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| DISTRICT COURT, DENVER COUNTY, COLORADO |  |
| DATECourt Address: Denver County Court FILIN1437 Bannock St., Room 256 CASEDenver, CO 80202(720) 865-8301 | FILED: September 7, 2016 3:56 PM G ID: 22490226D6A84NUMBER: 2015CV31709 |
| Plaintiffs: ROBERT ABRAMS and ABRAMS & ASSOCIATES, LLC, a Colorado limited liability company; |  |
| v. | **COURT USE ONLY** |
| Defendants: SHAWN BEESON |  |
| 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: 409 |
| ABRAMS & ASSOCIATES, LLCRobert Abrams700 17th St., Suite 650Denver, CO 80202Phone #: (303) 322-4115Fax #: (303) 333-0708E-mail: Robert@AbramsLaw.net Atty. Reg. # 37950 |  |
| **PLAINTIFFS’ MOTION TO RECONSIDER TRIAL CONTINUATION PURSUANT TO C.R.C.P. 60(b)** |

COMES NOW, Plaintiffs Robert Abrams and Abrams & Associates, LLC, by their attorneys at Silver Law Firm, LLC and Abrams & Associates, LLC, and hereby file their Motion to Reconsider Trial Continuation. In support thereof, Plaintiffs state and allege as follows:

C.R.C.P. 121 § 1-15, ¶8 Certification: Plaintiff contacted defense counsel in good faith

regarding this Motion. Defendant opposes the relief requested herein.

# INTRODUCTION

1. Plaintiffs Abrams & Associates, LLC and Robert Abrams (hereinafter “Plaintiffs”) file this Motion to Reconsider requesting the court reconsider its ruling on continuing the trial date, where the court is allowing defendant to put forth future damages for shoulder injuries that

his prior attorney Mike Boyce failed to pursue during the one year long litigation. *Exhibit 3, p.4 line 15-17.*

1. Trial in this matter was scheduled for May 2, 2016. The Court abused its authority when it disregarded the Rules of Civil Procedure, to benefit Judge Vellejos’ personal friend and ex-mentee, Mike Boyce, who the judge personally supervised as Mr. Boyce’s mentor for five years at the public defender’s office.
2. On June 12, 2015, plaintiffs filed a motion to recuse against the judge on this very issue for fear something like this favoritism could or might arise during the litigation. The court denied the motion almost as if to stay in the case to watch his friend and perhaps protect him. A judge is not qualified to hear a case if he “is in any way interested or prejudiced with respect to the case, the parties, or counsel. § 16-6-201(1)(d), C.R.S. 2009. Further, a judge should

disqualify himself “in a proceeding in which the judge's impartiality might reasonably be

questioned.” C.J.C. 3(C)(1). Thus, a judge should recuse himself whether bias is actual or merely

apparent. *Wilkerson v. District Court,* 925 P.2d 1373, 1376 (Colo.1996). Here, Judge Vallejos’ past direct supervision of defense counsel in the public defender’s office, along with his standing compliments and admission of closeness to opposing counsel, may cause impartiality with respect to defense counsel. *Exhibit 1, Plaintiffs’ Motion to Recuse ICCES Trans #*

*ACF9EFE67B554.* Additionally, on or about September 11, 2015, the parties in this matter held a hearing whereby Judge Vallejos informed plaintiffs he received a personal e-mail from Mike Boyce, regarding an alleged assault claim against Mr. Abrams, which amounted to a very improper ex-parte communication between the judge and Mr. Boyce. How Mr. Boyce would have the judge’s e-mail is very interesting. Ex-parte communications, during litigation, are not allowed under the Professional Rules of Conduct. Mr. Boyce patently violated this Rule and the court notified plaintiffs of same. However, to this date, the court failed to share this communication with plaintiffs and Mr. Boyce refused to share it after plaintiffs requested same.

