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| DISTRICT COURT, ADAMS COUNTY, COLORADO1100 Judicial Center Drive Brighton, CO 80601**Plaintiff:**American Family Mutual Insurance Company, As Subrogee of Kathryn Windt, | DATE FILED: February 6, 2017 4 FILING ID: E420BFB6A5100 CASE NUMBER: 2015CV31808* COURT USE ONLY 
 |
| v. |  |
| **Defendants/Third Party Plaintiffs:**Jvonne Becerril and Aurelio Meza-Cuevas, | Case Number: 2015CV31808 |
| v. | Div.: W Ctrm.: |
| **Third Party Defendant/Counterclaimant:** |  |
| Kathryn Windt |  |
| *Attorneys for Defendants Becerril and Meza-Cuevas:*Jeffrey Clay Ruebel Katherine L. Brim Ruebel & Quillen, LLC8501 Turnpike Drive, Ste 106Westminster, Colorado 80031Phone Number: (888) 989-1777FAX Number: (303) 362-5724E-mail: Jeffrey@rq-law.com |  |
| **DEFENDANTS’ COMBINED RESPONSE TO WINDT’S MOTIONS IN LIMINE** |

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DEFENDANTS JVONNE BECERRIL and AURELIO MEZA-CUEVAS (“Mrs.

Becerril” and “Mr. Meza-Cuevas”), by and through counsel, RUEBEL & QUILLEN, LLC, hereby submit their Combined Response to Windt’s Motions in Limine. In response to the Motions, Defendants state and allege as follows:

# Response to Motion in Limine regarding Collateral Source Payments.

Although Colorado’s Collateral Source Rule does prohibit a jury or trial court from

considering payments or compensation that an injured plaintiff receives from his or her third- party insurance, the Collateral Source Rule does not bar the admission of evidence of all sources of payment for a plaintiff’s medical expenses, particularly for the purpose of arguing for a post- verdict set-off. If, prior to or during trial, it becomes apparent that third parties paid portions of Windt’s medical expenses for which Defendants would be entitled to a post-verdict set-off, Defendants seek merely to reserve their rights to raise any issues regarding collateral sources with the Court at the time of trial or through post-verdict motions.

C.R.S. § 13-21-111.6 requires the trial court to reduce a successful plaintiff's verdict as a matter of law by the amount the plaintiff “has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company or fund in relation to the injury . . . sustained.” *Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562, 565-66 (Colo. 2012). The statute “preserves the common law post-verdict component of the collateral source doctrine *to a limited extent* by prohibiting trial courts from reducing a plaintiff's verdict by the amount of indemnification or compensation that the plaintiff has received, or will receive in the future, from ‘a benefit paid as a result of a contract entered into and paid for by or on behalf of’ the plaintiff.” *Id*. at 566 (emphasis added). A post-verdict setoff is not permitted under Colorado’s current collateral source rule *if* benefits result from a plaintiff’s *purchase of insurance. Volunteers of Am. Colo. Branch v. Gardenswartz,* 242 P.3d 1080, 1083 (Colo. 2010)*.*

Outside the insurance context, where the benefits in question do not fit within the statute’s exception for benefits “paid as a result of a contract entered into and paid for by or on behalf of such person,” a plaintiff’s verdict must be reduced. Benefits paid by an injury financing company, for example, do not fit within the statute’s exception and necessitate a post-

verdict reduction of a successful plaintiff’s recovery. Here, Defendants reserve their rights to argue that such a reduction is necessary, should Windt prevail at trial.

Therefore, Defendants request that any Order *in limine* this Court enters on Windt’s Motion be limited, such that Defendants may raise collateral source issues with the Court.

# Response to Motion in Limine regarding Financial Motives/Greed/Secondary Gain.

Colorado Rule of Evidence 403 permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. However, the rule “strongly favors the admission of relevant evidence.” *Haralampopoulos v. Kelly*, 361 P.3d 978, 1003 (Colo. App. 2011) (citations omitted). Where a court is weighing considerations of relevance and prejudice and both considerations are strong, the balance “should be struck in favor of admitting probative evidence.’” *Id*. (citations omitted) (quotation omitted).

The amount of damages Mrs. Windt incurred due to the negligence, if any, of Defendants will be a paramount issue at trial. Mrs. Windt will be the principal witness as to her claimed damages. The “question of a witness' credibility is *always* deemed to be in issue and is to be determined by the jury.” *People v. Roybal*, 775 P.2d 67, 72 (Colo. App. 1989) (emphasis added). Counsel should be allowed wide latitude during cross-examination of witnesses as to issues which bear upon their credibility. *Tarling v. People*, 194 P. 939 (Colo. 1921); *Davis v. People*, 238 P. 25 (Colo. 1925).

