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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203 _____ Weld County District Court Hon. Shannon D. Lyons, District Court Judge 2019CV30947 _____ **Plaintiff-Appellant:** ASHLEY BULLINGTON, **v.** **Defendant-Appellee:** COURTNEY BARELA _____	
Attorneys for Defendant-Appellee Courtney Barela: Elaine K. Stafford, #17879 J. Park Jennings, #51210 Lambdin & Chaney, LLP 4949 S. Syracuse Street, Suite 600 Denver, Colorado 80237 Telephone:(303) 799-8889 Facsimile: (303) 799-3700 E-mail: estafford@lclaw.net pjennings@lclaw.net	**COURT USE ONLY** _____ Court of Appeals Case Number: 2023CA364

ANSWER BRIEF BY APPELLEE COURTNEY BARELA

CERTIFICATION PURSUANT TO C.A.R. 28 AND C.A.R. 32

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g).
Choose one:
☒ Contains 9,214 words (less than 9,500 words), exclusive of captions, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, as measured by Microsoft Word.
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The brief complies with C.A.R. 28(b).
☐ 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.

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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.

☒ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ *Elaine K. Stafford*
Elaine K. Stafford
J. Park Jennings
Attorneys for Courtney Barela

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Appellee Courtney Barela ("Defendant"), through counsel Lambdin & Chaney, LLP, submits her Answer Brief to the appeal of Appellant Ashley Bullington ("Plaintiff); the designations of Defendant and Plaintiff are maintained on appeal to simplify review.

I. ISSUES PRESENTED FOR REVIEW

Defendant supplements and clarifies the statement of issues as follows:

I. Defendant disagrees. The issue is whether there was the minimum required amount of evidence to create a dispute of facts requiring that the jury be allowed to decide the "failure to mitigate" defense and/or that Plaintiff failed to meet her burden of proof of causation, and then if there was any evidence in the record from which the jury could have reached its verdict.

II. Defendant disagrees. The issue is a question of the sufficiency of the evidence, and whether there was any evidence by which the jury could have reached its verdict that Plaintiff failed to meet her burden of proof of demonstrating causation and damages by a preponderance of the evidence.

III. Defendant disagrees. The issue is whether the District Court abused its discretion in excluding the expert opinion testimony of Dr. Catherine J. Doty.

II. STATEMENT OF THE FACTS OF THE CASE

Plaintiff's objections are a "sufficiency of the evidence" appeal, as she claims the jury should have been persuaded by her evidence that her claimed damages were caused by the car accident in question. The jury heard all the facts and judged Plaintiff's repeatedly-contradicted and inconsistent evidence as non-credible and did not find in her favor on the damages issues. Plaintiff's disagreement with the jury's weighing of the evidence is the true substance of this appeal, which should be decided on a sufficiency of the evidence standard.

A. Plaintiff's Doctor/Life Care Planner Was Struck Due to Plaintiff's Disclosure Abuse and Violation of Repeated Court Orders, As Well As Disclosure of New Medical Opinions After the Close of Expert Disclosures.

Plaintiff claimed extreme and extensive injuries, claiming $70,000 in incurred medical expenses and over $1,000,000 in future medical care [Trial Day 1, p. 220:15-18]. The jury awarded under $24,000 for past medical expenses and no damages for future impairment or pain and suffering.

When Plaintiff's original intended life care planner became unavailable, the District Court allowed Plaintiff repeated and substantial extensions to provide a replacement life care plan report. [Record on Appeal, Court File 000614-617]

Plaintiff did not comply. Instead, Plaintiff tried to offer a doctor-and-lifecare-planner combination expert who, in every report submitted to the Court, offered new medical injury and treatment diagnoses that went beyond the allowed scope of a revised life care plan. As the District Court discussed with Plaintiff's counsel in ruling on Plaintiff's motion for reconsideration at the first day of trial: "MR. BONAVITA: Well, these are not her medical opinions. These are the medical opinions of Ms. Bullington's providers that she transcribed into her life care plan. THE COURT: Do you not see where she says [*Ed: in the report*], "My medical opinion is" –" [Trial Day 1, p. 169:4-16] As the District Court found, Plaintiff was repeatedly trying to improperly shoehorn in new medical diagnoses and opinions. [Trial Day 1, p. 178:13-20 ("…I can't change the fact that the plaintiff is attempting to gain an unfair advantage, which is to elicit both life care opinions and new medical opinions through the same witness.")]

Plaintiff's counsel's tactical choices to try to back-door in additional improper and untimely opinions (which could not have been rebutted by Defendant due to the lack of proper disclosure) under the guise of a "life care plan" were repeatedly rebuffed by the District Court, who still allowed Plaintiff additional and numerous opportunities to disclose a compliant life care plan opinion. Plaintiff's counsel's ill-

advised choice to repeatedly play tactical games to try to expand the claimed medical injuries instead of sticking to the District Court's permitted scope of providing a new life care plan is the sole cause of the exclusion of Dr. Doty. Plaintiff's repeated attempts to gain an unfair advantage by deliberately ignoring multiple rulings from the District Court trying to obtain Plaintiff's compliance should not be rewarded. As the District Court stated, Plaintiff "had an opportunity to fix the way she did things and to write a report as a life care planner only. But that opportunity was wasted." [Trial Day 1, p. 170:13-16] As the District Court clearly and patiently explained, Dr. Doty was struck because after repeated opportunities to cure, Plaintiff still kept inserting new and novel independent medical opinions in the "life care" plan report by Dr. Doty. [Trial Day 1, p. 178:10-180:21]

Moreover, the jury awarded Plaintiff zero dollars for future damages (including zero damages for permanent impairment), making the exclusion of the life care planner moot. The verdict shows that Plaintiff failed to meet her burden of proof of showing by a preponderance of the evidence to convince the jury that any injuries even existed that would require future care. Since the jury found that there were no future damages, a "pricing expert" to provide a proposed sum for the future medical treatment and care for those non-existent injuries was moot. Any assigned

error (and to be clear, there was no error) would thus be harmless: the price for non-existent damages is a nullity.