1. Now, on Friday April 29th, the day before trial, with no notice whatsoever to plaintiffs or the court, hidden under defendant’s motion in limine hearing, Mr. Boyce surprises the court and plaintiffs with a motion to continue trial based upon his “ineffective assistance of counsel.” (“IAC”). *Exhibit 2, Hearing Transcript, Apr. 29, 2016,* p. 3 ln. 3 – p.4 ln. 1. Plaintiffs vehemently objected because ineffective assistance of counsel is no basis to continue a trial. The court disregarded all of plaintiffs’ arguments regarding same, arguably to protect Mr. Boyce from a malpractice lawsuit. To continue the trial on Mr. Boyce’s hidden Crim. Proc. 35(c) basis, which does not apply in civil court, the court had to throw away the Rules of Civil Procedure and the basis for continuances defined in *Todd v. Bear Valley.* Defendant and Boyce benefitted from his negligence, to the prejudice of plaintiff, when there was an adequate remedy at law available to defendant on this very issue--legal malpractice against Mr. Boyce.
2. It appears the court considered Mr. Boyce’s basic admission of legal malpractice, as a personal favor to Boyce, his ex-mentee and continued the trial. *Exhibit 2,* p. 3, line 17-22; 9 ln. 20 –24; p. 14 ln. 8-13. *See also Exhibit 3*, *Hearing Transcript, May 20, 2016*, p. 6 ln. 8 – 16;

p. 7 line 19-- p. 9 ln. 6 – ln. 11. Judge Vallejos threw away the Rules on Civil Procedure,

arguably to benefit his friend, who admitted to committing legal malpractice. *Id.* And, the court used the excuse of being afraid of reversal on appeal, to go along with the continuance. *Exhibit 2*, p.7 ln.24 – p.8 ln. 4; p. 8 ln. 14 – ln. 18. Mike Boyce attempted to hide his malpractice under the criminal legal theory IAC, Crim. Proc. 35(c), a concept he is familiar with from practicing criminal law for 15 years.

1. Mike Boyce, sued Plaintiffs for battery and put forth some medical bills early on in the proceeding. So, Mr. Boyce was well aware of his obligation to prove his medical damages. *Exhibit 4,Medical Records.* With this knowledge, Mr. Boyce is a 15 year trial lawyer who failed to:
	1. Conduct any discovery in this litigation. *Exhibit 5. Pleading Log. See also Exhibit 2*, p. 5 ln. 4 – p. 6 ln. 12; p. 8, ln. 16 - p. 9, line 24. *Exhibit 3*, p. 7, line 19-- p.9, line 14; p. 10 ln. 10 – p. 11 ln. 6. 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. He made no inquiry whatsoever into the facts of his case to support any of his claims. Mike Boyce DID NOTHING in this case and is awarded a continuance.
2. 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. Now, as a direct and proximate result of the court’s protections and favoritism to Mike Boyce, plaintiffs are prejudiced with having to conduct expert discovery, put up rebuttal expert witnesses, take depositions and expend money for months, in preparation

for trial, all because of Mike Boyce’s negligence in the practice of law. These expenses are the prejudice to plaintiffs. Further, Mr. Boyce sued Abrams individually for theft. Because he did no investigation and conducted no discovery, he has not one shred of evidence in support of this claim. Had he conducted discovery he would have learned the defendant’s disputed sum is sitting in a COLTAF account for 3 years. Accordingly, Mike Boyce prosecuted a case, in patent violation of Rule 11, before this court to no consequence.

1. The parties filed a joint Case Management Order, on March 29, 2016, the “at issue date” of this case is September 22, 2015. *CMO at ICCES trans # 33E665153B688.* In the CMO the parties stipulated discovery closed on March 14, 2015. The CMO discussed expert witnesses and discovery at length, ¶ 9 and defendant’s medical injuries, ¶ 5(e). So, Mike Boyce has no excuse for his failure to practice law as he knew and pled all of his issues. Furthermore, as stated in the CMO, “the Parties stand on their pleadings as the issues to be tried in this matter.” Mr.

