

COURT OF APPEALS, STATE OF COLORADO  
Two East Fourteenth Avenue  
Denver, CO 80203

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Appeal from the Trial Court:  
DISTRICT COURT, WELD COUNTY, STATE OF  
COLORADO  
901 9<sup>th</sup> Avenue  
Greeley, CO 80632  
District Court Judge: Shannon D. Lyons  
District Court Case Number: 2019CV30947

Plaintiff-Appellant:  
**ASHLEY BULLINGTON**

v.

Defendant-Appellee:  
**COURTNEY BARELA**

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Case No.: 2023CA364

**PLAINTIFF-APPELLANT'S OPENING BRIEF ON APPEAL**

**CERTIFICATE OF COMPLIANCE WITH C.A.R. 28 AND 32**

Undersigned counsel certifies 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).

Choose one:

It contains 8,902 words.

It does not exceed 30 pages.

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For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. \_\_, p. \_\_), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Respectfully submitted on August 4, 2023.

By: */s/ Anthony Viorst*

\_\_\_\_\_  
Anthony Viorst. #18508

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## **INTRODUCTION**

In this car accident case, the Defendant admitted fault and the Plaintiff, Ashley Bullington, suffered serious injuries. However, prior to trial, the district court struck Ms. Bullington's physician life-care planner, as being late-disclosed, despite the absence of any valid prejudice to the defense due to the late disclosure. Thereafter, during the trial, the district court, over Ms. Bullington's objection, erroneously instructed the jury that the affirmative defense of failure to mitigate damages could be proven if they found that Ms. Bullington unreasonably delayed her medical treatment by getting pregnant and breastfeeding. At the conclusion of the trial, the jury rendered a legally inconsistent verdict, in which it awarded Ms. Bullington approximately \$24,000 for her economic damages, and zero for her noneconomic damages. For the reasons provided below, the judgment should be reversed, and this case should be remanded for a new trial on the issue of damages.

## **STATEMENT OF THE CASE**

This case concerns a motor vehicle accident that occurred on December 18, 2016, on 29<sup>th</sup> Street in Greeley, Colorado, in which Defendant-Appellee Barela's 2001 Dodge Durango rear-ended Ms. Bullington's 2007 Dodge Nitro (CF, p11). Ms. Bullington timely filed her complaint in Weld County District Court on November 14, 2019 (CF, p10-13). Following several continuances, due to Covid-

19 and other circumstances, the matter was tried to a jury on November 14-18, 2022. At the conclusion of the trial, the jury returned a verdict in favor of Ms. Bullington, awarding her \$23,638 for economic damages, zero for noneconomic damages, and zero for physical impairment (Tr. 11/18/22, p87-88; CF, p3184-3185). On December 9, 2022, Plaintiff filed a timely motion for new trial on the issue of damages (CF, p3235-3241, 3688). On January 12, 2023, the district court denied the motion for new trial (CF, p3644-3648). Thereafter, Ms. Barela was awarded her costs pursuant to C.R.S. § 13-17-202 and, when the value of those costs was subtracted from the value of the jury award, Ms. Bullington's judgment totaled \$9,000.02. (CF, p3649-3650). This timely appeal followed.

### **ISSUES PRESENTED**

I. Whether the district court reversibly erred in instructing the jury that the affirmative defense of failure to mitigate damages could be proven if they found that Ms. Bullington unreasonably delayed her medical treatment by getting pregnant and breastfeeding.

II. Whether the verdict awarding approximately \$24,000 in economic damages, but awarding nothing for noneconomic damages or physical impairment, reflects that the jury failed to follow the trial court's instructions, and that a new trial on damages is warranted.

III. Whether the district court reversibly erred in striking Ms. Bullington's physician life-care planner, as being late-disclosed, despite the absence of any valid prejudice to the defense from the late disclosure.

### **STATEMENT OF FACTS**

On December 18, 2016, at approximately 12:00 p.m. in the afternoon, Ms. Bullington was driving her Dodge Nitro westbound on 29<sup>th</sup> Street in Greeley, Colorado, and stopped behind a Ford F-150 at a red light on the corner of 29<sup>th</sup> Street and 35<sup>th</sup> Avenue (Tr. 11/14/23, p289-296; Ex. 1, p319-321). Ms. Bullington's vehicle was then hit from behind by a Dodge Durango driven by Ms. Barela (Tr. 11/14/23, p289-296; Ex. 1, p319-321). At the time of the accident, Ms. Barela's vehicle was traveling at a rate of approximately 20 mph (Tr. 11/14/23, p289-290). After being hit from behind, Ms. Bullington and her vehicle were pushed forward into the Ford F-150 (Tr. 11/14/23, p289-296). Ms. Barela's vehicle suffered severe front-end damage, and both the front and the back of Ms. Bullington's vehicle suffered moderate damage (Tr. 11/14/23, p294; Ex. 1, p319, 326-331; Ex. O, p138-141). Ms. Bullington was pregnant at the time of the accident, and was transported by ambulance to North Colorado Medical Center ("NCMC") (Tr. 11/14/23, p296-298).

A. Medical Records

At NCMC, Ms. Bullington complained of right-sided abdominal pain and tenderness in her neck, as well as a headache (Ex. 10, p721, 727). She rated her pain as a 7 out of 10 (Ex. 10, p719-720). Imaging of her cervical spine, right hip, and abdomen was performed (Ex. 10, p719-720). She was treated with non-opioid pain medication and a cervical collar, and was discharged (Ex. 10, p719-721).

In the first three days following the accident, Ms. Bullington consulted with her OB/GYN, primary-care doctor, and chiropractor. On December 20, 2016, she informed her OB/GYN, who was monitoring her pregnancy, that she had been in a car accident on 12/18/2016 and that, among other concerns, her left neck was sore, her right knee and hip were sore, and she had been suffering from a headache since the date of the accident (Ex. Q, p144). She also stated that the accident had caused her to suffer uterine contractions (Ex. Q, p144). On December 21, 2016, Ms. Bullington met with her primary-care physician, at which time she reiterated that she had been in an accident on December 18, 2016, and that since then she had been suffering from neck pain, right knee pain, headaches, and abdominal pain (Ex. 8, p698-700). These subjective complaints were verified through a physical exam. (Id.).

That same day, December 21, 2016, Ms. Bullington met with her chiropractor, Dr. Michael Springfield (who she had not seen since April 2016), and reported, among other issues, neck pain, right knee pain, and abdominal tenderness (Ex. 4, p346-347). An examination and evaluation confirmed these symptoms (Id.). Thereafter, Ms. Bullington's pain persisted, and she continued to receive treatment from Dr. Springfield. Dr. Springfield diagnosed Ms. Bullington with a Grade 3 whiplash (Ex. 4, p351-352) and, in order to treat her symptoms, provided chiropractic care to Ms. Bullington on a weekly basis (Ex. 4, p348-381).

