COLORADO COURT OF APPEALS 101 West Colfax Avenue Suite 800 Denver, Colorado 80202 On Appeal From: District Court, Morgan County Honorable Douglas R. Vannoy Case No. 10 CV 186	**COURT USE ONLY**
Plaintiff(s): ASYE BEKIROVA and YUNUZ SULEYMAN **v.** **Defendant(s):** DORIS ANDERSON as Personal Representative of the Estate of MERVIN ANDERSON	Case Number: 2011 CA 2558
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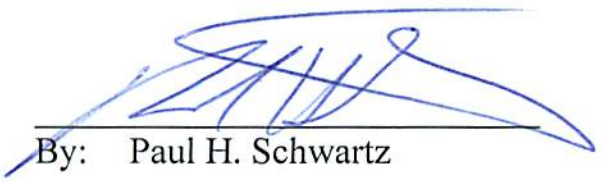
OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) as it contains 8,942 words.



By: Paul H. Schwartz

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2. Did the trial court err in granting Defendant's motion for a directed verdict on the issue of medical expenses?

3. Did the trial court abuse its discretion in refusing to instruct the jury as to Plaintiffs' economic damages?

4. Did the trial court abuse its discretion in excluding Plaintiffs' medical records?

STATEMENT OF THE CASE

A. Nature Of The Case

This is an appeal arising from multiple errors by the trial court that prevented Plaintiffs from fully and fairly presenting their personal injury action to the jury. Individually and especially cumulatively, these errors deprived Plaintiffs of a fair trial. These errors included excluding Plaintiffs' only non-party witnesses; refusing to allow the issue of Plaintiffs' medical expenses to go to the jury; refusing to instruct the jury as to Plaintiffs' economic damages; and excluding Plaintiffs' medical records. For the reasons below, the Court should reverse the judgment below and remand the action to the district court for a new trial.

B. Course Of Proceedings And Disposition Below

Plaintiffs Ayse Bekirova and Yunuz Suleyman ("Bekirova" and "Suleyman," and collectively "Plaintiffs") filed this personal injury action on July

30, 2010 against the Estate of Mervin Anderson (through its representative Doris Anderson) ("Defendant"). 31790492_Complaint---Def.-Estate-of-Mervin-Anderson at 1. The action arose out of an automobile accident involving Plaintiffs and Anderson. Plaintiffs initially were represented by counsel, but on June 21, 2011, counsel withdrew, and they proceeded *pro se*. 40246609_38252448. Defendant admitted negligence and causation of the accident. 32402921_answer at ¶ 1. The only issues at trial were the causation and extent of Plaintiffs' economic and noneconomic damages. Day 3, 11:1-13.[1] Following a three-day trial, the jury found in favor of Defendant as to both issues and awarded no damages. 43943011_10CV166-MINC. This appeal followed.

C. Statement Of Facts

On December 19, 2006, Plaintiffs were sitting in traffic at an intersection when Defendant rear-ended them. 31790492_Complaint---Def.-Estate-of-Mervin-Anderson at 2 ¶ 7. Defendant, as a result of his admitted negligence, failed to stop as he approached the intersection, causing the front of his vehicle to collide with the rear of Plaintiffs' vehicle. *Id.* at ¶¶ 9-10. The force of the impact caused Plaintiffs' vehicle to collide with the rear of the vehicle in front of him. *Id.* at ¶ 12.

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[1] Because the CD-ROM of the original trial transcript does not contain electronic bookmarks, references to the transcript will be as follows: "Day of trial, page number: line number(s)."

The vehicle sustained some damage, but was still operable. Day 1, 46:22-47:4. As soon as emergency services arrived, Bekirova was taken to the hospital. Day 1, 46:9-13. Suleyman followed her there, but did not seek medical treatment at the time. Day 1, 48:2, 48:5-10.

Following the accident, Plaintiffs began experiencing chronic physical pain and neurological symptoms that interfered with their daily lives. 37186058_Report-by-Plaintiff-s-Expert-W.-Rafer-Leach--MD-re-Bekirova at 1-2, ¶¶ 7-10; 37186077_Report-by-Plaintiff-s-Expert-W.-Rafer-Leach--MD-re-Suleyman at 1-2, ¶¶ 7-11. They visited many doctors and underwent physical therapy in an attempt to resolve these issues. *See, e.g.*, Day 1, 76:14-24, 77:6-12; Day 2, 6:25-7:2, 12:13-21, 31:8-11, 32:11-13. As their medical bills mounted and their income declined, Plaintiffs sought recovery for their losses from Defendant. *See, e.g.*, Bekirova Dep. 59:2-9, 60:21-61:21. They filed their complaint on July 30, 2010. 31790492_Complaint---Def.-Estate-of-Mervin-Anderson at 1.

Until June 21, 2011, Bekirova and Suleyman were represented by Ring & Associates, P.C. 39666304_37849663 at 2-3. After a court-ordered mediation conference failed, Ring & Associates informed Plaintiffs that it would "not be in a position to pay the costs associated with trial" and withdrew. *Id.* at 2, ¶

3. Unable to find anyone to take their case, Plaintiffs proceeded *pro se*. *See* 39666304_37849663 at lines 4-5; 43351097_40400593.

Plaintiffs are not native English speakers, and Suleyman is only semi-literate. Bekirova Dep, 58:6-7; Suleyman Dep. 27:7-12. During the trial, it was clear that their difficulty with the language, combined with their lack of familiarity with basic trial procedure and evidentiary rules, put them at a severe disadvantage. Virtually all of their exhibits were excluded (27 of 33) due to purported authentication and hearsay issues. *See* Day 1, 2-3; Day 2, 2-3. The court also excluded both of their non-party witnesses, apparently as a sanction for untimely disclosure, leaving them with only their own testimony and six exhibits to prove their case. Day 2, 46:11-47:23, 50:1-8. Despite these setbacks, Plaintiffs were able to present evidence of their medical expenses and the cost of repair of their vehicle. The court, however, either overlooked or disregarded this evidence because (1) at the close of the examination of Defendant's first witness, the court granted a directed verdict in favor of Defendant as to Plaintiffs' medical expenses, and (2) at the end of the trial, the court rejected Plaintiffs' economic damages jury instruction and removed economic damages from the special verdict forms. *Id.* at 79:10-14, 191:5-18. The jury thus was left to consider solely noneconomic damages. Day 3, 11:1-13. It returned a verdict in favor of Defendant. 43943011_10CV166-MINC.

