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Denver, Colorado 80202</td><td rowspan="2">DATE FILED: June 21, 2016 7:09 PM
CASE NUMBER: 2014CV32213

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<tr><td>Plaintiff:
WILLIAM SCHOLLE,

v.

Defendant:
DELTA AIRLINES, INC.</td></tr>
<tr><td></td><td>Case No: 2014CV32213

Courtroom: 414</td></tr>
<tr><td colspan="2">ORDER GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL</td></tr>
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Defendant Delta Airlines, Inc. asks that the Court grant it a new trial on damages (the sole issue considered at trial) contending that the misconduct of Plaintiff William Scholle's counsel prevented a fair trial. Delta filed its motion on April 24, 2016. Scholle responded on May 16, 2016 and Delta submitted a reply on May 26, 2016. After reviewing in detail the parties' filings and exhibits, the Court's file, and applicable law, Delta's motion is granted based on the following:

I. Background

Central to Delta's motion is the contention that it did not receive a fair trial because one of Scholle's non-retained experts, Dr. Eric Ray, was permitted to testify regarding facility charges that Scholle allegedly would have to incur for future medical treatment at the Baylor Medical Center. The Court provides this procedural summary of the case because it is important to the conclusion that misconduct of counsel warrants a new trial.

Scholle initiated this action to recover for injuries that he claims occurred when a luggage tug driven by Daniel Moody, a Delta employee at the time, hit a tug that he was driving. Delta admitted liability for the collision leaving the question of damages incurred by Scholle as the sole issue at trial.

The case was originally set for trial commencing September 8, 2015. Because of various extensions that the parties requested and the Court permitted, Scholle's rebuttal expert disclosures were due on August 3, 2015. Scholle failed to meet this deadline and without leave of Court submitted what he designated to be expert "rebuttal" disclosures two days later, on August 5, 2016.

Relevant to Delta's motion, Scholle designated Dr. Eric Ray as a non-retained rebuttal expert and provided the following disclosure:

> **A. STATEMENT OF ALL OPINIONS TO BE EXPRESSED AND THE BASIS THEREOF:** Mr. Scholle will require Medial Branch Blocks (MBB), Intra-articular Facet Injections and Radiofrequency Ablation for the rest of his life, with procedures to take place approximately every 12-24 months. The average cost per bilateral MBB will be $2,167 for Dr. Ray and $12,908 for the ambulatory surgery center.
>
> EA. = Approx $23,000
>
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>
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> The average cost for an RF will be $925 per side for Dr. Ray and $8,015 per side for the ambulatory surgical center.
>
> Each time Mr. Scholle has an RF it will need to be preceded by a MBB. If Mr. Scholle lives another 20 years, and continues to need MBB and RF's his costs will be between $329,550 and $659,100, depending on whether he can go 12 months or 24 months between RF procedures. Dr. Ray will testify that all the treatment he provides is made necessary because of the tug collision on June 10, 2012. He will also testify that the pain associated with the tug collision is unlikely to resolve itself without continued treatment.
>
> He will also opine that a 50% reduction in pain, based upon Mr. Scholle's symptoms, is a medically appropriate treatment.
>
> In addition, Dr. Ray is expected to testify that all of the above care and treatment provided to Plaintiff was reasonable and necessary. In addition, he are expected to testify to physical therapy records for Colorado Athletic Conditioning Clinic, records for Kaiser Permanente, OccMed, Industrial Rehab Evaluation Services, LLC, Drs. Gretchen Brunsworth, Craig Robbins, M.D., Brian Reiss, M.D., and radiology studies including, but not limited to, 6/10/12 - Chest CT wo contrast, 6/10/12 – Left shoulder Radiograph, 6/10/12 – Left scapula radiograph, 6/10/12 – Cervical spine CT wo contrast. He is also expected to testify that the charges for said treatment were reasonable, usual and customary.
>
> **B. LIST OF DATA OR INFORMATION CONSIDERED IN FORMING OPINIONS:** Dr. Ray holds his opinions with a reasonable degree of medical certainty (meaning more probable than not), based upon his education, training, expertise and experience, history taken from Plaintiff, examination, diagnostic studies of Plaintiff, medical literature, medical knowledge and experience with injuries such as those diagnosed for Plaintiff, and all materials and information used, consulted, or relied upon in formulating their opinions.

Pl.'s Resp. Ex. 1.

In response to Scholle's late-filed disclosure, on August 13, 2016, Delta filed a motion to strike the rebuttal disclosures, including the disclosure of Dr. Ray, a copy of which is attached. Delta contended that Dr. Ray's opinions were not proper rebuttal – they had not been offered to rebut any opinions of Delta's experts and should have been addressed in Scholle's initial expert disclosures. Additionally, although Scholle had endorsed Dr. Ray as a non-retained expert, his alleged opinions relating to the reasonableness of other providers' medical treatment and charges went beyond the scope of an "occupational" witness. Because any opinions relating to other providers' medical treatment required that he review documents and form opinions solely for litigation purposes, Delta contended that Scholle actually and improperly intended to have him testify as a retained expert without complying with the disclosure requirements of C.R.C.P. 26(a)(2)(B)(I).

On August 21, 2015, on the eve of trial, Scholle filed a "trial brief" concerning continuing and future medical treatment. *See* Aug. 21, 2015 Pl.'s Trial Br. Re: Continuing and Future Treatment. In this brief, Scholle advised that during his deposition in June 2015 he had made clear that he intended to seek additional treatment after release from the workers' compensation system. Scholle indicated that on July 21, 2015 he began treating with Dr. Ray and intended to continue to do so and receive medical branch blocks in his cervical spine followed by radiofrequency ablation of his cervical facet nerves.

The Court held a pretrial conference in the case on August 24, 2015 and considered argument relating to Delta's motion to strike and Scholle's advisement that he was continuing medical treatment. Although the Court concluded that Scholle had failed to fully comply with his expert disclosures obligations, the Court also concluded that Dr. Ray's testimony was of significant importance to his case and that Scholle would be unduly prejudiced if the Court struck the expert. Weighing the factors outlined in *Todd v. Bear Valley Village Apartments,* 980 P.2d 973 (Colo. 1999), the Court found that a continuance of the trial was warranted to rectify Dr. Ray's incomplete disclosure. To cure the prejudice resulting to Delta from the continuance, the Court required that Scholle pay some of the costs of the additional discovery to which Delta was entitled. The Court entered two relevant written orders outlining the purpose of the continuance and the discovery that would be permitted incorporated by reference into this order. *See* Aug. 24, 2015 Order Continuing Trial and Sept. 10, 2015 Order Regarding Continuance of Trial and Add. Disc.

Regarding additional discovery, the Court allowed Delta to depose Dr. Ray to fully explore the scope of his opinions. The Court also permitted Delta to retain an expert witness to rebut the opinions expressed by Dr. Ray in the August 5, 2015 summary that had been provided, with any such rebuttal opinions to be disclosed by December 15, 2015. Delta further had the right to conduct an additional independent medical examination of Scholle to address Dr. Ray's treatment. *See* Sept. 10, 2015 Order Re: Continuance of Trial and Add. Disc.