Beginning on December 27, 2016, at a medical facility called Compcare, Ms. Bullington also received accident-related physical therapy, several times per week for a period of two months (Ex. 4, p440-467), and then once per week thereafter (Ex 4, p513-544).

On April 12, 2017, after recently giving birth to her son Cash, Ms. Bullington consulted with Dr. Jeffrey Donner, an orthopedic surgeon (Ex. 5, p546-561). At that time, she complained of headaches emanating from her neck, as well as tenderness in her lumbar spine, right knee, and right hip (Ex. 5, p558-560). Dr. Donner reviewed the cervical X-rays taken at NCMC on the date of the accident (no MRI imagining had been performed at that facility), and concluded that the cervical X-ray did not show any fractures (Ex. 5, p560). After examining Ms.

Bullington, Dr. Donner diagnosed her with accident-related neck pain, back pain, and headaches, and ordered a cervical MRI scan (Ex. 5, p560). The cervical MRI scan, taken on May 3, 2017, showed that Ms. Bullington had right foraminal narrowing at the C4-C5 levels (Ex. 5, p562-563).

Ms. Bullington consulted with Dr. Donner again on May 5, 2017, at which time she was still suffering from accident-related symptoms (Ex. 5, p567-569). At that time, Dr. Donner reviewed Ms. Bullington's cervical MRI imaging, and determined that she had accident-related right C4-C5 foraminal narrowing (Ex. 5, p568). Based upon the MRI results and his clinical examination, Dr. Donner determined that Ms. Bullington's cervical symptoms were related to this foraminal narrowing, as well as a severe accident-related cervical sprain/strain (Ex. 5, p568). Dr. Donner recommended cervical steroid injections, as well as stem cell injections, but stated that "[s]ince she is breastfeeding for about another year, I will not recommend any medication unless it is fully approved by her obstetrician in writing." (Ex. 5, p568). Dr. Donner also recommended trigger-point injections, but did not believe that any other surgical intervention was warranted at that time (Ex. 5, p568).

Although her breastfeeding prevented the administration of cervical injections, Ms. Bullington, after meeting with Dr. Donner in May of 2017,

continued to receive chiropractic treatment from Dr. Springfield, as well as physical therapy from Compcare (Ex. 4, p337-544). Dr. Springfield provided chiropractic care to Ms. Bullington on a regular basis, several times per month, through August of 2017 (Ex. 4, p348-381), and on a monthly basis thereafter, through August of 2022 (Ex. 4, p382-439). Ms. Bullington also received accident-related physical therapy at Compcare once per week, through August of 2017 (Ex. 4, p468-512), and on a periodic basis thereafter (Ex 4, p513-544).

In June of 2017, Ms. Bullington met with Dr. Christy Young, a neurologist employed at UCHealth, in order to receive treatment for her post-accident headaches. (Ex. 13, p782). Dr. Young diagnosed Ms. Bullington with muscle tension headaches, post-traumatic headaches, and bilateral occipital neuralgia (Ex. 13, p782-784). She recommended occipital nerve blocks and Botox injections (Id.). On June 22, 2017, Ms. Bullington received bilateral occipital nerve blocks (Ex. 13, p800-807). She received Botox on August 1, 2017 (Ex. 13, p813), and another occipital nerve block thereafter (Ex. 13, p821-846).

On September 12, 2017, Ms. Bullington met with Dr. Katie Weatherhogg, a physical medicine and rehabilitation specialist employed at UCHealth, who diagnosed her with accident-related cervical myofascial pain and cervicogenic headaches, and recommended trigger point injections to treat these conditions (Ex.

7, 647). Thereafter, beginning in November of 2017, and continuing through June of 2018, Ms. Bullington received multiple trigger-point injections in her neck and shoulder muscles to treat these conditions (Ex. 7, p650-678).

In June of 2018, Ms. Bullington was evaluated by Dr. Usama Ghazi, a physical medicine and rehabilitation specialist, who diagnosed Ms. Bullington with cervical pain causing “severe occipital headaches, as well as temporomandibular referred pain and sometimes photophobia.” (Ex. 5, p614). He recommended cervical facet injections, as well as physical therapy at Symfit Physical Therapy in order to work on core stabilization. (Ex. 5, p614-619). Ms. Bullington did not undergo the injections at that time, because she was still breastfeeding and Dr. Ghazi was “in agreement with Dr. Donner it is best to avoid injections of steroids in patients who are breastfeeding.” (Ex. 5, p618). Ms. Bullington did undertake physical therapy at Symfit, per Dr. Ghazi’s recommendation (Ex. 7, p623).

In October of 2018, Ms. Bullington had stopped breastfeeding, and met with Dr. Ghazi again, at which time he cleared her for cervical facet injections (Ex. 7, p622-623). However, before she could get in for those injections, Ms. Bullington became pregnant again, and therefore the injections could not be safely performed. Dr. Ghazi’s treatment note from May of 2019 recounted that Ms. Bullington had cancelled the injections due to her recent pregnancy, and included his medical

opinion that “[n]o injections can be performed while she is pregnant. She may revisit with us for injections once she has delivered her baby and is no longer breastfeeding.” (Ex. 5, p626). Beginning in November of 2020, and continuing through December 2020, Dr. Ghazi confirmed that Ms. Bullington was not breastfeeding, “pregnant or attempting pregnancy,” (Ex. 5, p635) and proceeded to administer four rounds of pelvic shockwave therapy (Ex. 5, p635-646).

In November of 2020, Ms. Bullington returned to Dr. Donner with ongoing accident-related cervical whiplash symptoms, at which time he ordered a vertebral motion analysis, which exhibited cervical subluxation and instability (Ex. 5, p571-580). In December of 2020, after reviewing the vertebral motion analysis as well as Dr. Ghazi’s treatment notes, Dr. Donner concurred with Dr. Ghazi’s recommendation for cervical facet injections, and once again recommended stem cell therapy (Ex. 5, p610). However, these injections were delayed because in early 2021 Ms. Bullington became pregnant with her sixth child (Tr. 11/16/22, p235).

#### B. Dr. Aschberger’s IME Reports

Dr. John Aschberger, a physical medicine and rehabilitation specialist, was hired by the defense to examine Ms. Bullington, to review her medical records, and to prepare a report. His examination of Ms. Bullington occurred on December 4,

2020, and he issued his report following that exam (Ex. H, p111-121). Thereafter, he issued four supplemental reports (Exs. J, K, L, p122-131). Based upon Ms. Bullington's pre-accident records, Dr. Aschberger concluded that she had "pre-existing structural issues, predating the motor vehicle collision," in her neck and back (Ex. J, p123). Nonetheless, the accident aggravated those issues, such that "[a] course of treatment with chiropractic, physical therapy, and massage therapy post motor vehicle collision for aggravated symptomatology [was] reasonable." (Id.).

