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| DISTRICT COURT, DENVER COUNTY, COLORADO |  |
| DAT | E FILED: October 14, 2016 1:09 PM |
| Court Address: Denver County Court FILI1437 Bannock St., Room 256 CAS | G ID: F6D0DA85207FEE NUMBER: 2015CV31709 |
| Denver, CO 80202 |  |
| (720) 865-8301 |  |
| 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’ RESPONSE TO DEFENDANT’S MOTION FOR EXTENSION OF DISCOVERY FOR INJURY CLAIM AND TO DESIGNATE EXPERT(S)** |

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 Response in Objection to Defendant’s Motion for Extension of Discovery. In support thereof, Plaintiffs state and allege as follows:

# INTRODUCTION

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 Vallejos’ personal friend and ex-mentee, Mike Boyce, who the judge supervised as Mr. Boyce’s mentor for five years at the public defender’s office. Upon this assertion Judge Vallejos recused himself in this matter.
2. Over plaintiff’s objection, trial was continued in this matter ½ business day before trial was to commence on Mr. Boyce’ assertion of ineffective assistance of counsel. In other words, he failed to prosecute his battery case under the C.R.C.P. timelines, failed to disclose any experts, failed to produce an expert report under R. 26, failed to take discovery, failed to take depositions, failed to prove his case in any way, then admitted to doing same to Judge Vallejos, who then gave defendant a “do over” and granted future litigation damages on the alleged shoulder injury. *Exhibit 1, Filing History.*
3. 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. Defendant knew of his injuries on May 19, 2015, over a year before his surgery. *Exhibit 4, Touchstone Imaging Report.* He filed suit against plaintiff for battery, then never prosecuted his case. The court on April 29, 2016 then granted the continuance, but never expanded discovery. Now defendant’s new lawyer fails to practice law, fails to disclose a

R. 26 expert and upon being called out on it in plaintiff’s motion in objection to trial continuance, suddenly files his motion with a new litany of excuses, most of which are not true as identified below. *Exhibit 5, Plaintiffs’ Resp. to DF Motion Continue Trial at ¶ 8.*

1. Defendant asserts in his motion, a status conference was held on May 20, 2016 in Division 409 of the Denver District Court. The Court scheduled the case for jury trial beginning November 28, 2016. The Court permitted the parties to continue discovery only on the battery, or

personal injury claims. *See DF Motion ¶ 2.* This is not true. The May 20th status conference specifically stated discovery was limited ONLY to future damages identified by expert testimony and discovery will not open on other matters. *Exhibit 3, Hearing Transcript, May 20, 2016, p. 3 ln. 24 through p. 4 ln. 8.* Accordingly, plaintiff has not taken discovery either and the parties should be bound by the evidence they have and proceed to trial on November 28, 16 as ordered by the prior court.

1. On September 29, 2016, Judge Vallejos recused himself from this matter for reasons stated in his Order. Nowhere in his order does it suggest a discovery continuance.
2. As stated in defendant’s motion, “Currently, based on the current trial date, the deadline to disclose an expert witness has passed, and general discovery closes on October 6, 2016. CRCP 26(a)(2)(C)(III); CRCP 16(b)(11).” This is precisely the argument stated by plaintiffs in *Exhibit 5, PL Response to DF Motion for Continuance, at ¶ 8.* And, the basis for plaintiffs’ objection to a new trial date and objection to discovery continuance--the open admission by defense counsel that they miss deadlines and ask for more time.
3. But for plaintiffs’ notice, defendant never would have filed his motion because had he wanted an extension to disclose an expert witness he needed to file that motion before his “known date,” 126 days before trial (18 weeks) or July 25, 2016, C.R.C.P. 26(a)(2)(C)(III). Again, defense counsel fails to practice law, under the court’s May 20, 2016 order, stating it is not continuing discovery. *Exhibit 3, p. 3 ln. 24 through p.4 ln. 8, p. 14 ln. 23 through p. 15 ln. 5,*

*p. 15 ln. 20-23.* Now in October, new counsel, who fails to practice law, requests a “do over” in violation of the Rules. Plaintiffs object, and request trial commence on November 28th with the evidence the parties have accumulated in the last 1 and ½ years. Defendant and counsel, through their practice of law, again seek to prejudice plaintiffs by requiring plaintiff to spend more time,

effort, attorney fees, expert witness fees and the like, because they failed to disclose that which was due, and which they knew about, that their expert report was due in July of 2016.