On September 22, 2015, Delta sent a Request for Production of Documents to Scholle requesting production of "any and all documents and/or medical records provided to Eric Ray, M.D. regarding William Scholle," and indicated that Scholle had a continuing duty to supplement such responses. Def.'s Mot. Ex. G. Scholle responded to the requests for production on October 27, 2015 providing documents containing correspondence between Scholle's counsel and Dr. Ray's office as well as the expert report of Dr. Beatty, one of Scholle's designated experts. Scholle included no records relating to Baylor Medical Center or facility charges with his responses.

Delta took Dr. Ray's deposition on October 30, 2015. During the deposition, Dr. Ray was not shown any actual billing records. Instead, he was provided with a copy of the August 5, 2015 summary disclosure drafted by Scholle's counsel identifying various costs, including costs ranging from $329,550 to $659,100 for future treatment. When asked about the documents that he had reviewed and the knowledge that he had of Baylor Medical Center facility charges, not only did Dr. Ray testify that he had no knowledge of the facility charges (*see* Mot. Ex. F 44:15-20; 67:17-25; 68:21-11)– what they are or what is charged – Scholle's counsel represented in the deposition that he did not know why facility charges had been included in the August 5, 2015 disclosure because Dr. Ray had nothing to do with such charges:

> Q: (BY MR. BENDINELLI) Okay. And – and I don't know why we got the facility charge in there. You don't – you have nothing to do with the facility charge, do you? Okay.

Mot. Ex. F 82:24-25; 83:1-8. As Dr. Ray's deposition testimony makes clear, all that he could confirm at the time of his deposition were his own charges to Scholle which included $2,167 for medial branch blocks and $925 per side for radiofrequency ablation. *See* Resp. Ex. 1, pp. 1-2. Indeed, a review of Dr. Ray's trial testimony indicates that he did not actually offer a firm opinion on all of the future medical expenses that Scholle might need. *See* Mot. Ex. B.

Delta's counsel also learned at the deposition that Scholle's counsel had provided some records to Dr. Ray for the first time -- an hour before the deposition. Delta's counsel requested a copy of the documents during the deposition and Scholle's counsel agreed to provide them. Delta's counsel subsequently followed up with Scholle's counsel multiple times requesting the documents (*see* Mot. Ex. I); however, Scholle's counsel never provided the documents.

Although the Court had specifically limited the additional discovery that would be permitted at the time of continuing the trial in its August 24 and September 10, 2015 orders, on November 19, 2015, Scholle filed an opposed Motion for Enlargement of Time to File Expert Disclosures. *See* Pl.'s Nov. 19, 2010 Mot. for Enlargement of Time to File Expert Disclosures. Scholle contended that the Court had continued the trial, in part, to allow him to "quantify legitimate economic losses." Scholle represented that "to effectively quantify Plaintiff's future economic losses, Plaintiff must seek clarification and additional potential information regarding this issue and disclose the same to Defendants." *See id.*

On December 2, 2015,without the Court having ruled on the pending motion for additional time to submit expert disclosures, Scholle served a third supplemental expert disclosure disclosing a new expert in the case, Laura Woodard, a rehabilitation specialist. *See* Defs.' Mot. to Strike Pl.'s Untimely Expert Disclosures and Request for Sanctions, Ex. A. Woodard provided a report dated November 24, 2015 in which she indicated that Scholle had been referred to her for a "rehabilitation evaluation, needs assessment and preparation of a life care plan." *See id.* Woodard stated that she had interviewed Scholle, but also reviewed his medical records and the deposition of Dr. Ray. She opined as to a series of expenses that Scholle would allegedly incur in the future as a result of the incident, including future medical expense. Of relevance here, Woodard indicated in her report that the cost of medial branch radiofrequency ablation, based on her review of bills from August 2015, totaled $15,720 which would likely represent the future cost and opined that Scholle would need to incur $15,720 every 6 to 18 months for the remainder of his life. Regarding the need for lumbar medial branch radiofrequency ablation, Woodard's report indicates that this is "[t]o be determined once information is known regarding how many levels and sides are involved." *See id.*

Then, on December 7, 2015, Scholle filed a fourth supplemental expert disclosure identifying yet another new expert witness, Steven Hazel, an economic damages expert. Hazel's report indicated that he was engaged to perform an analysis of Scholle's economic damages and opined that as a result of the collision, Scholle had suffered $715,511 in economic damages reflecting his alleged loss of earnings. *See* Defs.' Mot. to Strike Pl.'s Untimely Expert Disclosures and Request for Sanctions, Ex. B.

On December 7, 2015, the Court entered an order denying Scholle's request, which is incorporated into this order. *See* Dec. 7, 2015 Order Den. Pl.'s Mot. for Enlargement of Time to File Expert Disclosures. The Court noted that only the discovery identified in its order continuing the trial was to be permitted based on the understanding that all other necessary discovery had been completed. *See id.* Moreover, at the time of the continuance, Scholle had already been given the opportunity to submit affirmative expert disclosures and rebuttal disclosures.[1] *See id.*

Delta then filed a Motion to Strike Plaintiff's Untimely Expert Disclosures on January 8, 2016. Scholle's response to the motion is particularly important to the Court's decision to grant Delta a new trial. Scholle's counsel represented to the Court in the response that he learned (apparently for the first time)[2] at the deposition that Dr. Ray could not testify as to the Baylor Medical Center facility charges and knew that in order to establish these charges, someone else would have to testify. Scholle's counsel specifically stated:

> At that deposition, both parties became aware that Dr. Ray's [sic] could *not* testify as to some ancillary charges related to the procedures (e.g.: Facility Fee, attendants, etc.), and that additional expert testimony would be required to substantiate the charges. (emphasis in original).

Plaintiff's Amended Response to Defendants' Motion to Strike Expert Disclosures and Request for Sanctions filed on January 21, 2016, p. 2, incorporated into this order.

The Court held a second pretrial conference on February 25, 2016 at which Scholle's counsel brought up the issue of future medical expenses. Regarding the pending motion to strike Woodard and Hazel, the following transpired between Scholle's counsel and the Court:

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[1] Scholle has taken the position in this case that the Court erred in not allowing him to submit further "rebuttal" or expert disclosures after Dr. Ray's deposition and the second independent medical examination that the Court allowed Delta to take. Dr. Ray was one of Scholle's treating physicians. Thus, Scholle had no basis for rebutting his opinions given that rebuttal is to "contradict or rebut evidence on the same subject matter by another party…." C.R.C.P. 26(a)(2)(C)(III). The alleged "rebuttal" experts that Scholle wanted to disclose were Woodard and Hazel who were not rebuttal witnesses at all.

