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| DISTRICT COURT, DENVER COUNTY, COLORADO |  |
| DACourt Address: Denver County District Court FILI1437 Bannock St., Room 256 CASDenver, CO 80202(720) 865-8301 | E FILED: October 27, 2015 4:06 PM NG ID: E85B1CAAA3666E NUMBER: 2015CV31709 |
| Plaintiff: ROBERT ABRAMS |  |
| v. |  |
| Defendants: SHAWN BEESON, an individual; and CALIFORNIA STREET PARKING GARAGE, LLLP, aColorado limited liability limited partnership. | **COURT USE ONLY** |
| Attorneys for Plaintiff: | Case Number: 2015CV31709 |
| ELKUS SISSON & ROSENSTEIN, P.C.Steven T. Mandelaris, #37964 501 S. Cherry Street, Suite 920Denver, CO 80246Phone #: (303) 567-7981Fax #: (303) 431-3753E-mail: smandelaris@elkusandsisson.com | Division: 409 |
| ABRAMS & ASSOCIATES, LLCRobert Abrams700 17th St., Suite 650Denver, CO 80202Phone #: (303) 322-4115Fax #: (303) 333-0708E-mail: Robert@AbramsLaw.net Atty. Reg. #: 37950 |  |
| **PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION FOR ATTORNEY FEES** |

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COMES NOW, Plaintiff Robert Abrams, through his attorneys at Elkus Sisson and Rosenstein, P.C. and Abrams & Associates, LLC, and hereby files his Response to Defendant’s Motion for Attorney Fees (“Motion”). In support thereof, Plaintiff state and allege as follows:

# INTRODUCTION

1. Plaintiff represented Defendant as his lawyer nearly three years ago in a personal injury lawsuit. At the end of the representation, as stated in this Court, Defendant became violent and irate, demanded his files back, caused a scene in Plaintiff’s building and terrified Plaintiff’s paralegal, Brittany Hayes. Ms. Hayes stated in court, she was so afraid of Defendant at that time, she locked the office door for several days in fear of him.
2. As confirmed at the parties’ hearing, nearly three years have passed since the fore-mentioned incidents, where Plaintiff has not seen nor heard from Defendant in that time. Then, upon the very first encounter with Defendant, he accosted Abrams in the street and publically called him a “piece of shit” and a “motherfucker.”
3. Subsequent, about 4-6 weeks later, again in the very next encounter between these parties, Defendant again called Abrams a “motherfucker” as witnessed in court by Alex Osborne and testified thereto.
4. On September 11, 2015, this Court held a hearing (the “Hearing”) on Plaintiff’s motion for a permanent protection order against Defendant. Plaintiff stands by his Complaint and asserts all averments therein are true. The Court did not find there was a continuing threat to Abrams and thus denied his motion for permanent protection order.
5. Although the Court did not find Plaintiff met his burden to enter a permanent protection order, factually per three eye witnesses, a fight ensued between the parties and Plaintiff was injured in the fight. This material fact alone, as acknowledged by all parties, proves Plaintiff’s motion for protection order was not frivolous, groundless or vexatious.

