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| DISTRICT COURT, DENVER COUNTY, COLORADO |  |
| DATCourt Address: Denver County Court FILI1437 Bannock St., Room 256 CASDenver, CO 80202(720) 865-8301 | E FILED: February 23, 2017 4:29 PM G ID: EE79EE07EB6F3NUMBER: 2015CV31709 |
| Plaintiffs: ROBERT ABRAMS and ABRAMS & ASSOCIATES, LLC, a Colorado limited liability company; |  |
| v. |  |
| Defendants: SHAWN BEESON | **COURT USE ONLY** |
| Attorneys for Plaintiffs: | Case Number: 2015CV31709 |
| Nathan SilverSilver Law Firm, LLC 700 17th Street, Suite 650Denver, Colorado 80202Phone: (303) 328-8510E-mail: nathan@silverlawdenver.com Atty. Reg. # 28836 | Division: 275 |
| ABRAMS & ASSOCIATES, LLCRobert Abrams700 17th St., Suite 650Denver, CO 80202 |  |
| Phone #: (303) 322-4115Fax #: (303) 333-0708E-mail: Robert@AbramsLaw.net Atty. Reg. # 37950 |  |
| **PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUES OF CAUSATION AND DAMAGES UNDER DEFENDANT’S BATTERY CLAIM** |

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COMES NOW, Plaintiffs Robert Abrams and Abrams & Associates, LLC, through their attorneys at Abrams & Associates, LLC and Silver Law Firm, LLC, and hereby file their Motion for Partial Summary Judgment on the Issues of Causation and Damages under Defendant’s Battery Claim. In support thereof, Plaintiffs state and allege as follows:

C.R.C.P. 121 § 1-15, ¶8 Certification: Plaintiffs contacted defense counsel regarding their position on this Motion. Defendant opposes the relief requested herein. Counsel for Plaintiffs allowed Defendant a brief extension to produce documents and interrogatories, but explicitly excluded requests for admissions as the basis for this Motion. *See Exhibit 1.*

1. From the pleadings, Affidavits and matters of record, no genuine issue of material fact exists; therefore, Plaintiff’s Motion must be granted.
2. A Memorandum Brief setting forth Plaintiff’s position with particularity is set forth herein in support of its Motion for Summary Judgment.

# ISSUES PRESENTED AGAINST DEFENDANT

**I. DEFENDANT’S ALLEGED BACK AND SHOULDER INJURIES WERE NOT PROXIMATELY CAUSED BY PLAINTIFF ABRAMS, AND DEFENDANT SUFFERED NO DAMAGES FROM WHICH HE MAY STATE A CLAIM AGAINST ABRAMS**

**NO GENIUNE ISSUE OF MATERIAL FACT EXISTS REGARDING THE CAUSATION OR EXTENT OF DEFENDANT’S BACK OR SHOULDER INJURIES. ACCORDINGLY, SUMMARY JUDGMENT IS APPROPRIATE UNDER C.R.C.P. 56**

**STATEMENT OF THE CASE**

1. October 21, 2015, Defendant filed his answer and counterclaims to Plaintiffs’ Third Amended Complaint, wherein Defendant alleged a battery claim against Plaintiff Abrams.
2. Defendant claimed that the alleged battery caused injuries to his right shoulder and lower back.
3. Despite failing to disclose an expert to establish such damages on multiple occasions, Defendant was given an extension and expanded discovery, as to future damages only, on this limited issue. Specifically, Defendant disclosed an expert and provided his medical bills and treatment as evidence of his damages.
4. Initially, Mike Boyce, defendant’s prior counsel, sued Plaintiff Abrams for battery and put forth some medical bills early on in the proceeding. So, defendant was well aware of his

obligation to prove his medical damages*.* However, counsel failed to conduct any discovery in this litigation. He served no interrogatories, no request for production of documents or request for admissions. He took no depositions, hired no experts and did no investigation. He filed no Rule 26(a)(2) expert report and disclosed no medical records of any kind. Counsel made no inquiry whatsoever into the facts of his case to support any of his claims or alleged damages.

