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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: January 23, 2017 7:32 P FILING ID: 88D7822E84C29CASE 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 |  |
| **MOTION IN LIMINE RE TESTIMONY OF WINDT’S EXPERT WITNESSES** |

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

Becceril” and “Mr. Meza-Cuevas”), by and through counsel, RUEBEL & QUILLEN, LLC, hereby submit their Motion in Limine seeking an Order limiting the testimony of Ms. Windt’s treatment providers disclosed as non-retained expert witnesses pursuant to

C.R.C.P. 26 (a)(2)(B)(II) to matters disclosed in specific detail in their medical records

and the statements accompanying Mrs. Windt’s expert disclosures and precluding Mrs. Windt’s medical billing expert from testifying at trial.

# CERTIFICATE OF RULE 121 CONFERRAL:

Counsel for Defendants has conferred with counsel for Mrs. Windt as to this Motion. Mrs. Windt opposes the Motion.

# BACKGROUND

This matter arises out of an October 3, 2014 motor vehicle accident (“the accident”). Mrs. Windt claims that she incurred physical injuries and resultant medical expenses and lost wages due to the accident. Liability for the accident is disputed, as is the causation, nature, and extent of Mrs. Windt’s injuries and damages. Mrs. Windt disclosed several of her treatment providers as non-retained experts; she did not disclose any expert witness as a retained expert in accordance with the requirements of C.R.C.P. 26 (a)(2)(B)(I), nor did she provide the report of any expert.

# STANDARD OF REVIEW

Rule 104(a) of the Colorado Rules of Evidence provides that “[p]reliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court…” The purpose of a motion *in limine* is to allow the court to rule in advance of trial on the admissibility and relevance of certain anticipated evidence. *Uptain v. Huntington Lab, Inc.,* 723 P.2d 1322, 1330 (Colo. 1986). A motion *in limine* provides the court with the opportunity to rule on the admissibility of evidence to shorten trial time, simplify the issues, and reduce the possibility of mistrial. *Id.* Motions *in limine* allow the Court to thoughtfully consider evidentiary issues, expedite trials, eliminate bench conferences,

avoid juror annoyance and permit more accurate rulings. *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1333 (Colo. 1986). A party’s motion *in limine* is adequate to preserve that party’s objection to the evidence that is the subject of the motion *in limine* without the need for contemporaneous objections. *Id.*

# ARGUMENT

Mrs. Becerril and Mr. Meza-Curevas anticipate that Mrs. Windt will attempt to elicit opinions from treatment providers testifying as non-retained expert witnesses which go beyond the bounds of her expert disclosures for those experts. Mrs. Windt’s expert disclosures for her treatment providers contain only general statements as to the conditions for which the providers treated Mrs. Windt and the topics upon which they will opine. See Mrs. Windt’s Expert Disclosure, attached hereto as **Exhibit A**. They contain no specific references to portions of her medical records; rather, they reference “Mrs. Windt’s medical history and records” generally. *Id*. They contain no specific qualifications for her treating physicians. *Id*. Mrs. Windt’s medical records themselves contain no future treatment recommendations. They contain no indications that Mrs. Windt’s treatment providers analyzed documentation and data regarding the subject accident or rendered causation opinions based on data other than Mrs. Windt’s own subjective reporting. None of Ms. Windt’s treatment providers have been disclosed as experts in biomechanics, nor have they been qualified to opine as such. *Id*. Moreover, Mrs. Windt has disclosed a medical billing expert, Nancy Barnard, who is obviously being offered to testify in the role of a retained expert witness, without providing an expert report or otherwise complying with the requirements of C.R.C.P. 26 (a)(2)(B)(I).

*See id*. Where Mrs. Windt has disregarded the dictates of Rule 26, Ms. Bernard cannot be permitted to testify at trial.

An expert witness should not be permitted to testify as to matters not within the scope of the expert disclosure for that witness. *See Gonzales v. Windlan*, --P.3d--, 2014 COA 176 (December 31, 2014); *Freedman v. Kaiser Found. Health Plan,* 849 P.2d 811,

815 (Colo. App. 1992); *Saturn Sys. v. Militare*, 252 P.3d 516, 523 (Colo. App. 2011). Disclosure requirements exist, and should be enforced, to prevent undue surprise and allow all parties to prepare adequately for trial. *Freedman,* 849 P.2d at 815. C.R.C.P. 37(c) “provides for sanctions if a party fails to properly disclose expert testimony under

C.R.C.P. 26 (a)(2), including the exclusion of evidence at trial.” *Gonzales*, 2014 COA at

¶ 28. The sanction provides parties with incentives to make timely disclosures and to resist the temptation to try and gain a tactical advantage at trial by exposing for the first time at that stage evidence favorable to their position. *Todd v. Bear Valley Village Apts.*, 980 P.2d 973, 977 (Colo. 1999). The sanction is automatic and self-executing; it encourages effective case management and is necessary both to punish discovery violations and deter abuses. *Id*. at 978. The trial court has considerable discretion as to limiting testimony based on deficient disclosures or striking such disclosures. *See id*.