With regard to the post-accident treatment that Ms. Bullington received for her neck and back pain, Dr. Aschberger opined that "Ms. Bullington was reporting pain levels in the range of 5-6/10 prior the motor vehicle collision, in 2015, and by February 2017, [after the collision], again was reporting pain levels of 5-7/10 or less duration during the day. This would indicate that she likely returned to her pre-accident level of irritation." (Ex. L, p129). With regard to Ms. Bullington's need for additional neck and back treatment, Dr. Aschberger opined that because "Ms. Bullington was back to her pre-accident status as of 2017, ongoing intervention after that does not appear specifically related to the motor vehicle collision." (Ex. L, p129).

However, Dr. Aschberger's opinions relating to Ms. Bullington's neck and back pain did not apply to her headaches. During the initial examination of Ms. Bullington, she told Dr. Aschberger that she suffered from chronic headaches (Ex. I, p112), and he found that "[s]he is tender at the upper cervical facets, with radiation to the occiput and symptoms replicating her headache." (Ex. I, p112). In his reports, Dr. Aschberger diagnosed Ms. Bullington as suffering from cervicogenic headaches, and opined that her "[h]eadache symptomatology does not appear to be pre-existing." (Ex. I, p118; Ex. J, p123). He stated further that, in contrast with her neck and back pain, all of the post-accident treatment that Ms. Bullington had received for her headache symptomatology was directly related to the accident. (Ex. L, p129). He opined further that additional treatment, including the cervical facet injections recommended by Dr. Ghazi, would be appropriate (Ex. L, p129).

### C. Trial Testimony

#### 1. Dr. Aschberger

Dr. Aschberger testified that Ms. Bullington had no prior history of headaches. (Tr. 11/15/22, p122). He testified that when he met with Ms. Bullington, she complained of accident-related headaches, and that his examination confirmed that she was suffering from accident-related cervicogenic headaches (Tr. 11/15/22, p143-144). He explained that "[t]he facet joints which are the . . . joints

within the spine on . . . both sides, they have a referral pattern when irritated from C2 through C4 for occipital distribution.” (11/15/22, p131). He explained further that a patient who suffers a neck injury “can have headache from a soft tissue [but that Ms. Bullington’s] symptoms were more specific for . . . the facets.” (11/15/22, p132). Dr. Aschberger testified that he, like Dr. Ghazi, was recommending cervical facet injections to treat Ms. Bullington’s headaches. (Tr. 11/15/22, p161). Regarding Ms. Bullington’s neck and back pain, Dr. Aschberger testified that Ms. Bullington suffered neck and back injuries in the accident but that in early 2017 she was back to her pre-accident baseline, and that none of her subsequent treatment was related to the accident. (Tr. 11/15/22, p220-221). Dr Aschberger did not testify that the delay in receiving cervical injections, due to Ms. Bullington’s pregnancies and breastfeeding, had any impact whatsoever upon Ms. Bullington’s recovery.

## 2. Dr. Springfield

Dr. Spingfield, an expert chiropractor and acupuncturist (Tr. 11/15/22, p242-260), testified at trial. He stated that he began treating Ms. Bullington in October of 2015, prior to the car accident (Tr. 11/15/22, p261). Between October 2015 and April of 2016, Ms. Bullington received preventative or “wellness” care from Dr. Springfield on approximately six occasions (TR. 11/15/22, p262-66). With the

exception of a sore rib on one occasion, Ms. Bullington did not report any injuries during those treatment sessions (Tr. 11/15/22, p262-266). Between April 2016 and the date of the accident, in December 2016, Ms. Bullington did not receive any treatment from Dr. Springfield (Tr. 11/15/22, p265-266). Following the motor vehicle accident, Dr. Springfield treated Ms. Bullington for her acute accident-related injuries (Tr. 11/15/22, p269-276). Dr. Springfield confirmed that, in his professional opinion, in January of 2017 Ms. Bullington was suffering from a Grade 3 whiplash (Tr. 11/15/22, p270-271; Tr. 11/16/22, p160-168, 174). Dr. Springfield testified further that Ms. Bullington's injuries were likely permanent. (Tr. 11/16/22, p173-174).

### 3. Dr. Donner

Dr. Donner testified that Ms. Bullington was suffering from accident-related cervicogenic headaches, which emanated from her neck into her head (Tr. 11/16/22, p39-42). Regarding Ms. Bullington's neck and back injuries, Dr. Donner testified that those injuries were also caused by the motor vehicle accident (Tr. 11/16/22, p71-72). Dr. Donner testified that his 2017 diagnosis relating to Ms. Bullington's neck and back was confirmed after Ms. Bullington underwent the vertebral motion analysis in November of 2020 (Tr. 11/16/22, p94). Dr. Donner did not testify that the delay in receiving cervical injections and stem cell

treatment, due to Ms. Bullington's pregnancies and breastfeeding, had any impact whatsoever upon Ms. Bullington's recovery.

4. Dr. Weatherhogg

Dr. Weatherhogg, a physical and rehabilitation medicine specialist, explained that she works with Dr. Young, a neurologist who specializes in headache treatment (Tr. 11/16/22, p16). Dr. Weatherhogg testified that her "number one diagnosis [of Ms. Bullington] was chronic and cervicogenic daily headaches and posterior neck and lower back pain since rear-ended . . . on December 18th of 2016." (Tr. 11/16/22, p69). She explained that the occipital nerve blocks that Ms. Bullington received from Dr. Young were "procedure[s] where you put cortisone and numbing medicine into the back of the skull to try to block those nerves from sending fibers up that cause headaches." (Tr. 11/16/22, p37). Likewise, Botox, another medication that Dr. Young administered, can also serve to alleviate headaches (Tr. 11/16/22, p57). Dr. Weatherhogg explained that she performed trigger point injections in Ms. Bullington's shoulders and neck, to treat her myofascial pain in those areas, and the related headaches (Tr. 11/16/22, p43-45).

5. Ashlee Bullington

Ms. Bullington testified that she was 32 weeks pregnant at the time of the accident and that she felt pain in her belly immediately following the collision (Tr. 11/16/22, p213-214). She was transported to the hospital, where fetal monitoring was performed, and she was treated for her other injuries (Tr. 11/16/22, p215-216, 238-239). She explained that during the months following the accident her treatment options for her neck pain, back pain, and headaches, were limited, due to her pregnancy, but that she did receive chiropractic care, physical therapy, and massage therapy. (Tr. 11/16/22, p217). After her son Cash was born, in February of 2017, she obtained additional medical treatment, but still could not receive injections or medication, because she was breastfeeding (Tr. 11/16/22, p217).

Ms. Bullington testified that the occipital nerve blocks were not effective in treating her headaches, but that the trigger point injections she received in late 2017 and early 2018 from Dr. Weatherhogg were helpful in treating her neck pain and headaches (Tr. 11/16/22, p220, 247-248). Ms. Bullington stated that the medical treatment she received for her accident-related injuries, and the bills that she incurred for those medical services, were necessary to treat those conditions (Tr. 11/16/22, p226-227).