[2] Since Dr. Ray was Scholle's own witness, and Scholle had included in Dr. Ray's disclosure future medical costs, Scholle's counsel certainly should have known prior to the deposition what its expert knew and did not know.

MR. BENDINELLI: -- and then I'll be quiet. So I would just say that, if the witnesses that are -- were retained to discuss the evidence of future medical expenses are struck, number one, then the Plaintiffs' efforts were frustrated to comply with putting together the future medical expenses, because Dr. Ray cannot do that. And the Defense knew that at his deposition because he testified he cannot speak to these expenses. You know, he can talk about his historically. He can't talk about Miami Surgery Center (phonetic). He can't talk about the anesthesiologist. And the Defendants were at that deposition, and they knew at that time that we were going to have to get another witness to quantify these future medical expenses. Because if we were limited to Dr. Ray, we can't -- it is impossible for Plaintiff to present evidence of future medical expenses.

THE COURT: Okay.

MR. BENDINELLI: That's number one.

Number two, I would just ask, if the Court is going to strike these other witnesses, how are we able to present the future medical expenses? And number two (sic), what the prejudice is to the Defendant?

THE COURT: Okay. I don't know if you want to respond to that.

Mot. Ex. J.

After reviewing Scholle's response to the motion to strike and Delta's reply, the Court granted the motion by order dated February 27, 2016, issuing a detailed order outlining the history of expert discovery in the case, a copy of which is attached. Rather than repeat the extensive findings and rationale for striking both Woodard and Hazel as experts in this case, the Court references and incorporates its order here. *See* Feb. 27, 2016 Order Re: Defs.' Mot. to Strike Expert Disclosures.

Regarding pretrial disclosure of future medical expenses, Scholle did not provide quantified expenses until his fourteenth supplemental C.R.C.P. 26(a)(1) disclosures, given to Delta on January 29, 2016, more than 20 months after Scholle filed the case in June 2014. For the first time, Scholle identified that his future medical expenses were estimated at "$286,084," without providing any quantification as to how he derived this number as is required under Rule 26. The only other disclosure of future medical expenses provided by Scholle was in his proposed second amended Trial Management Order filed on March 16, 2016 in which he again indicated that such expenses would be "approximately $286,084," again, with no quantification as is required under C.R.C.P. 16.

The records that Dr. Ray had reviewed at the time of his deposition and what he could testify to resulted in numerous objections and bench conferences during his testimony. Early in his testimony, Scholle's counsel asked Dr. Ray whether he had "reviewed many records…associated with this case." Mot., Ex. E 7:16-20. Delta's counsel objected because she had never received a copy of the actual records that Dr. Ray allegedly reviewed in discovery, and was concerned that some of the records about which he planned to testify involved records not used in Scholle's treatment. Because the Court had limited Dr. Ray's testimony to that of a non-retained or occupational witness, Delta's counsel was concerned that Scholle's counsel planned to use this reference to documents never disclosed to elicit testimony outside the scope that the Court had permitted. In response to the Court's question as to whether the records discussed at the deposition had been disclosed, Scholle's counsel claimed that they had (*see* Mot. Ex. E 58:4-8), although this was not the case. Ultimately, the Court determined that Scholle's counsel could question Dr. Ray only about what had been testified to during his deposition. The Court cautioned Scholle's counsel that if he went beyond the scope of Dr. Ray's deposition, such testimony would be impermissible. *See* Mot. Ex. E 12:2-6.

Scholle's counsel proceeded with questioning Dr. Ray about his treatment which included doing medial branch blocks followed by a radiofrequency ablation ("RF"). Regarding the medial branch blocks and RF treatment, Scholle's counsel attempted to elicit testimony from Dr. Ray as to all of the various associated costs, although he had represented to the Court that Dr. Ray was not competent to offer testimony about anything other than his own charges to Scholle.

For example, Dr. Ray testified in response to questioning that he performed the procedures in the "OR" or operating room. Scholle's counsel then asked:

Q: And that's the ambulatory surgery center?

A: Correct.

Q: And you did this at Baylor in the surgery center?

A: Yes.

Q: And you have a 1 percent interest or something in that?

A: Yes.

Mot. Ex. E 44:1-15. Although the Court allowed the testimony of Dr. Ray's ownership interest in the center over Delta's objection, the Court did not allow Dr. Ray to respond to the question of whether the ambulatory surgery center was less expensive than a hospital.

Scholle's counsel then asked Dr. Ray:

Q: And why do you say that it's going to be – he's going to need to have future treatment? Repeat neck and back radiofrequencies?

Mot. Ex. E 45:18-22. The Court sustained Delta's objection to this testimony as outside the scope of Dr. Ray's deposition because Dr. Ray never testified in his deposition that Scholle would, in fact, require future treatment. The Court advised Scholle's counsel that absent laying a foundation relating to future treatment, the testimony would not be allowed. Mot. Ex. E 45:21-25; 46:1.

Scholle's counsel proceeded to try to elicit testimony regarding the surgery center costs for Baylor Medical Center:

Q: So can you look at Exhibit 16, please. And can you tell us what that is.

A: Looks like a record from the surgery center at Baylor.

Q: And that's where Mr. Scholle's procedures were performed?

A: Yes.

Mot. Ex. E 50:23-25, 51:1-5. Without foundation, Scholle's counsel then asked Dr. Ray:

Q: …Is there about $10,000 each time you use the surgery center?

Mot. Ex. E 51:15-16. Delta's counsel timely objected as outside the scope of his deposition. The Court sustained the objection because, indeed, Dr. Ray had never testified to this sum in his deposition. Mot. Ex. E 51:17-20.

Contrary to the Court's prior rulings, Scholle's counsel then asked Dr. Ray about the facility charges again:

Q: Do you know what the facility, I think it's in one of the exhibit [sic] charges, do you have any independent recollection as to what the facility charges for radiofrequency?

Mot. Ex. E 55:10-15. The Court overruled the objection, however, Dr. Ray testified:

A: Only – typically I don't get involved in that. Only I know that because of –

Mot. Ex. E 55:16-25. The Court then stopped Dr. Ray from continuing the response, concerned that he was about to testify about matters outside the scope of his deposition. A bench conference followed along with additional testimony:

13 MS. THOMSON: At his deposition, he
14 testified what he just said just a minute ago, he
15 doesn't typically get involved and he couldn't say
16 what the facility charges were. And as I recall
17 after that, then there was a representation that,
18 well, defendants and plaintiffs learned that
19 Mr. Ray could not talk about the facility cost.
20 Now all of a sudden he's talking about the facility
21 costs. I've never been supplied with any
22 additional opinions or anything on this, and that
23 deposition was my chance to ask him questions about
24 whether he knew anything about the facility
25 charges.
1 MR. BENDINELLI: I'm going to
2 respond in a couple ways. Number 1 is that that is
3 why plaintiff believes that, you know, he has been
4 denied the opportunity to present his bills,
5 because of the witness that was struck. But
6 secondly, it was talked about in the deposition,
7 and he did see the bills, and he testified that
8 he's part owner, so he can testify as to what they
9 were. He said, I don't usually get involved in
10 that but I see them here. So he saw them and he
11 saw them at the deposition.
12 THE COURT: Hold on. What is it
13 you're wanting him to testify to?
14 MR. BENDINELLI: Just what his
15 facility charges for, you know, the visit.
16 THE COURT: And this is where he
17 never disclosed that opinion, so I'm going to
18 sustain the objection. As I already ruled prior to
19 this trial, he never disclosed that opinion, and I
20 read in his deposition that he said he doesn't get
21 involved in that. So the fact that maybe after the
22 fact you went back and he looked at it, I'm not
23 going to allow it in.