Boyce states in the CMO, he participated in creating it and signed it. To now say he wants a continuance based on his negligent practice of law, is preposterous. If the court goes along with this, based on this new precedence, no lawyer has to practice law, they can sit and do nothing then ask for a “do over” on the eleventh hour if the case never settled.

1. Finally, Mr. Boyce and his client may very well have provided no expert testimony as to current or future damages simply as a cost saving strategy, knowing full-well how expensive discovery and medical expert testimony in civil litigation can be. But, to now prejudice plaintiffs who conducted no discovery for this very reason, to now be forced to do so, is prejudicial as the matter was set for trail to proceed the next day on both parties’ evidence. Now plaintiffs must spend excessive money based on Mike Boyce actions or negligence.

# LEGAL AUTHORITY

1. Rule 60. Relief from Judgment or Order. (b) Mistakes; Inadvertence; Surprise; Excusable Neglect; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect. Relief from the operation of a judgment alleged to have resulted from mistake must be pursued by motion, to be made within a "reasonable time." *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609 (1964). The Court grants Mr. Boyce’s continuance as if it were an inadvertent surprise or mistake that Boyce failed to practice law. This is not a valid basis for a continuance as defined below in *Todd v. Bear Valley Village Apartments*, 980 P.2d 973 (1999).

1. Pursuant to Rule 60(b) the court may reconsider its orders for mistake. Plaintiff requests the court reconsider its order because by law, the court’s reliance on *Todd v. Bear Valley* is misplaced. *Todd,* outlines specific criteria for the court’s discretion to continue trial. Ineffective assistance of counsel (Boyce’s hidden Rule 35(c) argument) is not a basis in civil court to grant a trial continuance because a separate and clear adequate remedy at law exists for defendant in the form of a claim against Mike Boyce for legal malpractice.

# ARGUMENT

1. The Court erred in granting a continuance on Mr. Boyce’s admission of ineffective assistance of counsel (“IAC”). *Exhibit 2,* p. 13 ln. 15 – ln. 17. *Exhibit 3,* p. 3, ln 20 – p. 4 ln. 4. The general rule in civil cases is that the ineffective assistance of counsel is not a basis for appeal

or retrial. If a client's chosen counsel performs below professionally acceptable standards, with adverse effects on the client's case, the client's remedy is not reversal, but rather a legal malpractice lawsuit against the deficient attorney. *Nelson v. Boeing Co.*, 446 F.3d 1118 (10th Cir. 2006). A claim for ineffective assistance of counsel generally does not apply in civil actions, and

plaintiff's only arguable recourse would be a claim for legal malpractice against his former counsel. *Smith v. SDI Industries, Inc.*, 260 Fed.Appx. 93 (10th Cir. 2008) citing to *Nelson.* IAC is post trial relief in a criminal proceeding under Crim. P. 35(c) because there is no adequate remedy at law since the defendant is convicted and in jail. Here, there is an adequate remedy at law in the form of a malpractice lawsuit by defendant against his lawyer Mike Boyce for failing to follow the rules of civil procedure. IAC is not a basis for a continuance as it is post trial relief in a criminal matter C.R.S. § 18-1-147, upon which a conviction was based. Accordingly, the court should not continue trial and reopen discovery upon this basis. Further, the court precisely stated it continued the trial based on concern of reversal on appeal. *Exhibit 2*, p.7 ln.24 – p.8 ln. 4; p. 8 ln. 14 – ln. 18. However, *Nelson* makes clear IAC is not a basis for appeal or retrial, so the court erred in its ruling.

1. The United States and Colorado Constitutions guarantee an accused in a criminal

prosecution the right to effective assistance of counsel. U.S. Const. Amends. VI and XIV; Colo.