Ms. Bullington testified that she had no prior history of accidents or injuries (Tr. 11/16/22, p229). Regarding her neck pain, back pain, and headaches, she stated that: “I did not have chronic pain before the car accident. I live in chronic pain now. I never experienced this before the car accident.” (Tr. 11/16/22, p221). Ms. Bullington testified further that she still suffers from constant headaches, and that when her “headaches set in pretty bad” she cannot perform her normal daily activities (Tr. 11/16/22, p33).

On cross examination, Ms. Bullington was questioned about her pregnancies and births. At the time of the accident, Ms. Bullington had three children, Toree (DOB 12/22/2002), Brynlee (DOB 08/02/2013), and Preslee (DOB 01/24/2015) (Ex. Q, p146), and she was pregnant (Tr. 11/16/22, p238). Her fourth child, Cash, was born healthy in February of 2017, approximately two months after the December 2016 accident (Tr. 11/16/22, p237-238). Ms. Bullington’s fifth child, daughter Madelyn, was born in July of 2019 (Tr. 11/16/22, p235-237). Her sixth child, daughter Danica, was born in February of 2022 (Tr. 11/16/22, p235).

Regarding her most recent two pregnancies, Ms. Bullington testified as follows:

. . . [Y]ou know, our family grew and we both came from families of four. We thought that was our family. **And we were definitely preventing** with the fifth baby and then she came along and then again with the sixth baby. And then I was like, "I'm done." (Tr. 11/16/22, p218) (Emphasis supplied).

Ms. Bullington testified that she could not do the cervical or stem cell injections recommended by Dr. Donner in May of 2017 because she was nursing Cash at that time (Tr. 11/16/22, p245-246). She also stated that after Dr. Ghazi recommended cervical facet injections in June of 2018, she wanted to receive those injections, but that her breastfeeding, and then her fifth pregnancy, prevented her from doing so (Tr. 11/16/22, p219). Her sixth pregnancy, in May of 2021, also impeded her ability to receive treatment (Tr. 11/16/22, p235).

She explained that she diligently underwent chiropractic adjustments and physical therapy after the accident because she knew those treatments would not “hurt the baby.” (Tr. 11/16/22, p217). Ms. Bullington acknowledged that she received chiropractic treatment prior to the accident, but stated that this treatment was just for wellness visits (Tr. 11/16/22, p244).

### **SUMMARY OF THE ARGUMENT**

I. Under well-settled Colorado and constitutional law, a failure-to-mitigate damages defense cannot be based upon a litigant’s act of getting pregnant, staying pregnant, of nursing her baby, or any combination of these acts. Therefore, the district court reversibly erred in instructing the jury regarding the affirmative defense of mitigation of damages.

II. Because it was uncontroverted by the medical experts that Ms. Bullington suffered from chronic headaches as a result of the accident at issue, the verdict awarding approximately \$24,000 in economic damages, but awarding nothing for noneconomic damages or physical impairment, reflects that the jury failed to follow the trial court's instructions, and that a new trial on damages is warranted.

III. C.R.C.P. 37(c)(1) provides that the failure to timely disclose evidence should not result in preclusion of that evidence "unless such failure has not caused and will not cause significant harm." Here, even if Plaintiff's physician life-care planner, Dr. Catherine Doty, was late disclosed, the Defendant was given 60 days to disclose a responsive expert, and the defense did disclose Dr. John Aschberger, who wrote a report challenging many of Dr. Doty's conclusions. Thus, there was no prejudice, or "significant harm," suffered by the defense, and the district court abused its discretion in striking Dr. Doty as a witness.

## ARGUMENT

### I. **THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY REGARDING THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES**

#### A. Standard of Review

During the instruction conference, Plaintiff's counsel interposed a timely objection to Defendant's proposed failure-to-mitigate instruction (Tr. 11/17/22, p37-40). The district overruled that objection (11/17/22, p41). This court reviews de novo whether the evidence in the record supported the giving of an affirmative defense instruction. *People v. Sandoval*, 2016 COA 14, ¶ 18, 409 P.3d 425, 428

#### B. Factual Background

At the time of the accident, Ms. Bullington had three children, Toree (DOB 12/22/2002), Brynlee (DOB 08/02/2013), and Preslee (DOB 01/24/2015) (Ex. Q, p146), and she was pregnant with her son Cash (Tr. 11/16/22, p238). Cash was born healthy in February of 2017, approximately two months after the December 2016 accident (Tr. 11/16/22, p237-238). Ms. Bullington's fifth child, Madelyn, was born in July of 2019 (Tr. 11/16/22, p235-237). Her sixth child, daughter Danica, was born in February of 2022 (Tr. 11/16/22, p235). Regarding her most recent two pregnancies, Ms. Bullington testified as follows:

. . . [Y]ou know, our family grew and we both came from families of four. We thought that was our family. And we

**were definitely preventing** with the fifth baby and then she came along and then again with the sixth baby. And then I was like, "I'm done."

(Tr. 11/16/22, p218) (emphasis supplied).

Regarding the impact of her pregnancies and breastfeeding on her medical treatment, Ms. Bullington testified that Ms. Bullington testified that she could not do the stem cell injections recommended by Dr. Donner in May of 2017 because she was nursing Cash at that time (Tr. 11/16/22, p245-246). She also stated that after Dr. Ghazi recommended cervical facet injections in June of 2018, she wanted to receive those injections, but that her breastfeeding, and her fifth pregnancy, prevented her from doing so (Tr. 11/16/22, p219). Her sixth pregnancy, in May of 2021, also impeded her ability to receive treatment (Tr. 11/16/22, p235).

There was no evidence or testimony at trial from any medical provider indicating that the child-related delays in obtaining medical treatment had any impact on Ms. Bullington's recovery from her accident-related injuries. Rather, as set forth in their medical records (Ex. 5, p568, 618, 626), both Dr. Donner and Dr. Ghazi were opposed to steroid injections while Ms. Bullington was pregnant or nursing, and during their trial testimony neither Dr. Donner (Tr. 11/15/22, p7-94) nor Dr. Aschberger (Tr. 11/15/22, p114-241) indicated that the delay in treatment had any impact on Ms. Bullington's recovery. Further, it was undisputed that Ms.

Bullington was very diligent about attending her chiropractic and physical therapy appointments, as she was trying to recover from her accident-related injuries, and that treatment did not require the ingestion of drugs that could hurt her children (Tr. 11/16/22, p217; Ex. 4, p337-544).<sup>1</sup>

Thereafter, during the instruction conference, Ms. Bullington's counsel objected to the failure-to-mitigate instruction (Tr. 11/17/22, p37-40). In support of this objection, counsel argued that there was no evidence that the treatment delays related to Ms. Bullington's pregnancies and nursing had a negative impact upon her recovery (Tr. 11/17/22, p37-40). Overruling this objection, the district court state as follows:

[Ms. Bullington] was also told by Dr. Donner that he wouldn't do any treatment on her. [A]s long as she was pregnant and nursing, it was a waste of her money to come to him.