The jury will be instructed, pursuant to Colorado Jury Instruction 3:16, that in determining the credibility of each witness, it should consider, among other matters, “the…unreasonableness of their testimony…their motives…bias, prejudice or interest…and all other facts and circumstances shown by the evidence which affect the credibility of the witness.” CJI-Civ. 3:16. Financial motives, ‘greed,’ and secondary gain pertain to all of those considerations. Windt’s

Motion seeks to circumvent the dictates of this instruction and improperly exclude from the jury’s consideration Mrs. Windt’s financial motives or interest in the outcome of this litigation as they weigh on the credibility of her testimony. It would be inconsistent with the intent and purpose of the instruction, would inhibit its effectiveness, and would hinder the fact-finders’ determinations as to witness credibility if Defendants were precluded from referencing, arguing, or inquiring into Mrs. Windt’s financial motivations which bear upon her relevant motives, bias, prejudice, or interest.

Therefore, Defendants request that Windt’s Motion be denied.

# Response to Motion in Limine regarding Discussion of Insurance Rates

Defendants do not object to this Motion as drafted.

# Response to Motion in Limine Regarding Prior Medical Conditions and Plaintiff’s Prior Workers Compensation Claim.

The Colorado Rules of Evidence presume the admissibility of all relevant evidence.

C.R.E. 402, 403. Mrs. Windt’s pre-accident tailbone injury and history of back pain are not “unrelated” medical conditions; rather, they involve areas Windt claims were injured in the accident and pre-existing complaints similar to those Windt attributes to the accident. Defendants dispute whether Windt’s claimed injuries were causally related to the accident; evidence as to Windt’s history of complaints which pre-existed the accident is therefore highly relevant.

Windt claims that she experienced, among other issues, low back pain as a result of the accident. In deposition, Windt testified that she shattered her tailbone and sustained other back injuries when she fell out of a semi-truck and while lifting a tailgate that collapsed at her workplace. *Deposition of Kathryn Windt*, November 23, 2016, at 14.5-10, 14.19-24, attached hereto as **Exhibit A**. The impact of those injuries was apparently severe; Windt was rendered

unable to do “just about everything,” and the effects persisted for roughly three years. *Id*. at 15.18-24. Windt’s disclosures related to the prior tailbone and back injuries were inadequate, and additional relevant evidence as to the extent of those injuries and Windt’s treatment may be introduced at trial. Windt’s medical records disclosed in this action demonstrate that she has a history of low back pain and complaints for which she sought medical treatment on multiple occasions prior to the accident, following her initial work-related injury.

*Westfall v. Town of Hugo*, 851 P.2d 299 (Colo. App. 1993), cited by Windt, does *not* establish that evidence regarding Mrs. Windt’s prior injuries for which she brought a workers’ compensation claim is inadmissible. Instead, in *Westfall* the court held only that if prior litigation or the issue decided therein is not relevant to *any substantive issue* presented in the present case, evidence of the prior litigation is generally inadmissible. *Id*. at 301. For example, if evidence of prior litigation is offered only to suggest a plaintiff’s litigious tendency, it should not be admitted. *Id*. However, evidence regarding prior litigation may be admitted if it is related to the subject matter of the case at hand and relevant to one of the issues presented therein. *Id*.

Here, Mrs. Windt’s prior workers’ compensation claim, to the extent it can be characterized as prior litigation, was a prior injury claim in which Windt alleged she hurt her low back; it is relevant to Windt’s current personal injury claim in which she alleges injuries of a similar nature and complaints involving the same area. Even assuming, arguendo, that the fact that Mrs. Windt made a workers’ compensation *claim* related to her previous work-related injury is not admissible, evidence regarding Mrs. Windt’s prior injuries themselves and history of complaints and treatment is certainly relevant and admissible.

Therefore, Defendants request that Windt’s Motion be denied.

**DATED** this 6th day of February, 2017.

Respectfully submitted, RUEBEL & QUILLEN, LLC



Katherine L. Brim, No. 46532

# CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing Response to Windt’s Motions in Limine was E-Served by the Court-authorized E-System provider, to the following on this 6th day of February, 2017:

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 */s/ Katherine L. Brim*

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