SUMMARY
March 13, 2025

2025COA28

No. 24CA0364, *Curry, J. v Brewer, C.* — Labor and Industry — Workers' Compensation — Coverage and Liability — Contractors and Lessees — Cause of Action Brought Against Another Not in the Same Employ

A division of the Court of Appeals addresses the novel issue of whether two independent contractors who work *with* each other and not *for* each other, and who have no agreement between them to perform work for one another, are subject to the workers' compensation act (WCA) and its limitation on damages found in section 8-41-401(3), C.R.S. 2024. The division concludes they are not subject to the WCA and its limitation on damages and holds that an independent contractor who is injured on the job by the negligence of another independent contractor may recover damages in excess of the $15,000 WCA limit because they are third parties as to each other, not co-employees, are not "in the same employ."

Therefore, they fall within the damages limitation exception of section 8-41-401(3). Accordingly, the division affirms the trial court's ruling, but on different grounds. The court also rejects the remaining evidentiary claims and affirms the judgment.

COLORADO COURT OF APPEALS **2025COA28**

Court of Appeals No. 24CA0364
City and County of Denver District Court No. 21CV33940
Honorable Jon J. Olafson, Judge

James Curry,

Plaintiff-Appellee and Cross-Appellant,

v.

Charles Brewer,

Defendant-Appellant and Cross-Appellee.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE FREYRE
Schock and Sullivan, JJ., concur

Announced March 13, 2025

Irwin Fraley, PLLC, Ken Falkenstein, Centennial, Colorado; Wilcox Law Firm, LLC, Ronald L. Wilcox, Denver, Colorado for Plaintiff-Appellee and Cross-Appellant

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¶ 1 In this negligence case arising from injuries that occurred during a work-related accident involving two independent contractors, defendant, Charles Brewer, appeals the judgment entered on a jury's verdict in favor of the injured plaintiff, James Curry. The jury awarded Curry noneconomic, physical impairment, and disfigurement damages. Curry conditionally cross-appeals the judgment.

¶ 2 This case presents a novel statutory interpretation issue; namely, whether two independent contractors who work *with* each other and not *for* each other, and who have no agreement between them to perform work for one another, are subject to the Workers' Compensation Act of Colorado (WCA) and its limitation on damages found in section 8-41-401(3), C.R.S. 2024. We conclude they are not and hold that an independent contractor who is injured on the job by the negligence of another independent contractor may recover damages from the other contractor in excess of the $15,000 limit imposed by the WCA because they are third parties as to each other, not co-employees, and thus are not considered to be "in the same employ." *Id.* We also reject Brewer's remaining contentions, for the reasons described below, and affirm the trial court's

judgment. Finally, because we affirm the judgment, we need not address the issues raised in the cross-appeal.

I. Background

¶ 3 On December 13, 2018, Curry unloaded a refrigerator from a truck that Brewer had backed up to a Home Depot loading dock. Brewer prematurely pulled away from the loading dock, causing Curry to fall onto a hydraulic plate adjacent to the dock and suffer injuries. Curry and Brewer, who are both residents of Georgia, worked under separate independent contracts for Ideal Transport, LLC, a Texas-based transportation company with an office in Georgia. Home Depot contracted with Ideal Transport for delivery services to and from their store in Aurora, Colorado.

¶ 4 Following the incident, Curry filed a personal injury suit against Ideal Transport. In the suit, Curry also named as defendants the truck rental company (Penske), Home Depot, the company that contracted with Home Depot to have Ideal Transport to perform deliveries (Linn Star/Midwest), and his fellow independent contractor (Brewer). Over the course of the litigation, all defendants and claims, except the negligence claim against Brewer, were dismissed.

¶ 5 On January 29, 2024, after a three-day jury trial, the jury found Brewer liable for Curry's injuries and awarded Curry noneconomic damages in the amount of $219,000 and physical impairment and disfigurement damages in the amount of $734,152.50.

II. Motion to Limit Damages

¶ 6 Brewer contends the trial court erred by denying his motion to limit Curry's damages under section 8-41-401(3). He reasons that, as an independent contractor, Curry could have secured his own coverage through the WCA but chose to opt out. Brewer argues that the statutory limitation on damages would therefore apply to Curry because it applies to independent contractors who suffer work-related injuries after electing not to obtain workers' compensation coverage. We disagree and conclude that Curry and Brewer are third parties as to each other and, therefore, are not "in the same employ" under section 8-41-401(3), the statutory exception to the damages limit. Further, because they are not in the same employ, the trial court erred by finding to the contrary. But even though the court erred in its analysis of the WCA, it nonetheless found, for different reasons, that the damages

limitation did not apply. We therefore conclude that the court reached the right result and affirm its ruling. *See Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406 (Colo. App. 2004) (citing *People v. Quintana*, 882 P.2d 1366 (Colo. 1994) (reasoning that appellate courts may affirm on any ground supported by the record).

