|  |  |
| --- | --- |
| DISTRICT COURT, DENVER COUNTY, COLORADO |  |
| DADenver County Court FIL1437 Bannock St., Room 409 CADenver, CO 80202(720) 865-8301 | TE FILED: April 20, 2016 4:45 PM ING ID: 7D6B7C421084DSE NUMBER: 2015CV31709 |
| Plaintiffs: ROBERT ABRAMS and ABRAMS & ASSOCIATES, LLC, a Colorado limited liability company; |  |
| v. |  |
|  | **▲ COURT USE ONLY ▲** |
| Defendants: SHAWN BEESON |  |
| Attorney for Plaintiffs: | Case Number: 2015CV31709 |
| ABRAMS & ASSOCIATES, LLCRobert Abrams700 17th St. Suite 650Denver, CO 80202 | Division: 409 |
| Phone Number: (303) 322-4115Fax Number: (303) 333-0708E-mail: Robert@AbramsLaw.net Atty. Reg. #: 37950 |  |
| **PLAINTIFFS’ RESPONSE TO DEFENDANT’S MOTION TO DISMISS CLAIM OF BATTERY AS BARRED BY COLLATERAL ESTOPPEL AND DISMISS PLAINTIFFS’ CLAIM OF OUTRAGEOUS CONDUCT** |

COMES NOW, Plaintiffs, Robert Abrams and Abrams & Associates, LLC, through their attorneys at Abrams & Associates, LLC and hereby submit their Response to Defendant’s Motion to Dismiss Claim of Battery and Outrageous Conduct. In support thereof, Plaintiffs state and allege as follows:

# INTRODUCTION

1. On May 14, 2015, Plaintiff filed his Verified Complaint and Motion for a Civil Protection Order against the Defendant.
2. On September 11, 2015, the court held a hearing (the “Hearing”) on Plaintiff’s Complaint and Motion for a Civil Protection Order. The central issue before the court was a

determination if Plaintiff’s complaint could support the law defined within C.R.S. § 13-14-106 to issue a permanent protection order. The claim of battery and the elements thereto were never tried before the court and have not been to this day.

1. At the Hearing, 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. The Court found there was not enough evidence to conclude the events alleged by the Plaintiff occurred by a preponderance of the evidence and the Court denied the Plaintiff’s request for a permanent protection order.
2. At the Hearing, defendant first moved to have Plaintiff’s case dismissed. The court denied Defendant’s motion. Next, 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. Accordingly, a *prima facie* case may exist on Plaintiff’s battery claim, even if the facts asserted could not support the elements of a permanent protection order, which are different elements, yet to be tried to a jury.
3. On October 6, 2015, Plaintiff filed his Third Amended Complaint and added and removed claims. The elements to prove a battery claim are different from the elements to support a permanent protection order. The allegations may be the same, but the legal claim is different; accordingly, *res judicata,* has not occurred.
4. At the Hearing, 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. However, this does not mean that a jury may not find differently on Plaintiff’s claim of battery, which consists of different elements.

# LEGAL AUTHORITY

1. C.R.C.P. 8. Defendant failed to raise the affirmative defense of *res judicata* as required by Rule 8, and has therefore waived same*. See Defendant’s Answer and Counter- claim* filed on October 21, 2015.

Affirmative Defenses and Mitigating Circumstances. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

Because defendant failed to raise this exact issue in his Answer, he waived the right claim same. Plaintiff had no notice of this affirmative defense. The closest notice pled by

defendant was *estoppel* couched within other equitable estoppel claims of waiver, laches and unclean hands, which have no relation to issue preclusion.

C.R.C.P. Rule 8

1. *Res judicata,* also known as claim preclusion, bars litigation over matters decided in an earlier proceeding, as well as any matters that could have been raised in that proceeding but were not. *Gavrilis v. Gavrilis*, 116 P.3d 1272, 1273 (Colo. App. 2005). Re-litigation of an issue is precluded if (1) the issue precluded is identical to an issue actually determined in the prior proceeding, (2) the party against whom estoppel is asserted was a party in the prior proceeding, (3) a final judgment on the merits was entered in the prior proceeding, and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.*
2. C.R.S. § 13-14-106, if upon examination of the evidence, 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.
3. Elements of Battery. For the plaintiff to recover from the defendant on his claim of battery, you must find that all of the following have been proved by a preponderance of the evidence:
	1. The defendants act resulted in physical contact with the plaintiff; and
	2. The defendant intended to make harmful or offensive physical contact with the plaintiff (or knew that he would probably make such contact); and
	3. The contact was [harmful] [or] [offensive].