SUMMARY OF ARGUMENT

1. The trial court erred in excluding both of Plaintiffs' witnesses as a sanction for their untimely disclosure. The sanction of exclusion is inappropriate where the untimely disclosure was substantially justified or harmless. First, the court applied the incorrect legal standard under C.R.C.P. 37(c), considering whether the disclosure was "harmless" or due to "excusable neglect." Second, the untimely disclosure met the correct standard, that is, was either substantially justified or harmless, and therefore the court abused its discretion when it excluded the witnesses. Lastly, the court abused its discretion in imposing the sanction of exclusion when other sanctions were available, Plaintiffs were proceeding *pro se*, and the testimony of the excluded witnesses was central to Plaintiffs' case.

2. The trial court erred in granting a motion for directed verdict against Plaintiffs on the issue of their medical expenses. Contrary to the court's ruling, Plaintiffs presented substantial evidence of the expenses they incurred in seeking medical treatment for their injuries. That evidence showed that the expenses were reasonable and necessary. When viewed in the light most favorable to Plaintiffs, this evidence was sufficient to sustain a jury verdict awarding them medical expenses.

3. The trial court abused its discretion in refusing to instruct the jury on Plaintiffs' economic damages. The court granted a directed verdict against Plaintiffs on the issues of medical expenses and lost income and past and future wages. Assuming incorrectly that these directed verdicts disposed of Plaintiffs' economic damages claim entirely, the court refused to instruct the jury on the issue. In fact, Plaintiffs presented significant evidence in support of their claim for cost of repairs to their vehicle, a category of economic damages they requested in their complaint. They were therefore entitled to a jury instruction on the issue, and the trial court abused its discretion in refusing to do so.

4. The trial court abused its discretion in excluding Plaintiffs' medical records. Plaintiffs were able to lay foundation for these records, but the trial court not only denied them the opportunity to do so, but actively discouraged them from doing so. Further, it appears from the record that Defendants had no reason to doubt the authenticity of these documents, suggesting their objections were made in bad faith. If Plaintiffs had been permitted to authenticate these documents, the court could have found the contents of the records admissible under C.R.E. 807, the residual hearsay exception. The court did not recognize this potential exception and instead sustained Defendants' objections to these documents with minimal, if any, explanation. This represented an abuse of discretion.

ARGUMENT

I. THE COURT ERRED IN EXCLUDING PLAINTIFFS' THIRD-PARTY WITNESSES AS A SANCTION FOR UNTIMELY DISCLOSURE UNDER C.R.C.P. 37(C)

A. Standard Of Review And Issue Preservation

An appellate court reviews the trial court's exclusion of witnesses for abuse of discretion. *Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray*, 215 P.3d 1277, 1289 (Colo. App. 2009). A trial court necessarily abuses its discretion if its ruling is based on an incorrect legal standard. *BP Am. Prod. Co. v. Patterson*, 263 P.3d 103, 108 (Colo. 2011). Whether the trial court applied the correct legal standard is a question of law subject to de novo review. *Corsentino v. Cordova*, 4 P.3d 1082, 1087-88 (Colo. 2000).

The admissibility of Plaintiffs' first witness, Ray Krupa ("Krupa"), was raised and ruled on below. Day 2, 40:8-47:23. Alhough the court did not explicitly rule on the admissibility of Plaintiffs' second witness, Larry French ("French"), it is clear that Plaintiffs did not attempt to call him because they understood that he would be excluded for the same reasons the court excluded Krupa, namely his untimely disclosure. When asked after Krupa's exclusion whether they intended to call any other witnesses, Plaintiffs replied, "If Krupa was not on the list for the time limit, I believe French was not on that list either then." *Id.* 50:3-5. The court

did nothing to disabuse them of this notion, stating, "Okay. Well do you intend to rest your case then at this point?," *id.* 50:6-7, to which Plaintiffs responded in the affirmative. *Id.* 50:8. This Court should interpret Plaintiffs' statement regarding French as a pro se offer of his testimony, and the court's response as the exclusion thereof on the grounds of untimely disclosure. *See People v. Bergerud*, 223 P.3d 686, 696-97 (Colo. 2010) (*pro se* allegations "will be broadly construed to ensure [the movant] is not denied review of important . . . issues simply for his inability to articulate his concerns within the legal lexicon").

B. The Exclusion Of Plaintiffs' Witnesses Was Improper Because Plaintiffs' Untimely Disclosure Was Substantially Justified And Harmless And They Were Proceeding *Pro Se*

During their case-in-chief, Plaintiffs sought to introduce the testimony of Krupa and French. Krupa has known Plaintiffs since 2007. 43351097_40400593 at 6, ¶ 3. He was to testify as to their physical condition after the accident. *Id.* French was the accountant for Plaintiffs' restaurant and was to testify as to "tax questions concerning the restaurant" as well as the restaurant's operation. *Id.* ¶ 4. Krupa and French were Plaintiffs' only non-party witnesses. *See id.* Plaintiffs disclosed the identity of these witnesses in their Trial Management Order along with their contact information and a brief description of their anticipated testimony. 43351097_40400593 at 6, ¶¶ 3-4. Opposing counsel received this order no later

than October 17, and possibly as early as October 6, 2011. *Id.*; Day 2, 42:3-8, 44:17-18. Trial commenced November 7, 2011. 40246609_38252448. The trial court excluded both witnesses as a sanction for untimely disclosure under C.R.C.P. 37(c).

This Court should reverse and remand for a new trial because Plaintiffs' witnesses should not have been excluded under C.R.C.P. 37(c) and their exclusion impaired the basic fairness of the trial and likely influenced the outcome of the case. *See* C.R.E. 103; C.R.C.P. 61.

i. The Trial Court Failed To Apply The Correct Legal Standard Under C.R.C.P. 37(c)

In ruling on the admission of Plaintiffs' first witness, Krupa, the trial court articulated the standard under Rule 37(c) as whether Plaintiffs could show "that there's no harm . . . to the other side, or that your failure to [timely] endorse the witness . . . was due to excusable neglect." Day 2, 46:21-24. Later, the trial court explained the standard as whether Plaintiffs could show "a lack of prejudice to the other side or harmless situation . . . [or] excusable neglect for not mentioning [the witness] earlier in the disclosure process." *Id.* 47:13-16. Neither of these standards is correct.