A. Relevant Facts

¶ 7 It is undisputed that, at the time of the incident, Curry and Brewer were independent contractors of Ideal Transport. It is also undisputed that Curry was working alongside Brewer rather than for Brewer. After the incident, Curry filed a workers' compensation claim against Ideal Transport's insurer, Business First Insurance Company (a Georgia company), in Georgia, where Curry resided. For reasons not explained in the record, Curry's claim was denied.

¶ 8 Before trial, Brewer's counsel filed a motion to limit damages to $15,000 pursuant to sections 8-41-401(3) and 8-40-202(2), C.R.S. 2024. He argued that, as an independent contractor, Curry was excluded from the definition of employee under section 8-40-202(2) and, instead, fell within the category of individuals who could obtain WCA coverage but elected not to under section 8-41-

202(1), C.R.S. 2024. He reasoned that Curry's damages were limited to $15,000 under section 8-41-401(3) because Curry's injuries were work-related, thereby triggering the WCA's damages limit.

¶ 9 Curry's counsel argued that section 8-41-401(3) did not apply because Curry's injuries were not otherwise compensable under articles 40 to 47 of the WCA. He also argued that Colorado law was inapplicable because, although Curry was injured in Colorado, he was a resident of Georgia, so Georgia's workers' compensation laws were controlling. He further argued that, even if Colorado's WCA applied, it did not limit Curry's damages because he worked *with*, not *for*, Brewer. He reasoned that, because Curry worked for Ideal Transport, the WCA only limited any damages claims against Ideal Transport, the entity with a duty to provide coverage. In sum, because he never worked for Brewer, his injuries were not compensable under the WCA, and thus his claim against Brewer was not subject to the WCA's damages limit.

¶ 10 In a post-trial ruling, the court denied Brewer's motion and found that the damages limitation did not apply to Curry's claim. The court first found that Curry's injuries were work related. It

next found that, as an independent contractor, Curry was not an employee as defined by the WCA and was therefore unable to recover damages under the WCA. Based on that finding, the court concluded that Curry's injury would not "otherwise have been compensable" under the WCA and denied the motion on that ground. But the court went on to find that the statutory exception to the damages limit (for actions brought against another "not in the same employ") did not apply because Brewer and Curry worked for the same employer, Ideal Transport, and were therefore "in the same employ."

B. Standard of Review and Applicable Law

¶ 11 Statutory interpretation is a question of law that we review de novo. *Godinez v. Williams*, 2024 CO 14, ¶ 19. When the statutory language is clear, we apply it as written. *Diehl v. Weiser*, 2019 CO 70, ¶ 13. If, however, the language in the statute is ambiguous — in other words, if it is reasonably susceptible of multiple interpretations — then we may rely on other tools of statutory construction. *Id.*; *see also* § 2-4-203, C.R.S. 2024. In interpreting a statutory requirement, we must give effect to the General Assembly's intent by first turning to the text and giving the words

their plain and ordinary meanings. *Jones v. Williams*, 2019 CO 61, ¶ 7 (citing *Colorow Health Care, LLC v. Fischer*, 2018 CO 52M, ¶ 11).

¶ 12 The General Assembly enacted the WCA to protect employees who sustain work-related injuries. *Am. Fam. Mut. Ins. Co. v. Ashour*, 2017 COA 67, ¶ 66. The WCA's purpose is to "assure the quick and efficient delivery of disability and medical benefits to injured workers . . . without the necessity of any litigation." § 8-40-102(1), C.R.S. 2024; *see also Klabon v. Travelers Prop. Cas. Co. of Am.*, 2024 CO 66, ¶ 15. To that end, the WCA sets forth statutorily mandated insurance coverage that certain employers must provide to employees who are injured on the job, including coverage of "medical expenses, lost wages, disability benefits, compensation for disfigurement, and death and burial benefits." *Delta Air Lines, Inc. v. Scholle*, 2021 CO 20, ¶ 14; *see also* §§ 8-42-101 to -127, C.R.S. 2024.