And so, anyway, there's an argument. I'm not addressing the benefits or disadvantages of having children at all, but the fact is Ms. Bullington became pregnant twice more after the

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<sup>1</sup> As set forth above, Dr. Springfield provided chiropractic care to Ms. Bullington on a regular basis, several times per month, through August of 2017 (Ex. 4, p348-381), and on a monthly basis thereafter, through August 2022 (Ex. 4, p382-439). And, at Compcare, Ms. Bullington received accident-related physical therapy, several times per week, through February of 2017 (Ex. 4, p440-467). Thereafter, she continued to receive physical therapy once per week, through August of 2017 (Ex. 4, p468-512), and on a periodic basis thereafter (Ex 4, p513-544).

accident and that status and the fact that she was both pregnant and nursing delayed her treatment in certain areas.

And so those -- that was a voluntary decision on her part, and it could be argued by the defense that that [delay was] caused due to failure to mitigate damages resulting from this car accident.

So based on that, that's all that's necessary, some evidence, and the defense meets that standard.

(Tr. 11/17/22, p41). Thereafter, the district court instructed the jury regarding the affirmative defense of failure to mitigate (CF, p3108).

In her closing argument, defense counsel asked the jury to penalize Ms. Bullington, and reduce its compensation award, because she had given birth to three children after the accident:

But now, how many years later, Ms. Bullington stands before you saying she needs all this treatment, may need surgery, Ms. Barela needs to pay for it. Not to be disrespectful, but for treatment she has not gotten that she claims was due to her choice to have additional children and breastfeeding. (Tr. 11/18/22, p53).

In its order denying Ms. Bullington's motion for a new trial, the district court reiterated its prior reasoning regarding the failure to mitigate, stating that:

Finally, it must be noted that the elephant in the room was the fact Plaintiff delivered her fourth child following the collision, then had two more children. While Plaintiff was claiming that she was experiencing ongoing and debilitating pain and impairment from the collision in the six years since, Plaintiff became pregnant twice more and delivered two healthy babies. Plaintiff now has six children. This is noteworthy for

several reasons. First, Plaintiff avoided certain treatments after the collision because she was pregnant or nursing. A reasonable juror might conclude that Plaintiff did not pursue her own recovery in a reasonable manner . . .

(CF, p3647).

C. Legal Argument

Failure to mitigate damages is an affirmative defense which must be proven by the defendant. *Powell v. Brady*, 30 Colo. App. 406, 412, 496 P.2d 328, 332 (1972); *Billings v. Boercker*, 648 P.2d 172, 173 (Colo. App. 1982). In order for the issue to be submitted to the jury there must be competent evidence to the effect that plaintiff failed to take reasonable efforts to mitigate her damages. *Powell v. Brady*, *supra*, 496 P.2d at 332.

Here, the district court found that the failure-to-mitigate instruction should be given to the jury because there was evidence in the record that “Ms. Bullington became pregnant twice more after the accident and . . . that status and the fact that she was both pregnant and nursing delayed her treatment in certain areas.” (Tr. 11/17/22, p41).

It is not clear, from the district court’s ruling, whether the court believed that Ms. Bullington’s potentially unreasonable conduct consisted of getting pregnant, staying pregnant, nursing her baby, or some combination of these actions. Regardless, the district court’s rationale was fatally flawed.

If the potentially unreasonable conduct was the fact that Ms. Bullington got pregnant, rather than using birth control, this ruling is belied by Ms. Bullington's trial testimony, in which she stated that "**we were definitely preventing** with the fifth baby and then she came along and then again with the sixth baby." (Tr. 11/16/22, p218) (emphasis supplied). This testimony indicates that Ms. Bullington was utilizing birth control methods prior to the birth of her fifth and sixth children, but that the birth control methods were ineffective. No birth control method is 100% ineffective, and an unintended pregnancy while using contraception is not evidence of unreasonable care. *See* Centers for Disease Control, *Contraception*, <https://www.cdc.gov/reproductivehealth/contraception/index.htm> (failure rate for oral contraception is 7%). Further, the decision whether to use birth control is a personal decision that should not be subject to second-guessing by a judge or jury. *See People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 369 (Colo. 1985) (contraception is "among the decisions that an individual may make without unjustified government interference"); *accord, People v. Rosburg*, 805 P.2d 432, 435 (Colo. 1991).

If the potentially unreasonable conduct that the district court was referring to was Ms. Bullington's decision to give birth to, and breastfeed, her baby, this ruling is also inconsistent with Colorado law. Ms. Bullington's decision to carry her

pregnancies to full term was not unreasonable, as pregnant women are protected from discrimination under the Colorado Constitution. *Colorado C.R. Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1361 (Colo. 1988) (under the Equal Rights Amendment to the Colorado Constitution, Colo. Const. art. II, § 29, employer cannot provide health insurance for complications of pregnancy and exclude coverage for expenses incurred during a normal pregnancy). Further, although not addressed by the Colorado Appellate Courts, numerous State courts in this region, and elsewhere, have held that a pregnant plaintiff need not mitigate damages by resorting to abortion or adoption. *See, e.g., Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 805 P.2d 603 (N.M. 1991) (Parents bringing medical malpractice action not required to mitigate damages by either having abortion or placing child up for adoption; neither alternative is “ordinary or reasonable measure” within meaning of law relating to mitigation of damages.); *Morris v. Sanchez*, 1987 OK 110, 746 P.2d 184 (OK 1987) (same); *Univ. of Arizona Health Scis. Ctr. v. Superior Ct. of State In & For Maricopa Cnty.*, 136 Ariz. 579, 667 P.2d 1294 (1983) (in wrongful pregnancy action, parents should not be forced to mitigate damages by choosing abortion or adoption); *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988) (same).

Finally, if the district court’s rationale was that Ms. Bullington’s decision to breastfeed was unreasonable, this ruling was also legally infirm, as being contrary

to Colorado public policy, which provides, at C.R.S. § 8-1.3.5-102, that “[n]ursing is a basic, normal, and important act of nurturing that should be encouraged in the interests of maternal and infant health.”

For the reasons stated above, a failure-to-mitigate damages defense cannot be based upon a litigant’s act of getting pregnant, staying pregnant, of nursing her baby, or any combination of these acts. Therefore, the district court erred in instructing the jury regarding the affirmative defense of mitigation of damages.