Colorado Rule of Civil Procedure 37(c) governs the sanctions available when a party fails to timely disclose a witness. The rule provides that a party that

fails to disclose information required by Rules 26(a) or 26(e) "shall not . . . be permitted to present any evidence not so disclosed at trial" unless the party can show the failure is "substantial[ly] justifi[ed]" *or* "harmless." C.R.C.P. 37(c). Because it bears this burden, the party who would suffer this sanction "must be given an opportunity" to make this showing. *Todd v. Bear Valley Village Apts.*, 980 P.2d 973, 978 (Colo. 1999). The trial court failed to apply the correct standard because the court replaced the "substantial justification" requirement with an "excusable neglect" requirement. Day 2, 47:13-16. This replacement was significant because it precluded the court from considering the importance of the testimony Krupa and French would have offered in determining whether to exclude them. Given the exclusion of most of Plaintiffs' documentary evidence combined with the language barrier that necessarily diminished the impact of their own testimony, the testimony of these two witnesses may well have determined the outcome of this case.

The Colorado Supreme Court has identified the following factors to guide courts in evaluating whether a failure to timely disclose a witness is either substantially justified or harmless: "(1) the importance of the witness's testimony; (2) the explanation of the party for its failure to comply with the required disclosure; (3) the potential prejudice or surprise to the party against whom the

testimony is offered that would arise from allowing the testimony; (4) the availability of a continuance to cure such prejudice; (5) the extent to which introducing such testimony would disrupt the trial; and (6) the non-disclosing party's bad faith or willfulness." *Todd*, 980 P.2d at 978.[2] Although the Court did not specifically identify which factors are relevant to a determination of substantial justification, the Court did explain that the harmlessness analysis centers around "whether the failure to disclose the evidence in a timely fashion will prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence." *Id.* at 979. Thus, it is clear that the third, fourth, and fifth factors are primarily relevant to a determination of whether untimely disclosure is harmless, while the first and second apply to the substantial justification analysis.[3] The central considerations in determining substantial justification, therefore, are "the importance of the witness's testimony" and "the explanation of the party for its failure to comply with the required disclosure." This reading is supported by the case law, which shows that in analyzing whether an untimely disclosure was substantially justified, courts often find the significance of the testimony to be the

[2] This list is "non-exhaustive." *Todd*, 980 P.2d at 978.

[3] The sixth factor may apply to either consideration -- if a party is acting willfully or in bad faith, there is presumably a greater likelihood of harm to opposing counsel as well as a lower likelihood that the party's actions lacked substantial justification.

deciding factor. *See, e.g., Berry v. Keltner*, 208 P.3d 247, 248 (Colo. 2009) (untimely disclosure of witness substantially justified where his testimony was "critical" to plaintiff's case); *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 763 F. Supp. 2d 671, 692 (D. Del. 2010) (refusing to strike untimely disclosed portion of expert report, noting "courts' general reluctance to strike crucial evidence from a case"); *Metts v. Airtran Airways, Inc.*, No. DKC 10-0466, 2010 U.S. Dist. LEXIS 112714, at *9 (D. Md. Oct. 22, 2010) (refusing to exclude expert testimony where doing so would be "outcome determinative").

The court's application of the "excusable neglect" standard instead of "substantial justification" likely derived from its confusion regarding the applicability of Rule 6(b) under these circumstances.[4] Rule 6(b) permits courts to grant motions for extension of time after a deadline has passed when the failure to meet the deadline was the result of "excusable neglect." C.R.C.P. 6(b). The Colorado Supreme Court has defined "excusable neglect" in the context of Rule 6(b) as "a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty." *P.H. v. People*, 814

[4] Such confusion is not without precedent. *See, e.g., Welch v. Eli Lilly & Co.*, 1:06-cv-0641-RLY-JMS, 2009 U.S. Dist. LEXIS 21417, at *15-16 (S.D. Ind. Mar. 16, 2009) (court first applied "excusable neglect" standard under Rule 6(b), then noted that "[p]laintiffs assert excusable neglect is the incorrect legal standard," and concluded that "[r]egardless of whether the standard is substantially justified or excusable neglect," plaintiffs had failed to meet it).

P.2d 909, 912-13 (Colo. 1991) (citing *Farmers Ins. Group v. Dist. Ct.*, 181 Colo. 85, 507 P.2d 865 (1973), *cert. denied*, 414 U.S. 878 (1973)). In contrast to substantial justification analysis, under which the importance of the evidence is the primary consideration, the chief concern under an excusable neglect analysis is whether the party was at fault for the delay or whether there were intervening circumstances beyond the party's control. *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994) ("[F]ault in the delay remains . . . perhaps the most important single factor . . . in determining whether neglect is excusable.").

By requiring Plaintiffs to show "excusable neglect" rather than substantial justification, the court deprived them of the opportunity to explain the significance of the non-party witness testimony to their case. As described in further detail below, this testimony was crucial, particularly as to the issue of economic damages as one of the improperly excluded witnesses, French, was Plaintiffs' accountant and would have been the only source of evidence as to their loss of income. The court's failure to apply the correct legal standard is "necessarily" an abuse of discretion and constitutes reversible error. *BP Am. Prod. Co.*, 263 P.3d at 108.

ii. Plaintiffs' Untimely Disclosure Was Both Substantially Justified And Harmless

In addition to applying the incorrect legal standard, the trial court's decision to exclude the two witnesses was an abuse of discretion for other reasons.

Under the *Todd* factors, Plaintiffs' failure to timely disclose these witnesses was indisputably harmless and substantially justified. And even if that were not so, Rule 37(c) provides that in addition to the sanction of exclusion of evidence, the court may impose "other appropriate sanctions," including requiring payment of attorney fees caused by the untimely disclosure. C.R.C.P. 37(c); *Camp Bird* ("[S]anctions should be commensurate with the seriousness of the disobedient party's conduct."). Witness preclusion is a "severe sanction," and a party "should not be denied its day in court by an inflexible application of a procedural rule that would sanction a nondisclosing party by precluding a witness." *Id.* at 1292.

The importance of Krupa and French's testimony cannot be understated. At the time Plaintiffs offered these witnesses, the court already had excluded most of their exhibits, leaving their own testimony and that of any third-party witnesses as their principal sources of evidence. Krupa and French were Plaintiffs' only third-party witnesses. 43351097_40400593 at 6. They could have offered crucial corroboration of Plaintiffs' own testimony and, presuming they are more competent with English than the Plaintiffs, would have been able to bring much-needed clarity to the presentation of their case.