# STATEMENT OF UNDISPUTED FACTS

1. At the Hearing the following facts occurred, were testified thereto and are cited to herein as the record of transcript. *Exhibit 1.*
2. Defendant first moved to have his case dismissed on the grounds opposing counsel thought relevant. The Court denied Defendant’s motion.
3. Upon completion of Plaintiff’s case, Defendant moved for a directed verdict for Plaintiff’s failure to make a *prima facie* case. The Court denied Defendant’s motion and articulated Plaintiff’s *prima facie* case on the record.
4. The Court held a trial on the basis of Plaintiff’s claim against Defendant, to make the current temporary protection order in place against Defendant, permanent. Upon completion of the case, the Court denied Plaintiff’s request and vacated the temporary protection order.
5. Upon conclusion of the evidence, the Court articulated its findings and facts, including the heavily conflicted and disputed testimony of witness Alexander Osborne, and ruled Plaintiff did not meet his burden for a permanent protection order.
6. At no time in the Court’s findings on the record did the Court find Plaintiff’s case frivolous, groundless or vexatious. The Court simply found that under the law’s two-part test for a permanent protection order, Plaintiff did not meet his burden.
7. Witness Osborne testified, Abrams and Beeson were yelling at each other in the street, Abrams walked away, Beeson followed Abrams while yelling at him, Abrams opened the garage entrance while his back was to Beeson, Beeson was shouting “Hit me again” and “You owe me $30,000,” Beeson had a brief conversation with Osborne after being punched in the face (Abrams disputes), and Beeson shoved Abrams through the parking garage doorway. *Exhibit 1, pg. 17-20, 22.*
8. Defendant Beeson testified, Abrams turned and continued to the garage, where after Beeson followed Abrams to the garage, told him to “hit me again, motherfucker,” made sure to qualify his attack on Abrams with witnesses wherein he asked witnesses, “did everybody see him hit me,” followed Abrams into the garage as Abrams was trying to move, Beeson stepped in and pushed him up against the wall, proceeded to pull Abrams hair out and wanted to keep fighting Abrams. *Exhibit 1, pg. 40-43.*

# LEGAL AUTHORITY

1. C.R.S. § 13-14-106. Procedure for permanent civil protection orders

(1)(a) ….If upon such examination the judge or magistrate finds by a preponderance of the evidence that the respondent has committed acts constituting grounds for issuance of a civil protection order and that unless restrained will continue to commit such acts or acts designed to intimidate or retaliate against the protected person, the judge or magistrate shall order the temporary civil protection order to be made permanent or enter a permanent civil protection order with provisions different from the temporary civil protection order. A finding of imminent danger to the protected person is not a necessary prerequisite to the issuance of a permanent civil protection order….

Here, Plaintiff must prove Defendant committed the acts complained of herein and will continue to commit acts to retaliate against Plaintiff if not restrained. At the Hearing, the Court found Plaintiff did not meet this burden. Failing to meet a burden at trial does not mean the claim is automatically frivolous, groundless or vexatious. There is nothing in the record of a meritless claim.

1. Defendant brings his motion under C.R.S. § 13-17-102 for his attorney fees. To prevail upon such a request Defendant must prove Plaintiff’s claim lacked substantial justification. A claim lacks substantial justification if it is “substantially frivolous, substantially groundless, or substantially vexatious.” *Id.*
2. A claim is “frivolous,” if the proponent can present no rational argument based on the evidence or law in support of the claim. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984). Here, Plaintiff argues he was attacked, a fight ensued, and Defendant started the fight and injured Plaintiff. These are all rational arguments supported by the evidence from all witnesses that a fight ensued where Plaintiff asserted he was injured. Factually, Plaintiff was injured as he went to the doctor with a concussion. *Exhibit 7.*
3. “Groundlessness assumes the proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim.” *Bilawsky v. Faseehudin,* 916 P.2d 586 (Colo. App. 1995). Here, Plaintiff showed the evidence of his pulled-out hair, scratches on his back, legs and knee, identification of the perpetrator (Defendant), swollen temple from Defendant hitting Plaintiff in the face; and, a doctor’s office visit report showing his statements in furtherance of medical treatment and his concussion. Further, Plaintiff presented Ms. Hayes as a witness in support of his claims to show Defendant’s motive. *Exhibits 6 and 7.*
4. “A vexatious claim is one bought or maintained in bad faith to annoy or harass and may include conduct that is arbitrary, abusive, stubbornly litigious or disrespectful of the truth.” *Bockar v. Patterson*, 899 P.2d 233 (Colo. App. 1994)**.** Here, the parties admit to being in a fight. Both parties assert the other one started the fight and put up evidence in support of their claim. Each called witnesses to prove motive ($30,000 claimed owed to Defendant by Plaintiff) past hostility by Defendant against Plaintiff for representation issues and injuries. Factually, Plaintiff was injured in the fight and sought the legal remedy of a protective order. The evidence proved the parties met twice in the street, which ultimately resulted in violence and injury. Plaintiff’s seeking a protective order under the circumstances is a valid legal remedy.
5. Pursuant to C.R.S. § 13-14-106, motion for permanent protection order, the statute does not provide for attorney fees or even costs to a defendant.
6. C.R.S. § 13-14-109 at the permanent protection order hearing, the court may require the respondent to pay the filing fee and service-of-process fees and to reimburse