C.J.I. 20:5

These elements of liability are different from the elements of liability to issue a permanent protection order, accordingly, they have never been litigated to finality.

# I. Plaintiff’s Claims Are Not Barred by ResJudicataor Collateral Estoppel

1. *Res judicata*, also known as claim preclusion, bars litigation over matters decided in an earlier proceeding, as well as any matters that could have been raised in that proceeding but were not. *Gavrilis v. Gavrilis* 116 P.3d 1272, 1273 (Colo. App. 2005). “For a claim in a second judicial proceeding to be precluded [under res judicata], there must exist (1) the issue precluded is identical to an issue actually determined in the prior proceeding, (2) the party against whom estoppel is asserted was a party in the prior proceeding, (3) a final judgment on the merits was entered in the prior proceeding, and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.*
2. In this case, the second, third and fourth elements are satisfied. (2) Plaintiff was a party to the prior action; (3) a final judgment on the merits was entered in the prior proceeding; and, (4) Plaintiff had a fair opportunity to litigate the matter. However, the first element is not satisfied. The allegations are similar, but the claims are not identical, to those at issue in the battery proceeding. The prior proceeding only addressed the elements for a permanent protection order (the event occurred and it is likely to occur again). Nothing was addressed regarding battery (the Defendant intended to harm Plaintiff and incurred injuries). This was not addressed at the prior hearing. In fact, testimony by defense witness Osborne openly stated after Plaintiff allegedly struck Defendant, Defendant stopped, had a conversation, and then attacked Plaintiff. *Exhibit 1, page 19, 20 lines 21-8.* A jury, under a battery claim can easily find different fault in this matter as to battery. And, the extent of Plaintiff’s injuries was not determined to final resolution either. So, there is no *res judicata* that would be collaterally estopped on the battery claim.
3. In this proceeding, Plaintiff wishes to establish Defendant’s intentional tort conduct and related injuries thereto, rather than the likeliness, without restraint, the events will reoccur. This is separate from the claims for relief previously addressed in the permanent protection order hearing. Consequently, Plaintiff’s claims are not barred by the doctrine of *res judicata.*
4. Similarly, “[c]ollateral estoppel, or issue preclusion, bars litigation of an issue determined in a prior proceeding.” *Dale v. Guaranty Nat. Ins. Co*., 948 P.2d 545, 550 (Colo. 1997). Collateral estoppel applies if: “(1) the issue precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding.” *Id.*
5. For the aforementioned *res judicata* reasons and analysis thereto, issues 2-4 are satisfied, but element (1) was not determined because battery was never before the court, as a claim for relief, litigated to final determination. Only the elements to obtain a permanent protection order were litigated prior. Accordingly, by law, collateral estoppel has not occurred. Therefore, Plaintiff’s claims are not barred by the doctrine of collateral estoppel, either.
6. This matter is set to litigate in front of a jury under the claims of battery and extreme and outrageous conduct. The elements of each will be before the jury with those jury instructions as separate matters, with separate elements, never before tried.

# CONCLUSION

Plaintiff raises claims of battery and extreme and outrageous conduct against Defendant. Neither of these claims was tried before the court in the parties’ prior hearing, which was for an order seeking permanent protection against defendant, which has its own elements. The claims are different; the elements of proof are different; as such, neither collateral estoppel nor *res judicata* occurred. Accordingly, the court should dismiss defendant’s motion.

WHEREFORE, Plaintiffs respectfully request this Court deny Defendant’s motion to dismiss Plaintiff’s claims of battery and, extreme and outrageous conduct.

RESPECTFULLY SUBMITTED this 20th day of April 2016.

ABRAMS LAW, LLC

*/s/Robert Abrams*

Robert Abrams, Attorney for Plaintiffs

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

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have this 20th day of April, 2016, served via ICCES, a true and correct copy of the foregoing PLAINTIFFS’ RESPONSE TO DEFENDANT’S MOTION TO DISMISS CLAIM OF BATTERY AS BARRED BY COLLATERAL ESTOPPEL AND DISMISS PLAINTIFFS’ CLAIM OF OUTRAGEOUS CONDUCT, upon:

Michael P. Boyce

Law Office of Michael P. Boyce, PC

3773 Cherry Creek Drive North, Suite 575 Denver, CO 80209

*Attorney for Defendant*

*/s/ Josiah Silverstein*

Josiah Silverstein

*(Original signature on file at the law office of Abrams & Assoc., LLC pursuant to Rule 121 § 1-26).*