B. There Was Ample Evidence Presented to the Jury Sufficient to Sustain Their Weighing of the Evidence and Finding That Plaintiff's Claims of Pain, Suffering, Injury, and Impairment Were Exaggerations and/or Not Caused by the Accident

Here, there was ample evidentiary basis for the verdict because Plaintiff's claims were externally and internally contradicted, Plaintiff's testimony was not found to be credible, and Defendant's expert (whom Plaintiff called in her case-in-chief) countered all material aspects of Plaintiff claims, as well as Plaintiff's own experts' contradictory testimony. Given the evidence presented at trial, the jury had ample *proof* and *evidence* that Plaintiff's complaints were not causally related to the accident in question, either because they were continuations of pre-existing conditions, including degenerative spinal conditions that had existed for years, were not-credible subjective reporting of pain, or they were conditions that were not sufficiently proven by a preponderance of evidence to have been caused by the accident (*e.g.*, Plaintiff's headaches, which did not appear for a month after the car accident).

The key takeaway and theme of the case, as presented to the jury by the defense, was from Plaintiff's own "non-retained" doctor, Dr. Donner was that "life is injury." [Trial Day 2, p. 108:11-20]. As Dr. Donner testified: "Q. And in other words, there are other ways that things can happen within a person's body, not just a motor vehicle accident? A. Yes. Q. And there are ways to treat those things, but they're not necessarily due to an accident, correct? A. Correct." [Trial Day 2, p. 108:14-20] As discussed in granular detail below, the jury repeatedly heard that Plaintiff's injuries were not and could not have been caused by the motor vehicle accident in question. Since there was evidence supporting the verdict, this Court should decline Plaintiff's request to re-weigh the evidence and credibility determinations of the jury, and uphold the verdict and judgment entered.

1. **Evidence Supports the Jury's Verdict That Plaintiff's Complaints of Headaches, Neck Pain, Back Pain, and Related "Soft Tissues" Muscle Pain Were Not Credible as They Existed Before the Subject Motor Vehicle Accident**

Plaintiff argues that "[t]he undisputed evidence – including testimony of Defendant's Rule 35 examiner – established that Ms. Bullington suffered ongoing headaches that would require cervical injections and that she suffered pain and suffering and underwent treatment that was reasonable and related to the crash for a

significant period; that this alleged undisputed evidence establishes that the jury's award of zero non-economic damages against a significant award for economic damages is inadequate as a matter of law and clear indication that the jury failed to follow the Court's instructions." [Record on Appeal, Court File, 003237.] However, Plaintiff's wording is deceptive. There was *evidence* that Plaintiff had headaches; however, the *proof* that the jury found by a preponderance of the evidence was that the headaches were not caused by the accident, either because they believed the evidence that the headaches (and the other nonobjective soft-tissue symptoms allegedly caused by the accident, such as neck and low back pain) were pre-existing, or the evidence that the headaches did not start until too long after the car accident to be causally related, or simply did not believe Plaintiff's testimony about the existence of subjective non-verifiable complaints that are a common part of everyday life. It was purely a jury's determination of the evidence and credibility of witnesses.

Plaintiff was not credible in her testimony about pre-existing neck, back, and headache complaints and was inconsistent in her testimony about pursuing her medical care injections; therefore, in accordance with the Court's jury instructions and law, the jury was entitled to discount and/or disbelieve her testimony as being

"false in one, false in all." [Trial Day 2, p. 92:2-25; Trial Day 2, p. 102:1-24; Trial Day 3, p. 246:1-7; Trial Day 3, p. 246:20-247:14; Trial Day 2, p. 39:7-12].

To begin with a recitation of the evidence that the jury had to sustain their verdict, they heard that Plaintiff had degenerative spinal changes shown in a May 3, 2017 MRI that were not acutely caused (*i.e.,* not caused by this accident) and which would take years to develop; that there was no compression or impingement in Plaintiff's neck/cervical spine in April or May of 2017; and that the May 2017 MRI showed no other anomalies in her spine. [Trial Day 2, p. 95:11-22; Trial Day 5, p. 52:18-25]. As such, the jury had contravening evidence to believe that Plaintiff's neck pain, and thus her "cervicogenic headaches" resulting from her neck pain, were not causally linked to the motor vehicle accident.

There was also evidence presented to the jury that Plaintiff's complaints of lumbar pain, listhesis, and instability were not causally related to the accident for the same reason: an X-ray early in her post-accident treatment of her lumbar spine showed no such conditions. [Trial Day 2, p. 96:10-24]. Then despite the contravening proof of no injury immediately after the accident, Plaintiff's treating doctors (at least one of which was her employer) then claimed that such spinal injuries were caused by the car accident. [Trial Day 3, p. 71-72] Clearly, the jury

was convinced by these X-rays and testimony that Plaintiff had NOT proved by a preponderance of the evidence that her lumbar/spinal complaints were caused by the car accident: they did not exist immediately after the accident in her medical treatment files, but inexplicably appeared as complaints months or years later.