24 MR. BENDINELLI: The deposition
25 indicates that he looked at it the day of the
1 deposition.
2 MS. THOMSON: But he didn't say that
3 he could say that it was --
4 THE COURT: I will give you some
5 leeway. You can lay a foundation as to what he did
6 and you can cross-examine him.
7 MR. BENDINELLI: That's all I want
8 to do, Your Honor.
9 THE COURT: All right. I will
10 overrule it.
11 (In open court.)
12 Q (By Mr. Bendinelli) So I need to
13 ask you brief questions, 30 seconds about this,
14 okay. So you saw the bills from the surgery center
15 at your deposition?
16 A Yes.
17 Q And you don't normally get involved
18 in the billing from Baylor?
19 A Correct.
20 Q But you did see them?
21 A Yes.
22 Q All I want to know is,
23 approximately, what it was for the back, what it
24 was for the neck?
25 A For the medial branch blocks and
1 radiofrequency for the neck, I believe it was
2 23,000 --
3 Q Okay.
4 A -- facility charge.
5 Q Okay. How about low back?
6 A Somewhere along the same lines. I'm
7 not exactly sure, though.

Mot. Ex. E 57-59.

On cross examination, Delta's counsel then again clarified that Dr. Ray did not know what the facility charges were for the Baylor Medical Center:

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 9          Q    (By Ms. Thomson)  So in your
10   deposition on October 30, 2015, you were asked
11   about billing documents from the facility where the
12   procedures, the radiofrequency ablation and medial
13   branch block procedures had been done for
14   Mr. Scholle on August 10th and August 24th.  Do you
15   recall that?
16          A    Yes.
17          Q    Do you recall being asked whether
18   you had any idea what the facility charges were?
19          A    Yes.
20          Q    Do you recall your answer?
21          A    I believe I said that that's not
22   something I typically would see.
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Mot. Ex. E 77:9-22.

In addition to Dr. Ray's testimony, Scholle endeavored to establish his economic damages through his own testimony. Scholle testified that he had lost future wages of $268,800, based on the fact that at the time of the collision he earned $44,800 and planned to work until age 70.5. Scholle also testified that he had incurred past medical expenses of $113,833.27 by relying on a C.R.E. 1006 summary that the Court admitted over Delta's objection.[3] Based on this evidence, the jury awarded Scholle $1,038.738 in economic damages. As Delta notes in its motion, considering the evidence that was presented, it appears that the jury awarded future medical expenses of $656,104.73, an amount that exceeded Scholle's pretrial disclosure of future medical expenses by over $370,000.

II. The Parties' Positions

A. Delta

Delta seeks on new trial on two grounds: (1) the Court's erroneous allowance of Dr. Ray's testimony regarding Baylor Medical Center facility charges; and (2) Scholle's failure to produce Safeway pharmaceutical records that Scholle allegedly obtained prior to trial.

[3] Scholle's C.R.E. 1006 summary included a line item indicating that he had incurred $18,542.07 in prescriptions as a result of the collision. *See* Mot. Ex. N.

Regarding Dr. Ray, Delta contends that the Court improperly admitted evidence of over $700,000 in economic damages relating to Baylor Medical Center facility charges which resulted in the jury awarding Scholle significantly more that he was entitled to recover. While Scholle's only pretrial disclosure of future medical expenses totaled $268,084, at trial Scholle asked for $930,000 in future medical expenses, an amount that exceeded his disclosures by over $640,000.

Delta specifically argues that during a bench conference, Scholle's counsel misrepresented to the Court that Dr. Ray had reviewed the Baylor Medical Center bills at his deposition.. Based on this misrepresentation, the Court allowed Scholle's counsel to ask Dr. Ray about the total cost for the medial branch block and RF procedures that he had performed on Scholle, including the Baylor facility charges and Dr. Ray testified that the cost was $23,000 per procedure. According to Delta, at Dr. Ray's deposition he testified that he did not see the bills and did not get involved in the facility charges. Delta contends that the admission of this improper testimony was highly prejudicial, as it put costs before the jury for future medical expenses significantly greater than what Scholle could actually prove through admissible evidence.

Delta claims that Scholle never actually produced the documents allegedly provided to Dr. Ray for review, notwithstanding Delta's repeated request for this information in discovery. Because Delta never received any of the documents before or after Dr. Ray's deposition, and Dr. Ray testified that he had never seen the facility center bills, Delta had no basis for knowing what he would say at trial and no means of cross-examining him about the charges. While Delta did endeavor to impeach Dr. Ray at trial by soliciting his admission that he did not get involved in the facility center charges, this went to the weight and credibility of the evidence, not the admissibility.

Delta argues that Scholle's counsel engage in misconduct by admitting on more than one occasion pre-trial that Dr. Ray could not offer the very testimony that was elicited. At Dr. Ray's deposition, Scholle's counsel admitted on the record that Dr. Ray had nothing to do with facility charges and that these charges should not have been included on the summary of opinions that counsel had prepared and put in front of him. When the Court discussed Delta's motion to strike the late and new expert witnesses that Scholle had improperly submitted, Scholle's counsel again admitted that Dr. Ray could not testify as to future medical expenses.

Delta also claims that Scholle's failure to produce Safeway pharmacy records allegedly received by Scholle pretrial resulted in surprise. Prior to trial, Delta asked Scholle for a copy of all prescription records disclosed along with a privilege log. When Scholle failed to response, Delta solicited the Court's help resulting in the Court granting a motion to compel and ordering the production. Scholle, however, never produced the records. In reviewing Scholle's bill of costs, an entry appears for searching pharmacy records at Safeway. Delta argues that based on this entry, Scholle had to have the records pretrial and improperly withheld them.

Delta asserts that Scholle's prescription history was central to their defense that he had a pre-existing condition, and that they were precluded from fully defending by not receiving the records. Delta also takes issue with the fact that Scholle introduced evidence at trial of over $18,000 in prescription medical expenses without ever having disclosed the underlying information.

B. Scholle

Scholle contends that Delta suffered no surprise at trial because as of August 5, 2015 he had formally disclosed projected future medical expenses in a range that exceeded $650,000.

In support of this assertion, Scholle points to several pieces of information.