In particular, Krupa could have described the adverse physical and mental changes he observed in Plaintiffs after the accident, supporting their claim for

noneconomic damages (pain and suffering). *Id.* ¶ 3. The importance of Krupa's testimony was heightened by the exclusion of substantially all of Plaintiffs' medical records. Day 1, 2-3; Day 2, 2-3. Without their medical records, Krupa was the only non-party source of evidence in support of this claim. In the absence of Krupa's testimony, the jury awarded Plaintiffs nothing for their pain and suffering. 43943011_10CV166-MINC.

French, as Plaintiffs' accountant, could have offered testimony as to their lost business income in the wake of the accident. 43351097_40400593 at 6, ¶ 4. The record shows that when Plaintiffs were represented by counsel, counsel retained an expert who prepared a calculation of these losses, which counsel presumably intended to present at trial. 37186030_Plaintiff-s-Rule-26-a--2--Expert-Disclosures at 6, ¶ 6. However, when counsel withdrew, Plaintiffs were no longer able to afford the expert witness' fee. 39666304_37849663 at lines 2-3. French's testimony would have been the only evidence presented in support of this claim and was therefore critical – in its absence, the court granted a directed verdict against Plaintiffs on the issue. Day 2, 75:9-11. Where a witness' testimony is "potentially central to plaintiff's case," the sanction of witness exclusion is disfavored. *Berry*, 208 P.3d at 248 (trial court erred in excluding witness where witness' testimony would have "a substantial impact on Plaintiff's ability to

recover for her alleged injuries"); *Capital Funding, VI, LP v. Chase Manhattan Bank USA*, 191 Fed. Appx. 92, 96 (3d Cir. 2006) ("[T]he exclusion of critical evidence is an 'extreme' sanction, not normally . . . imposed absent a showing of willful deception or 'flagrant disregard' of a court order") (citations omitted).

The explanation for Plaintiffs' untimely disclosure of these witnesses was straightforward, reasonable and unchallenged. When the initial Rule 26 disclosures were made, Plaintiffs were represented by counsel and did not intend to call either Krupa or French. 37186030_Plaintiff-s-Rule-26-a--2--Expert-Disclosures. It is unclear from the record when they decided to call these witnesses, but it was likely some time after the withdrawal of their counsel on June 21, 2011. 40246609_38252448. On either October 6 or 17, a full three to four weeks before trial, they filed a list of potential witnesses containing just four names – their own, Krupa and French. Day 2, 42:3-8, 44:17-18. There is no evidence in the record that Plaintiffs acted in bad faith in failing to disclose these witnesses earlier. The untimely disclosure was simply a function of their loss of counsel and their status as *pro se* litigants.

In addition, the untimely disclosure was harmless to Defendant. In evaluating whether a failure to disclose evidence is harmless under Rule 37(c), the inquiry is "not whether the new evidence is potentially harmful to the opposing

side's case," but rather whether the failure to disclose the evidence in a timely fashion "will prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence." *Todd*, 980 P.2d at 979. Although French was not disclosed as a witness until, at the latest, October 17, Defendant was aware of his existence as early as March 16, 2011, the date of Bekirova's deposition. Bekirova Dep. 1. Defendant specifically questioned Bekirova regarding French, and even requested that she produce documents he had prepared. *Id.* 8:21-24; 11:22-24. As for Krupa, he appeared in a surveillance video Defendant took of Plaintiffs, so while it is possible Defendants were unaware of his existence, it is unlikely. Day 2, 45:24-46:3.

Assuming for the sake of argument that the October 17 disclosure was the first mention of these witnesses, this neither constitutes surprise nor serious misconduct. *See Cook v. Fernandez-Rocha*, 168 P.3d 505, 506-07 (untimely disclosure harmless where witness names submitted fewer than 35 days before trial and opposing counsel had "a pretty good idea" of who party would be calling); *Camp Bird*, 215 P.3d at 1292. Even though formal discovery had closed, because Krupa and French were non-party lay witnesses, Defendant was free to interview them at any time. If he believed depositions were necessary, he had ample time to file a motion to that effect. *See Kussman v. Denver*, 671 P.2d 1000, 1001 (Colo.

App. 1983) (trial court's admission of two untimely-disclosed expert witnesses was harmless where defense counsel "knew the names of both expert witnesses," but chose not to request a continuance to obtain more information after his motion in limine to exclude their testimony was denied). He also had the opportunity to raise the issue on the first day of trial as the court mentioned both Krupa and French during the recitation of possible witnesses. Day 1, 15:11-12; Day 2, 41:15-20.

iii. The Trial Court's Exclusion Of Plaintiffs' Witnesses Was Improper In Any Event

Regardless of the court's failure to apply the correct legal standard, once the court determined sanctions were proper, the court had the obligation to select a lesser sanction than exclusion. C.R.C.P. 37(c); *Pinkstaff v. Black & Decker (U.S.), Inc.*, 211 P.3d 698, 702 (Colo. 2009) (noting that where sanctions are warranted, the court should impose the "least severe sanction" that is "commensurate with the prejudice caused to the opposing party"). The primary purpose of sanctions under Rule 37(c) is to discourage "'hide-the-ball' and 'hardball' tactics," *Todd*, 980 P.2d at 977 n.2, and to prevent parties from "gain[ing] advantage by failing to disclose information harmful to [their] position." *Bonin v. Chadron Community Hosp.*, 163 F.R.D. 565, 569 (D. Neb. 1995). Neither of these concerns is even arguably implicated here. There could be no legitimate worry that *pro se* litigants would engage in "hardball" tactics given the uphill battle they face simply complying

with basic practice and procedure. In fact, when the federal version of Rule 37(c) was amended so that sanctions became "self-executing," the Federal Rules Advisory Committee specifically addressed this issue, explaining that it was necessary to carve out exceptions for substantially justified or harmless disclosures "to avoid unduly harsh penalties" where the untimeliness was cause by, *inter alia*, "the lack of knowledge of a *pro se* litigant of the requirement to make disclosures." F.R.C.P. 37 advisory committee's note (1993). The circumstances of this case are precisely those the drafters of the rule envisioned when they allowed for an exception to the sanction of automatic exclusion.

Here, the trial court engaged in minimal if any analysis regarding whether the imposition of sanctions was appropriate and, if so, whether a lesser sanction than exclusion was proper. In ruling on the exclusion, the court stated in a summary fashion:

> So allowing [the untimely-disclosed witnesses] to testify would be contrary to the rule and [the witness] is presumed to be inadmissible unless you can show that there's no harm . . . to the other side, or that your failure to endorse the witness . . . was due to excusable neglect. I don't think those things have really been met here. There is some trial preparation harm if he's going to testify at this stage of the proceedings.