Furthermore, there was mounting evidence that, taken all together in the totality of the circumstances allowed the jury to conclude that Plaintiff's subjective soft-tissue complaints were either not credible, untrue and/or exaggerations. Ultimately, as shown by the jury's verdict, Plaintiff was unable to prove to the jury that such everyday aches and ailments (some appearing in her medical treatment notes for the first time years after the accident) were caused by the at-issue motor vehicle accident.

The jury was cognizant of and clearly placed weight on the issue of the pre-existing nature of Plaintiff's complaints: The jury's question No. 3 for Dr. Donner (Plaintiff's treating orthopedic surgeon) was "'"Did you have any of Ashlee's preexisting records prior to treatment? And if so, when were they from?" [Trial Day 2, p. 109:5-7] As the jury was aware of and had evidence that all of Plaintiff's treatment with Dr. Donner was for complaints that she had experienced for years prior to the subject motor vehicle accident, the jury had sufficient evidence to decide

that there was no causation of any of those injuries, damages, and expenses that were reasonably related to the car accident at issue. The jury's additional question for Dr. Donner was "Did you ever compare, before and after the accident, X-rays, MRIs, CT scans, prior doctor records?" [Trial Day 2, p. 109:22-24] Clearly, the jury focused in on the fact that Plaintiff's subjective, soft-tissue complaints were pre-existing conditions that were unrelated to the subject car accident.

Still further, Plaintiff's spinal surgeon expert Dr. Donner, under questioning by the jury via the Court, testified that the spine can lose normal lordosis, or the natural curving alignment of the spine, over a period time without acute injury. [Trial Day 2, p. 112:6-14] In examining Plaintiff's former chiropractor, Dr. Springfield, Plaintiff then elicited testimony about the lack of normal cervical lordosis and how that can cause "massive degenerative changes" that result in neck pain, arthritis and related symptoms, all of which occurred here and were properly weighed by the jury to Plaintiff's detriment. [Trial Day 3, p. 146:8-25; Trial Day 3, p. 159:5-16] It is common knowledge that arthritis is a chronic age-related complaint. Furthermore, both Dr. Donner and Dr. Springfield testified that Plaintiff's May 2017 MRI showed these non-acute, degenerative-type changes. [Trial Day 2, p. 88:20-89:4; Trial Day 3, p. 178:9-12] The jury clearly put two and two together from this evidence, and

concluded that Plaintiff's complaints were due to age-related chronic spinal-region pain due to her degenerative changes, not due to any acute injury from the motor vehicle collision at issue here.

The contemporaneous records to the accident had no mention of a headache until more than a month after the accident, providing further sufficient evidence that Plaintiff's complained-of headache was not caused by the accident. Dr. Springfield (Plaintiff's chiropractor and employer for 5+ years before the accident) treated Plaintiff on several occasions immediately after the car accident (treatments on December 21, 2016, December 23, 2016, December 27, 2016, December 30, 2016, January 3, 2017, January 6, 2017, January 10, 2017, January 16, 2017, January 20, 2017, January 23, 2017); yet, he had no record of any complaint of headaches by Plaintiff until late January of 2017, a month after the car accident. [Trial Day 3, p. 179:24-184:10]

Plaintiff's own elicited testimony was that Plaintiff's headaches were "cervicogenic" and caused by her neck pain. [Trial Day 2, p. 142:5-14] As discussed at length above, there was evidence given to the jury of several reasons that Plaintiff's neck pain both pre-existed and was not caused by the motor vehicle

accident in question. Therefore, the jury had sufficient evidence to support their conclusion that the accident was not a cause of Plaintiff's complaints of headaches.

Plaintiff was also inconsistent in her testimony about her subjective and pre-existing conditions. While she claimed that she only received "maintenance" chiropractic care for the 3-5 years prior to the accident [Trial Day 1, p. 211:18-21, her pre-accident chiropractic records had repeated, years-long complaints of, *inter alia*, neck pain that would be the exact kind of condition to cause "cervicogenic headaches." [Trial Day 2, p. 122:6-12; p.191:12-200:17 (noting Plaintiff had complaints of neck pain from 2011 through 2015, at times being experienced 50%+ of the time, with up to 7/10 on a pain scale, essentially identical to her post-accident complaints); *compare with* Trial Day 2, p. 41:24-43:9 (Plaintiff's questioning showing that neck pain can cause "cervicogenic" headaches)]

This verdict turned on the jury's evaluation of the evidence, as well as Plaintiff's and her treating physicians' credibility. The jury found the weight of the evidence to be against Plaintiff. Accordingly, there is no proper basis for Plaintiff's appeal here. It is exactly the kind of situation where the case law concerning "weight of the evidence" appeals prohibits disturbing the jury's fact-finding conclusions.