¶ 13 Three groups of individuals have no cause of action under the WCA: (1) individuals excluded from the definition of employee under section 8-40-202(2); (2) working general partners or sole proprietors who are not covered under a workers' compensation insurance

policy; and (3) corporate officers or members of limited liability companies who elect to reject coverage under section 8-41-202(1). *Pulsifer v. Pueblo Pro. Contractors, Inc.*, 161 P.3d 656, 659 (Colo. 2007); *see also* § 8-41-401(3).

¶ 14 Section 8-40-202(2) excludes independent contractors from the definition of employee. *See Cont'l Divide Ins. Co. v. Dickinson*, 179 P.3d 202, 204 (Colo. App. 2007). For purposes of the WCA, an employee does not include an individual who is "free from control and direction in the performance of the service, both under the contract for performance of service and in fact," if "such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." § 8-40-202(2)(a).

¶ 15 As relevant here, section 8-41-401(3) provides as follows:

> Notwithstanding any provision of this section or section 8-41-402[, C.R.S. 2024,] to the contrary, any individual who is excluded from the definition of employee pursuant to section 8-40-202(2), or a working general partner or sole proprietor who is not covered under a policy of workers' compensation insurance, or a corporate officer or member of a limited liability company who executes and files an election to reject coverage under section 8-41-202(1) shall not have any cause of action of

> any kind under articles 40 to 47 of this title. Nothing in this section shall be construed to restrict the right of any such individual to elect to proceed against a third party in accordance with the provisions of section 8-41-203[, C.R.S. 2024]. The total amount of damages recoverable pursuant to any cause of action resulting from a work-related injury brought by such individual that would otherwise have been compensable under articles 40 to 47 of this title shall not exceed fifteen thousand dollars, except in any cause of action brought against another not in the same employ.

¶ 16 "The purpose of section 8-41-401(3) is to encourage participation in the workers' compensation system and limit the exposure of those contractors who obtain coverage from lawsuits or claims brought by uncovered independent contractors who are injured on the job." *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1215 (Colo. App. 2009).

C. Analysis

¶ 17 We conclude that the trial court reached the correct result in concluding that the damages limitation did not apply, but for the wrong reasons. Contrary to the court's findings, we conclude that Curry and Brewer were "not in the same employ" because they were not co-employees or principal parties to an agreement for services. In fact, as to the former, Curry and Brewer stipulated that "co-

worker immunity did not apply," and Brewer withdrew his assertion of co-worker immunity. *See generally Kandt v. Evans*, 645 P.2d 1300, 1304-06 (Colo. 1982) (explaining co-employee immunity).

¶ 18 We reject Brewer's assertion that Curry's decision to opt out of workers' compensation coverage is determinative of this issue. Brewer has not cited, nor are we aware of, any authority requiring independent contractors to secure coverage for the negligence of other independent contractors with whom they work alongside. Indeed, the WCA covers the employer-employee relationship to ensure immediate coverage for employees without regard to who might have been negligent. *See Pulsifer*, 161 P.3d at 659. It does not shield third-party tortfeasors from liability for damages resulting from their negligence. *Frohlick Crane Serv., Inc. v. Mack*, 510 P.2d 891, 893 (Colo. 1973).

¶ 19 No one disputes that the parties are independent contractors, and the record contains a clear stipulation by both Curry and Brewer that they are not co-employees. Therefore, they were not "in the same employ" by virtue of being co-employees. Rather, for the purposes of the WCA, they were third parties to one another. *See* § 8-41-203(1)(a).

¶ 20 Additionally, we are not persuaded by Brewer's reliance on *Snook*. The plaintiff in that case, Snook, was an independent contractor who worked for a subcontractor that was doing construction work for the defendant, the general contractor. *Snook*, 215 P.3d at 1213. Snook was injured when he fell from scaffolding, and he sued the general contractor, alleging that the scaffolding was negligently constructed. *Id.* at 1214. Snook's contract with the subcontractor required him to obtain workers' compensation insurance, but he neglected to do so. *Id.* at 1217. The general contractor filed a C.R.C.P. 56(h) motion for a determination of a question of law asking whether it was Snook's statutory employer and whether Snook's damages were capped under section 8-41-401(3). *Id.* at 1214. The trial court found that the general contractor was a statutory employer; Snook failed to obtain coverage under his contract; and, therefore, the statutory damages limitation applied. *Id.* On appeal, a division of this court affirmed the ruling. *Id.* at 1218. The division noted that the purpose of the WCA is to encourage participation in the workers' compensation system and to limit the exposure of those contractors who obtain coverage from lawsuits brought by uncovered independent

contractors who are injured on the job. *Id.* at 1215. Here, however, there is no contract between Brewer and Curry requiring or providing the option for either to obtain coverage for work-related injuries. Rather, their contracts were with Ideal Transport. Thus, Curry's decision not to obtain his own coverage is not dispositive and does not limit his damages under section 8-41-401(3).