the petitioner for costs incurred in bringing the action. The statute is silent as to an award of attorney fees.

1. Colorado follows the common law “American Rule” regarding attorney fees: as a general rule, in the absence of a statute, court rule, or private contract expressly saying to the contrary, each party in a lawsuit bears its own legal expenses. *See* [*Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 818 (Colo. 2002)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2002357946&amp;pubNum=0004645&amp;originatingDoc=Ic73dfc50e9dd11e48cb2e12b655d7643&amp;refType=RP&amp;fi=co_pp_sp_4645_818&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.CustomDigest%29&amp;co_pp_sp_4645_818); [*Bernhard v. Farmers Ins. Exch.*, 915 P.2d 1285, 1287 (Colo. 1996)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1996098215&amp;pubNum=0000661&amp;originatingDoc=Ic73dfc50e9dd11e48cb2e12b655d7643&amp;refType=RP&amp;fi=co_pp_sp_661_1287&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.CustomDigest%29&amp;co_pp_sp_661_1287).
2. In Colorado, attorney fees are generally not recoverable absent a statute, court rule, or private contract to the contrary. [*Bernhard v. Farmers Ins. Exch.,* 915 P.2d 1285, 1287 (Colo.1996)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1996098215&amp;pubNum=0000661&amp;originatingDoc=I80fc630de06c11e28503bda794601919&amp;refType=RP&amp;fi=co_pp_sp_661_1287&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.CustomDigest%29&amp;co_pp_sp_661_1287); *see also* \*566 [*Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1975129779&amp;pubNum=0000708&amp;originatingDoc=I80fc630de06c11e28503bda794601919&amp;refType=RP&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.CustomDigest%29). This reasoning is based on the American rule, which requires each party in a lawsuit to bear its own legal expenses. [*Bernhard*, 915 P.2d at 1287](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1996098215&amp;pubNum=0000661&amp;originatingDoc=I80fc630de06c11e28503bda794601919&amp;refType=RP&amp;fi=co_pp_sp_661_1287&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.CustomDigest%29&amp;co_pp_sp_661_1287).
3. This reasoning is based on the American rule, which requires each party in a lawsuit to bear its own legal expenses. The rationale behind the rule is broad-ranging: for example, responsibility for one’s own legal expenses is thought to promote settlement; poor litigants may be discouraged from instituting actions to vindicate their rights if the penalty for losing were to include paying their opponent’s attorney fees; and the difficulty of ascertaining reasonable attorney fees in every case would pose a substantial burden on judicial administration. *See* [*Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1967129502&amp;pubNum=708&amp;originatingDoc=I2f5aa600f57c11d9bf60c1d57ebc853e&amp;refType=RP&amp;fi=co_pp_sp_708_1407&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.DocLink%29&amp;co_pp_sp_708_1407).