First, Scholle claims that Delta knew well in advance of trial that he would be claiming damages in excess of $650,000 based on his August 5, 2015 rebuttal disclosure. As discussed previously, the disclosure indicates that the average cost per bilateral medial branch block will be $2,167 for Dr. Ray and $12,980 for the ambulatory surgery center. The average cost of RF will be $925 per side for Dr. Ray and $8,015 per side for the ambulatory surgical center. The disclosure also indicates that if Scholle lives for another 20 years, and continues to need medial branch blocks and RF, his costs will be between $329,550 and $659,100 depending on whether he can go 12 months or 24 months between procedures. Scholle argues that this disclosure was sufficient to put Delta on notice of the $930,000 claim that he made at trial for future medical damages.

Second, Scholle contends that Delta had notice of his future medical expenses based on the rebuttal disclosure provided by Woodard. While Scholle acknowledges that the Court struck this disclosure, and did not permit Woodard to testify or her opinions to be received at trial, Scholle claims that this disclosure still gave Delta advance warning of his future medical expenses. Scholle claims that Dr. Ray testified in his deposition that he had reviewed Woodard's report and agreed with her conclusions relating to future medical expenses.

Third, Scholle provides a post-trial affidavit from Dr. Ray in which Dr. Ray purports to state that he had reviewed Scholle's rebuttal disclosures that included a breakdown of billings associated with future medical expenses, including facility fee charges, and that at the time of his deposition he was aware of the billings/charges for each procedure including the facility fee and that the rebuttal disclosures "stated that the cost for future medical care alone could exceed $650,000, to which I agree." Resp. Ex. 12.

With respect to the pharmaceutical records, Scholle contends that Delta suffered no prejudice as a result of not having obtained the records because Delta argued at trial that the absence of those records demonstrated that Scholle was on pain medication prior to the incident at issue in this case. Scholle's counsel claims that it attempted in good faith to obtain the pharmacy records, however, "the request, sent by staff, was restrictive and inadvertently only requested records back to the date of the tug crash (and the defendant had requested the pharmacy records that pre-dated the tug crash). Scholle argues that more importantly, the actual prescriptions were allegedly produced in Kaiser medical records admitted at trial. Scholle also claims that the absence of the records did not preclude the jury from knowing what was prescribed to him and when in that Scholle testified that he ceased taking narcotic pain medication long before the collision. According to Scholle, the actual records would merely have been duplicative of his own testimony.

III. <u>Legal Analysis</u>

A. Legal Standard for a New Trial

Under C.R.C.P. 59, a motion for a new trial may be granted for any of the following causes: (1) any irregularity in the proceedings by which any party was prevented from having a fair trial; (2) misconduct of the jury; (3) accident or surprise, which ordinary prudence could not have guarded against; (4) newly discovered evidence, material for the party making the application which that party could not, with reasonable diligence, have discovered and produced at trial; (5) excessive or inadequate damages; or (6) error in law. C.R.C.P. 59(d). When application is made under grounds (1), (2), (3), or (4) it shall be supported by affidavit filed with the motion. C.R.C.P. 59(d). The Court may permit reply affidavits. C.R.C.P. 59(d)

The purpose of a motion for a new trial is to give the trial court an opportunity to correct any errors that it may have made. *Harriman v. Cabela's, Inc.,* COA No. 14CA1671, 2016 WL 1165425, at *3 (Colo. App. Mar. 24, 2016). As the Colorado Supreme has held:

> A motion for a new trial is not to be regarded as a routine or perfunctory matter. Its obvious purpose is to direct the attention of the trial court with at least some degree of specificity to that which the losing litigant asserts to be error, all to the end that the trial court will be afforded a last look, and an *intelligent* last look, at the controversy still before it.

Martin v. Opdyke Agency, Inc., 398 P.2d 971, 973 (Colo. 1965) (emphasis in original).

A trial court has broad discretionary powers to determine whether a new trial is required. *Park Station, Inc. v. Hamilton,* 554 P.2d 311, 313 (Colo. 1976). A "new trial may be founded upon counsel's misstatements of fact, or on his statements of fact which have not been introduced in or established by evidence, or on a finding that counsel has made a statement or argument appealing to the emotions and prejudices of the jury. *Id.* (citation omitted). Additionally, "a new trial is not granted for misconduct of counsel as a disciplinary measure, but to prevent a miscarriage of justice." *Id.*

B. Failure of Delta to Submit Affidavit with Motion

As a threshold matter, the Court disagrees with Scholle's contention that Delta's motion fails because of the lack of a supporting affidavit.

As the *Park Station* court held, a case considering whether an affidavit was required with a motion for a new trial based on alleged misconduct of counsel, the purpose of an affidavit under Rule 59 is to give notice of facts previously unknown to the trial court which support the motion in question. *Id.* Where, however, the basis of the motion is the misconduct of counsel in the presence of the court, or other irregularity in the proceedings by which any party was prevented from having a fair trial, the court may act without an affidavit. *Id.* The purpose of the affidavit is to provide the court with facts from one having first-hand information of the facts. *Id.* Where the events forming the basis for the request for a new trial occurred in the presence of the court and during trial, a trial judge obviously has sufficient firsthand knowledge to determine whether adequate grounds exist for a new trial. *Id.* The absence of an affidavit under such

circumstances does not prevent a court from granting the relief requested. *Id.*

Delta seeks a new trial based on the misconduct of counsel during trial as well as irregularity in proceedings preventing a fair trial. The circumstances giving rise to Delta's motion either occurred in the presence of the trial court, or the trial court has specific firsthand knowledge about the issues raised in Delta's motion.

The misstatement of fact that Delta alleges Scholle's counsel made at trial resulting in the improper admission of evidence (that Dr. Ray had seen the Baylor facility charges and had testified to them during his deposition) occurred during a bench conference. Additionally, the issue at the heart of Delta's motion – whether the Court permitted Dr. Ray to testify outside the scope that had already been established – was an issue about which the Court was well-informed prior to trial. Delta had filed a motion to limit the scope of Dr. Ray's testimony pretrial based on his deposition, which the Court granted. Delta had also filed a motion to strike late-disclosed experts endorsed by Scholle through which Scholle attempted to correct the fact that there was no witness who could testify as to all of the future medical expenses that he intended to claim, which the Court also granted. Moreover, at the final pretrial conference held in this case, Scholle's counsel advised the Court that if the late-endorsed experts were stricken, he had no way of establishing Scholle's future medical expenses.

In short, the Court knew based on the prior motions practice and conferences, and what occurred at trial the facts underlying Delta's motion for a new trial. Consequently, the absence of an affidavit with Delta's motion does not preclude the Court from granting the relief requested.

C. Misconduct/Misstatements of Fact by Scholle's Counsel

Scholle's future medical expenses constituted the central issue in this lawsuit, and accounted for the most significant portion of economic damages that he claimed. Scholle's counsel asked for $930,000 in future medical expenses versus only $268,800 in lost wages and $113,833.27 in past medical expenses. Based on the evidence presented, the jury's significant economic damages verdict had to have been based largely on the evidence that the Court permitted at trial relating to future medical expenses.