¶ 21 Instead, we are persuaded by *Frohlick* and *Pulsifer*. In *Frohlick*, the plaintiff, a general contractor's employee, was injured by the negligence of a subcontractor's employee. 510 P.2d at 892. The plaintiff received workers' compensation benefits through the general contractor and then filed a negligence action against the subcontractor. *Id.* The trial court dismissed the negligence claim on summary judgment because the plaintiff had received compensation through the WCA. *Id.* A division of this court reversed and remanded the case for further proceedings. *Id.* The supreme court affirmed the reversal and noted that the trial court had erroneously concluded that the general contractor's and subcontractor's employees were co-employees. *Id.* The court held that because "there was no employer-employee relationship between [the general contractor employee] and [the subcontractor

employee]," the WCA was inapplicable. *Id.* It noted that the purpose of the WCA was to immunize employers who provided coverage to their employees, not to shield third-party tortfeasors from liability. *Id.* at 893.

¶ 22 In *Pulsifer*, a subcontractor painter, Pulsifer, sued the general contractor for negligence after he suffered injuries caused by defective stairs at a construction site. 161 P.3d at 658. Pulsifer was not eligible for workers' compensation coverage under the general contractor's policy and voluntarily chose not to seek his own coverage. *Id.* In an interlocutory appeal from the trial court, the supreme court considered two issues: (1) whether Pulsifer fell within the category of persons subject to the WCA's damages limit and (2) whether the "another not in the same employ" exception to the damages limit applied. *Id.* at 659. In its interpretation of section 8-41-401(3), as relevant here, the court held that individuals who are excluded from the WCA's definition of employee (e.g., independent contractors) are precluded from recovery under the WCA and, therefore, may pursue a common law cause of action. *Id.* It next held that the groups precluded from seeking recovery under the WCA consisted of individuals who could have obtained

coverage but did not, either because they chose not to or opted out. *Id.* Lastly, it concluded that individuals who have the option to obtain WCA coverage but choose to reject it are generally subject to WCA's damages limit. *Id.* Pulsifer, therefore, was subject to the damages limit unless the exception applied. *Id.* at 660.

¶ 23 Turning to the exception, the court interpreted the language "another not in the same employ" that appears in both sections 8-41-401(3) and 8-41-203(1)(a) and concluded that the terms "stranger" and "third party" in these sections were synonymous. *Id.* at 662. It also found that the terms suggested that "another not in the same employ" must be a person who is not a "principal party." *Id.* at 661. Thus, in deciding whether an individual is a third party, the focus is on whether services are being directly performed for another and not on whether one of the parties meets the definition of employee under section 8-40-202(2)(a). *Pulsifer*, 161 P.3d at 661-62. The court then held that "an injured plaintiff is entitled to sue a defendant who is not a direct party to the agreement for services for pay and is not subject to the statutory limitation on damages." *Id.* at 662. "However, if the parties to the suit are the principle [sic] parties to the agreement, the limitation on damages applies." *Id.*

Because Pulsifer was a principal party to the contract to provide painting services for the general contractor, he was subject to the statutory damages limit. *Id.*

¶ 24 Applying these holdings to the facts found here, we agree with the trial court that Curry and Brewer are not employees within the meaning of the WCA and that Curry's claims are not compensable under the WCA. However, we conclude that these facts are not dispositive, as the court concluded, because they would render the damages limitation inapplicable in every claim involving independent contractors — an absurd result. *See Am. Fam. Mut. Ins. Co. v. Barriga*, 2018 CO 42, ¶ 8 ("We must consider the statutory text as a whole, and give 'consistent, harmonious, and sensible effect to all of its parts and avoid[] constructions that would render any words or phrases superfluous or lead to illogical or absurd results.'") (citation omitted). Instead, the controlling question is whether Brewer is "another not in the same employ" as Curry, which is determined by the nature of their relationship with each other, not their relationship with their principal. We note that the record does not reveal the existence of any contract or agreement between Curry and Brewer to perform services in

exchange for pay for one another. Nor are they parties to a single contract with Ideal Transport. Therefore, we conclude, consistent with *Pulsifer*, that Brewer and Curry are not principals to any agreement to perform services for pay for one another and, therefore, are "not in the same employ." Because they are not in the same employ, the WCA's damages limit does not apply. *See* §§ 8-41-203(1)(a), -401(3). Accordingly, we affirm the court's ruling, but on different grounds.