2. Evidence Supported the Jury's Finding That Plaintiff and Her Experts Lacked Credibility, And This Court Should Not Re-weigh the Jury's Determination of the Credibility of Plaintiff's Evidence

The jury also heard that plaintiff's complaint of restricted movement was due to her being 7 months pregnant, not due to any injury from the car accident. [Trial Day 2, p. 211:10-19] Even further supporting the verdict, there is testimony in the record from Plaintiff's employer, treating chiropractor, and trial witness Dr. Springfield, who testified that it is common for late-stage pregnant women to have low back pain and thus such complaints were unrelated to the car accident. [Trial Day 3, p. 188:14-189:1]

The jury also heard that most of Plaintiff's treatment came from "Compcare, Inc.," which was care from chiropractor Michael Springfield, DC, physical therapy and massage therapy. Not only did Dr. Springfield, D.C. testify on behalf of Plaintiff and submit rebuttals to Defendant's expert in the course of litigation [Trial Day 2, p. 267:17-20], he was also her employer at the time of the accident. [Trial Day 2, p. 261:17-24; Trial Day 3, p. 177:3-5] The jury was entitled to discount the testimonies and expert opinions of Plaintiff's close personal associates as biased, especially in light of Dr. Aschberger's identification of all of Plaintiff's complaints as pre-existing conditions.

The jury also heard conflicting testimony from Plaintiff's own experts about whether or not she had radicular symptoms (nerve pain due to nerve root compression). [Trial Day 3, p. 178:13-179:6] Of course, if Plaintiff's own doctors cannot agree on the existence and validity of Plaintiff's reported subjective conditions, the jury was entitled to disregard that offered evidence as being contradicted and unreliable. Again, the issues on appeal all boil down to Plaintiff's failure to meet her burden of proof in persuading the jury by a preponderance of the evidence that her claims were more likely true than false. Therefore, the issue here is the weight of the evidence, which the jury found as insufficient to support the vast majority of her claims.

The jury also had further evidence to give the testimony and opinions of Dr. Donner little to no weight, in addition to those discussed elsewhere. Dr. Donner provided litigation reports (which is logically contradictory to him being a "non-retained treating physician") to support Plaintiff's claims for damages in this case in a report dated December 14, 2020. However, Dr. Donner had not treated or examined Plaintiff since May 5 of 2017, three and a half years prior. [Trial Day 2, p. 99:19-100:13] They jury was entitled to give little or no weight to a doctor who was "treating" Plaintiff by providing litigation-tailored "reports" where the doctor had not

even personally treated the so-called patient for almost 1/3 of a decade. The jury was entitled to disregard the claims of Dr. Donner. This Court should reject Plaintiff's request to re-weigh the jury's credibility determinations and weight of this evidence.

3. The Jury Had Evidence That All Damages Reasonably Related to the Instant Motor Vehicle Accident Were Resolved no Later than January 2017, Giving Evidentiary Support for Their Verdict Finding Very Limited Damages Here

The jury was also aware that the re-emerging but pre-existing soft-tissue injuries had resolved within a month or two of the December 2016 accident. [Trial Day 2, p. 209:2-7 ("And there are no pain scales on this Acupuncture Chiropractic January 6, 2017, note, are there? A. No. Q. But it does note on the assessment, "Ashlee's condition appears to be resolving," right? A. Yes.")] In questioning about records at the end of January of 2017, Dr. Aschberger testified that Plaintiff had returned to a condition "consistent with what we're finding after the car accident and her treatment level was back to where it was for a long period of time." [Trial Day 2, p. 215:6-8]

In conclusion of his testimony to the jury, Dr. Aschberger testified that his opinion was that Plaintiff's sole injury from the car accident was that she sustained a neck injury that was exacerbated, but returned to baseline by the end of January of

2017. [Trial Day 2, p. 220:9-21; Trial Day 5, p. 58:11-14] Of course, this meant that all treatment, including the $1,000,000+ figure claimed by Plaintiff for future care, was all unrelated to the car accident. [Trial Day 2, p. 220:22-222:5]

The jury was well aware that Plaintiff's complaints of "cervicogenic" headaches, neck pain, back pain, and shoulder pain were still being treated up through a month before trial. [Trial Day 3, p. 166:11-20] As a matter of logic, it appears the jury believed Dr. Aschberger that all accident-related injuries were resolved by January of 2017, and therefore the injuries still being treated in October of 2022, more than half a decade later, were not causally related to the accident. Thus the verdict is logically consistent: they just did not believe that essentially all of Plaintiff's injuries were caused by the motor vehicle accident, and clearly did not believe that Plaintiff met her burden of proof in showing the injuries she still had in 2022 were causally related.

Finally, this case comes to the Court on a unique set of facts; Plaintiff here was seven months pregnant. [Trial Day 2, p. 211:10-19] As such, Plaintiff seeking out medical care as a precautionary measure to ensure the health of her *in utero* baby and herself was probably found by the jury to be reasonable, and thus the award of over $20,000 in medical expenses. However, the costs for checking for damages is not the

same as costs for treating of damages that were actually found. The scans, ER visit, and check ups to ensure that there *was no injury* appear to have been awarded as reasonable and related damages here, but thankfully the monitoring and evaluations were entirely precautionary: the baby was unharmed and Plaintiff had no actual acute injuries herself. While it is reasonable for the jury to award "checking and monitoring" damages, where they did not believe there were any actual injuries found by the checking and monitoring, then the award of only limited economic damages and an award of zero general damages is entirely consistent. Of course, the "black box" nature of the jury verdict here prevents this Court from truly knowing whether this was the internal thought processes of the jurors in reaching this conclusion, which is why such a verdict should only be overturned where it is clearly erroneous. This verdict is not clearly erroneous.

C. Plaintiff's Actions and the Evidence Presented Gave the Jury Ample Evidentiary Basis to Award No Damages for "Headaches."

