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| **DISTRICT COURT, CITY AND COUNTY OF** DA  **DENVER, COLORADO** FILI | E FILED: October 21, 2016 11:45 AM NG ID: C4574F7BDE16D |
| CA | E NUMBER: 2015CV31709 |
| **Denver County District Court** |  |
| **Denver City & County Bldg.** |  |
| **1437 Bannock Street, Room 256** | ▲**COURT USE ONLY**▲ |
| **Denver, Colorado 80202** |  |
| **Plaintiffs: ROBERT ABRAMS and ABRAMS & ASSOCIATES, LLC, a Colorado limited liability**  **company** | **Case Number: 2015CV31709**  Ctrm.: 275 |
| **v.** |  |
| **Defendant: SHAWN BEESON** |  |
| Wadi Muhaisen, 34470 **Muhaisen & Muhaisen, LLC** 1435 Larimer Street Ste 203  Denver, Colorado 80202  Phone Number: 303-872-0084  Fax Number: 303-309-3995 [wadi@muhaisenlaw.com](mailto:wadi@muhaisenlaw.com) |  |
| **SHAWN BEESON ’S REPLY TO DEFENDANT ABRAMS’ RESPONSE TO MOTION TO DEFENDANT’S MOTION FOR EXTENSION OF DISCOVERY FOR INJURY CLAIM AND TO DESIGNATE EXPERT(S)** | |

COMES NOW, the Defendant above named (“Mr. Beeson”), by and through counsel, Muhaisen & Muhaisen, LLC, and again moves the Court to GRANT his Motion to for Extension of Discovery for Injury Claim and to Designate Expert(s), and as grounds therefore states as follows:

1. In his Response, Mr. Abrams (not his counsel, who interestingly doesn’t sign all

of Plaintiffs’ pleadings), again misstates and mischaracterizes the record and the law. Mr. Abrams states that the Court previously abused its authority to allegedly benefit Judge Vallejos’s “personal friend and ex-mentee” Mike Boyce (previous counsel for Mr. Beeson), and that “[u]pon his assertion Judge Vallejos recused himself in this

matter.” Plaintiffs’ Response ¶ 1. While these claims are not fully dispositive to the motion at hand; Mr. Beeson and his counsel address them because Mr. Abrams uses some of the same facts in the current Response, to correct the record in the interest of the integrity of the judicial process; and since it is important that the Court, its law clerk, and staff, are put on notice as to Mr. Abrams’ constant misrepresentations.

1. Judge Vallejos has held that Mr. Abrams has exaggerated the facts and misrepresented what was stated by the Court on these issues. *Order Regarding Plaintiff’s Motion to Reconsider Granting of Continuance and for Further Limited Discovery and Order for Recusal,* September 29, 2016. P.1 (“Vallejos Order”.) The Court found that Mr. Abrams’s “recitation of the facts in his motion was inaccurate.” *Id.* These are the same facts Mr. Abrams asserts in his Response here.
2. Judge Vallejos further found that Mr. Abrams “impugns the integrity of the Court” when he argues that the Court denied his motions due to some alleged impropriety. *Id. at 4.* The Court stated that Mr. Abrams’s allegations against him (Judge Vallejos) are not only unsupported but also accuse the Court of blatant unethical behavior. *Id.*
3. The Court labeled Mr. Abram’s assertion that the Court communicated improperly with a party as “as baffling as it is inaccurate.” *Id.* at 5.
4. The Court stated the following about Mr. Abrams, a member of the Colorado Bar and officer of the court:

It is acceptable, and expected, for counsel to file motions, state the facts and law accurately, and ask the court for a remedy that is appropriate. But it is quite another matter to petulantly exaggerate and misrepresent facts and then, unjustifiably, accuse the court of unethical conduct.