III. Evidence of Other Injuries

¶ 25 Brewer next contends that the trial court erroneously excluded evidence of other injuries Curry sustained before and after the incident. Brewer reasons that the absence of this evidence deprived the jury of the ability to determine the cause of the decline in Curry's quality of life. We disagree.

A. Relevant Facts

¶ 26 During Curry's cross-examination at trial, Brewer's counsel asked about injuries Curry sustained in a 2019 car accident. Curry's counsel objected and argued that Curry's injuries before and after the incident were irrelevant to the injuries he suffered from the fall at issue. The trial court sustained the objection,

finding that Curry's previous and subsequent injuries were irrelevant to the injuries he suffered during the incident and thus were not admissible. Neither party suggested or requested a limiting instruction pertaining to the prior and subsequent injuries.

B. Standard of Review and Applicable Law

¶ 27 We review evidentiary rulings for an abuse of discretion. *Leaf v. Beihoffer*, 2014 COA 117, ¶ 9. A court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair or when it misapplies the law. *Id.* "Even when a trial court may have abused its discretion in admitting certain evidence, reversal is not required if the error was harmless under the circumstances." *People v. Summitt*, 132 P.3d 320, 327 (Colo. 2006).

¶ 28 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. Under CRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, potential to mislead the jury, undue delay, waste of time, or needless presentation of cumulative evidence. Preliminary questions

regarding the admissibility of evidence "shall be determined by the court." CRE 104(a).

C. Analysis

¶ 29 We discern no abuse of discretion in the court's ruling, for three reasons. First, Brewer's counsel did not explain to the trial court how Curry's 2019 injuries made any fact of consequence to the case more or less probable. Indeed, Curry's counsel explained that, while Curry suffered injuries to his neck and shoulder in the 2019 car accident, Curry was not claiming any damages related to his neck or shoulder in this case. Without more by Brewer's counsel, we cannot fault the trial court for finding the 2019 injuries were unrelated to the case and thus irrelevant. On appeal, Brewer broadly asserts that potential prior and subsequent injuries were relevant to the jury's determination of causation, but he does not identify what those other injuries are or how they might have affected the outcome.

¶ 30 Second, we reject Brewer's contention that the relevance of this evidence was for the jury to decide and that the court deprived the jury of its factfinding function by excluding it. Contrary to this contention, the jury's factfinding function begins during its

deliberations. C.R.C.P. 47(5). It is the trial court's duty to determine the relevance and admissibility of evidence. *See Rojhani v. Meagher*, 22 P.3d 554, 558 (Colo. App. 2000).

¶ 31 Third, we are not persuaded that the trial court's ability under CRE 105 to limit the purposes for which the evidence is admitted itself justifies admission of the evidence. Under CRE 105, a court may restrict evidence to its proper scope and instruct the jury accordingly. However, Brewer never made this request of the trial court or mentioned CRE 105, and we do not consider issues raised for the first time on appeal. *See Est. of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992).

¶ 32 Accordingly, we discern no abuse of discretion.

IV. Untimely Witness Disclosure

¶ 33 Brewer next contends that the trial court erroneously permitted Curry's counsel to call Ginger Chavez, an eyewitness to the accident, because her identity was not disclosed until three days before the trial began, well beyond the witness disclosure deadline. We disagree and discern no abuse of discretion.

A. Relevant Facts

¶ 34 The parties do not dispute that on Friday, January 26, 2024, the last business day before the third and final trial setting, Curry's counsel filed an amended witness list and a "Third Amended Joint Order of Proof" listing Chavez as an expected trial witness. Curry's counsel claimed that he had learned of Chavez's identity while speaking with another witness. He was able to meet and speak with Chavez before the trial began. Curry disclosed Chavez's identity to the defense as soon as he learned of it.

