District Court, Adams County, State of Colorado 1100 Judicial Center Drive, Brighton, CO 80601 303-659-1161	DATE FILED: August 8, 2017 12:52 PM CASE NUMBER: 2016CV31355
Plaintiff: Robert Stephenson Defendant: Lindsay Heaston	Case No. 2016 CV 31355 Division C Courtroom 506

Amended Order of Dismissal for Continued Violation of Discovery Obligations

This case involves a motor vehicle accident which occurred in 2013. The case has been plagued by plaintiff's ongoing pattern of evading discovery obligations. Defendant filed notices of discovery disputes (as required by the Pretrial Order) on May 26, 2017, June 12, 2017 and July 24, 2017. A hearing on the July 24 Notice of Discovery Dispute and Request for Evidentiary Hearing occurred on August 4, 2017 (four weeks before trial). Defendant presented the hearing exhibits referenced below and was ordered to file them electronically.

After the July 24, 2017 Notice was filed, plaintiff filed a Motion to Continue Trial. The Motion noted that two weeks earlier, plaintiff was seen by a specialist who "advised" plaintiff to attend physical therapy. The Motion further noted that after physical therapy was completed, "it is *possible* that plaintiff will require surgery." (emphasis added). The Motion to Continue was denied by bench ruling at the August 4, 2014 hearing.

Legal standard – dismissal as a discovery sanction

"Dismissal, the severest form of sanction, is generally appropriate only for willful or deliberate disobedience of discovery rules, flagrant disregard of a party's discovery obligations, or a substantial deviation from reasonable care in complying with those obligations." *Prefer v. PharmNetRx, LLC*, 18 P.3d 844, 849 (Colo.App. 2000).

"Dismissal may be imposed as a sanction for willful or deliberate disobedience of discovery rules, flagrant disregard of a party's discovery obligations, or a substantial deviation from reasonable care in complying with those obligations." *Pullen v. Walker*, 228 P.3d 158, 161 (Colo.App. 2008).

"The discovery rules were revised in large part to curtail abuses, which had been commonplace under the previous rules. *Todd*, 980 P.2d at 977 n.2. Under the new rules, trial courts are expected to 'assertively lead the management of cases.' *Id.* (quoting C.R.C.P. 16, committee cmt.). And litigation-ending sanctions may be appropriate, given sufficiently serious discovery violations by a party or counsel." *Kallas v. Spinozzi*, 2014 COA 164 (Colo.App. 2014).

"The supreme court has generally disfavored litigation-ending sanctions, emphasizing that 'litigation should be determined on the merits and not on formulistic application of [procedural] rules. [*Nagy v. District Court*, 762 P.2d 158 (Colo. 1988).] The supreme court has not altogether foreclosed the possibility of and need for litigation-ending sanctions, but has

cautioned that such harsh sanctions should be imposed "only in extreme circumstances." *Kallas v. Spinozzi*, 2014 COA 164, ¶ 21.

"[T]he elephant in the living room of civil litigation is that even 'proportionate' litigation costs in the average case are so high [as] to be out of reach for all but the wealthiest of individuals and corporations…. Judges have some responsibility for this situation, because many of us are so resistant to enforcing the existing rules with the bite of sanctions." Wang & Hoffman, *A Year after Significant Civil Justice Reforms in Colorado*, Colorado Lawyer (Jan. 2017).

Factual Backrgound

This case involves a rear end motor vehicle accident which occurred in 2013. The Complaint describes the impact as "violent." Complaint ¶ 8. Defendant describes the accident as "a low impact, rear-end collision causing minor vehicle damage." Notice of Discovery Dispute (July 24, 2017) p. 2. The lawsuit was filed three years after the accident.

Initial disclosures

Initial disclosures were exchanged October 17, 2016. In his initial disclosures, plaintiff claimed $250,000.00 in economic and non-economic damages. (Ex. A, Initial Disclosures § II(g)). He identified four medical providers, but disclosed only a single medical bill after the three year old "violent" accident. The bill was for $1,442. (*Id.* at § II(a)).

Disclosed in → **Treatment provided by ↓**	Initial disclosure served Oct. 17, 2016 (Hearing Ex A)
Harlan Chiropractic	0
Carepoint PC Urgent Care	0
Diversified Radiology	0
Advanced Medical Imaging	1,442
TOTALS	1,442

November 1, 2016 case management conference – discovery begins: The C.R.C.P. 16 case management conference was held on November 1, 2016. Paragraph 9 of the jointly proposed case management order noted plaintiff's failure to provide medical and wage loss records:

> Counsel have conferred regarding Plaintiff's disclosures and Defendant's concerns regarding the need for Plaintiff's medical records and wage loss documentation. Plaintiff's counsel has advised that Plaintiff is in the process of obtaining all documentation and will supplement the materials promptly upon receipt.