1. As such, because plaintiffs were aware defendant had no evidence to prove his case, plaintiffs sat on their evidence waiting for trial, which saved plaintiffs time, effort and money in both defense and prosecution. Prior to this court’s expanded order for limited discovery, Plaintiffs conducted no written discovery because Plaintiffs felt Defendant’s failure to adequately litigate would suffice for Plaintiffs to prevail in the matter. Defendant’s expanded discovery forced Plaintiffs to serve discovery and so they did.
2. On January 12, 2017, Plaintiffs served their first set of written discovery on Defendant. Defendant’s deadline to answer discovery was February 16, 2017. Defendant failed to answer discovery by that deadline.
3. Plaintiffs’ first set of discovery contained several requests for admission regarding

the central issue of causation and extent of the alleged shoulder and back injuries. *Exhibit 2.* This

is the foundation for the instant motion. Defendant, through counsel, was in possession of these questions (admissions) for over 8 weeks. There is no excuse for not answering.

1. Plaintiffs’ failure to timely answer discovery is not only typical of Defendant’s participation in this matter, but also serves as the basis for this Motion. Pursuant to C.R.C.P. 36, Plaintiffs’ requests for admissions are deemed admitted, and no genuine issue of material fact

remains after such admissions on the issues of damages from alleged shoulder and back injuries and causation thereof.

# STATEMENT OF UNDISPUTED FACTS

1. After Plaintiff Robert Abrams allegedly struck Defendant, Defendant paused to speak to witnesses and then attacked Plaintiff Robert Abrams, which started the fight. *Request for Admission, ¶ 18.*
2. Plaintiff Robert Abrams did not “head butt” Defendant in the lower back or right shoulder. *Request for Admission, ¶ 6.*
3. Plaintiff Robert Abrams’ alleged punch to Defendant’s face did not damage Defendant’s lower back or right shoulder. *Request for Admission, ¶ 7.*
4. Defendant has a long history of shoulder and lower back pain. *Request for Admission, ¶ 3, 14.*
5. Defendant’s alleged right shoulder injury is an aggravation of a preexisting condition of which he was aware and for which he was treated prior to the date of the alleged battery. *Request for Admission, ¶ 1, 9, 10, 11*
6. Defendant’s alleged lower back injury is an aggravation of a preexisting condition of which he was aware and for which he was treated prior to the date of the alleged battery. *Request for Admission, ¶ 2, 12, 13.*
7. Defendant was made aware that he suffers from a degenerative disc disease and that his condition would inevitably worsen over time. *Request for Admission, ¶ 8, 16, 17.*
8. A physician told Defendant that the MRI on his back did not reveal any obvious acute changes to his back’s condition prior to the alleged battery. *Request for Admission, ¶ 15.*
9. Defendant’s alleged right shoulder injury does not hinder his ability to perform his desk job and data entry job functions. *Request for Admission, ¶ 4, 5.*
10. Defendant’s alleged injuries were not the cause of any pay cut from his job.

*Request for Admission, ¶ 19.*

1. Defendant’s prior back injuries, surgeries, and pain caused Defendant to frequently take breaks at his job prior to the alleged battery. *Request for Admission, ¶ 20.*