**II. THE JURY VERDICT AWARDING \$23,638.00 IN ECONOMIC DAMAGES, BUT DECLINING TO AWARD ANY COMPENSATION FOR NONECONOMIC DAMAGES, REFLECTS THAT THE JURY FAILED TO FOLLOW THE TRIAL COURT’S INSTRUCTIONS, AND THAT A NEW TRIAL ON THE ISSUE OF DAMAGES IS WARRANTED**

A. Standard of Review

On December 9, 2022, Plaintiff filed a timely motion for new trial on the issue of damages, in which she argued that the noneconomic damage award was inadequate as a matter of law (CF, p3235-3241). On January 12, 2023, the district court denied the motion for new trial (CF, p3644-3648). A reviewing court should overturn a jury verdict on damages where the undisputed evidence shows that the jury failed to follow the trial court’s instructions on damages. *Martinez v. Shapland*, 833 P.2d 837, 839 (Colo. App. 1992).

## B. Factual Background

As set forth above, following an examination of Ms. Bullington in December of 2020, Dr. Aschberger wrote an IME report, and multiple addendums, relating to Ms. Bullington. With regard to the post-accident treatment that Ms. Bullington received for her neck and back pain, Dr. Aschberger acknowledged that she suffered such pain, but opined that Ms. Bullington was back to her pre-accident status as of February 2017 (Ex. L, p129). However, Dr. Aschberger's opinions relating to Ms. Bullington's neck and back pain did not apply to her headaches. During his initial examination of Ms. Bullington, she told Dr. Aschberger that she suffered from chronic headaches (Ex. I, p112), and he found that "[s]he is tender at the upper cervical facets, with radiation to the occiput and symptoms replicating her headache." (Ex. I, p112). Dr. Aschberger diagnosed Ms. Bullington as suffering from cervicogenic headaches, and opined that her "[h]eadache symptomatology does not appear to be pre-existing." (Ex. I, p118; Ex. J, p123). In his final addendum report, he stated further that, in contrast with her neck and back pain, all of the post-accident treatment that Ms. Bullington had received for her headache symptomatology was directly related to the accident. (Ex. L, p129). He opined further that additional treatment, including the cervical facet injections recommended by Dr. Ghazi, would be appropriate (Ex. L, p129).

Dr. Aschberger testified that Ms. Bullington had no prior history of headaches. (Tr. 11/15/22, p122). He testified that when he met with Ms. Bullington, she complained of accident-related headaches, and that his examination confirmed that she was suffering from accident related cervicogenic headaches (Tr. 11/15/22, p143-144). He explained that [t]he facet joints which are the . . . joints within the spine on . . . both sides, they have a referral pattern when irritated from C2 through C4 for occipital distribution.” (Tr. 11/15/22, p131). He explained further that a patient who suffers a neck injury “can have headache from a soft tissue [but that Ms. Bullington’s] symptoms were . . . more specific for the facets.” (Tr. 11/15/22, p132). Dr. Aschberger testified that he, like Dr. Ghazi, was recommending cervical facet injections to treat Ms. Bullington’s headaches. (Tr. 11/15/22, p161).

Dr. Aschberger’s opinion that Ms. Bullington was suffering from cervicogenic headaches was consistent with the testimony of Dr. Donner, who testified that Ms. Bullington was suffering from headaches which emanated from her cervical facets (Tr. 11/15/22, p39-42), as well as the testimony of Dr. Weatherhogg, who testified that her “number one diagnosis [of Ms. Bullington] was chronic and cervicogenic daily headaches and posterior neck and lower back pain since rear-ended . . . on December 18th of 2016.” (Tr. 11/16/22, p69). The

opinion of Dr. Aschberger was also consistent with the report issued by Dr. Ghazi, that was admitted into evidence, and which stated that Ms. Bullington was suffering from “severe occipital headaches” (Ex. 5, p614), for which he recommended cervical facet injections (Ex. 5, p614-619).

In the final charge, the district court instructed the jury that, if proven, the jury should award noneconomic damages for “physical and mental pain and suffering, inconvenience, emotional distress, and loss of quality of life.” (CF, p3106).

In his initial closing argument, Ms. Bullington’s counsel stated that “when [Dr. Aschberger] touched her, he admitted that the pain caused a cervicogenic headache,” and asked the jury to award economic and noneconomic damages for this condition (Tr. 11/18/2022, p29). In the Defendant’s closing argument, defense counsel acknowledged that Dr. Aschberger testified that “he might attribute to the accident complaints of headache” (Tr. 11/18/2022, p59),<sup>2</sup> but asked the jury to award damages only for Ms. Bullington’s neck and back pain, and only through February 2017, when she allegedly returned to baseline. Defense counsel acknowledged that Ms. Bullington was entitled to both economic and noneconomic

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<sup>2</sup> Of course, Dr. Aschberger did not use the word “might,” and instead testified confidently that Ms. Bullington’s headaches were accident-related.

damages, which she computed at \$10,208.80 and \$15,000 respectively (Tr. 11/18/22, p61-64). During his rebuttal closing argument, Ms. Bullington's counsel reminded the jury that "[y]ou have the records in that book that show headaches the day of the crash." (Tr. 11/18/22, p66).

At the conclusion of the trial, the jury returned a verdict in favor of Ms. Bullington, awarding her \$23,638 for economic damages, zero for noneconomic damages, and zero for physical impairment (Tr. 11/18/22, p87-88, CF, p3184-3185).

Following the trial, Plaintiff's counsel filed a motion for new trial on the issue of damages (CF, p3235-3241), arguing that "the unrebutted evidence [at trial] established that [Ms. Bullington] suffered injuries that at a minimum exacerbated pain for several months and that she suffered from ongoing cervicogenic headaches that continued through her examination by Dr. Aschberger several years later in [December] 2020" (CF, p3239). In response, defense counsel argued that Ms. Aschberger's neck and back pain resolved by January 30, 2017. (CF, p3246-3252). With regard to Ms. Bullington's chronic headaches, defense counsel argued that Ms. Bullington failed to mitigate her damages, by timely obtaining cervical injections. (Id.). Therefore, according to defense counsel, the jury award of \$23,638.00 for economic damages, but zero for noneconomic damages, was

factually and legally justified (CF, p3248-3249). In her reply, Ms. Bullington argued that the amount billed for her neck and back treatment through January 30, 2017, was much less than \$23,638 (as set forth above, defense counsel computed the figure at \$10,208.80 during her closing argument), and that therefore the jury award necessarily reflected some economic compensation for her headaches, that should have been accompanied by noneconomic damages for this same injury (CF, p3635-3640).

In its January 12, 2023, order denying the motion for new trial (CF, p3644-3648), the district court ignored Dr. Aschberger's testimony that Ms. Bullington's chronic headaches were accident-related and his recommendation for cervical facet injections to treat those headaches (Tr. 11/15/22, p143-144, 161), and instead found, incorrectly, that "it was Dr. Aschberger's testimony that treatment after January 30, 2017 was not reasonable, necessary, or related to the collision." (CF, p3646). In addition, the district court found that Ms. Bullington had arguably failed to mitigate her damages, by having two more children after the accident, and breastfeeding them, thereby preventing her from receiving the medical treatment that she needed. (CF, p3647).