The minute order from the conference notes that plaintiff had "no preexisting injuries." The court ordered procedure for discovery disputes was discussed. (The procedure is outlined at ¶ 7 of the November 1, 2016 Pretrial Order).

April 28, 2017 deposition: Plaintiff's deposition was taken on April 28, 2017. Plaintiff claimed he had not yet seen written discovery served by defendant, despite the fact that by then

his discovery answers were ten days past due. (Ex. U, deposition pp. 30 and 41). Plaintiff refused to answer certain questions and his counsel directed him not to answer others based on counsel's *relevancy* objections. (*See, e.g., id.* at p. 31-32); *see also* C.R.C.P. Rule 30(d)(1) ("An instruction not to answer may be made during a deposition only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion pursuant to subsection (d)(3) of this Rule."); *Liscio v. Pinson*, 83 P.3d 1149, 1157 (Colo. App. 2003) ("[Even] a valid objection is not, in and of itself, ground for instructing a witness not to answer and suspending part of a deposition.").

May 8, 2017 interrogatory answers: Plaintiff's answer to Pattern Interrogatory 8 lists only four treatment providers since the 2013 accident: Harlan Chiropractic ($5,918); Carepoint ($246); Advanced Medical Imaging ($1,442); and a new provider, Max Bowman (deep tissue massage, $6,280). (Ex. B, p. 11-12)

May 26, 2017 Notice of Discovery Dispute: The first Notice of Discovery Dispute complained of plaintiff's continued failure to provide medical and income loss documentation. The Notice recites:

> On March 14, 2017, undersigned wrote Plaintiff's counsel [Ex. L] regarding many missing records and billings related to Plaintiff's medical treatment he claims from the accident, as well as the lack of documentation for Plaintiff's income loss claim. Plaintiff's counsel wrote a letter on March 15, 2017 [Ex. M] refusing to provide anything more and stating if Defendant wanted more records, Defendant must send releases for Plaintiff to sign.

Plaintiff did not offer to obtain additional records. Instead, plaintiff's counsel wrote that *defendant* was "free to provide us with HIPAAs (fully completed) and we can have our client sign them for you." (Ex. M at 1). At its core, plaintiff declined to provide further disclosures.

With regard to income loss, plaintiff is a commissioned salesperson. (Ex. U, deposition, p. 39-40). As a commissioned salesperson, he receives commission payments some weeks or months after a sale is made. The only income loss documents provided were commission statements for the two weeks *before* and two weeks *after* the accident. They do not reflect commissions paid for the two weeks plaintiff claims he was unable to work. Plaintiff made no offer to provide these, or W-2s, 1099s, or any further income documentation.

The May 26, 2017 Notice indicated that the discovery cut off was only 50 days away and trial only 100 days away. Defendant still lacked medical records, medical bills, and wage loss documentation.

A written Response was filed on June 6, 2017. In it, plaintiff disclosed that he was "awaiting the results of a 2nd MRI…." Plaintiff had yet to disclose documentation or imaging of the first MRI.

June 7, 2017 hearing: Judge Goodbee ruled that the Notice of Discovery Dispute was being considered a motion to compel. The minute order from the hearing indicates that the motion was granted and attorney fees were awarded to defendant. Plaintiff was ordered to sign medical releases for all medical records within seven days. Depositions were ordered to be re-

set. With these sanctions, Judge Goodbee declined to "strike claims or preclude testimony." Minute Order.

June 12, 2017 Notice of Discovery Dispute. The parties were unable to reach agreement on a date to resume plaintiff's deposition. Defendant requested Court assistance. The day after this Notice was filed, the parties agreed on a date. *See* June 13, 2017 Notice of Resolution of Discovery Dispute.

June 13, 2017 supplemental disclosures. Plaintiff filed supplemental disclosures which "updated" his medical expenses (Ex. A, pp. 97-98). Past medical expenses were disclosed as:

Harlan Chiropractic	October, 2014 to July 2014 [sic]	$5,918
Carepoint PC Urgent Care	None listed	246
Advanced Medical Imaging	January, 2014	1,442
No. Suburban Med. Center	Aug. 2013 to June, 2017	10,750
Max Bowman massage therapy	Aug. 2013 to June, 2017	10,750
Total		**20,652**

June 29, 2017 deposition: Plaintiff's deposition was completed.

July 24, 2017 Notice of Discovery Dispute. The pending Notice recites that plaintiff's counsel has no further information or documents to disclose; and that he has disclosed whatever documents were turned over to counsel. Defendant presents the following claims in the Notice:

- Plaintiff failed to obtain and disclose the identity of (or any records or bills) of an urgent care facility he apparently visited in the weeks following the accident, which was newly disclosed at his June 29, 2017 deposition.