# LEGAL AUTHORITY

1. Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c); *see also Huydts v. Dixon*, 606 P.2d 1303, 1306 (1980). “A material fact is a fact that affects the outcome of a case.” *Trigg v. State Farm Mut. Auto. Ins. Co.*, 129 P.3d 1099, 1101 (Colo. App. 2005). “A court must afford all favorable inferences that may be drawn from the undisputed facts to the nonmoving party, and must resolve all doubts as to the existence of a triable issue of fact against the moving party.” *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). The moving party has the burden of establishing the nonexistence of a genuine issue of material fact*. Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Urban v. Beloit Corp.*, 711 P.2d 685, 687 (Colo.1985). “This burden has two components: an initial burden of production on the moving party, which burden when satisfied then shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party.” *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). “Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish there is a triable issue of fact.” *Continental*, 731 P.2d at 713. If the nonmoving party cannot produce sufficient evidence to make out a triable issue of fact, “a trial would be useless and the moving party is entitled to summary judgment as a matter of law.” *Id*. On summary judgment, the court’s “role is simply to determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate factfinder, to sustain [a] claim.” *Jones v. Barnhart*, 349 F.3d 1260, 1265-66 (10th Cir. 2003).
2. C.R.C.P. 36 provides that a party has 35 days from valid service of requests for admissions to answer same. “When a party fails to respond in a timely way to a request for admission, it admits the relevant subject matter of the request.” *Grynberg v. Karlin*, 134 P.3d 563, 565 (Colo. App. 2006); *see also Lionelle v. S.E. Colo. Water Conservancy Dist.,* 676 P.2d 1162, 1167 (Colo.1984); *Cox v. Pearl Inv. Co.,* 450 P.2d 60, 62 (1969); *Engel v. Engel,* 902 P.2d 442, 446 (Colo.App.1995). “These admissions may then be used to support a motion for summary judgment.” *Grynberg*, 134 P.3d at 565; *see also Lionelle, supra; Cox, supra; Trautman & Shreve, Inc. v. Mead & Mount Constr. Co., 163 Colo. 308, 430 P.2d 474 (1967).* Any matter deemed admitted under C.R.C.P. 36 is conclusively established unless the Court, on motion,

permits withdrawal or amendment of the admission. C.R.C.P. 36(b). “Trial courts should be cautious in exercising their discretion to permit withdrawal or amendment of an admission.” *Grynberg*, 134 P.3d at 566. “Because the language of the Rule is permissive, the court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule.” *Donovan v. Carls Drug Co.,* 703 F.2d 650, 652 (2d Cir.1983). “Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.” 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2264 (2d ed. 2005) (citing Advisory Committee Note to 1970 Amendments of Rule 36(b)).

1. Colorado courts treat federal authority on an identical federal rule of procedure as “highly persuasive” in interpreting the Colorado Rules. *See Leaffer v. Zarlengo*, 44 P.3d 1072, 1080 (Colo. 2002). A party cannot recover in an action for damages for battery where there is no evidence of damage. *See Davis v. Heinze,* 184 P.2d 493 (Colo. 1947).

# ARGUMENT

**I. DEFENDANT’S ALLEGED BACK AND SHOULDER INJURIES WERE NOT PROXIMATELY CAUSED BY PLAINTIFF ABRAMS, AND DEFENDANT SUFFERED NO DAMAGES FROM WHICH HE MAY STATE A CLAIM AGAINST ABRAMS**

**THE FACTS IN PLAINTIFFS’ REQUEST FOR ADMISSIONS TO DEFENDANT ARE DEEMED ADMITTED; NO GENUINE ISSUE OF MATERIAL FACT EXISTS RELATING TO DEFENDANT’S ALLEGED DAMAGES OR CAUSATION THERETO, UNDER HIS BATTERY CLAIM**

**A. The Facts in Plaintiffs’ Request for Admissions to Defendant are Deemed Admitted and no Genuine Issue of Material Fact Exists Relating to Defendant’s Alleged Damages or Causation Thereto Under his Battery Claim**

1. Plaintiffs served Defendant their first set of discovery requests on January 12, 2017. *Exhibit 2.* Pursuant to C.R.C.P. 36(a), Plaintiffs’ requests for admissions are deemed admitted 35 days after service. Defendant failed to timely respond to Plaintiffs’ requests for admission, which were due on February 16, 2017.
2. Defendant’s counsel is an experienced trial attorney with 15 years of experience and no excusable neglect sufficient to exculpate his failure to answer discovery.
3. Pursuant to C.R.C.P. 36(b), the substantive matters in requests for admissions set forth therein are conclusively established.