Day 2, 46:21-47:2. To the extent this can be considered analysis, the court only addressed the issue of harm, in part because of the application of an incorrect legal

standard. This lack of analysis rendered the trial court's decision-making unreasonable and arbitrary. *See Cook*, 168 P.3d at 506-07 (reversing decision to exclude witness where court addressed lack of substantial justification but "made no inquiry into whether the untimely disclosure was harmless"); *Trattler v. Citron*, 182 P.3d 674, 682 (Colo. 2008) ("[I]t is unreasonable to deny a party an opportunity to present relevant evidence based on a draconian application of pretrial rules."). The exclusion of these witnesses thus constituted an abuse of discretion that deprived Plaintiffs of a fair trial. If the trial court's actions in imposing sanctions "unreasonably deny a party his day in court," the reviewing court must overturn the trial court's decision. *Pinkstaff*, 211 P.3d at 703. Plaintiffs deserve to have their case determined on the merits rather than on "formulistic application of the rules." *Id.* The judgment should be reversed and the case remanded for a new trial.

II. THE COURT ERRED IN GRANTING A DIRECTED VERDICT ON THE ISSUE OF PLAINTIFFS' MEDICAL EXPENSES

A. Standard Of Review And Issue Preservation

An appellate court reviews de novo a trial court's decision granting a motion for directed verdict, viewing the evidence in the light most favorable to the plaintiff. *Thyssenkrupp Safway, Inc. v. Hyland Hills Parks & Rec. Dist.*, 271 P.3d

587, 590 (Colo. App. 2011); *Land-Wells v. Rain Way Sprinkler & Landscape, LLC*, 187 P.3d 1152, 1153 (Colo. App. 2008).

The issue was raised and ruled on below. Day 2, 75:19-23; 79:10-14.

B. Plaintiffs Presented Enough Evidence Of Their Medical Expenses To Have The Claim Sent To The Jury

One of the categories of relief Plaintiffs sought was reimbursement for the medical expenses they incurred in the diagnosis and treatment of the injuries they sustained as a result of the collision. *See, e.g.*, 43351097_40400593 at 2. At trial, Plaintiffs each offered testimony as to the physical and neurological symptoms they experienced after the accident, the medical treatment they sought in connection with those symptoms, and the costs associated with that treatment. In spite of this substantial testimony, the court granted a directed verdict against Plaintiffs on the issue of medical expenses, Day 2, 78:19-23, 79:10-14, finding that they had presented "no testimony about what [they] paid to doctors." *Id.* 78:11-18. This holding was error.

A motion for directed verdict may be granted only where reasonable jurors could not disagree and no evidence or legitimate inference has been presented upon which a jury's verdict against the moving party could be sustained. *Boryla v. Pash*, 960 P.2d 123, 127 (Colo. 1998). Conflicting evidence must be submitted to the jury. *Burgess v. Mid-Century Ins. Co.*, 841 P.2d 325, 328 (Colo. App. 1992).

The evidence must be viewed in the light most favorable to the non-moving party. *Thyssenkrupp*, 271 P.3d at 590. Furthermore, the fact that an issue is one that is usually reserved for the jury, such as the proper amount of damages, "militates against a directed verdict." *Fair v. Red Lion Inn*, 943 P.2d 431, 436-37 (Colo. 1997).

To recover their medical expenses, Plaintiffs had to show "the necessary and reasonable value of the services rendered." *Lawson Safeway, Inc.*, 878 P.2d 127, 131 (Colo. App. 1994) (*overruled in part on other grounds by Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562 (Colo. 2012)). A party may establish the reasonable value of medical services through testimony as to the amount paid for such services. *Lawson*, 878 P.2d at 131 (the amount paid for medical services is "some evidence of their reasonable value"); *Pyles-Knutzen v. Board of County Commissioners*, 781 P.2d 164 (Colo. App. 1989) (in a personal injury action arising from a car accident, the court held that plaintiff's testimony that he had incurred over $7,000 in medical bills was admissible as evidence of the reasonable value of the medical services rendered). Plaintiffs offered comparable testimony by identifying their respective insurance carriers and required co-payments, Day 2, 11:7-19, and describing their doctor's visits, physical therapy sessions, and associated medical treatment after the accident. Day 1, 76:14-24, 77:23-78:2,

86:20-24; Day 2, 6:25-7:2, 12:13-21, 13:20-22, 14:3-9, 14:13-14, 14:19-20, 14:22-23, 17:10-19, 30:18-31:4, 31:22-25. By multiplying the number of physician's visits by their respective co-payments, a reasonable jury could have found that Plaintiffs incurred medical expenses of over $1,500. *See Coleman v. Tennessee*, 998 F. Supp. 840, 850 (W.D. Tenn. 1998) (awarding plaintiff medical expenses based solely on testimony of the amount of her co-payment and the number of doctor's visits she made); *see also Margenau v. Bowlin*, 12 P.3d 1214, 1218 (Colo. App. 2000) (noting that an amount of damages may be an approximation so long as "there is some evidence from which the jury can make a reasonable estimation"); *Martinez v. Shapland*, 833 P.2d 837, 840 (Colo. App. 1992) ("Recovery of damages may not be denied merely because the amount is difficult to ascertain.").

As to establishing the necessity of medical expenses, lay testimony, particularly from the plaintiffs themselves, is adequate. *See* C.R.E. 701 (lay witness may testify as to opinions or inferences that are "rationally based on the perception of the witness [and] helpful to a clear understanding of the witness' testimony or the determination of a fact in issue"); *see also Young v. Barbera*, 366 Ark. 120, 126 (2006) (noting that expert medical testimony is "not essential" in every case to prove the reasonableness and necessity of medical expenses, and that "the testimony of the injured party alone can provide a sufficient foundation for the

introduction of medical expenses incurred"); *Sharp v. Bragg Crane Serv.*, 168 Cal. App. 3d 993, 996-97 (Cal. Ct. App. 1985) ("A personal injury plaintiff may . . . give his lay opinion that medical services rendered were reasonably necessary for his treatment . . . ."). Here, Plaintiffs testified repeatedly as to the injuries they suffered during the collision and the pain they experienced afterward that led them to seek medical treatment.