1. Defense counsel next argues, “The surgeon then first informed Mr. Beeson that his labrum was completely torn all the way through and around both sides (anterior and posterior) which was significantly worse than previously diagnosed.” *DF Motion at ¶ 8.* Defendant puts up no Dr.’s affidavit or report thereto in support of this position. Counsel is merely testifying without support. And, it 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. This is the precise prejudice plaintiff faces on a daily basis in this litigation. Every time defendant fails to practice law, the injuries are worse and plaintiff is blamed for it. Upon this basis, plaintiffs move to trial on the disclosed evidence of each party, of trial set for May 2, 2016. Defendant, with two lawyers, had ample time to comply with the Rules of Civil Procedure.
2. Counsel next argues in his Motion, “Mr. Beeson’s counsel had difficulty obtaining Mr. Beeson’s complete medical records that are relevant in this matter. Contemporaneous to the filing of this motion, counsel’s office just received records from Colorado Pain and Rehabilitation and Select Physical Therapy, which will be disclosed to Plaintiff by the week of October 3, 2016.” However a review of *Exhibit 6, Request for Medical Records,* proves defense counsel never requested the records until September 19, 2016, months after the July 2016 deadline passed, his excuse by his own evidence is disingenuous. And, he puts up no evidence whatsoever to prove he made any attempts to retrieve “Cornerstone’s” records as stated within his Motion at ¶’s 12 and 13. The remainder of counsel’s motion is unsupported, self-serving testimony especially about disclosing expert witnesses, because the treating doctors are the expert witnesses in this matter that could easily have been disclosed. However, his current damages are irrelevant

because, pursuant to the court’s first extension of time based on *Exhibits 2 and 3,* this continuance is ONLY about future medical damages related to the shoulder injury, not current medical

damages. *See Exhibit 2, p. 26 ln. 18-21; Exhibit 3, p.3 ln. 24 through p.4 ln. 8, p. 14 ln. 23 through p. 15 ln. 5, p. 15 ln. 20-23.* Medical damages, not identified to date, were lost, under the prior court’s orders (Apr. 29 and May 20); not reopening discovery. The only additional issue before the court was defendant’s future damages as to his shoulder injury. *Id.*

1. Plaintiffs did not conduct discovery as a direct result of the court’s orders stated *supra.* Specifically, defendant’s current medical injuries shall not be expounded upon and the only issue before the court is proof of defendant’s future damages as a result of his shoulder injury. If defendant is allowed to put up evidence regarding his back injuries and shoulder injuries, where he has disclosed no information to date, plaintiffs will be prejudiced by having no evidence regarding defendant’s extensive prior back injuries (that he now blames plaintiff) and taking no discovery regarding his alleged shoulder injury, that suddenly became a total tear from a “mild tear” a year earlier. This is the exact prejudice the Rules attempt to avoid.
2. The parties’ CMO, which was an order of the court was agreed to by the parties and contained all the discovery, experts and related issues thereto, all signed by the parties. *Exhibit 7, Case Management Order.* Further, defendant is plaintiff in his alleged battery claim, stated his alleged damages including shoulder thereto, in May of 2015. There is no excuse for two lawyers to both show they failed to practice law, disregarded the Rules for months, then request do-overs in both trial continuance and discovery continuance, all to the financial prejudice of plaintiff.

# LEGAL AUTHORITY

1. Rule 26(a)(2)(C) sets the sequence for expert witness disclosures. All expert witnesses shall be disclosed 126 days before trial. Here, July 25, 2016.
2. C.R.C.P. 37(c) provides for the exclusion of non-disclosed evidence unless the failure to disclose is either substantially justified or harmless to the opposing party. "A party offering late-disclosed evidence bears the burden of showing that the failure to disclose was harmless." *City of Aurora ex rel. Util. Enter. v. Colo. State Eng'r,* 105 P.3d 595, 610 (Colo. 2005). A party that without substantial justification fails to disclose information required by

C.R.C.P. 26(a) or 26(e) shall not, be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56, unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm. The court, after holding a hearing if requested, may impose any other sanction proportionate to the harm, including any of the sanctions authorized in subsections (b)(2)(A), (b)(2)(B) and (b)(2)(C) of this Rule, and the payment of reasonable expenses including attorney fees caused by the failure.

1. The basis for a trial continuance is surprise. Trial continuances "should be limited to circumstances in which unforeseen and exceptional circumstances require diligent attorneys to

request an adjournment." *Todd v. Bear Valley Village Apartments,* 980 P.2d 973 (1999).