# ARGUMENT

1. Pursuant to C.R.S. § 13-14-106, motion for permanent protection order, the statute does not provide for attorney fees or even costs to a defendant. C.R.S. § 13-14-109 at the perm- anent protection order hearing, the court may require the respondent to pay the filing fee and service-of-process fees ……….and to reimburse the petitioner for costs incurred in bringing the action. The statute is silent as to an award of attorney fees, arguably because a plaintiff should not suffer the penalties of attorney fees for trying to protect himself.
2. Plaintiff’s burden for making a temporary protection order permanent requires a preponderance of the evidence that unless restrained, Defendant will continue to commit such acts to retaliate against the protected person. Plaintiff proved, the parties met in the street on two occasions, Defendant verbally assaulted Plaintiff and a fight ensued. Plaintiff asserted that, unless restrained, Defendant would continue this conduct in the future. Plaintiff did not meet his burden but the record is replete with facts and allegations in support of Plaintiff’s claims. *Exhibits 3, 6, 7, and 10.*
3. Defendant argues he should be awarded attorney’s fees under C.R.S. § 13-17-102. To prevail upon such a request Defendant must prove Plaintiff’s claim lacked substantial justification. Plaintiff presented evidence, witnesses and tried his case under C.R.S. § 13-14-106 to seek protection from this Court. Because the Court did not find that Plaintiff met his burden under the law, does not mean that Plaintiff’s request for protection was frivolous, groundless or vexatious. If that was the case, every trial loss would result in attorney’s fees and costs. In fact, the record proves just the opposite. It is undisputed Plaintiff was verbally assaulted, followed and yelled at by defendant, who admitted to shoving plaintiff through his parking garage door, which brought about Plaintiff’s motion for protection order. Therefore, the Court cannot find Plaintiff’s claim lacked substantial justification. *Exhibit 1, pg. 20, ln 6-8.*
4. Witness Alexander Osborne, stated he witnessed Defendant call Abrams a “mother fucker,” watched Abrams turn and walk away while Defendant followed behind Abrams yelling at Abrams, Abrams turned and punched Defendant (Abrams disputes), Defendant stopped and had a conversation after the alleged one punch to make sure Defendant had witnesses (which on its face seems absurd), then Defendant became the attacker, shoved Abrams through the door and that is when the fight ensued. *Exhibit 1, pg. 17-20*. This is what Osborne saw: Defendant became the attacker after stopping and talking to Osborne. *Exhibit 1, pg. 20, ln 2-8.*
5. Defendant claims he needed to defend himself, yet he clearly had enough time to turn to witnesses and qualify with them before proceeding to “defend himself.” *Exhibit 1, pg. 41, ln 17-19.* If Defendant needed to immediately “defend himself” so as to avoid further injury in self-defense, he would not have felt the need to justify his actions with witnesses, nor would he have had the time to do so. At this point, it is clear Defendant became the attacker. Defendant, who is much larger than Abrams, came at Abrams from behind as he started moving away and shoved Abrams through the parking garage door*. Exhibit 1, pg. 22, ln 4-7; pg. 41, ln 21-25.*
6. Arguably, Abrams turned around while being pursued by Defendant yelling at him and punched Defendant in self-defense. Abrams continues to dispute Osborne’s statement and asserts Beeson followed Abrams into the garage and attacked him from behind. *Exhibit 1, pg. 40, ln 22-23; pg. 41, ln 23-25.*
7. Plaintiff stands by his testimony and asserts Defendant’s statements are false. The Court did not make any findings as to this issue.
8. Plaintiff sought to admit evidence as is appropriate in the practice. The court is the gatekeeper of evidence. Plaintiff sought to introduce evidence he thought admissible pursuant to R.P.C. Rule 1.6 because under Rule 1.6, “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary (1) …to prevent substantial bodily harm; or (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.” *See* Colo. RPC

1.6. This is the precise foundation, as allowed by the Rules, under which Plaintiff introduced his evidence. Here, Defendant assaulted Plaintiff and arguably, if unrestrained, would continue his pattern of violent behavior, which is likely to lead to bodily harm to Plaintiff, as defined in Rule

1.6 and C.R.S. § 13-14-106. Plaintiff believed revealing this information, obtained during representation, is necessary and allowed under Rule 1.6, to prevent future bodily harm.