- After defendant obtained plaintiff's medical records (using the releases signed pursuant to Judge Goodbee's order), it was learned that plaintiff had numerous medical providers that he did not disclose. These include pre-accident providers who treated Plaintiff for similar injuries and conditions he currently claims. (Plaintiff previously represented that he had "no preexisting injuries." *See* case management conference minute order and (plaintiff's answer to Pattern Interrogatory 15, Ex. B at 13-14)).

- Plaintiff failed to disclose any treatment records or bills from massage therapist, Max Bowman, despite claiming he paid Mr. Bowman $10,750 over four years.

- Plaintiff made numerous inaccurate statements and misrepresentations in discovery responses and depositions, including statements related to his injuries and treatment providers from before the accident, the existence of additional documents requested by Defendant, and his ability to access documents requested by Defendant.

- Plaintiff's counsel produced amended/supplemental responses to interrogatories which were not under oath pursuant to CRCP 33; in which he contradicted in his June 12, 2017 deposition.

- Plaintiff failed to disclose the identity of or any records or bills from medical providers he has treated with in the last three months (with the exception of a report from a specialist he consulted the day before his deposition which served as the basis for the Motion to Continue).

- Plaintiff failed to disclose any records or bills related to MRI's taken in June, 2017, despite providing this information to subsequent providers and selectively disclosing other medical reports that were based on those MRI's.

- Plaintiff refused to provide discoverable information regarding his wage loss. He testified in deposition that he did not have access to the information or documents requested. Upon taking the deposition of Plaintiff's supervisor, it was learned that not only did plaintiff have access to all of the wage loss information, but that some months earlier the supervisor showed plaintiff how to review the information online and print it out.

August 4, 2017 hearing: The overwhelming bulk of the claimed discovery abuses were not denied by plaintiff's counsel. Counsel emphasized that he disclosed his client's medical records promptly after they were received, but no denial was made that counsel had received hardly any records - - and thus turned over hardly any.

Findings

The court finds: no adequate disclosure was made of medical providers seen in the days, weeks, months and years *before* the motor vehicle accident; no disclosure was made of records from the urgent care facility seen after the accident; plaintiff denied seeing multiple medical providers, including multiple chiropractors, before the accident for injuries to the same areas of his body to which he claims injury here; plaintiff has been unable to provide treatment records or bills for three years of massage therapy which he claims was necessitated by the accident and which total $10,750; although treated by Dr. Bock in 2015, plaintiff made no disclosure about Dr. Bock or the treatment received until plaintiff's June, 2017 deposition; plaintiff claims to have had MRIs taken in 2014 and again in 2017, but has provided neither MRI (notwithstanding providing a CD which was wrongly represented to contain the MRI images); plaintiff claims treatment from Harlan Chiropractic, but did not disclose a copy of the 2014 MRI image which was in Harlan Chiropractic's records; documents obtained from 'The Joint' in response to the June 6, 2017 hearing refer to 16 chiropractic treatments *before* the accident for lower back pain – the same pain which he claims was caused by the 2013 accident (Ex. J, pp. 77-81) notwithstanding repeated claims of no pre-existing injuries to his lower back; a physical therapist who plaintiff identified during his April, 2017 deposition has still not been identified; although claiming $10,750 in massage therapy bills from Max Bowman (Ex. A, p. 98), not a single bill, session record, or evidence of payment has been provided, although the therapist's June, 2017 email refers to 215 message sessions since the accident (Ex. A, p. 100); plaintiff's lost sales commission claim is not supported by appointment calendars or other records of sales appointments which he could not attend during the time he claims he was not able to work; despite plaintiff's insistence at his June, 2017 deposition that he did not know how to obtain the records when defendant took the manager's C.R.C.P. 45 deposition, after the close of discovery it was learned that sometime

between January and April, 2017, plaintiff's manager had shown plaintiff how to print out his monthly and weekly commission statements going back to 2012 (Ex. T, pp. 60, 70-71).

Discussion

Plaintiff's discovery abuses reflect "willful [and] deliberate disobedience of discovery rules, flagrant disregard of a party's discovery obligations, [and] a substantial deviation from reasonable care in complying with those obligations." *Prefer v. PharmNetRx, LLC*, 18 P.3d 844, 849 (Colo.App. 2000). The harsh sanction of dismissal is appropriate.

ORDERS:

1. Plaintiff claims and lawsuit are dismissed as a discovery sanction.

2. Within 14 days, plaintiff may respond to the July 18, 2017 affidavit of attorney fees.

Dated: August 8, 2017

BY THE COURT:

Edward C. Moss
District Court Judge