After reviewing in detail the trial and deposition transcripts provided by the parties as well as the Court's prior orders entered in this case and the motions giving rise to those orders, the Court finds that Scholle's counsel misrepresented to the Court that Dr. Ray had reviewed Baylor Medical Center facility charges prior to or during his deposition and was, therefore, competent to testify to these charges over Delta's objection. Moreover, Scholle's response is based on further misrepresentations and an effort to re-create a record that Scholle's counsel created. It appears to the Court that, at a minimum, this resulted in the jury considering over $320,000 in future medical expenses that should not have been admitted[4] – a number comprising approximately

[4] This conclusion is based on the fact that in Scholle's August 5, 2015 rebuttal disclosures, it was identified that the facility charges associated with the medial branch block were $12,908 and with the RF procedure $8,015, for a total facility charge of $20,923. Scholle's counsel argued at

50% of $656,104.73 in future medical expenses that the jury must have awarded. Dr. Ray's own deposition testimony makes clear that he had not reviewed the facility charges prior to his deposition and was not competent to testify about such costs. The self-serving, after the fact, affidavit submitted by Scholle's counsel does not change the fact that at the time of his deposition, he testified to the contrary.

1. Dr. Ray's Deposition

During his deposition, Dr. Ray was advised by Delta's counsel that she did not have any billing documents relating to the facility in which he performed his procedures and then asked:

> Q: …Do you have any idea what the facility charges run for something like this [the procedures that he performed]?
>
> A: I do not, no.

Mot. Ex. F 44:15-20. Scholle's counsel questioned Dr. Ray and tried to get him to testify that he knew what the facility charges were, but was unsuccessful. First, Scholle's counsel referred Dr. Ray to the summary of his opinions provided in the rebuttal disclosure prepared by counsel and asked a series of ambiguous questions about the document without actually providing it to the witness:

> Q: …that document was entitled rebuttal opinions. It had numbers in it. Do you recall that, you know, the cost of future treatment:
>
> A: Yes.
>
> Q: And do you remember in your records it says how much the radiofrequency costs and the facility charge and that kind of thing?
>
> A: Right.
>
> Q: So was that taken right – was that a reasonable deduction taken right from your records? There were no liberties taken that you're aware of:
>
> A: Not that I'm aware of.
>
> Q: Okay. And – and to the extent it talked about future treatment, it was based on your medical records. Did you see anything – let me ask you this. Did you see anything in there that was not a reasonable conclusion based on your medical treatment and diagnosis?
>
> A: – I mean, I don't have that in front of me, so it's hard for me to say 100 percent, but…

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trial that his life expectancy was 15.3 years. Assuming, *arguendo,* that Scholle had one of these set of treatments a year for 15.3 years, the facility charges would total $320,121.90.

Q: Nothing jumps out at you:

A: No.

Q: It was just a summary of conclusions based on your records?

A: Yes.

Mot. Ex. F 64-65. Scholle's counsel then went back to the issue of the facility charges and asked more specific questions of Dr. Ray:

Q: So in your records, did you – where did – where did you get the facility charge? Wasn't there a facility charge in your records:

A: Not that I know of.

Q: For the ambulatory surgery center:

A: I don't think so.

Q: Okay.

A: That's not something that I typically see. Occasionally, my staff will – no. That usually all, you know, provided to the patient from the facility.

Q: And the – okay. Thanks. And the numbers that we went over in that rebuttal expert opinion, that was – so you can only confirm that those were your – what you charged?

A: What charge, yeah. I don't know anything about the facility and what they charge.[5]

Mot. Ex. F 67:24-25; 68:1-11. The Court finds that based on Dr. Ray's deposition testimony it could not be more clear that he never reviewed the substantial facility charge bills prior to or during his deposition and had no basis for testifying about these charges at trial given that the Court had limited his testimony to items that he reviewed and were discussed in his deposition. The only reason that the Court allowed Scholle's counsel to ask Dr. Ray about facility charges and testify to these numbers was that during the bench conference to address the issue Scholle's counsel represented to the Court that Dr. Ray had reviewed these numbers and had discussed them at his deposition which was inaccurate and a misrepresentation of what had occurred at the deposition.

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[5] The Court notes that in his response, Scholle's counsel again violates his duty of candor to the Court by relying on a selective and less than clear portion of Dr. Ray's deposition while failing to mention entirely Dr. Ray's specific testimony in which he denies knowing anything about the facility charges.

2. Admission of Scholle's Counsel During Dr. Ray Deposition

Second, Scholle's counsel stated on the record during Dr. Ray's deposition that Dr. Ray had no involvement in facility charges and that counsel had included these charges in his rebuttal disclosure summary in error. Scholle's counsel referred to Dr. Ray's summary of opinions providing in Scholle's rebuttal disclosures and stated:

> Q: Okay. And – and I don't know why we got the facility charge in there. You don't – you have nothing to do with the facility charge, do you? Okay. And the cost for the RF per side, does that seem – do those numbers seem right, 925 and -- $925 and $8,115 per side for –
>
> A: That's the surgery center again.
>
> Q: The surgery center. Okay. But your charge appears right?
>
> A: Right. 925 per side for four nerves, yes.

Ex. F. 82:24-25; 83:1-10. After this acknowledgement, there was no basis for Scholle's counsel to tell the Court that Dr. Ray had reviewed anything other than his own bills for the procedures given to Scholle and could testify about these number.

3. Admission of Scholle's Counsel During Pretrial Conference

Third, that Scholle's counsel knew that Dr. Ray could not testify as to future medical expenses is also evident from the fact he admitted a second time to the Court on the record that Dr. Ray could not testify as to future medical expenses. At the pretrial conference held in this matter, Scholle's counsel advised, in response to the fact that Delta had moved to strike his disclosures of Woodard and Hazel:

> So I would just say that, if the witnesses that are – were retained to discuss the evidence of future medical expenses are struck [Woodard and Hazel], number one, then the Plaintiffs' effort were frustrated to comply with putting together the future medical expenses, because Dr. Ray cannot do that. And the Defense knew that at his deposition because he testified he cannot speak to these expenses. You know, he can talk about his historically. He can't talk about Miami [Baylor] Surgery Center. He can't talk about the anesthesiologist. And the Defendants were at that deposition, and they knew at that time that we were going to have to get another witness to quantify these future medical expenses. Because if we were limited to Dr. Ray, we can't – it is impossible for Plaintiff to present evidence of future medical expenses.

Mot. Ex. J.