# Mrs. Windt’s treatment providers disclosed as non-retained experts must not be allowed to render opinions which are not clearly contained within Mrs. Windt’s medical records.

For non-retained experts, trial testimony must be limited to what is contained in the written report or statement that forms the expert disclosure for that witness. C.R.C.P. 26 (A)(2)(b)(II) (“The witness’s direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.”). The text of and

comments to C.R.C.P. 26 make clear that regardless of whether a party is calling a retained or non-retained expert witness, the disclosure must include a written report or statement containing “a complete description of all opinions to be expressed and the basis and reasons therefore.” C.R.C.P. 26 (a)(2)(B)(II)(a). Any expert opinions offered by the witness on direct examination must be limited to matters disclosed in detail in the report or statement. C.R.C.P. 26 (a)(2)(B)(II); *see also* Comments to Amendments Effective July 1, 2015 at Comment 18 (“expert testimony is to be limited to what is disclosed *in detail* in the disclosure.”) (emphasis added). The parties must be afforded advance notice of the substance of all expert opinions which may be offered at trial. *Id*. at Cmmt. 21. A statement providing generically that a physician will testify as to “causation” or “future treatment” is insufficient; the statement must include the specific substance of and basis for the opinion. *See id.* The disclosure of medical records in lieu of expert reports or statements is disallowed; even where the report or statement references medical records, any such reference should include designated pages of medical records which set forth the opinions to be expressed, along with the reasons and basis therefore. *See id*; C.R.C.P. 26 (a)(2)(B)(II)(a).

The Colorado Court of Appeals most recently addressed the distinction between retained and non-retained experts in *Gonzales v. Windlan*, --P.3d--, 2014 COA 176 (December 31, 2014). It highlighted that C.R.C.P. 26 (a)(2) “distinguishes between experts ‘retained or specially employed to provide expert testimony’ and non-retained experts.” *Id*. at ¶ 28. It defined non-retained experts as “occupational experts, such as treating physicians…or others who might testify as experts but whose opinions are formed as part of their normal occupational duties.” *Id.* (quotation omitted). Its opinion

indicates that a treating physician disclosed as a non-retained expert witness may testify as to opinions formed during her care of the patient, in her role as the patient’s treating physician. *See id* at ¶ 4-30. If a non-retained treating physician is to offer opinions based on the records of others, those records must be those which he or she reviewed as part of his or her treatment of the patient. *Id*. at ¶ 12, 18, 29. Such an expert may not testify as to records which she did not consider during the course of treatment, or opinions which she did not form as part of her normal duties as a treating physician. *See id*. It is clear that a treating physician, who has not complied with the reporting requirement of Rule 26 (a)(2)(B), should not be permitted to render opinions outside the course of treatment and beyond the reasonable reading of his own medical records. *Lamere v. New York State Office for the Aging*, 223 F.R.D. 85, 88-91 (N.D.N.Y. 2004); *see also Gonzales*, 2014 COA 176; Order of United States Magistrate Judge Kristen L. Mix, *Scholl v. Pateder*, No. 09-cv-02959-PAB-KLM, 2011 WL 2473284, D. Colo. June 22, 2011; Order of Jack

Berryhill, *Probst v. Portland Systems*, No. 06CV2358, 2007 WL 4741335, D. Colo. June 22, 2007, attached hereto as **Exhibit B**.

The opinions of other jurisdictions as to this issue, particularly those interpreting the Federal Rules of Civil Procedure, are instructive. Many courts have recognized that it is unfair to allow a party to elicit testimony from a non-retained treatment provider which extends beyond simply the care of the plaintiff to classic expert opinion regarding causation and prognosis, particularly when such opinions have not been properly disclosed. *Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1, 2 (D. Mass. 1996). A treating physician who attempts to offer opinions that reach beyond what was necessary to provide appropriate care for the injured party may step “into the shoes of a retained

expert for the purposes of Rule 26 (a)(2).” *Thomas*, 169 F.R.D. at 2. Disclosure of an expert report has been required “where the witness’ testimony was not based on his observations during the course of treating the plaintiff.” *Thomas,*169 F.R.D. at 2; *see also Lamere,* 223 F.R.D. at 89. Indeed, the purpose of the Rules of Civil Procedure is to promote fairness, trial on the merits, and avoid undue surprises at trial.