¶ 35 On the first day of trial, Brewer's counsel moved to exclude Chavez's testimony on the basis that her designation was untimely and amounted to an "attempted ambush." He argued that it would be prejudicial to require him to prepare for Chavez's testimony when the parties had two years to locate and timely disclose her pursuant to C.R.C.P. 16 and 26. Curry's counsel argued that both parties were generally aware of Chavez's existence because Curry mentioned in his deposition that a woman was present at the time of the incident. However, at that time, Curry was unable to identify the woman or to provide any additional information about her until his counsel spoke to another witness who identified Chavez as the

previously unidentified female witness. In his rebuttal, Brewer's counsel admitted to having spoken with Chavez before trial.

¶ 36 In denying Brewer's counsel's motion to exclude Chavez's testimony, the court said, "I agree with defense counsel that this wasn't disclosed. It's a bit of a surprise." However, the court reasoned that "the deposition testimony said that there was a female witness" and therefore found there was sufficient notice for Brewer's counsel to anticipate Chavez's potential testimony.

¶ 37 During trial, Chavez testified that, at the time of the incident, she worked at Home Depot in the area where trucks loaded and unloaded materials. She said she saw Curry and Brewer's truck backed up to a moving loading dock with a hydraulic plate that acted as a bridge between the back of the truck and the dock itself. She said Curry was either loading or unloading the truck when she heard a slam, indicating "somebody pulled away without lifting the loading dock" back into place. Chavez further testified she did not see the truck pull away but did see Curry fall on the top of the hydraulic plate. Chavez also explained that a signal at the dock typically informs the driver when it is safe to drive away, but to her knowledge the signal was not working that day, and nobody

informed Brewer or Curry of that fact. Chavez also said she told Brewer that he needed to take Curry to the hospital because "he was hurt bad."

B. Standard of Review and Applicable Law

¶ 38 Trial courts have broad discretion in determining whether to allow the late endorsement of witnesses not listed in pretrial orders, and we will not disturb a trial court's ruling absent a showing of an abuse of that discretion. *Welsch v. Smith*, 113 P.3d 1284, 1290 (Colo. App. 2005). A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair or if the court bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Sch. Dist. No. 12 v. Sec. Life of Denver Ins. Co.*, 185 P.3d 781, 787 (Colo. 2008).

¶ 39 A party's mandatory disclosures under C.R.C.P. 26(a)(1) are broad and self-executing and require disclosure of information "whether or not supportive of the disclosing party's claims or defenses." C.R.C.P. 26(a)(1)(A) requires a party to disclose the following:

> [T]he name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the

> claims and defenses of any party and a brief description of the specific information that each such individual is known or believed to possess.

¶ 40 Rule 26(e) imposes on litigants a continuing duty to update and supplement all C.R.C.P. 26(a) disclosures "in a timely manner." Rule 26(e) states, in relevant part,

> A party is under a duty to supplement its disclosures under [sub]section (a) of this Rule when the party learns that the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process . . . .

¶ 41 C.R.C.P. 37(c)(1) allows a court to exclude evidence that was disclosed late unless the late disclosure was either substantially justified or harmless to the opposing party. *See Todd v. Bear Valley Vill. Apartments*, 980 P.2d 973, 977 (Colo. 1999). "Where a party fails to make pretrial disclosures, a trial court may impose appropriate sanctions," including the preclusion of evidence. *Brooktree Vill. Homeowners Ass'n v. Brooktree Vill., LLC*, 2020 COA 165, ¶ 91 (quoting *Mullins v. Med. Lien Mgmt., Inc.*, 2013 COA 134, ¶ 37).

¶ 42 "The burden is on the non-disclosing party to establish that its failure to disclose was either substantially justified or harmless." *Todd*, 980 P.2d at 978. Under CRE 103 and C.R.C.P. 61, we may reverse for an erroneous evidentiary ruling only if the ruling affected a substantial right of a party. *Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010). An error affects a substantial right of a party 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.* (quoting *Banek v. Thomas*, 733 P.2d 1171, 1178 (Colo. 1986)).

¶ 43 In exercising its discretion, a trial court may evaluate any number of factors, such as the importance of the witness's testimony, the party's explanation for their failure to comply with the required disclosure, the potential prejudice to the party against whom the testimony is offered, the availability of a continuance to cure the prejudice, and the extent to which introducing the testimony would disrupt the trial. *D.R. Horton, Inc.-Denver v. Bischof & Coffman Constr., LLC*, 217 P.3d 1262, 1268 (Colo. App. 2009).