As to the headache issue, the jury likely found Plaintiff unbelievable. As the damages show, they did not award damages for injuries existing past early 2017 [*compare* Court File 003649 (verdict of $23,638 in economic damages) *with* Trial Exhibit 000855, Exhibit 50 (Ashlee Bullington's Medical Bills CRE 1006

summary)], but Plaintiff claimed to have suffered headaches from December 18, 2016 through trial in 2022. [Trial Day 3, p. 68:14-69:10] Furthermore, Plaintiff's counsel argued that Defendant's expert, Dr. Aschberger, "agreed" that Plaintiff suffered cervicogenic headaches in his opening. [Trial Day 1, p. 201:20-202:24]. However, that was deceitful, as Plaintiff was quoting from Dr. Aschberger's first report, which was made before Plaintiff produced her prior treatment records.

The jury found out about this during Dr. Aschberger's testimony [Trial Day 2, 120:1-8 "Q: …. you got all of the chiropractic records before the crash, yes? A.: Not with my first report, no."] Dr. Aschberger's second report, and his testimony to the jury, clearly stated that after he was able to review Plaintiff's pre-accident record, the headaches were a pre-existing condition unrelated to the accident. [Trial Day 2, p. 170:13-171:3 ("Q. And at the time that report and your examination was done on December 4th, 2020, you did not have any of Ms. Bullington's prior medical records, correct? A. That's correct."); Trial Day 2, p. 184-195 (evidence of continuing chiropractic treatment for several years before accident to Plaintiff's pelvis, sacrum, trapezius, posterior cervical neck, cervical, mid-thoracic, and lumbosacral areas of her spine; 187:9-12: "A: (Dr. Aschberger) Again, all these areas that are addressed

with this note are areas that Ms. Bullington was complaining about with my evaluation, my hands-on evaluation, and after the collision")]

Additionally, the jury heard that the emergency room imaging records within hours of the accident showed that there were no acute cervical spinal injuries to Plaintiff, and that the ER doctors found no evidence of a concussion. [Trial Day 2, p. 202:2-203:5] Furthermore, Dr. Springfield (Plaintiff's chiropractor and employer for 5+ years before the accident) treated Plaintiff on several occasions immediately after the car accident (December 21, 2016, December 23, 2016, December 27, 2016, December 30, 2016, January 3, 2017, January 6, 2017, January 10, 2017, January 16, 2017, January 20, 2017, January 23, 2017) and had no record of any complaint of headaches by Plaintiff until late January of 2017, a month after the car accident. [Trial Day 3, p. 179:24-184:10] Plaintiff's other treatment at Compcare, Inc. (her employer and Dr. Springfield's practice) also had no immediate contemporaneous reports of headaches from Plaintiff. [Trial Day 3, p. 185:23-188:13; 189:7-190:20] Plaintiff first reported a headache, specifically a "halo" headache, to her physical therapist at Compcare on March 23, 2017. [Trial Day 3, p. 191:2-7]

Not only did the prior treatment records fail to substantiate Plaintiff's subjective complaints of pain and spinal dysfunction after the crash, but the jury also

learned that Plaintiff concealed the records and did not disclose them on time, necessitating a follow-up report by Dr. Aschberger clarifying the issue. [Trial Day 2, p. 190:5-22 ("Q. So these prior records of Acupuncture Chiropractic in 2015 and 2016, were those important to your overall opinions in this case? A. Yes. Why? A. I define specific areas of problem with my examination of Ms. Bullington. Neck, thoracic, lumbar, neck facet, lumbar facet, and she had pelvic dysfunction. She had a rotated pelvis; and these evaluations, although not as detailed as the findings with my evaluations, indicate all the same areas are involved and have been treated before this car accident. Q. And at the time of your December 4th, 2020, examination and report, these records from Acupuncture Chiropractic from 2015 and 2016 were not provided to you at that point? A. That's correct.")] This evidence, plus Plaintiff's counsel's obtuseness during questioning of Dr. Aschberger in front of the jury in refusing to recognize the changes resulting from the late disclosure of these contraindicating records, was more than ample evidence for the jury to find as they did: that Plaintiff's complaints of pain, suffering, and impairment were all pre-existing and not caused by the motor vehicle accident in December 2016. This contrary evidence of non-causation of Plaintiff's soft tissue complaints was in addition to Plaintiff's lack of credibility.

Finally, there's the basic lack-of-causation issue of an intervening cause. The pregnancy and birth process was reported in Plaintiff's own physical therapist records as having exacerbated her headaches. [Trial Day 3, p. 191:13-21] Since the jury heard that something during the birthing process caused Plaintiff's years-long constant halo headaches, then they had sufficient evidence to conclude that such injury was not caused by the motor vehicle collision at issue here. Thus, there was ample evidence for the jury to support their verdict. Plaintiff simply failed to meet her burden of proof.

D. Sufficient Evidence Was in the Record to Justify the Court's Giving the Failure to Mitigate Instruction; Plaintiff's Real Complaint on Appeal is A Weight of the Evidence Dispute with the Jury's Factual Determination of The Unreasonableness of Her Actions

Plaintiff's argument on appeal regarding her failure to mitigate damages is improper at the outset because it incorrectly assumes the jury found she had "general damages" for pain and suffering and/or future medical expenses, and that she was not awarded those damages due to her failure to mitigate. There is no factual citation in the Opening Brief showing where in the record there is evidentiary support for this contention. The most logical interpretation of the verdict is that Plaintiff failed to prove to the jury that these damages existed, as discussed above. Therefore, her

appeal on the basis of any arguments regarding mitigation of damages (as opposed to the failure of proof where the jury simply did not find that Plaintiff proved her case that these damages existed) is improperly targeted. The evidence in the record shows Plaintiff did not prove by a preponderance of the evidence that the disputed damages existed, so it is moot whether or not it was proper and there was sufficient evidence of Plaintiff's failure to mitigate. The jury appears to have not reached the issue, as they appear to have found the damages did not exist, as by their award of zero dollars for pain and suffering.