# ARGUMENT

1. Pursuant to prior counsel Boyce’ request, the court granted a continuance of the May 2 trial to determine the extent of future damages on defendant’s shoulder injury. *Exhibits 2 and 3.* As such, these future damages are the only issue before the court. New counsel had until July 25, 2016 to either disclose his expert report and witnesses thereto, regarding future shoulder injury damages; or, request a continuance thereto under Rule 6. Neither event occurred.
2. Defendant cites a litany of tests from *Todd v. Bear Valley.* However, the thrust of *Todd* by defendant is misplaced. The basis for a trial continuance is surprise. Trial continuances "should be limited to circumstances in which unforeseen and exceptional circumstances

require diligent attorneys to request an adjournment." *Todd v. Bear Valley Village Apartments,*

980 P.2d 973 (1999). (*emphasis added).* In *Todd,* the exceptional circumstance was plaintiff’s counsel needed emergency back surgery. Here, Defendant’s counsel contrives two excuses blaming others for his failure to practice law: 1) allegedly another judge double booked him on the same day of the May 20th hearing, which he failed to disclose until October 2016; 2) because defense counsel failed to request medical records until September of 2016, he should be granted a discovery continuance.

1. Defendant’s current damages issues are outside of this court’s order for future

damages of shoulder injury, as stated above. Therefore, the basis for the continuance has no

bearing. Because the current continuance is based upon future damages, the only witness necessary to prove future damages is an economic witness, which counsel has had months to disclose. Should that disclosed witness request more time to determine future shoulder injuries to complete his/her report, that would be reasonable. Such is not the case here as no economic damages witness is disclosed, though known about and requested continuance about, for 1 and ½ years. So, under *Todd,* there is no surprise, excusable neglect, nor unforeseen and exceptional circumstances upon which the court could continue the trial or reopen discovery.

1. It appears this is a delay tactic because Defendant has no expert witnesses to support his alleged shoulder injury damages or he doesn’t want to pay the expensive cost to obtain same. Plaintiff again moves the court to continue to trial on November 28th, with the evidence the parties have. Causing plaintiffs to now incur expensive discovery costs on the basis of defense counsel’s negligence to practice law is prejudicial to plaintiffs. Another delay tactic on a baseless excuse is no reason to delay the trial. On the face of counsel’s argument he does not meet the *Todd* elements for continuance.
2. 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 original 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. Here, Mr. Muhaisen missed the deadline to disclose his expert, seeks matters outside of the court’s discovery continuance, failed to request medical records until 3 weeks ago and now has a litany of excuses for doing same. In *Todd* this is not a basis for a continuance for trial or discovery. 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 granted an 11th hour continuance to defendant upon his lawyer’s representation to the court he failed to practice law, failed to endorse experts and was ineffective assistance of counsel. The Court granted defendant a new trial date to complete expert disclosure of future shoulder injury damages, not current shoulder and back damages known about for 1 ½ years. 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. However,

the prior court allowed the limited issue to go forward and now today, current counsel uses more excuses to ask for another continuance, this time as to discovery, where he failed to endorse an economics expert as to future damages. Plaintiff did not cause this careless practice of law but is being prejudiced to the extent of now having to pay for experts, not authorized under the court’s order (shoulder injuries) regarding damage to the shoulder; and, another expert to controvert the economics expert if one were to appear. These expenses are highly prejudicial and unwarranted against plaintiff. If the discovery continuance and expansion thereto is granted, the court will prejudice plaintiffs who 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 Mr. Boyce and here Mr. Muhaisen’s failure to practice law does not satisfy the exceptional circumstances defined in *Todd v. Bear Valley.*

WHEREFORE, Plaintiffs respectfully request this Court deny expanding and continuing discovery; and, a new trial that would allow defendant to put on additional damages and/or future damages of any sort, not previously disclosed. Plaintiffs request the parties try the case only on the evidence disclosed and developed to date, in preparation of the November 28, 2016 trial date.

RESPECTFULLY SUBMITTED this 14th day of October, 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 14th day of October, 2016, via ICCES, served a true and correct and correct copy of the foregoing PLAINTIFFS’ RESPONSE TO DEFENDANT’S MOTION FOR EXTENSION OF DISCOVERY FOR INJURY CLAIM AND TO DESIGNATE EXPERT(S) upon:

Wadi 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)*