Based on his deposition and the admission of Scholle's counsel, Dr. Ray only had personal knowledge of his own charges for the procedures that he performed on Scholle, which, as Scholle's August 5, 2015 rebuttal disclosure (and deposition testimony establishes) totaled $2,167

per bilateral medial branch block and $925 per side for RF. Instead of limiting Dr. Ray to testifying about these amounts only, the Court erroneously permitted Scholle's counsel to question him about the estimated *total* cost of the procedures including facility/ambulatory surgery center charges for the Baylor Medical Center based on the misconduct and misrepresentation of Scholle's counsel to the Court that Dr. Ray had reviewed the facility charges and had knowledge of the costs. In response to this questioning, the Court allowed Dr. Ray to testify that these charges totaled approximately $23,000, over the objection of Delta at trial, and notwithstanding the fact that he was not competent to do so and that this was outside the scope of what he had disclosed during his deposition.

This Court, therefore, erroneously admitted evidence of at least $320,000 in future medical expenses based on misconduct of counsel. The Court concludes that the record clearly shows that this error was prejudicial to Delta. Given the evidence before the jury, the jury had to have awarded Scholle over $656,000 in future medical expenses, which, at a minimum, was 50% more than he was entitled to under any circumstances, and requires a new trial.

4. Scholle's Contention that the Future Medical Expenses were Disclosed

Scholle claims that Delta had notice of the damages claimed because his August 5, 2015 rebuttal disclosures "formally disclosed projected future medical expenses, in a range that exceeded $650,000." This assertion is unpersuasive.

In the first instance, Scholle never disclosed the future medical expenses that he claimed at trial. Based on Dr. Ray's testimony allowed by the Court, Scholle's counsel asked the jury for $930,000 in future medical expenses – a number that had never been disclosed. Not only did Scholle's Rule 26(a)(1) disclosures and proposed trial management order claim future medical expenses in the amount of only $268,084, his August 5, 2015 rebuttal disclosure did not remotely identify that he intended to seek $930,000 at trial. The statement of opinions to be allegedly expressed by Dr. Ray at trial indicated only that:

> Each time Mr. Scholle has an RF it will need to be preceded by a MBB [medial branch block]. *If* Mr. Scholle lives another 20 years, and continues to need MBB and RF's his costs will be between $329,550 and $659,100, depending on whether he can go 12 months or 24 months between RF procedures.

Resp. Ex. 1, p. 2 (emphasis added). This disclosure establishes only that Scholle *may* live another 20 years, that he *may* continue to need the procedures that Dr. Ray provided, that the frequency *may be* between 12 and 24 months, and that if those circumstances occur, the costs *will be between* $329,550 and $659,100 – the disclosure hardly puts Delta on notice that Scholle will need these treatments, or the cost of the treatments. The disclosure does not identify the necessary frequency of the anticipated treatments – rather it merely states that the frequency will depend on how long

Scholle can go between treatments. Moreover, the disclosure does not notify Delta that future medical expenses associated with Dr. Ray could reach $930,000.[6]

Scholle's contention that Delta had notice of the facility charges because a "portion" of the future medical bills supporting the August 5, 2015 summary were disclosed on September 22, 2015 prior to the deposition, with the remainder disclosed "shortly after Dr. Ray's October 30, 2015 deposition," is also not helpful.

Dr. Ray testified at his deposition that he had not seen bills for the facility charges and could not comment on the charges. Based on his deposition testimony, Delta could only conclude that Dr. Ray would not testify about these charges. Moreover, because he had not seen the bills, there was no basis for Delta to question Dr. Ray about them or to develop cross-examination about the charges. While Scholle may have disclosed the facility charges after the deposition, Scholle never identified any witness (not stricken by the Court) that was competent to testify as to these charges, and, in fact, acknowledged that Dr. Ray would not testify about these charges because he had no knowledge of them. The mere fact that the bills were turned over in discovery, did not make them admissible at trial, and did not put Delta on notice that Dr. Ray would testify about these bills, which is what occurred at trial.

Lastly, Dr. Ray should never have been permitted to testify about the facility charges because he had only been endorsed as a non-retained expert, and the Court, pretrial, had expressly limited his testimony to matters he considered or reviewed in treating Scholle and that had been properly disclosed. *See* Feb. 26, 2016 Order Re: Def.'s Mot. in Limine to Limit Plaintiff's Non-Retained Expert Testimony. Dr. Ray made clear that he had nothing to do with facility charges. To the extent that Scholle wanted him to testify about these bills, the information would have to have been provided to him not to treat Scholle, but for the litigation. This would have made him a retained expert and Scholle would have been required to provide disclosures for Dr. Ray in accordance with C.R.C.P. 26(a)(2)(B)(I) which Scholle failed to do.

5. Scholle's Contention That No Surprise Occurred Because Delta's Rebuttal Expert Testified That The Future Medical Treatment Was Not Necessary

Scholle argues that there was no trial by ambush because Delta's retained rebuttal expert, Dr. Schakaraschwili, testified that he reviewed Dr. Ray's deposition as well as Woodard's stricken report and concluded that the treatment recommended by Dr. Ray was not medically necessary. Resp. p. 8. The fact that Dr. Schakaraschwili disagreed with Dr. Ray's conclusion on future medical treatment is irrelevant to the issue raised in Delta's motion – that is whether the Court erroneously admitted evidence of future medical expenses through a witness admittedly not

[6] Although Delta's counsel did not object during Scholle's closing argument to the number $930,000, the Court concludes Delta preserved the objection for appeal. "Once the trial court makes definitive rulings either at or before trial, the objecting party need not renew the objection contemporaneously during trial to preserve a claim of error on appeal." *Camp Bird Colo., Inc. v. Bd. of Cty. Comm'rs of Cty. of Ouray,* 215 P.3d 1277, 1289 (Colo. App. 2009). Delta's counsel objected repeatedly to the introduction of Dr. Ray's testimony relating to future medical expenses, including the $23,000 used to compute the $930,000 and moved for a directed verdict on the issue of damages which the Court denied.

competent to testify on the subject and after Scholle's counsel admitted that the witness would not offer this testimony and the witness testified in his deposition that he had no knowledge of the charges. Dr. Schakaraschwili rebuttal does not remedy the misconduct of Scholle's counsel or make the evidence admissible through Dr. Ray.

6. Scholle's Reliance on Dr. Ray's Post-Trial Affidavit

The Court finds Dr. Ray's post-trial affidavit, prepared by counsel, wholly unpersuasive, and an effort to improperly alter a clear record. The affidavit states that "[a]t the time of my Dr. Ray was asked by both Delta's counsel and Scholle's counsel about the facility charges during his depositions and consistently testified that he had no knowledge of these bills. Scholle's counsel admitted during his deposition that the facility charges, which included $12,908 per medial branch block, and $8,015 per side per RF treatment, had been erroneously included in the summary of Dr. Ray's alleged opinions provided on August 5, 2015. Scholle's counsel admitted to the Court at the pretrial conference that Dr. Ray could not testify about future medical expenses. The affidavit, which directly contradicts Dr. Ray's deposition testimony, provides no explanation for the contradiction and no plausible excuse for the contrary testimony that Dr. Ray gave in his deposition.

7. Scholle's Contention That No Surprise Occurred Because Woodard Disclosed the Future Medical Expenses In Question

Scholle's assertion that Delta had notice of his future medical expenses based on Woodard's report also fails.