C. Analysis

¶ 44 We discern no abuse of discretion in the court's ruling, for two reasons. First, despite alleging surprise, Brewer's counsel was on notice that Chavez existed and that she was the only witness to the accident other than the parties. Curry's deposition testimony revealed the existence of a female eyewitness and his inability to provide further identifying information for her. Additionally, Curry learned of and immediately disclosed Chavez's identity on the same day that his counsel discovered her identity through another witness. Moreover, the record shows that Brewer's counsel spoke to Chavez right before the trial began. Given these facts and the importance of this sole independent eyewitness to the incident, we conclude the trial court properly exercised its discretion in allowing Chavez to testify "on a narrow leash." *See D.R. Horton*, 217 P.3d at 1268.

¶ 45 Second, the record does not show that Brewer was deprived of any substantial right. While he argues on appeal that he was surprised by the evidence of the malfunctioning dock signal, the record shows he asked no questions at trial regarding the dock signal, and he never requested any form of relief, such as a

continuance, to remedy this surprise. Moreover, we cannot discern how this prejudiced him because he was not responsible for Home Depot's dock signal's functioning. In sum, Brewer has not identified any portion of Chavez's testimony that he was unprepared to meet, nor has he explained how additional preparation would have influenced the outcome of the case. *See Gold Hill Dev. Co., L.P. v. TSG Ski & Golf, LLC*, 2015 COA 177, ¶¶ 70-72 (holding that a failure to identify specific instances where conduct affected counsel's ability to fairly and fully prepare for trial coupled with conclusory statements of prejudice are insufficient to establish harm). Chavez's testimony was generally consistent with Curry's testimony and Brewer was able to cross-examine her extensively about the incident. In the absence of any evidence to the contrary, we conclude that the trial court did not abuse its discretion by allowing this key eyewitness to testify.

V. Medical Billing Records

¶ 46 Brewer next contends that the trial court erroneously admitted Curry's medical bills and a CRE 1006 summary of Curry's medical bills on hearsay and foundational grounds. We agree that the court

erred but conclude that the error was harmless and therefore does not require reversal.

A. Relevant Facts

¶ 47 Curry filed an amended joint exhibit list that included a CRE 1006 summary of plaintiff's medical expenses as an exhibit to be used at trial. Brewer's counsel objected, both before and during Curry's cross-examination, and argued that the medical bills summarized in the list constituted inadmissible hearsay. The trial court found the medical bills and summary were admissible so long as Curry's counsel laid the proper foundation and testified to receiving each bill. The court further reasoned that evidence of whether the medical expenses were reasonable and necessary and whether they were incurred because of injury did not require expert testimony. Over Brewer's counsel's objection, the court admitted the documents during Curry's trial testimony.

¶ 48 At the end of Curry's evidence, Brewer's counsel moved for a directed verdict and to strike Curry's claim for medical expenses, arguing that Curry did not prove his medical treatment was reasonable and medically necessary. The trial court agreed and found that the bills were not sufficient on their own to establish the

reasonableness or necessity of Curry's medical treatment. Specifically, the trial court noted that Curry "was not competent to testify as to the reasonable need for this treatment or the treatment being caused by the accident and linking that treatment together with what happened in the accident." As a result, the court struck Curry's claim for economic damages. However, the court also found that the medical bills and summary continued to have limited relevance as "some evidence" of noneconomic damages.

B. Standard of Review and Applicable Law

¶ 49 We review evidentiary rulings for an abuse of discretion. *Leaf*, ¶ 9. A trial court abuses its discretion if its ruling is manifestly arbitrary, reasonable, or unfair or if the court bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Front Range Res., LLC v. Colo. Ground Water Comm'n*, 2018 CO 25, ¶ 15.

¶ 50 Hearsay is an out-of-court statement offered for the truth of the matter asserted. *See* CRE 801(c). Hearsay is not admissible unless it fits into an applicable exception. *See* CRE 802-04. As relevant here, CRE 803(6), the business records exception, allows the admission of records or data compilations if such records are

kept during regularly conducted business activity. Relevant and material business records qualify for the business records exception when supported by an adequate foundation showing that (1) the records were made in the regular course of business; (2) those participating in the record-making were acting in the routine of business; (3) the input procedures were accurate; (4) the entries were made within a reasonable time after the occurrence in question; and (5) the information was transmitted by a reliable person with knowledge of the event reported. *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 201 (Colo. 1984). The reliability of such a record is demonstrated by evidence of it having been made pursuant to established and routine company procedures for the systematic conduct of its business. *Teac Corp. of Am. v. Bauer*, 678 P.2d 3, 4 (Colo. App. 1984).