Where Mrs. Windt’s expert witnesses have been disclosed pursuant to C.R.C.P. 26 (A)(2)(b)(II) as non-retained and hence have prepared no expert reports, and where the text of Mrs. Windt’s expert disclosure statements is nonspecific, Mrs. Windt’s experts cannot be permitted to testify as to matters not stated with specificity and detail Mrs. Windt’s disclosure statements and their records and, hence, undisclosed to Defendants. Where Mrs. Windt’s medical records contain no specific future treatment recommendations, they cannot opine as to future treatment. They cannot be permitted to testify to causation opinions not clearly contained within Mrs. Windt’s medical records. Nor can they be permitted to testify as if they were experts in biomechanics, offering opinions as to the effects of the particular circumstances of the collision, the positioning of Ms. Windt’s body upon impact, crash dynamics, and force of impact, where their qualifications to render such opinions and the substance of the opinions themselves have not been disclosed.

# Nancy Barnard was not properly disclosed pursuant to C.R.C.P. 26 (a)(2)(B)(I) and hence should not be permitted to testify.

Mrs. Windt failed to comply with her disclosure obligations as to her “medical billing expert”, Nancy Barnard. For all retained expert witnesses, C.R.C.P. 26 (a)(2)(B)(I) requires that the disclosure “be made by a written report signed by the witness.” The report must include:

1. a complete statement of all opinions to be expressed and the basis and reasons therefor;
2. a list of the data or other information considered by the witness in forming the opinions;
3. references to literature that may be used during the witness's testimony;
4. copies of any exhibits to be used as a summary of or support for the opinions;
5. the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
6. the fee agreement or schedule for the study, preparation and testimony;
7. an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and
8. a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The Rule dictates that the witness's direct testimony **shall be limited** to matters disclosed

# in detail in the report. *Id*.

Failure to make proper expert disclosures “generally precludes the undisclosed expert testimony.” *Haralampopoulos v. Kelly*, 361 P.3d 978, 993 (Colo. App. 2011) (*citing Locke v. Vanderark*, 843 P.2d 27, 30 (Colo. App. 1992)). C.R.C.P. 37 (c) specifies that a party who fails to disclose the information required by C.R.C.P. 26(a) **shall not** be permitted to present at trial “**any evidence not so disclosed**.” C.R.C.P. 37; *Trattler v. Citron*, 182 P.3d 674, 681 (Colo. 2008). If the failure to disclose will prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence, witness preclusion is warranted. *Todd v. Bear Valley Vill. Apts.*, 980 P.2d 973, 979 (Colo. 1999).

Mrs. Windt disclosed Nancy Barnard as a “medical billing expert.” Ms. Barnard was not, of course, one of Mrs. Windt’s treatment providers; rather, her involvement in this matter is as an expert who Mrs. Windt retained or employed for this litigation in order to render opinions as to the reasonableness of her medical expenses at trial. Mrs. Windt was, therefore, required by C.R.C.P. 26 to provide a written report signed by Ms. Barnard which includes a detailed statement as to the specific opinions Ms. Barnard will express at trial. *See* C.R.C.P. 26 (a)(2)(B)(I). Mrs. Windt did no such thing. Rather, she included a generalized statement, drafted and signed only by counsel, as to merely the subjects on which Ms. Barnard would opine. See Exhibit A, section 8. For example, the disclosure states simply that Ms. Barnard will “testify as to the costs for future medical expenses for the services recommended by Mrs. Windt’s healthcare providers. She will further testify that these future medical expenses are reasonable and customary charges,” without even specifying *what* future medical expenses Ms. Barnard will testify about. *Id*. Mrs. Windt’s medical records contain no specific future treatment recommendations. Where the substance of Ms. Barnard’s opinions has not been revealed, Defendants are prevented from preparing an adequate defense to those opinions prior to trial. Witness preclusion is warranted where Mrs. Windt has completely disregarded her disclosure obligations as to Ms. Barnard.

It would be both improper and unfair to allow Mrs. Windt’s treatment providers to testify as to matters undisclosed to Defendants. Mrs. Windt should be precluded from eliciting testimony from her non-retained experts insofar as the opinion or information elicited goes beyond a reasonable reading of the testifying expert’s own treatment

records. Mrs. Windt must be prohibited from calling Ms. Barnard as an expert witness

without first complying with her disclosure obligations as to retained expert witnesses.

WHEREFORE, Defendants request an Order precluding Ms. Barnard from testifying at trial and limiting the testimony of Mrs. Windt’s non-retained expert witnesses to opinions specifically disclosed in their medical records.

**DATED** this 23rd day of January, 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 Motion in Limine was E-Served by the Court-authorized E-System provider, to the following on this 23rd day of January, 2017:

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 */s/ Katherine L. Brim*

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