Plaintiffs presented the following testimony as to the necessity of Bekirova's medical expenses:

1. Emergency room visit
   a. Suleyman testified that Bekirova suffered a "nicked disc" as a result of the collision. Day 1, 56:1-5.
   b. Bekirova testified that she "ended up in the hospital" the day of the accident and was experiencing "a lot of pain" in her back, neck and shoulders. Day 2, 27:12-13, 27:18-20.
2. Physical therapy - Bekirova testified that the physical therapist massaged her neck and it was "very painful." *Id.* 31:13-14.
3. Visit to Dr. Leach - Bekirova testified that she visited Dr. Leach due to pain in her neck, shoulders, and upper and lower back. *Id.* 32:11-13.

Plaintiffs presented the following testimony as to the necessity of Suleyman's medical expenses:

1. Visit to Dr. Budensiek - Suleyman testified that Dr. Budensiek was treating him for vertigo, which "comes from the trauma." Day 1, 76:18-19, 76:24.
2. Visit to Dr. McClure - Suleyman testified that he went to see Dr. McClure "for neck pain and vertigo." Day 2, 12:13-15.

3. Visit to Dr. Leach - Suleyman testified that he went to see Dr. Leach because of his neck pain, vertigo and "because of my arm." *Id.* 14:7-9.

There is also documentary evidence in the record supporting the necessity of these expenses. With respect to Bekirova's trip to the emergency room, the accident report indicates that at the time of the collision, Bekirova informed the police officer on the scene that she had experienced an injury that was "incapacitating." R. 6; Day 2, 87:23-88:6. A visit to the emergency room in the wake of a car accident, particularly if an individual is experiencing severe pain, must be considered necessary. In support of the necessity of treatment for the neurological symptoms Suleyman now experiences as a result of the accident, Plaintiffs presented an emergency room record reflecting Suleyman's treatment in early 2007 for vertigo ("dizziness"). R. 18-19. Defendants presented no contrary evidence.

A directed verdict should only be granted "in the clearest of cases," when the evidence is undisputed and no reasonable jury could decide the issue against the moving party. *Huntoon v. TCI Cablevision, Inc.*, 969 P.2d 681, 686 (Colo. 1998). Viewing Plaintiffs' uncontradicted evidence in the light most favorable to them, it is plain that a reasonable jury could conclude they incurred some amount of medical expenses as a result of the collision and that these expenses were reasonable and necessary. The trial court, explaining its ruling to

the parties, stated that Plaintiffs had failed to present *any* evidence, "whether it was a co-payment or a deductible," of their out-of-pocket medical expenses, Day 2, 78:11-18, and that medical expenses are "not something that a patient can testify to under the rules of evidence." Day 2, 77:15-21. The record shows that these statements are incorrect. Plaintiffs *did* testify as to their co-payments and their physician's visits and treatments and presented documents in support of this testimony. No expert was required. The credibility and appropriate weight of the evidence was an issue for the jury. *See Gray v. Houlton*, 671 P.2d 443, 444 (Colo. App. 1983) (upholding trial court's denial of a directed verdict, stating, "Credibility, sufficiency, probative effect, and weight of . . . evidence, and the inferences and conclusions to be drawn therefrom, are all within the province of the jury.").

III. The Court Erred By Refusing To Instruct The Jury As To Recovery Of Economic Damages

A. Standard Of Review And Issue Preservation

A trial court's decision to give a particular jury instruction is reviewed for abuse of discretion. *Horton v. Bischof & Coffman Constr., LLC*, 217 P.3d 1262, 1271 (Colo. App. 2009). A judgment should be reversed for refusal of the trial court to give requested instructions where there was resulting "substantial, prejudicial error." *Armentrout v. FMC Corp.*, 842 P.2d 175, 186 (Colo. 1992).

This issue was raised and ruled on below. Day 2, 191:5-18.

B. Plaintiffs' Economic Damages Claim Should Have Gone To The Jury Based On Their Evidence Of Vehicle Repair Costs

Another category of economic damages Plaintiffs sought was the cost of repairs to their vehicle. *See, e.g.*, 31790492_Complaint---Def.-Estate-of-Mervin-Anderson at 3 ¶ 20, 4 ¶ 28. Throughout the trial, Plaintiffs presented significant evidence of these damages. Plaintiffs testified that as a result of the collision, the front and rear bumpers of their vehicle were damaged and the "brackets" under the bumper were "busted." Day 1, 76:1-11, 58:18-20. Plaintiffs testified that the cost to repair this damage was approximately $1,400. *Id.* 57:10, 76:1-11. The accident report prepared by Officer Kevin Richards confirms Plaintiffs' testimony regarding the damage to the front and rear bumper, R. 6, and Officer Richards himself testified that he believed this damage exceeded $1,000. Day 2, 96:14-17. Yet, the trial court refused to instruct the jury on the issue of economic damages, stating: "I don't believe anything was presented to the jury concerning . . . economic losses such as reasonableness necessary medical, hospital or other related expenses." *Id.* 191:7-10. This ruling was erroneous. Although the court had granted directed verdicts on the issues of lost wages and medical expenses, *id.* 75:9-11, 79:10-13, it did not rule on the issue of property damage, and there was evidence in the record

sufficient to support a finding in favor of Plaintiffs on the issue. Consequently, the trial court should have instructed the jury as to recovery of economic damages.

The trial court has an obligation to present to the jury proper instructions in support of a party's theory of recovery when there is "evidence in the record upon which to base such instructions," even when this evidence is controverted by evidence of the opposing party. *Martinez v. Shapland*, 833 P.2d 837, 840 (Colo. Ct. App. 1992); *Horton v. Mondragon*, 705 P.2d 977, 979 (Colo. App. 1984). "Sufficient competent evidence" is required. *Melton v. Larrabee*, 832 P.2d 1069, 1072 (Colo. App. 1992). The failure to give a requested instruction that is "legally correct and clearly applicable to a material question of fact in controversy," can constitute reversible error. *Horton*, 705 P.2d at 979. Compensatory damages for personal property which has been "damaged but not destroyed" include the "reasonable costs of repair." *Airborne, Inc. v. Denver Air Ctr., Inc.*, 832 P.2d 1086, 1091 (Colo. App. 1992). The purpose behind such damages is to make the injured party whole by compensating the plaintiff for actual losses suffered. *Id.*

Here, Plaintiffs presented "sufficient competent" evidence as to the cost of repairs to the vehicle. It is well-established that in Colorado an owner can testify to the value of his property without being qualified as an expert witness. *Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.*, 117 P.3d 60, 69 (Colo. App. 2004).