¶ 51 The party seeking admission of business records must first satisfy the requirements for the business records exception through the testimony of the records custodian or other qualified witness or by certification. *See* CRE 803(6).

¶ 52 Additionally, CRE 602 prohibits a lay witness from testifying to "a matter unless evidence is introduced sufficient to support a

finding that the witness has personal knowledge of the matter." The "threshold for satisfying the personal-knowledge requirement is not very high and may be inferable" from the "total circumstances surrounding the matter." *Murray v. Just In Case Bus. Lighthouse, LLC*, 2016 CO 47M, ¶ 33 (internal citation omitted).

¶ 53 Under CRE 1006, "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." For admission, the proponent of the summary evidence must (1) identify the documents underlying the summary and show them to be voluminous; (2) establish that the underlying documents are otherwise admissible evidence; (3) provide the other party with a copy of the summary in advance of its use; and (4) provide "the opposing party with a reasonable time and place for examination of the available documents underlying such summary." *People v. McDonald*, 15 P.3d 788, 790 (Colo. App. 2000); *see also Pyles-Knutzen v. Bd. of Cnty. Comm'rs*, 781 P.2d 164, 167 (Colo. App. 1989) (Prior to the admission of a summary, the offering party must "lay a foundation for, or the parties must stipulate to, the admissibility of the underlying material.").

¶ 54 The standard of reversal is harmless error. C.R.C.P. 61; *see also* C.A.R. 35(c) ("The appellate court may disregard any error or defect not affecting the substantial rights of the parties."). An error affects a party's substantial rights "only if it can be said with fair assurance that [it] substantially influenced the outcome of the case or impaired the basic fairness of the trial itself." *Stockdale v. Ellsworth*, 2017 CO 109, ¶ 32 (quoting *Laura A. Newman, LLC v. Roberts*, 2016 CO 9, ¶ 24). The party asserting the error has the burden of showing that it was not harmless. *Moody v. Corsentino*, 843 P.2d 1355, 1375 (Colo. 1993).

C. Analysis

¶ 55 We conclude that the medical records constitute hearsay to the extent they were offered to prove the truth of their contents. *See Leiting v. Mutha*, 58 P.3d 1049, 1053 (Colo. App. 2002) (finding that a summary of medical records was an interpretation of medical records that did not meet CRE 803(6)'s requirements, rendering the statements inadmissible).

¶ 56 Next, we agree with Brewer that Curry failed to satisfy CRE 803(6) because Curry did not call the records custodian or any other qualified witness to establish the requirements for the

business records exception, nor did Curry provide a certification under CRE 902(11) or (12). To the extent Curry asserts that his personal knowledge from receipt of his medical bills was sufficient to establish CRE 803(6)'s requirements, we disagree. Curry had no personal knowledge concerning how the bills were created or whether they were kept in the regular course of the provider's business, a necessary requirement for admissibility under CRE 803(6). Further, the records contain a stamp that states they are not certified. Therefore, because the admissibility requirements were not met, the court erred by admitting the medical records for the purpose of proving the truth of their contents. Additionally, because the records themselves constitute inadmissible hearsay, the Rule 1006 summary was inadmissible for the same reasons.

¶ 57 Having concluded the trial court erred, we must decide whether the error requires reversal. Under the facts found here, we conclude it does not. After the trial court struck Curry's economic damages claim, Curry's counsel argued that the medical records served as evidence of his noneconomic damages. Even without the bills and summary, Curry testified to the noneconomic damages he incurred, including his injuries, the treatment he received, and how

those injuries affected his life. He related, from personal knowledge, the expenses he incurred for medical treatment and was able to approximate their total amount. Thus, the medical records and summary were cumulative of that testimony. *See Knowles v. Bd. of Educ.*, 857 P.2d 553, 555–56 (Colo. App. 1993).

¶ 58 Accordingly, we discern no basis for reversal.

VI. Cross-Appeal

¶ 59 Curry conditionally cross-appealed and agreed at oral argument that if the judgment was affirmed, his cross-appeal would be moot. Because we affirm the judgment, we do not address his cross-appeal.

VII. Disposition

¶ 60 The judgment is affirmed.

JUDGE SCHOCK and JUDGE SULLIVAN concur.