*Id. at 8.*

1. Judge Vallejos stood by his decision not to recuse himself because of any prior relationship with Mr. Boyce. *Id.* Judge Vallejos, an esteemed member of the bench, after exercising tremendous patience with Mr. Abrams, unfortunately has concluded that Mr. Abrams mispresents and exaggerates in his representations to the Court, which is pertinent here, and going forward. Finally, the Court at the October 17th hearing correctly pointed out to Mr. Abrams that since the first trial was vacated, his motion to reconsider the continuance was moot.
2. Focusing on the motion at hand, during the recent October 17th hearing before this Court, Mr. Abrams claimed that Mr. Beeson should have waited until 2017 to file his battery claim against him, presumably to wait until all diagnoses and treatment were complete. However, Mr. Abrams misstated the law to the court, once again, since contrary to his argument to this Court, Colorado requires all civil actions for battery to be brought within one year after the cause of action accrues. C.R.S. 13-80-103(1)(a). Furthermore, and more fundamentally, *Mr. Abrams filed this lawsuit.* Mr. Beeson is the victim of being attacked by his own lawyer, he didn’t choose the scope and duration of his diagnoses and treatment.
3. Regarding Judge Vallejos’s Order regarding extended discovery, the Court stated on May 20, 2016 that discovery was closed except for “*new damages or injury to Mr. Beeson* ***and*** *future damages.*” **Exhibit A, P. 15 Lines 20-23.** (Emphasis Added). Therefore, Judge Vallejos did not limit Mr. Beeson’s damages discovery as narrowly as Mr. Abrams claims. And even if discovery was limited in the fashion Mr. Abrams claims, this Court can extend discovery as it finds factually and legally appropriate under these circumstances, including circumstances that didn’t exist in July (e.g. additional medical tests and diagnoses); which basis Mr. Beeson will address *infra.*
4. As stated in Mr. Beeson’s motion to extend discovery, and by Mr. Beeson himself in Court on October 17th, the extent of his injuries cannot be ascertained until he is examined in November to determine if another surgery will be necessary. Once that examination is complete, Mr. Beeson will be in position to retain the appropriate expert and identify his damages more concisely.
5. Mr. Abrams then engaged in several speculative arguments, in his Response and at the October 17th hearing, about Mr. Beeson and his counsel, such as: “[I]t begs the question, if the MRI in May of 2015 showed “mild tearing”, Exhibit 4, then who is to say defendant didn’t cause his own injuries over the last year while waiting one full year to repair the “mild” shoulder injury.” *Abrams Response* p. 4. These are issues that are within the province of the fact-finder, do not weigh on the issue at hand, and Mr. Abrams will be free to attempt to refute Mr. Beeson’s injuries at trial. Mr. Beeson will not respond to all the other speculative arguments made by Mr. Abrams, as space is limited.
6. Mr. Abrams’ reliance on inapplicable case law continues, this time in his Response Motion. He claims that *Kallas v. Spinozzi,* 342 P.3d (Colo. Ct. App. 2014) is “a case nearly identical to this case.” Response Motion ¶ 7. Except that it is not. 1) The *Kallas* case had been set for trial three (3) times, not once like in this case. *Id. at 608.* 2) The attorney in *Kallas*, who was in an accident, refused to tell the court when he would be available to conduct the trial, and refused to bring in other counsel. *Id. at 609.* Here, counsel is not incapacitated and has agreed to a firm trial date. 3) In *Kallas,* there were numerous failures to disclose expert witness discovery after an expert was retained and drafted a report. *Id.* The Court still gave the Plaintiff numerous opportunities to comply with discovery, and delayed ruling on a motion to strike the expert, and a motion to dismiss. *Id.* If anything, that case stands for the proposition that Courts have latitude in accommodating disclosing parties; in fact, the *Kallas Court* remained patient with the Plaintiff and her counsel up until the day of trial, and only when the Plaintiff wasn’t prepared for the trial did the Court dismiss the case. *Id.* Far from being “nearly identical” to this case, *Kallas* is nearly completely distinguishable, and unlike the myriad delays in that case, Mr. Beeson’s request is simply to extend discovery, so that he can complete his diagnoses, currently expected to occur in November 2016.
7. Mr. Beeson previously listed out the *Todd v. Bear Valley Village Apartments,* 980 P.2d 973, 977 (Colo. 1999) factors, and established how they are applicable to his motion, so he will not fully restate them here. Those include: (1) The importance of Mr. Beeson’s expert’s testimony is very high, (2) there is absolutely no surprise to Mr. Abrams, since he was aware of Mr. Beeson’s pre-existing injuries from when *he was his attorney,* and since he will have every opportunity to review all records and expert

reports submitted, (5) and that Mr. Beeson requiring medical examination in the future does not amount to bad faith, but just the reality of his medical condition due to injuries sustained at the hands of his former attorney.

1. Mr. Beeson will expand on *Todd* factors (3) and (4), since they have become more relevant since the October 17th hearing, and after Mr. Beeson filed the original motion at issue here.
2. The third and fourth factors listed by the *Todd* Court are the availability of a continuance to cure any prejudice, and the extent to which introducing such evidence would disrupt trial. *Todd at 978.*
3. On October 17, 2016, this Court granted Mr. Beeson’s Motion to Continue the November trial date in this matter. The Court based his ruling on Mr. Beeson’s counsel’s conflicting Criminal Jury Trial that was scheduled the same week, and that since the matter was recently transferred to this new division, the existence of two matters already scheduled on the docket that same week.
4. *Todd* Factor (3) Now that the trial has been rescheduled trial to May 2017, it is

confirmed that Mr. Abrams and Plaintiffs would not be prejudiced by this endorsement(s) since he/they were aware that Mr. Beeson intended to provide evidence of his physical damages.