Even so, there was a showing of disputed evidence sufficient to support the Court's giving of the failure to mitigate instruction, as well as sufficient evidence to support the jury's verdict. First, the jury heard ample evidence that Plaintiff's doctors had recommended a course of injections, studies, and other treatment that were not followed. [Trial Day 2, p. 92:2-14 (trigger point injections, natural regenerative medicine did not occur); Trial Day 2, 92:15-25 (no treatment with Dr. Donner between May 5, 2017 and November 24, 2020); Trial Day 2, p. 102:1-24 (facet injections, trigger point injection, regenerative medicine and cervical epidural steroid injection were recommended, but never carried out for over three years)] This alone is sufficient to make this a jury issue: Plaintiff had a treatment

recommendation from her healthcare providers which she did not follow. Whether the reasonableness of Plaintiff's failure to go through with the treatment met the standard of reasonableness in their community was up to the jury's determination and it is entirely improper to overturn that fundamental jury function on appeal.

Furthermore, the jury also heard from Plaintiff that she was inconsistent in her position. Plaintiff claimed that she was unable to follow her spine pain doctor's course of treatment for spinal injections due to being pregnant and/or breast feeding. [Trial Day 3, p. 246:1-7: ("Q. But you do recall him recommending the stem cell injections, correct? A. Yeah. Q. And you didn't do any of those injections, right? A. Nope. He wouldn't do them because I was nursing.")] However, she did have trigger point injections and occipital nerve block injections while breast feeding and/or pregnant. [Trial Day 3, p. 246:20-247:14; Trial Day 2, p. 39:7-12]

The jury heard that Plaintiff had tried SOME injections after the accident, she just had not gone forward with the OTHER injections. [Trial Day 3, p. 80:10-81:22; Trial Day 3, p. 246:20-247:14] Plaintiff was plainly inconsistent in her testimony; she testified that she was unable to do injections with Dr. Ghazi prior to trial [Trial Day 3, p. 218:14-219:25], but then immediately after that told the jury that she had in fact done some trigger point injections [Trial Day 3, p. 220:1-9] The jury was right

to conclude that plaintiff's story about why she was not following her doctors' treatment plans was not believable: she claimed she could not do injections because of her pregnancies and breast feeding, but then turned around and testified minutes later that she did do injections. The reasonable conclusion of the jury from this inconsistent story is that Plaintiff's testimony was not credible, that she was exaggerating her claims and simply did not want to undergo the recommended procedures.

Finally, there was evidence in the record that Plaintiff's failure to pursue her doctors' course of treatment made her claimed pain and suffering persist for years longer than it would have lasted has she followed the doctors' instructions. [Trial Day 2, p. 105:6-106:1 ("Q. Is it better to get regenerative medicine techniques around the time that you would have originally recommended those rather than three years later? A. Yeah. You have pain longer. It probably takes -- it's more challenging to treat chronic pain no matter what you do if it drags out too long. But early in the treatment, it may be too early. I mean, she may get better with other treatments that don't require intervention. So we always go down that path.")]

III. SUMMARY OF THE ARGUMENT

The District Court correctly decided the disputes before it, and the jury did its job in weighing the hotly-disputed evidence.

The real issues that Plaintiff raises on appeal are with the factual decisions of the jury regarding weight of the evidence, credibility, and reasonableness, not any dispute of law. Critical instructions were properly given by the District Court to the jury, including the burden of proof instruction, where the District Court instructed the jury that they were to reject the claims of Plaintiff as to the existence or value of any claim of pain & suffering or future impairment if they found that Plaintiff did not prove such existed and were caused by the accident by a preponderance of the evidence. [Trial Day 5, p. 10:7-11; Trial Day 5, p. 14:23-16:2 (instruction 14)] Relatedly, the District Court gave the following Instruction 6, telling the Jury they could accept or reject any evidence as they judged fitting [Trial Day 5, p. 11:18-12:7]:

> "Instruction Number 6. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory, and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or lack of consistency in their testimony, their motives, whether their testimony

> has been contradicted or supported by other evidence, their bias, prejudice or interest if any, their manner or demeanor on the witness stand and all of the facts and circumstances shown by the evidence that affect the credibility of the witnesses. Based on these considerations, you may believe all, part or none of the testimony of the witness."

The court also properly gave Instruction 15, which was the disputed mitigation of damages instruction. [Trial Day 5, p. 16:3-17:5: Instruction Number 15.] The Jury properly followed these instructions, logically and neutrally weighed the evidence and decided the credibility of the witnesses, and made an appropriate verdict that had evidentiary support and which ultimately found that Plaintiff failed to meet her burden of proof on the large majority of her claims.