Const. Art. II, Sec. 16. This right may be violated by representation that falls below the level of competence to be expected of a reasonably competent attorney practicing criminal law, see, e.g.,

*McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *People v. Stroup,*

656 P.2d 680 (Colo.1982). This has nothing to do with civil proceedings as the adequate remedy

at law in civil proceedings is attorney malpractice. *People v. Castro*, 657 P.2d 932 (Colo).

1. IAC is post trial relief in criminal cases. The U.S. Supreme Court established the

test for ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffective assistance of counsel claim, a defendant must prove, 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. Unless both showings are made, a defendant has not proven that he was denied the effective assistance of counsel. *Id*.

1. Here, in a civil case, Plaintiff's claims arise as legal malpractice claims. “A breach of fiduciary duty claim asserted against a lawyer is a species of legal malpractice.” *Aller v. The law office of Schriefer,* 140 P.3d 23, 27 (Colo. App. 2006). “When such a claim is based on the breach of the duties of loyalty and confidentiality emanating from the attorney-client status between the parties, those duties are measured against standards applicable to attorneys.” *Id.* “Stated differently, a fiduciary breach in this context is a legal malpractice claim based on negligence because it arises from the representation of a client and involves the fundamental aspects of an attorney-client relationship.” *Id.*
2. For the performance prong, a defendant must prove that counsel's representation "fell below an objective standard of-reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. In conducting the reasonableness inquiry, a court must make "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. In addition, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* The court erred in granting a continuance on IAC because it does not apply prospectively; it applies retroactively in criminal matters.
3. For the prejudice prong, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. **Only** where both the performance prong and the prejudice prong have been proven will a defendant be entitled to post-conviction relief

because of the ineffective assistance of counsel. *Id.* Under the court’s flawed reasoning, granting a continuance on Boyce’s basis of IAC, the court erred in granting a trial continuance.

1. The court erred when it was more concerned on being reversed on appeal than following the standard set in *Todd* and *Nelson.* We review a trial court's decision to grant or deny a continuance for an abuse of discretion. *Cherry Creek Sch. Dist. No. 5 v. Voelker,* 859 P.2d 805, 809 (Colo. 1993). Trial continuances "should be limited to circumstances in which unforeseen

and exceptional circumstances require diligent attorneys to request an adjournment." *Todd*, 980

P.2d at 976. In *Todd,* the exceptional circumstance was plaintiff’s counsel needed emergency back surgery. Here, Boyce admits to malpractice, which on its face does not meet the *Todd* elements.

1. In *Kallas v. Spinozzi*, a case nearly identical to this case as to attorney preparation, the court denied Kallas’ motion reasoning, “the burden is upon the plaintiff to prosecute a case in due course without unusual or unreasonable delay.” Citing to *Lake Meredith Reservoir Co. v. Amity Mut. Irrigation Co*., 698 P.2d 1340, 1344 (Colo. 1985). Specifically, “[Plaintiff has] done absolutely nothing to prepare this trial…. I understand and I appreciate [counsel's] health condition, but that does not relieve this Court of its obligations under Rule 1 to secure a just, speedy, and inexpensive determination of every action. This case has another Party to it, that is the Defendant, who is a professional, and he's had to live with [this] case now for over two and a

half years. I'm not in a position today to grant a continuance because of the Plaintiff Counsel's medical condition. He could have easily brought in other Counsel to represent the Plaintiff in this case, and for whatever reason chose not to. We find ourselves here today with the Plaintiff not prepared to proceed to trial.” *Kallas v. Spinozzi*, 2014 COA 164, at 51. We conclude the trial court did not abuse its discretion in dismissing Kallas's claims for failure to prosecute*. Id.* Here, plaintiffs do not request dismissal of defendant’s claims or case, just to proceed on the evidence they each had on the date of trial, as that is what plaintiffs were prepared to defend.