### C. Argument

Under Colorado case law, where the defense admits that an injured plaintiff endured some pain and suffering, and the jury awards economic damages for medical bills, a noneconomic-damage award of zero cannot stand. In *Denton v. Navaratil*, 459 P.2d 761 (Colo. 1969), the Supreme Court ordered a new trial on the issue of damages where “the testimony as to injury resulting from the accident and as to pain and disability was corroborated not only by the plaintiff’s orthopedic surgeon, but by another orthopedist called to the stand by the defendant.”

Thereafter, in *Martinez v. Shapland*, 833 P.2d 837 (Colo. App. 1992), this Court granted a new trial on the issue of damages where experts on both sides testified that Plaintiff had suffered temporomandibular joint syndrome (“TMJ”) in the subject accident, but the jury awarded zero for noneconomic damages. This Court reasoned that “[g]iven the undisputed evidence from witnesses for both parties regarding the existence and nature of the TMJ injury, the jury’s failure to award any damages for non-economic losses, particularly pain and suffering, renders the verdict inadequate as a matter of law”. *Id.* at 839. The Court stated further that “the inadequacy of this portion of the verdict indicates that the jury failed to follow the court’s instructions on damages.” *Id.*

In 2004, in *Peterson v. Tadolini*, 97 P.3d 359 (Colo. App. 2004), the defendant testified that the plaintiff was “in obvious pain” immediately after the motor vehicle accident, and the jury awarded compensation for her medical expenses, but declined to award any compensation for noneconomic damages. Reversing and remanding for a new trial, this Court found that the award of actual damages was “inconsistent with the jury's award of zero noneconomic damages where the record contains undisputed evidence of plaintiff's pain and suffering and loss of enjoyment of life.” In reaching that holding, this Court distinguished *Lee's Mobile Wash v. Campbell*, 853 P.2d 1140 (Colo. 1993), in which “both the nature and extent of the plaintiff's injuries were hotly disputed at trial.” *Peterson, supra*, 97 P.3d at 362.

Finally, in *Gonzales v. Windlan*, 2014 COA 176, ¶ 40, 411 P.3d 878, a panel of this Court found that the jury's award of zero noneconomic damages was not inconsistent with its economic damage award, because “the jury could have determined that Gonzales experienced only a minor, temporary injury that did not cause compensable pain and suffering.” However, this Court also recognized that *Martinez* and *Peterson, supra*, were still good law, and that a noneconomic damage award of zero cannot stand when the jury awards economic damages, and “undisputed evidence from both parties show[s] that the plaintiff suffered

significant injury and pain as a result of an accident.” *Gonzales v. Windlan*, 2014 COA 176 at ¶ 43.

Here, as in the cases cited above, the jury awarded economic damages for almost \$24,000 in medical bills, but declined to award any sum for pain and suffering or other noneconomic damages. And, as in those cases, this jury finding is inconsistent not only with the testimony of Plaintiff’s experts and lay witnesses, but also with the testimony of the Defendant’s own retained expert, Dr. Aschberger, who stated that Ms. Bullington likely suffered a cervical facet injury that caused chronic cervicogenic headaches. It was also inconsistent with defense counsel’s admission, in closing argument, that as a result of the accident Plaintiff had incurred noneconomic damages in the amount of at least \$15,000. Therefore, under the authority of *Denton, Martinez, Peterson and Gonzales, supra*, Plaintiff asks this Court to find that the jury verdict was inadequate as a matter of law due to the jury’s failure to follow the district court’s instruction on economic damages, to reverse the judgment in this case, and to remand this matter for a new trial on the issue of damages.

### III. **THE DISTRICT COURT ERRED IN STRIKING DR. DOTY AS A WITNESS**

#### A. Standard of Review

Ms. Bullington timely objected, on multiple occasions, to Defendant's motion to strike her expert witness, Dr. Catherine Doty (CF, pp431-445, 1043-1057). The district court overruled these objections and struck the witness (CF, p2204-2213). This Court reviews a trial court's decision to exclude witness testimony for an abuse of discretion. *People v. Gwinn*, 2018 COA 130, ¶ 6, 428 P.3d 727, 731.

#### B. Factual Background

On December 14, 2020, prior to the initial trial date of April 12, 2021, Plaintiff filed her expert disclosures pursuant to C.R.C.P. 26(a)(2) (CF, 218-239). In those expert disclosures, Plaintiff endorsed Doris Shriver, a life care planner, to testify consistently with her written reports (CF, pp240-257, 258-277).

On January 6, 2022, Plaintiff filed a motion to continue the trial, on the grounds that Ms. Shriver was suffering from medical issues that prevented her from testifying at trial. On January 7, 2022, the district court granted Plaintiff's motion, writing that "plaintiff has 90 days within which to disclose a new expert witness," and that the defense would then have 60 days to disclose any responsive expert witness (CF, p278).

On April 6, 2022, Plaintiff filed a supplemental expert disclosure, endorsing retained expert Catherine J. Doty, MD, as a life care planner (CF, p279-281). In conjunction with this disclosure, Plaintiff's counsel filed Dr. Doty's expert report, which set forth Ms. Bullington's accident-related medical conditions, and the cost associated with the future medical treatment needed to treat those conditions (CF, p282-410). On May 27, 2022, Dr. John Aschberger, a retained defense expert submitted a report challenging Dr. Doty's diagnoses and treatment recommendations (CF, p479-481).

On May 10, 2022, Defendant moved to strike Dr. Doty's opinions, arguing that, in comparison with Ms. Shriver's life care plan, Dr. Doty made numerous new diagnoses and offered new opinions regarding the future care of Ms. Bullington. (CF, p187-204). On June 1, 2022, in response to the motion to strike, Plaintiff argued that Dr. Doty was required to prepare a new expert life care plan utilizing her own judgment, education, and expertise. (CF, p431-445). In addition, Plaintiff argued that defendant was not prejudiced by the new opinions, if any, of Dr. Doty, because Defendant had designated a responsive expert, Dr. John Aschberger, and had submitted a responsive report, to counter the opinions of Dr. Doty. (CF, p431-445; 479-481). On July 28, 2022, the district court issued an order (CF, p636-639), in which it stated that it was improper for Ms. Bullington to

replace an expert in life care planning with an expert in both life care planning and medicine, and that it was not possible to excise Dr. Doty's improper medical opinions from the life care plan that she prepared (CF, p638). The district court did not strike Dr. Doty's report, and instead permitted Plaintiff, within 14 days, to disclose a second report that excluded any independent medical opinions (CF, p639).

On August 18, 2022, Plaintiff timely submitted a supplemental disclosure of Dr. Doty (CF, p640-642), and a revised expert report (CF, p643-766). Although Defendant had 60 days to perfect any expert response to Dr. Doty's revised report, on September 1, 2022, defense counsel filed a renewed motion to strike, raising the same objections that were raised in her initial motion (CF, p626-635). In response, Plaintiff argued that the revised report had sufficiently excised Dr. Doty's medical diagnoses, and that Defendant was not prejudiced by the revised report (CF, 1043-1057).