1. Even if the Court accepts that Abrams was prejudiced by late disclosures prior to this past Monday, a continuance of the trial has now remedied the situation, and the availability of the granted continuance has cured any prejudice to him. Id.
2. *Todd* reaffirmed the notions that "sanctions should be commensurate with the

seriousness of the disobedient party's conduct" and that "witness preclusion is a severe sanction and should only be invoked when there has been serious misconduct," *Camp Bird Colorado, Inc. v. BOARD OF COUNTY COM'RS*, 215 P. 3d 1277 (Colo. Ct. App. 2009) (*quoting in part* J.P. v. Dist. Court, 873 P.2d 745, 751 (Colo.1994)). *Todd* did not hold that late disclosures automatically cause prejudice. In *Camp Bird Colorado, Inc.,* the Court allowed testimony from a party’s expert even though his expert report was submitted eleven days before trial; compare that to Mr. Beeson’s reasonable request to submit his expert evidence and injury disclosures many months before trial.

1. *Todd* Factor (4) The *Todd* Court’s fourth factor is the extent to which a late disclosure might disrupt trial. *Id.* Since this Court continued the November jury trial based on both counsel and the Court’s calendars, trial will not be disrupted by permitting Mr. Beeson to complete his diagnoses, disclose those records, and endorse an expert. Jury trial is scheduled for May 1, 2017. Trial therefore commences 196 days after the Court granted the continuance on October 17th, which is more than six months in the future, more than adequate time to remedy any alleged prejudice.
2. At the October 17th hearing, the Court asked counsel how much time would be required for Mr. Beeson to obtain his diagnoses and convey discovery disclosures to the Plaintiffs. Based on a starting date of Monday October 17, 2016, the date the Court granted the continuance motion (Mr. Beeson has already conveyed the medical records he has in his possession to Mr. Abrams.) Mr. Beeson submits that the following deadlines for discovery for his battery/injury claim, based on the Colorado Rules of Civil Procedure, would be adequate and appropriate, and not unduly

prejudice any party:

* + Claimant deadline to disclose expert witness – December 23, 2016.

C.R.C.P. 26(a)(2)(C)(I).

* + Defending party’s expert witness disclosures – January 23, 2016.

C.R.C.P. 26(a)(2)(C)(II).

* + Deadline to serve written discovery – February 6, 2017. C.R.C.P. 16(b)(10).
  + Discovery Cut-Off – March 13, 2017. 16(b)(11).

1. Discovery is designed to facilitate "a fair trial [through] the parties' production of all relevant evidence." *Warden v. Exempla, Inc.*, 291 P. 3d 30 (Colo. 2012) quoting *Trattler v. Citron*, 182 P.3d 674, 679 (Colo.2008).
2. A continuance has provided Abrams time to prepare for Mr. Beeson’s expert’s testimony, thus weighing against any prejudice the he might claim. *See Berry*, 208 P.3d at 251.
3. A party should not be denied its day in court by an inflexible application of a procedural rule that would sanction a non-disclosing party by precluding a witness. *Id.* Further, there is no misconduct by Mr. Beeson, but even if there was, *Todd* held that even serious misconduct is one of only several possible factors to consider under

C.R.C.P. 37(c) when imposing sanctions. *Id.* The controlling question is not whether the new evidence is potentially harmful Mr. Abrams's case, but rather whether Mr. Beeson’s failure to timely disclose the evidence will prejudice him by denying him an adequate opportunity to defend against the evidence. *Id.* Mr. Beeson moved to extend discovery before it closed. Now that the trial has been continued, the answer to whether Mr.

Abrams will have an adequate opportunity to defend against the evidence is resolved.

1. A trial court has considerable discretion in this situation, and this discretion enables the trial court to choose between two or more courses of action and does not bind it to select one course over an alternative. *Municipal Subdist. v. OXY USA, Inc.*, 990 P.2d 701, 710 (Colo.1999). Mr. Beeson respectfully requests the ability to fully pursue his claims and rights, and to have his day in Court.

**WHEREFORE**, in reliance on the argument and supporting facts set forth above, Shawn Beeson respectfully asks the Court to grant his motion.

**DATED** this 21st day of October, 2016.

Respectfully Submitted, Muhaisen & Muhaisen, LLC

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a copy of the foregoing pleading was [ ] hand delivered, or [X] E-Served by the Court-authorized E-System provider, or [ ] served by facsimile to [insert fax number of opposing party or their counsel], or [ ] sent by United States mail postage prepaid, to the following on this 21st day of October 2016:

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\_ /S/ Yvette Garcia Yvette Garcia