1. On September 11, 2015, Defendant testified he followed Plaintiff to the garage, called Plaintiff a “motherfucker” while following behind him, qualified his witnesses and then stepped inside the garage, pushed Plaintiff up against the wall as Plaintiff was trying to move away and pulled out Plaintiff’s hair. *Exhibit 1, pg. 40-42.*
2. Further, when Defendant became the attacker, he admitted at the Hearing, “At that point, I was like I don’t care; all these people saw you hit me, you know, and I wanted to continue fighting.” *Exhibit 1, pg. 43, ln 1-3*. This violent and intentional statement alone is enough proof that Defendant is a serious physical threat to Plaintiff and that Plaintiff’s request for a protection order was meritful. Not only did Beeson suspiciously justify initiating the fight with a few witnesses, he admits he then wanted to continue fighting Abrams and then pursued him and pushed him through the door and into the wall.
3. The testimony of Beeson, Osborne and Abrams (on certain undisputed issues) all confirm the following: Defendant and Abrams had two altercations in the street on the dates stated by Plaintiff. Defendant called Abrams a “mother fucker,” watched Abrams turn and walk away to his parking garage, where after Defendant followed behind Abrams yelling at him,

Abrams turned and punched Defendant (Abrams disputes), Defendant stopped had a conversation after the one punch to make sure Defendant had his witnesses (absurd), then Defendant became the attacker, pushed Abrams through the door, which is when the fight ensued. That is what Osborne saw and Defendant confirmed: Defendant became the attacker while Abrams turned to walk away after Defendant stopped to talk to Osborne. Defendant confirmed he pushed Abrams through the door, shoved him up against the wall, pulled out his hair and the fight occurred inside the California Street Parking Garage at the elevators, just as Abrams claimed the whole time.

1. Plaintiff asserts, as a direct and proximate result of Defendant’s violent conduct and battery perpetrated against Plaintiff, Abrams fears for his physical safety around Defendant and therefore sought to make the Court’s Temporary Protection Order permanent. Plaintiff had every right to bring his claims into court, seek a protective order and try his case. The record is filled with ample evidence that the incident occurred more as Abrams said than Defendant and therefore cannot be frivolous, groundless or vexatious. Accordingly, Defendant’s motion for attorney fees should be denied.

# CONCLUSION

Plaintiff has a history with Defendant, as his prior counsel, of Defendant’s discontent. Plaintiff brought Defendant into Court under a Verified Complaint and Motion for Protection Order. Trial testimony showed his hostile nature, belligerence and rage toward Plaintiff and Ms. Hayes. Plaintiff showed Defendant’s $30,000 motive and corroborating testimony as to Plaintiff’s case by both Defendant and Osborne. Plaintiff showed his injuries and exhibits thereto. The Court granted Plaintiff a Temporary Protection Order, which Plaintiff sought to make permanent. Plaintiff offered exhibits consist with his medical records, his injuries, photos of the incident, witness testimony, his own testimony, substantive law and legal basis for all his arguments. He supported his ethical authority under the Rules of Professional Conduct and presented evidence for his claim. Failing to meet one’s burden of proof is not grounds for the imposition of attorney fees. The law does not support attorney fees in this matter. Further, the undisputed fact that a fight ensued, during which Plaintiff was injured, is grounds for Plaintiff to request a protection order. There is nothing frivolous, groundless or vexatious about Plaintiff trying to keep himself protected from a man who physically attacked him and who works across the street from his office. To award Defendant attorney’s fees and costs in this matter would be a gross injustice to anyone who seeks to keep himself safe through a protection order by the Court.

RESPECTFULLY SUBMITTED this 27th day of October, 2015.

ELKUS SISSON & ROSENSTEIN, P.C.

*/s/ Steven T. Mandelaris*

Steven T. Mandelaris Attorney at Law

*(Original signature on file at Elkus Sisson & Rosenstein, pursuant to C.R.C.P. 121 § 1-26)*

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have this 27th day of October, 2015, served via ICCES a true and correct copy of the PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION FOR ATTORNEY FEES upon:

Michael P. Boyce

Law Office of Michael P. Boyce, PC

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*/s/ Brittany Hayes*

Brittany Hayes, Paralegal

*(Original signature on file at Abrams & Assoc., LLC, pursuant to C.R.C.P. 121 § 1-26)*