First and foremost, the Court struck Woodard's disclosure as improper in a lengthy order. *See* Feb. 27, 2016 Order Granting Defs.' Mot. to Strike Pl.'s Untimely Expert Disclosures.

Furthermore, Woodward's report does not correlate with the $23,000 that Dr. Ray testified to at trial, does not identify the cost of future RF treatment, and does not disclose that Scholle intended to seek future medical expenses of $930,000 at trial. Woodard identifies in her report that based on a review of charges by Dr. Ray and "Grapevine Surgicare" – an entity that was never discussed at trial – the cost of C3, 4, 5, 6 bilateral medial branch RF ablation (8 nerves total) would be $15,720 every 6 to 18 months to life. She also states that lumbar medical branch RF ablation costs were "[t]o be determined once information is known regarding how many levels and sides are involved." In short, even if the Court were to accept this improperly submitted disclosure, it hardly provided Delta with adequate notice of future medical expenses.

8. Scholle's Reliance on *Todd* and *Camp Bird*

Scholle contends that based on *Todd* and *Camp Bird*, Delta had an adequate opportunity to defend against the testimony that the Court allowed. The Court disagrees. *Todd* and *Camp Bird* are inapposite. The cases do not address the question of when a party is entitled to a new trial based on misconduct of counsel. Additionally, Delta did not have an adequate opportunity to defend against Dr. Ray's testimony. Prior to trial, Delta had been led to believe that Dr. Ray had no knowledge of the facility charges and would not testify about them. Given the manner in which Scholle did disclose the facility charges, and Scholle's pretrial disclosure of future medical expenses under Rule 26(a)(1) and his proposed trial management order, Delta had

no reason to believe that there would be any testimony relating to these substantial charges, let alone from Dr. Ray. While Delta had the opportunity to cross-examine Dr. Ray about these charges at trial, the cross-examination went only to the weight and not the admissibility of the evidence, and did not provide a means by which Delta could preclude this information from the jury's consideration.

9. Undisclosed Pharmacy Records

The Court also concludes that Scholle's counsel engaged in misconduct before the Court by failing to provide Delta with a copy of the Safeway pharmacy records prior to trial, which the Court permitted Scholle to testify to over Delta's timely objection.

Prior to trial, the Court ordered Scholle's counsel to produce the pharmacy records. Although Scholle apparently did a search for and obtained the records prior to trial, Scholle never complied with the Court's order.

Scholle then proceeded to testify at trial about his past medical expenses based on a C.R.E. 1006 summary. The Court recalls that at trial it was clear that Scholle had no independent knowledge of his past medical expenses, and was only able to talk about the expenses with the summary in front of him. The Court remembers distinctly that when Scholle's counsel attempted to introduce the C.R.E. 1006 summary, Delta's counsel objected, resulting in a bench conference. Delta's counsel advised that the underlying bills providing the basis for the C.R.E. 1006 summary had not been disclosed prior to trial, and that the summary had only been provided days before trial. Scholle's counsel represented that all records had been disclosed. The Court allowed the summary based on this representation and Scholle was able to introduce evidence that he had incurred $18,542.07 in prescriptions and the C.R.E. 1006 summary reflecting this amount.

C.R.E. 1006 provides:

> The contents of voluminous writings…which cannot conveniently be examined in court may be presented in the form of a chart….The originals or duplicates, *shall* be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court. (emphasis added).

Delta's counsel had timely and repeatedly requested a copy of the Safeway pharmacy records prior to trial and the Court had compelled Scholle to produce them, which was ignored. The Court erroneously admitted evidence of $18,542.07 in prescription costs – notwithstanding the fact that Delta had properly requested copies of these bills in a timely manner and was entitled to see these records in advance of trial – based on a misrepresentation of fact by Scholle's counsel at trial that all records underlying the summary had been produced.

The $18,542.07 that the jury considered constituted 16% of the total past medical expenses claimed by Scholle at trial and one of the more significant line items on Scholle's C.R.E. 1006 summary. In light of the fact that the jury likely awarded Scholle all of the past medical expenses that he claimed in Exhibit 22, the Court finds that introduction of this evidence over Delta's objection was not only in error but was prejudicial as well.

Scholle attempts to mask the misrepresentation by pointing to the argument that Delta made at trial about Scholle's alleged ongoing use of prescription medications both before and after the collision, and by claiming that the evidence was provided in Kaiser records and was duplicative of Scholle's testimony at trial. The Court is not persuaded. While Delta may have argued that Scholle had no records showing that he had stopped taking pain medication prior to the collision, this does not change the fact that Scholle asked to be awarded over $18,000 for prescription medication relating to the collision based on a C.R.E. 1006 summary and was obligated under both the rule and Court order to provide Delta with the backup to his testimony which he failed to do. Scholle provides no evidence that the Kaiser records contained the information that the Court ordered him to produce before trial. Moreover, Delta was not required to search through Kaiser records to try to find Safeway pharmacy charges (assuming that they were in these unidentified records) – Scholle had to provide Delta with the specific underlying information for each line item on its C.R.E. 1006 summary in advance of trial so that Delta could confirm the numbers included. Scholle requested the documents from Safeway and had no basis for not turning them over to Delta. Finally, the fact that Scholle testified that he ceased taking pain medication prior to the tug crash does not duplicate the information relating to prescription medication appearing in Exhibit 22, which is that he incurred and sought over $18,000 in prescription charges.

10. Scope of the New Trial

While a court has discretion to order a new trial on all or part of the issues, "where the issues at trial are interrelated and depend upon one another for determination, then error which requires a new trial on one issue, will, of necessity, require a new trial as to all issues." *Basset v. O'Dell,* 491 P.2d 604, 605 (Colo. App. 1971). Damages constituted the sole issue at trial. Given the significant economic damages awarded in one lump sum based, in part, on inadmissible evidence, and the fact that Scholle's claim for noneconomic damages and impairment were necessarily interrelated to the treatment that he received and the future treatment that he alleged he needed, the Court concludes that a new trial on all damages is warranted.

IV. Order

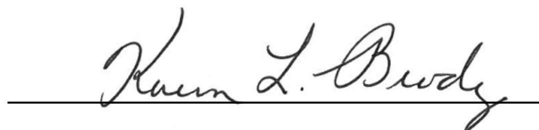
For the reasons discussed above, the Court GRANTS Delta's motion for a new trial pursuant to C.R.C.P. 59.

Delta's counsel is to contact the Court within seven (7) days of the date of entry of this order, by June 28, 2016, to obtain dates for a new trial and is to coordinate the setting with Scholle's counsel. Delta is to then file a notice of the new trial date.

If the parties encounter any problem in agreeing on a new trial date, they may set a telephone hearing and the Court will set the trial.

IT IS SO ORDERED on this Tuesday, June 21, 2016

BY THE COURT:



Judge Karen L. Brody
Denver District Judge