# Plaintiffs did not cause Defendant’s alleged shoulder and back injuries

1. The established facts in this case show that the claim for battery from which Defendant derives his alleged injuries is legally insufficient.
2. Defendant admits that his injuries to his back and shoulder were not caused by Plaintiff Robert Abrams’ alleged contact with his person. Defendant admits that a cooling down period occurred between Plaintiff Abrams’ alleged contact with Defendant, during which time he

spoke to several witnesses. Defendant admits, after that cooling down period, Defendant initiated the contact with Plaintiff Abrams that ultimately led to his injuries.

1. Thus, Defendant’s own actions to commit a battery against Plaintiff Abrams caused his injuries to his back and shoulder. Further, Defendant admits that the harm to his shoulder and back resulted from preexisting injuries, for which he sought treatment prior to the incident with Plaintiff Abrams. Accordingly, Defendant presents no evidence indicating damages occurred as a result of Plaintiffs’ alleged battery with Abrams and admits his alleged damages were the result of his preexisting injuries.

# 2. Since the Facts Establish no Damage Occurred as a Result of Plaintiff’s Alleged Battery, Defendant Cannot Assert a Claim for Damages Therefrom

1. Since Defendant presents no evidence of damages as it relates to his claim for battery against Plaintiffs, such a claim for damages must fail as a matter of law. Pursuant to *Heinze*, *supra*, “a party asserting a claim for damages resulting from battery cannot recover absent evidence thereof.” *Id.* Therefore, on the above-noted, conclusively-established facts, Defendant’s claim for damages resulting from Plaintiffs’ alleged battery is legally insufficient and must fail as a matter of law.

# CONCLUSION

For a party to prevail on a claim for damages resulting from battery, that party must provide evidence of damages therefrom. Here, Defendant failed to timely answer discovery requests, despite having the continuous representation of an experienced trial attorney. And, such counsel never conferred on untimely discovery responses or Rule 6 extensions thereto. Pursuant to C.R.C.P. 36, the failure to answer or object to requests for admissions within 35 days of valid service results in the admission and conclusive establishment of the substantive facts

therein. Defendant was validly served on January 12, 2017. *See ICCES filing.* Thus, the established facts prove Defendant’s claim for damages resulting from an alleged battery by Plaintiffs must fail as a matter of law. Defendant admitted that Plaintiff did not cause his damages, that they arose from an aggravation of a preexisting injury, and that Defendant caused such aggravation by initiating a separate battery after a cooling off period.

The undisputed facts of the case should be dispositive of Defendant’s lack of evidence supporting his claim for damages. Further, Defendant has no basis to excuse his failure to answer discovery sufficient to permit amendment or withdrawal of such admissions. As such, his claim must fail. The parties have no material factual disputes about Defendant’s claim of damages asserted or causation thereto. Thus, Plaintiffs’ Motion for Summary Judgment on these issues must be granted.

WHEREFORE, Plaintiffs Robert Abrams and Abrams & Associates, LLC, hereby request this court grant their motion for summary judgment on the issues of Defendant’s claim for damages resulting from the alleged battery by Plaintiff Abrams against defendant and causation thereto.

RESPECTFULLY SUBMITTED this 23rd day of February, 2017.

SILVER LAW FIRM, LLC

*/s/ Nathan Silver*

Nathan Silver, Attorney at Law

*(Original signature on file at Silver Law Firm, LLC, pursuant to C.R.C.P. 121 § 1-26)*

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have this 23rd day of February, 2017, via ICCES, served a true and correct and correct copy of the foregoing PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUES OF CAUSATION AND DAMAGES UNDER DEFENDANT’S BATTERY CLAIM upon:

Wadi Muhaisen

Muhaisen & Muhaisen, LLC 1435 Larimer Street, Suite 203

Denver, Colorado 80202

*Attorney for Defendant*

*/s/ Michael A. Gubiotti*

Michael A. Gubiotti, Law Clerk

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