An owner's ability to testify as to the value of his property extends to the giving of testimony as to the cost of repairs. *See Abbinett v. Fox*, 103 N.M. 80, 85-86 (N.M. Ct. App. 1985) (plaintiff's testimony as to estimates received for cost of repairs to property sufficient to support trial court's finding on damages). The owner's opinion must be based on "proper considerations." *Vista Resorts*, 117 P.3d at 69. Suleyman's testimony as to the cost of repairs was based on an estimate he received from an auto body shop, which was presented without objection. Day 2, 76:1-11. Regardless of the admissibility of Plaintiffs' testimony, it was admitted and corroborated by both the accident report and the testimony of Officer Richards, both showing there was damage in excess of $1,000. *See Murray v. San Leandro Rock Co.*, 111 Cal. App. 2d 641, 648 (1952) (granting new trial to plaintiff suing for damages to his automobile where only evidence of damages was plaintiff's testimony as to an estimate he received of the cost of repair; defendants failed to object and therefore "implied that it was a properly based estimate"). Concededly, the damages itemization contained in Plaintiffs' Amended Trial Management Order did not contain a request for cost of repair of the vehicle. 43533153_40524893 at 2; *See Miller v. Brannon*, 207 P.3d 923, 927-28 (Colo. App. 2009) (affirming trial court's decision prohibiting plaintiff from presenting evidence of past medical expenses where such expenses were not included in the

trial management order). The complaint, however, specifically included "vehicle damage" in its request for relief. 31790492_Complaint---Def.-Estate-of-Mervin-Anderson at 3 ¶ 20, 4 ¶ 28. In addition, given that Plaintiffs were proceeding *pro se* when they filed the Amended Trial Management Order, the court should have construed their pleadings liberally. *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir. 2002) (holding that *pro se* pleadings should be construed liberally and held to a less stringent standard than formal proceedings drafted by lawyers); *see also Beinor v. Indus. Claim Appeals Office of Colo. & Serv. Group, Inc.*, 262 P.3d 970, 973 (Colo. App. 2011) (where claimant appeared *pro se*, court "liberally interpret[ed] his brief").

Plaintiffs legally were entitled to recover the cost to repair the damage caused to their vehicle as a result of the collision, and the record contains sufficient evidence on the issue. Therefore, the trial court erred in refusing to instruct the jury as to economic damages. *See Anson v. Trujillo*, 56 P.3d 114, 120 (Colo. App. 2002) (where plaintiff legally entitled to assert noneconomic damages, trial court erred in refusing jury instruction as to that claim); *Martinez*, 833 P.2d at 840 (trial court's failure to instruct jury on future earning capacity was error where evidence presented as to plaintiff's previous occupation and compensation and reasonable inference could be made that return to work would be problematic). This error was

both substantial and prejudicial in that it deprived Bekirova and Suleyman of their right to present to a jury a claim on which they properly raised an issue of fact.

IV. The Trial Court Erred By Excluding Plaintiffs' Medical Records

A. Standard of Review And Issue Preservation

An appellate court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010). C.R.E. 103 and C.R.C.P. 61 allow reversal for erroneous exclusion of evidence only if the exclusion affected a substantial right of a party. *Id.* An error affects a substantial right only if "it can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself." *Id.*

The issue was raised and ruled on below. Day 1, 87:17-88:1, 88:4-11, 88:14-24, 89:2-9, 89:12-23, 90:1-7, 90:10-15, 90:18-91:3, 91:6-12, 91:15-92:5; Day 2, 18:11-17.

B. Plaintiff's Medical Records Should Have Been Admitted Where There Was No Reason To Doubt Their Authenticity And They Met An Established Hearsay Exception

The trial court's final error was its exclusion of the majority of Plaintiffs' medical records on the grounds of lack of authentication and hearsay. These medical records comprised the bulk of the documentary evidence Plaintiffs sought

to present to corroborate their testimony as to their numerous post-accident physician's visits. *See* 43743291_10CV166 at 17-20. The records were crucial to Plaintiffs' case as they represented the only non-testimonial evidence of their pain and suffering, the sole claim that went to the jury. As to the issue of authenticity, first, Plaintiffs were capable of authenticating the records themselves. Second, Defendant's objections to the authenticity of these records were specious considering that many of these documents were apparently produced by Plaintiffs to Defendant during discovery and subsequently introduced by Defendant at Plaintiffs' depositions. As for Defendant's hearsay objections, medical records are precisely the type of documents that possess "equivalent circumstantial guarantees of trustworthiness" that render them admissible under C.R.E. 807, the residual hearsay exception, which the court should have recognized. C.R.E. 807. It was error for the court not to do so.

To submit medical records in evidence: (1) the party must authenticate the documents under C.R.E. 901; and (2) the party must establish that the documents meet one of the enumerated hearsay exceptions under C.R.E. 803, 804 or the residual exception under C.R.E. 807. The requirement of authentication is satisfied by evidence sufficient to support a finding that the document in question "is what its proponent claims." C.R.E. 901. One such way to authenticate a document is to

provide "testimony of a witness with knowledge that a matter is what it is claimed to be." *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apts., LLC*, 825 F. Supp. 2d 1072, 1076 (D. Colo. 2011). Rule 901 "does not erect a particularly high hurdle," and the proponent of the evidence is not required "to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be." *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). There is no requirement in Colorado that either the individual who prepared the documents or a physician or expert witness authenticate them, and some courts in other jurisdictions have expressly allowed parties to authenticate their own medical records. *See, e.g., Cassibry v. Schlautman*, 816 So.2d 398, 403 (Miss. App. 2002) (interpreting Mississippi rule of evidence identical to F.R.E. 901 and holding a plaintiff's testimony may be sufficient to authenticate her own medical records); *see also Hardison v. Balboa Ins. Co.*, 4 Fed. Appx. 663, 669-70 (10th Cir. 2001) ("T]here is no requirement that the party offering a business record produce the author of the item."). Here, Plaintiffs could have testified that the medical records they sought to admit were in fact records they received from their physicians or other health care providers, and in fact they attempted to do so. *See, e.g.*, Day 1, 87:17-20, 88:4-6, 89:2-4.