1. Defendant’s counsel failed to disclose expert testimony. The disclosure of expert witness testimony is governed by C.R.C.P. 26(a)(2). The timing and sequence of expert witness disclosure shall proceed according to the provisions of the case management order. See C.R.C.P. 26(a)(2)(C). Thus, regardless of the continuance, endorsement of expert witnesses by this date would presumptively violate the deadline set by the case management order and thereby violate Rule 26(a)(2). *Todd* at 977.
2. Whether or not Mike Boyce, to save money in litigation, intentionally failed to disclose an expert or did so negligently is irrelevant. 37(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. (1) A party that without substantial justification fails to

disclose information required by C.R.C.P. Rules 26(a) or 26(e) shall not, unless such failure is harmless, be permitted to present any evidence not so disclosed at trial. The trial court must be careful not to reward a party who fails to make timely disclosures by granting a continuance, since this practice invites abuse. *See Sullivan v. Glock, Inc*. 175 F.R.D. 497, 508 (D.M.D. 1997).

1. The burden is on the non-disclosing party to establish that its failure to disclose was either substantially justified or harmless. *Todd* at 978*.* Because it bears this burden, however, "the party who would suffer [this] sanction must be given an opportunity to demonstrate that its

failure to disclose was substantially justified or harmless." Moore's Federal Practice § 37.60 (2)(a), at 37-118. A trial court has considerable discretion with respect to these factors. *Id.* The record is clear, Mr. Boyce states his basis for non-disclosure of the shoulder injury and future damages thereto, resulted from ineffective assistance of counsel. In *Todd* this is not a basis for a continuance. The basis in *Todd* is substantially justified or harmless. In *Todd* the court allowed a continuance because plaintiff’s counsel had an unexpected back injury, not IAC, which by its

nature would not be a basis for a continuance in *Todd.*

# CONCLUSION

The court erred in granting a continuance to defendant and allowing new evidence of future shoulder injury damages. Rule 60(b) allows the court to reconsider its orders upon new evidence, information or findings. Early on in the litigation, Mike Boyce disclosed a medical record showing a doctor’s visit regarding a back and shoulder injury. Therefore, Boyce knew about this medical condition in May of 2015. For whatever reason, intentionally to save money or attorney negligence, neither reason is a basis for continuance and the allowance of new evidence thereto at trial. The court erred in continuing the trial without defendant filing a Rule 60(b) motion to modify the parties’ CMO, which was an order of the court. The court further erred when it considered being reversed on appeal for ineffective assistance of counsel, which is not a basis for appeal or new trial. The court erred when it used IAC, for the benefit of Mike Boyce and defendant to continue the trial because Mr. Boyce’s admissions of attorney malpractice give the defendant full relief against his attorney, as an adequate remedy at law. The court prejudiced plaintiffs through the unwarranted continuance because plaintiffs will have to spend excessive amounts of money now conducting discovery, defending against motions and defending against damages that were not occurring as of the trial date set for May 2, 2016. The

court abused its authority when it granted a continuance because Mike Boyce’s failure to practice law does not satisfy the exceptional circumstances defined in *Todd v. Bear Valley.*

WHEREFORE, Plaintiffs respectfully request this Court reconsider its order granting a new trial that would allow defendant to put on additional damages and/or future damages of any sort, not previously disclosed, and have the parties try the case on only the evidence disclosed and developed in preparation of the prior May 2, 2016 original court date.

RESPECTFULLY SUBMITTED this 7th day of September, 2016.

ABRAMS & ASSOCIATES, LLC

*/s/ Robert Abrams*

Robert Abrams, Attorney at Law

*(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 7th day of September, 2016, via ICCES, served a true and correct and correct copy of the foregoing PLAINTIFFS’ MOTION TO RECONSIDER TRIAL CONTINUATION PURSUANT TO C.R.C.P. 60(b) upon:

Wadi Muhaisen

Muhaisen & Muhaisen, LLC 1435 Larimer Street, Suite 203

Denver, Colorado 80202

*Attorney for Defendant*

*/s/ Neil S. Sullenberger*

Neil S. Sullenberger, Law Clerk

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