court's May 16, 2005 Order and filed his Amended Motion for a hearing on the matter of the permanent restraining order.

9. Defendant's three-page Amended Motion, incorporating authorities, was unopposed (and is, therefore, 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)).

10. Despite that Defendant's *pro confesso* allegations are deemed confessed, this Court issued rulings that Defendant's applications for relief are moot, apparently adopting Plaintiff's July 13, 2005 response, which contained a one-sentence, one-paragraph argument that, "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.

11. Plaintiff's argument is clearly erroneous, as there is, indeed, a matter pending before this Court, not only by virtue of Defendant's prior two motions, but also as of the instant motion.

12. In addition, Plaintiff's argument [that this matter is moot] is without merit. Defendant's application for relief would have been moot if this Court had vacated the permanent restraining order. Upon information and belief, this Court has not vacated the permanent restraining order.

13. 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.

**14.** Further, a case is not moot so long as a moving party continues to suffer some harm that a favorable court decision would remedy. Indeed, so long as the parties have a concrete interest in the outcome of the litigation, the case is not moot. *Firefighter's Local 1784 v. Stotts*, 467 U.S. 561, 568 (1984). Plaintiff's affidavits [that Defendant has moved to strike] 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.

**15.** 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.

**16.** Pursuant to C.R.S. §13-14-102(b)(I)(B), Defendant attached 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 his Motion and, which included a review of the state and federal criminal history records maintained by the Colorado Bureau of Investigation and Federal Bureau of Investigation.

**WHEREFORE**, Defendant prays in the name of the LORD JESUS CHRIST and respectfully requests reconsiderations of the aforesaid rulings and for 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).

## VERIFICATION

STATE OF COLORADO )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

Acknowledged and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2005

Witness my hand and official seal: \_\_\_\_\_

[SEAL]

My Commission expires: \_\_\_\_\_

## CERTIFICATE OF MAILING

I hereby certify that on this \_\_\_\_\_ day of August 2005, a true and correct copy of the above and foregoing Rule 359 Motion was hand delivered to the Clerk of the Gilpin County Combined Court and a copy placed in the U.S. Mail to counsel-of-record Howard Bittman by 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

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