Furthermore, it is unclear that Defendant actually disputed the authenticity of these documents. It appears that Plaintiffs produced many of these records to Defendant during discovery, and that Defendant subsequently presented them at Plaintiffs' depositions, during which they served as the basis of significant questioning. *See* Bekirova Dep. 50:22-24, 52:8-12, 54:17-20, 54:22-23; Suleyman Dep. 15:10-13, 16:14-16, 18:4-7, 18:18-23, 19:24-24-25. Where documents have been produced in discovery and subsequently offered without objection by the opposing party at a deposition, it is unlikely that there is a genuine dispute regarding their authenticity. *See, e.g., Shannon v. Advance Stores Co.*, Case No. 3:08-0940, 2009 U.S. Dist. LEXIS 76658, at *13-14 (M.D. Tenn. Aug. 27, 2009) (where plaintiff provided medical records in support of a motion for summary judgment, and defendant introduced the records at plaintiff's deposition and did not raise any objection to authenticity at that time, the court noted, "[T]here does not appear to be a genuine dispute as to the authenticity of the medical records"); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 929 (3d Cir. 1985) (the fact that challenged documents were produced by the plaintiff "in answer to an explicit discovery request," while "not dispositive" on the issue of authentication, "is surely probative"). Nonetheless, the court accepted Defendant's objections as to the authenticity of many of these medical records at face value, sustaining them

without considering the possibility that (1) authenticity was not actually disputed and Defendant was acting in bad faith in objecting on these grounds, or (2) Plaintiffs were able to authenticate the documents. *See Fenje v. Feld*, 301 F. Supp. 2d 781, 789 (N.D. Ill. 2003) ("Even if a party fails to authenticate a document properly or to lay a proper foundation, the opposing party is not acting in good faith in raising such an objection if the party nevertheless knows that the document is authentic.").

The court's lack of analysis on the admissibility of these documents extended to its determination of the hearsay issue. In ruling on the admissibility of the records, the court repeatedly referred either directly or indirectly to the need for a "custodian" to show they were not hearsay. *See, e.g.*, Day 1, 79:8-13, 81:19-23. The requirement for a custodian only applies, however, if Plaintiffs were attempting to admit the documents as "records of regularly conducted activity" under Rule 803(6). It is true that medical records are commonly admitted under Rule 803(6). *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076, 1079 (Colo. App. 1992) ("Medical records have long been considered the prototype of business records for which admission as an exception to the hearsay rule is appropriate."). But this is not the only method of establishing the applicability of a hearsay exception. An equally valid method is found under Rule 807, the "residual"

hearsay exception. Rule 807 applies to documents not specifically covered by Rule 803 or 804 but having "equivalent circumstantial guarantees of trustworthiness." C.R.E. 807. Under 807, a document is admissible if the court determines that "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." C.R.E. 807. All of these factors were present here.

First, the records were offered as evidence of the numerous doctor visits and other medical treatment Plaintiffs sought after the accident, facts which were undeniably material to Plaintiffs' claims, specifically their request for medical expenses and noneconomic damages such as pain and suffering and loss of enjoyment of life, which were the largest categories of damages they sought. 40199708_38217261 at 8-11. Second, the only other evidence Plaintiffs could procure in support of these claims was their own testimony as they could not afford to hire experts to opine on their symptoms and both of their lay witnesses were excluded. 39666304_37849663 at lines 2-3; Day 2, 47:20-23, 50:1-8. Third, in light of Bekirova and Suleyman's *pro se* status and the exclusion of most of their documentary evidence and both of their non-party witnesses, it was clearly in the

interests of justice to allow for the admission of their medical records, which were their last and best remaining source of evidence.

There is some precedent in Colorado for admitting medical records under the residual exception. For example, in *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076, this Court held that a nurse's note in a hospital record, which was admissible under both Rule 801(d)(2)(D) and Rule 803(6), would have been independently admissible under Rule 807.[5] *Id.* at 1079-80. After finding that the document in question met the three criteria under 807, the court stated, "One of the primary reasons for admitting business/medical records is that they are roughly contemporaneous with the events they are recording, and as a consequence, they can be more accurate and reliable than evidence derived from memories which are years old . . . ." *Id.* at 1080. This statement applies with equal force here. Many of the medical records Plaintiffs sought to admit dated from between 2007 and 2009. *See, e.g.*, R. 22-24 (Ex. 6), R. 25 (Ex. 7), R. 29-33 (Ex. 10), R. 34-38 (Ex. 11). Those documents unquestionably contain a more accurate account of Plaintiffs' treatment than they could provide solely through their testimony.

Furthermore, the records in question would also have met the second requirement of Rule 807, which is that the proponent of the document must make

[5] The case was decided under Rule 807's predecessor Rule 803(24), however the relevant language of the rule was identical.

the document known to the adverse party "significantly in advance of the trial or hearing" to provide him with "a fair opportunity to prepare to meet it." C.R.E. 807. It appears from the record that many of these documents were provided to Defendant no later than March 16, 2011, the date of the depositions, a full six months prior to trial. *See* Bekirova Dep. 50:22-24, 52:8-12, 54:17-20, 54:22-23; Suleyman Dep. 15:10-13, 16:14-16, 18:4-7, 18:18-23, 19:24-20:5.

Rather than giving Plaintiffs the opportunity to authenticate the documents under Rule 901 or lay a foundation for their admissibility under Rule 807, the trial court discouraged them from doing so by instructing them not to comment at all as to the records they presented other than to state the exhibit number. Day 1, 91: 17-23 ("Just tell us you're offering an exhibit by number without reading or explaining the contents of the document exhibit."). Where possible, courts should attempt "to ensure that *pro se* litigants do not unwittingly fall victim to procedural requirements that they may, with some assistance from the court, be able to satisfy." *Waters v. Young*, 100 F.3d 1437, 1442 (9th Cir. 1996). In fact, Colorado's Code of Judicial Conduct encourages judges to do so. Colorado Code of Judicial Conduct R. 2.6 cmt. 2 (2010) ("The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include . . . providing brief information about the proceeding and evidentiary and foundational requirements;

modifying the traditional order of taking evidence; [and] attempting to make legal concepts understandable . . .").

By refusing to admit Plaintiffs' medical records, the court effectively granted a directed verdict on the issue of noneconomic damages. Without the ability to corroborate their testimony regarding the numerous doctors and hospitals they visited after the accident, they were left with only their own words to convince the jury of their suffering; words that were unclear or incoherent due to their difficulties with English. This deprived them of the opportunity to truly have their claims heard on the merits and essentially foreclosed the possibility of an award for pain and suffering. The judgment of the trial court should be reversed and the case remanded for a new trial.

CONCLUSION

For the reasons above, this Court should reverse the trial court's judgment and remand the case for a new trial.

Respectfully submitted, June 22, 2012.

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CERTIFICATE OF SERVICE

I certify that on June 22, 2012, I caused a true and correct copy of this **Opening Brief** to be served via U.S. Mail postage prepaid, and addressed to:

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