On October 31, 2022, the district court granted the Defendant's motion to strike (CF, p2204-2213), ordering that:

As one can see, Dr. Doty provides medical opinions, which she may be qualified to offer as a medical doctor, but which are outside the expertise of a life care planner . . .

For these reasons, the Court is compelled to conclude that Dr. Doty's life care plan not only contains impermissible

medical opinions but that the entire report is based on Dr. Doty's application of her skills and expertise as a physician . . .

The Court concludes that striking Dr. Doty's designation as Plaintiff's life care planner is the only practical outcome . . .

[T]he prejudice to Defendant is significant. Defendant should only be required to cross-examine and to rebut the testimony from a life care planner. The Court granted a prior trial continuance for the explicit purpose of enabling Plaintiff to retain a new life care planner, not to allow Plaintiff to retain a life care planner who could also provide medical opinion testimony. It is prejudicial to Defendant to allow the life care planner to additionally offer medical opinion testimony . . .

On November 7, 2022, Plaintiff requested reconsideration of the order striking Dr. Doty (CF, p2316-2320), and also submitted a second revised life care plan (CF, p2321-2449). In that motion, Plaintiff proposed that "Dr. Doty be permitted to testify at trial in a limited capacity regarding only the specific future treatment recommendations identified in her September 26, 2022, amended report that stem directly from the recommendations for future treatment and medications taken from Ms. Bullington's medical records and treating providers." (CF, p2318).

On the first day of trial, prior to empaneling the jury, a hearing was held on the motion to reconsider (Tr. 11/14/22, p161-180). During that hearing, the district court remarked that Dr. Doty's second revised report also contained her own medical diagnoses, rather than being limited to the opinions and diagnoses of Ms.

Bullington's treating medical providers (Tr. 11/14/22, p 169-170). The following colloquy then occurred:

**District Court:** Do you think the defense might be prejudiced?

**Plaintiff's Counsel:** Honestly, no. They have a medical doctor responding to [Dr. Doty's] medical report . . . Dr. Aschberger was their only response to that. They had Dr. Aschberger respond to this initial report back in May, so I have a difficulty assessing the actual prejudice when another medical doctor is responding to the life care plan.

And that is kind of an overarching issue . . . Dr. Doty is -- she may have used some of her own background to recognize and pull those [diagnoses] out of the records that Ms. Shriver probably lacked, but however, no, I have a difficult time assessing the level of prejudice . . . when [a] medical doctor responded to this life care plan.

(Tr. 11/14/22, p171-172). Defense counsel responded that the admission of Dr. Doty's professional medical opinions would be unduly prejudicial to the defense (Tr. 11/14/22, p172-174). In reply, Plaintiff's counsel stated: [T]he fact remains that the initial finding of prejudice is based on their not having the ability to respond to Dr. Doty's medical diagnoses. They had 60 days to respond. They had a medical doctor respond in the life care review. If he couldn't put together a response in 60 days, that's not prejudice we created." (Tr. 11/14/22, p175-176). Reiterating its prior findings relating to the impropriety of Dr. Doty's professional medical opinions, but without making a separate finding regarding the issue of

prejudice, the district court denied the motion to reconsider (Tr. 11/14/22, p176-180).

### C. Legal Argument

With regard to the admission of late-disclosed evidence, the applicable standard is governed by C.R.C.P. 37(c)(1). That Civil Rule provides that “[a] party that without substantial justification fails to disclose information required by C.R.C.P. Rules 26(a) or 26(e) shall not be permitted to present any evidence not so disclosed at trial . . . unless such failure has not caused and will not cause significant harm.” Under this standard, exclusion of evidence is not justified unless there is “significant harm caused by the late disclosure.”

As to the issue of harm, the applicable standard, set forth in *Todd v. Bear Valley Village Apartments*, 980 P.2d 973. 979 (Colo. 1999), is “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.” The Colorado Supreme Court has held, on multiple occasions, that witness preclusion constitutes an abuse of discretion in the absence of harm to the opposing party. *See Berry v. Keltner, supra*, 208 P.3d at 250 (finding no harm, and an abuse of discretion in excluding expert witness, where “Defendant will have ample opportunity to defend against Dr. Lewis's testimony.”); *Cook v. Fernandez-Rocha*,

168 P.3d 505, 506 (Colo. 2007) (finding a “harmless failure to comply with the disclosure deadlines in C.R.C.P. 26(a)(2). At the status conference, Farmers' counsel admitted that she already knew whom Cook intended to call at trial.”), *Todd v. Bear Valley, supra* (plaintiff's failure to comply with expert disclosure deadline was harmless to defendant, and thus exclusion of expert witness was an abuse of discretion).

Here, the district court's assessment of Dr. Doty's report was narrowly focused on the inclusion of Dr. Doty's own professional opinions related to Ms. Bullington's medical diagnoses, and failed to adequately consider whether the Defendant had been provided with a full and fair opportunity to rebut those opinions. Based upon the record recited above, the Defendant *was* provided such an opportunity, as shown by the fact that the defense had received an expert report, from its retained expert, Dr. Aschberger, challenging the diagnoses and treatment recommendations made by Dr. Doty. Furthermore, the district court's January 7, 2022, order continuing the trial did not preclude Plaintiff from disclosing a physician life care planner, rather than a non-physician life care planner, and also gave the defense 60 additional days to disclose its own responsive expert. Plaintiff should not have been held responsible for defense counsel's decision to expend her energy filing a motion to strike, rather than ensuring that Dr. Doty's expert

opinions were fully addressed in a responsive expert disclosure. Under these circumstances, the district court abused its discretion in striking Dr. Doty as a witness.

### **CONCLUSION**

Wherefore, for all of the foregoing reasons, Plaintiff-Appellant ask this Court to reverse the order of judgment, and to remand this case for a retrial on the merits.

Dated this 4<sup>th</sup> day of August, 2023.

**THE VIORST LAW OFFICES, P.C.**

*[Original signature on file at Viorst Law Offices, P.C.]*

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*/s/ Anthony Viorst*

Anthony Viorst, #18508

ATTORNEYS FOR PLAINTIFF-  
APPELLANT

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 4<sup>th</sup> day of August, 2023, the foregoing **PLAINTIFF-APPELLANT’S OPENING BRIEF ON APPEAL** was served via Colorado Courts E-filing system and/or first-class mail, postage prepaid, addressed to the following:

Elaine K. Stafford, Esq.  
Justin A. Carpenter, Esq.  
Lambdin & Chaney, LLP  
4949 S. Syracuse Street, Suite 600  
Denver, CO 80237

*[Original signature on file at Viorst Law Offices, P.C.]*

*/s/ Michelle Spadavecchia*