

<p>JEFFERSON COUNTY DISTRICT COURT STATE OF COLORADO 100 Jefferson County Parkway Golden, Colorado 80401</p> <hr/> <p>GILPIN COUNTY COURT 2960 Dory Hill Road, Golden, Co. 80403 Case No. 95-C-132</p> <hr/> <p>WARREN MARTIN HERN, Appellee,</p> <p>v.</p> <p>KENNETH TYLER SCOTT, Appellant</p> <hr/>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Civil Case No.: 96CV28</p> <p>Hon. Judge Jackson, presiding</p>
<p>BRIEF IN OPPOSITION TO APPELLEE’S MOTION TO DISMISS AND RULE 11 MOTION FOR SANCTIONS</p>	

COMES NOW, the Appellant, Kenneth Scott, in support of his Brief in Opposition to Appellee’s Motion to Dismiss in the above-styled matter and states as follows:

1. Appellee has forfeited his opportunity to file a meaningful and timely Answer Brief on the merits by using that opportunity to file an untimely “Response Brief,” without leave from this Court, and which advances a fatal and careless error in his calculation of chronology, as more fully set forth, hereinbelow.

2. Appellee argued that Appellant Scott’s appeal is untimely because he is allegedly appealing a May 16, 2005 Order of the Gilpin County Court by way of a Notice of Appeal filed on August 29, 2005, which is an incorrect conclusion. Appellant is **not** appealing the Order of May 16, 2005, but rather is challenging the denial of his Rule 360(b) motion (docketed July 26, 2005 and “Denied by the Court as moot 8-12, 2006 [sic]”), within which Appellant cured his

prior filing defect and requested an evidentiary hearing regarding the permanent restraining order. Vol. I, pp. 175 – 176. Appellant clearly identified this as the first of the two issues presented for appeal. Op. Brf. at p. 1 and p. 7 and again in the body of his Brief. Op. Brf. p 7 (lines 9 – 12) & p. 11 (lines 18 – 21).

3. Appellant also argued that an appeal of the denial of his Rule 360(b) Motion (and not the May 16, 2005 Order), is appropriate. Op. Brf. p. 10 (lines 9 – 12). *See United Bank v. Buchanan*, 836 P.2d 473 (Colo. App. 1992) (concluding that the “final order appealed from this is the order denying [appellee’s] C.R.C.P. 60 motion, not the judgment entered [seven months previously]). An order denying a Rule [3]60(b) motion is a final and appealable order, which this Court must review for abuse of discretion. *Guevara v. Foxhoven*, 928 P.2d 793, 795 (Colo. App. 1996); *Buchanon, supra* (“[d]enial of a motion under this Rule [60(b)] is appealable independently of an underlying judgment”).

4. The actual and applicable chronology is, as follows:

<u>Document</u>	<u>Docketed</u>
• Defendant’s Motion for Hearing on PRO	April 12, 2005
• Plaintiff’s Response in Opposition . . .	April 26, 2005
• Defendant’s Reply in Support . . .	May 09, 2005
• Order denying Motion for Hearing on PRO	May 16, 2005
• Defendant’s Motion to Strike Affidavits	July 12, 2005
• Plaintiff’s Response in Opposition . . .	July 14, 2005
• Defendant’s <i>combined</i> Reply in Support of Motion to Strike & Rule 360(b) Motion for Hearing on PRO	July 26, 2005
• Orders mailed by clerk on:	Aug. 19, 2005
(a) DENIED July 12 motion to strike affidavits (denied 7/19/05)	
(b) DENIED July 26 Motion for hearing on PRO, (denied 8/12/06 [sic])	
• Defendant’s Rule 359 Motion for Reconsideration of Denial of Rule 360(b) Motion for Evidentiary Hearing on PRO.	Aug 29, 2005
• Defendant’s Notice of Appeal	Aug. 29, 2005

5. Because it wasn't until August 19, 2005 that the clerk mailed the court's ruling denying Scott's Rule 360(b) Motion for Evidentiary Hearing, the time for filing a Rule 359 motion or Notice of Appeal started on August 19, 2005, rather than when it was actually denied (August 12, 2005). Op. Brf. at p. 7 (lines 13 – 15). 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; Notice of Appeal time begins to run when the Rule [3]59 motion is denied or sixty days, whichever occurs first). Appellant's Rule 359 Motion was denied on August 29th 2005. Therefore, the Notice of Appeal would have been due on September 13, 2005, not including three days for service by mail. Even if, *arguendo*, the clerk had mailed it on August 12, Appellant's Notice of Appeal was timely.

6. With respect to the trial judge's ruling on a ten-year pending recusal motion (noted by Appellee as being part of the May 19, 2005 Order), Scott is not appealing the May 19th Order, but rather calling attention to the prior ten years of failing to decide said motion.¹ This Court is not deprived of jurisdiction to consider the underlying procedural history (up to and including the May 19th order), because the scope of appeal includes orders that are "adequately encompassed," by an order or those that have "formed the basis for the later order," and, thus, may, "now be appealed in connection with the final orders subject to review." *In re Marriage of Paul*, 978 P.2d 136 (Colo. App. 1998). Consideration of the trial judge's motives and/or conduct in the case with respect to the recusal motion is appropriate in the context of deciding issues that have been properly preserved for review.

7. The carelessness evident in opposing counsel's two-page purported "Response Brief" is so conspicuous that an inference of lack of respect for the tribunal is warranted. Opposing counsel does not appear to take these proceedings seriously and this is not the first time —it is reminiscent of opposing counsel's one-paragraph, three-sentence responsive pleading filed on July 13, 2005 in the trial court case. Vol. I, p. 249. In addition, on or about November 3rd 2005,

¹ An order denying a request for recusal is appealable only after final judgment; however, requiring a party to wait until after trial and judgment before challenging the denial of a recusal request leaves him without a plain, speedy, adequate remedy. *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 (3d Cir. 1993) (citation omitted).

opposing counsel moved this Court for an order authorizing an extension of time. Upon information and belief, the court did not rule on said motion, yet opposing counsel has presumptively taken leave and, rather than file an actual response brief, filed a defective and untimely motion alleging that Appellant's appeal was untimely.

8. 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).

9. 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.

10. 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 (3d 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). Opposing counsel's November 15th 2005 purported “Response Brief” does not meet the burden under Rule 11. Accordingly, Appellant requests this court to strike his Response Brief and decide the merits of this appeal on the Record and briefs now properly before the Court and for other such relief as this Court deems appropriate.

WHEREFORE, the appellant prays in the name of the Lord Jesus Christ, the one and only true God, for the relief herein sought —namely, that Appellee’s Motion to Dismiss be denied in its entirety; that Appellee’s Response Brief be stricken pursuant to Rule 11; and that this appeal proceed on the record and briefs now before the Court.

Respectfully submitted this 23rd day of November 2005.

Kenneth Tyler Scott

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of November 2005, a true and correct copy of the above and foregoing Brief in Response to Motion to Dismiss and Rule 11 Motion for Sanctions was placed in the U.S. Mail, first-class postage prepaid and addressed hereto:

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Golden, Co. 80403

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Golden, CO 80401