IV. ARGUMENT

A. There Is Sufficient Evidence in The Record for the Jury's Verdict to Survive Plaintiff's Speculative Attacks on the Jury's Weighing of The Evidence

Standard of Review: An appeal attacking a jury verdict as against the weight of the evidence is reviewed only for "clearly erroneous" mistakes, or simply put, a fact finder's assessment of damages is reviewed for "clear error." *Blakeland Drive Investors, LLP IV v. Taghavi,* 532 P.3d 369, 378 (Colo. App. 2023). Whether to grant a new trial for inadequate damages is within the sound discretion of the trial

court, and [*the Court of Appeals*] will not disturb its ruling absent a showing of an abuse of that discretion." *Steele v. Law*, 78 P.3d 1124, 1127 (Colo. App. 2003).

Argument:

The amount of damages is "within the sole province of the jury, and an award will not be disturbed unless it is completely unsupported by the record." *Averyt v. Wal-Mart Stores, Inc*., 265 P.3d 456, 462 (Colo. 2011). "A jury verdict will not be reversed for inconsistency if a reading of the record reveals any basis for the verdict." *Kepley v. Kim*, 843 P.2d 133, 137 (Colo. App. 1992).

The issue Plaintiff raises is that Plaintiff believes that the law requires an award of pain & suffering and permanent impairment if there is *any* evidence adduced (even if the evidence is disputed) that Plaintiff suffered a soft-tissue neck injury in the car accident.

Plaintiff's argument is simplistic and a self-serving view of the facts of the case. Plaintiff's recitation of her version of the facts once again fails to provide the full and complete testimony of any expert, let alone that of Defendant's "Rule 35 examiner" John Aschberger, M.D., whom Plaintiff called in her own case-in chief to her detriment. Contrary to Plaintiff's argument, Plaintiff's evidence presented at trial was disputed and refuted as to Plaintiff's claims of continuing pain and suffering due

to the accident. Accordingly, the fact that the jury rejected such evidence and awarded zero non-economic damages and zero physical impairment was not arbitrary, capricious, or unsupported.

Moreover, the Court provided proper and appropriate stock jury instructions on the law to be applied in this case. In particular, Jury Instruction No. 12 that was provided states that "[t]he question of whether or not damages are to be awarded is a question for the jury's consideration." Also, according to Jury Instruction Number 6, the jury is the "sole judges of credibility of the witnesses and the weight to be given their testimony." Then, there was the disputed jury instruction of mitigation of damages - whether or not Plaintiff took the reasonable steps required in order to mitigate or minimize her damages, stating that "[d]amages, if any, caused by plaintiff's failure to take such reasonable steps cannot be awarded to the plaintiff." Given these jury instructions (and additional instructions), as well as the evidence before it, the jury was well within its purview to accept and/or reject Plaintiff's claims of injuries and damages. There is no evidence nor proof provided by Plaintiff that the jury failed to follow the Court's instructions, but rather that the jury very carefully and faithfully followed the law, assessed the credibility of the witnesses,

experts and evidence in the case, and as a result awarded economic damages in the amount of $23,638.00.

There is no legal infirmity in a jury not awarding general damages for pain and suffering or future impairment. *Miller v. Hancock*, 410 P.3d 819, 824 (Colo. App. 2017) ("An award of noneconomic damages is not required by the fact of actual injury."); *Gonzales v. Windlan*, 411 P.3d 878, 885 (Colo. App. 2014) ("We conclude that there was ample evidence to support the jury's award of zero noneconomic damages in this case . . . .[T]he jury could have determined that [the plaintiff] experienced only a minor, temporary injury that did not cause compensable pain and suffering."); *Steele v. Law*, 78 P.3d 1124, 1127 (Colo. App. 2003) ("From the evidence presented, the jury reasonably could have found that any pain and suffering, inconvenience, emotional stress, or impairment of quality of life plaintiff suffered as a result of the accident was de minimis."); *Lee's Mobile Wash v. Campbell*, 853 P.2d 1140, 1144 (Colo. 1993) ("[We reject the argument that] once physical injury and causation are proved, noneconomic damages are proven as well and must be compensated.")

The instant case is squarely in line with *Gonzales v. Windlan*, 411 P.3d 878 (Colo. App. 2014). In *Gonzales*, that plaintiff brought suit seeking relief on a claim

of negligence against the defendant for a motor vehicle accident. *Id.* at 881. At trial, the plaintiff presented evidence supporting a spinal injury that required several years of treatment and surgery to ultimately resolve. *Id.* On the other hand, the defendant presented evidence, through the plaintiff's primary care physician and their own retained expert that plaintiff only experienced a muscle strain that resolved in a few months. *Id.* Additionally, the defendant presented evidence that the plaintiff had a pre-existing degenerative spinal condition, and the defendant's retained expert opined that the pain and medical treatment, including surgery, plaintiff experienced was not related to the motor-vehicle accident. *Id.* After a four-day jury trial, the jury returned a verdict in favor of the plaintiff for economic damages but did not award any noneconomic damages. *Id.* Plaintiff appealed arguing that the jury not awarding noneconomic damages was counter to the evidence and inconsistent with an award for economic damages. *Id.* After a review of the record, the Court of Appeals upheld the jury's decision of zero dollars for non-economic damages, specifically noting that "[a] reviewing court should overturn a jury verdict on damages only upon a showing that the jury's action was arbitrary and capricious or that the jury was swayed by passion or prejudice. *Id.* at 886.

Here, the evidence presented by Plaintiff was not undisputed or unrefuted, but in fact conflicting with the evidence provided by Defendant (whether in cross-examination or otherwise). The jury carefully listened and reviewed the evidence, and its verdict was not arbitrary, capricious, swayed by passion or prejudice for either party. The jury's verdict was based on its assessment of such evidence and should not be disregarded. *Gonzales v. Windlan*, 411 P.3d 878, *supra,* at 886. "[T]he court's duty is to reconcile the verdict with the evidence if at all possible. If there is any basis for the verdict, it will not be reversed for inconsistency." *Id*. at 886. Dissatisfaction of one party with the jury's verdict does not equate with the verdict being inappropriate or inadequate as a matter of law. Here, not only is there no basis in fact or law to grant Plaintiff's motion, overturning this verdict would be in derogation of the purpose of a jury trial and contrary to justice.

B. <u>Plaintiff Misinterprets the Standard for Failure to Mitigate, and Inappropriately Conflates the Trial Court's Rulings with the Jury's Weighing of Evidence</u>

<u>Standard of Review</u>: The decision of the trial court to give the failure to mitigate instruction is reviewed only for "clear error." "[T]he defense of failure to mitigate damages will not be presented to the jury unless the trial court determines there is sufficient evidence to support it. *Burt v. Beautiful Savior Lutheran Church of*

Broomfield, 809 P.2d 1064, 1068 (Colo. App. 1990). A trial court's determination will not be disturbed on appeal unless it is clearly erroneous. See *Burt*, 809 P.2d at 1068." *Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997).

Argument:

As stated in *Ballow v. PHICO Ins. Co*., 878 P.2d 672, 680 (Colo. 1994): "Generally, an injured party has the duty to take such steps as are reasonable under the circumstances in order to mitigate or minimize the damages sustained. *Tull v. Gundersons, Inc*., 709 P.2d 940, 946 (Colo.1985); *Technical Computer Servs., Inc. v. Buckley*, 844 P.2d 1249, 1255 (Colo.App.1992), *cert. denied* (Feb. 16, 1993). This means that the plaintiff may not recover damages for injuries which he or she reasonably might have avoided. *Valley Dev. Co. v. Weeks*, 364 P.2d 730, 733 (Colo. 1961)."

A plaintiff's "unreasonable failure to follow […] medical advice once received" is a clear example of a proper failure to mitigate defense. *Banning v. Prester*, 317 P.3d 1284, 1288 (Colo. App. 2012). There are two kinds of mitigation of damages: stopping exacerbation of a harm, and stopping the duration of a harm. *Lascano v. Vowell*, 940 P.2d 977, 983 (Colo. App. 1996); *Highlands Broadway OPCO, LLC v. Barre Boss, LLC*, 528 P.3d 517, 522-523 (Colo. App. 2023).

The reason that Plaintiff did not seek the medical treatment is not relevant to the propriety of the District Court's decision to give the instruction here, and the District Court's decision to give the instruction is the sole basis of appeal. As to the rules controlling the District Court's decision here to give the instruction, the case law is clear: if you do not follow doctor's orders, that is a sufficient factual basis to give a failure to mitigate instruction.

The Court's reasoning was that Plaintiff could have received injections in 2017, 2018, 2019, 2020, 2021, or 2022 which would have alleviated some or all of plaintiff's pain and suffering and her physical impairment for an extended period of time, but that she did not do so for her own reasons. [Trial Day 4, p. 41:25-43:7] Since Plaintiff was requesting additional damages for each day that Plaintiff was in pain and for impairment during that time [Trial Day 5, 36:18-37:17], Plaintiff extended the time she suffered such damages by not undergoing the pain-management treatment her doctors ordered. Therefore, it was properly submitted to the jury for their fact-finding determination of the reasonableness of Plaintiff's actions. This is in line with Colorado law as cited and discussed above. Therefore, there is no error here.

Plaintiff's true dispute is with her allegation that the jury found her failure to follow her repeated doctors' recommendations for spinal injections unreasonable. This assumes, without citation to the record, that such was the case, instead of the jury simply not being persuaded that there were ongoing damages. Plaintiff assigns no error to the alleged determination by the jury that Plaintiff was unreasonable in failing to follow up on her several doctor's recommendations that she get spinal injections to stop or resolve her complained-of injuries. Either way, the "reasonableness" was an issue for the jury to consider the facts and the totality of the circumstances and determine what is or is not reasonable in that particularized, fact-bound circumstance. *Lascano v. Vowell, supra,* 940 P.2d 977, 983 ("The question whether plaintiff's conduct was reasonable under the circumstances was a necessary factual predicate to a finding that she had failed to mitigate her damages. As such, it should have been addressed to the jury as fact finder."); *see, Highlands Broadway OPCO, LLC, supra,* 528 P.3d 517, 523 (holding that the determination of the reasonableness of a plaintiff's mitigation efforts in a bench trial is a factual determination that will not be disturbed on appeal as long as some factual basis appears in the record). No appeal can lie from that fundamental function of the jury as the community's voice as to what is or is not reasonable.

C. Plaintiff's Attack on the Jury's Weighing of the Evidence Is Legally Insufficient as to the Hotly Contested Issues of Causation and Existence of Purely Subjective Damages

Standard of Review: An appeal attacking a jury verdict as against the weight of the evidence is reviewed only for "clearly erroneous" mistakes, or simply put, a fact finder's assessment of damages is reviewed for "clear error." *Blakeland Drive Investors, LLP IV. v. Taghavi,* 532 P.3d *supra, at* 378.

Argument:

The amount of damages is "within the sole province of the jury, and an award will not be disturbed unless it is completely unsupported by the record." *Averyt v. Wal-Mart Stores, Inc*., 265 P.3d 456, 462 (Colo. 2011). "A jury verdict will not be reversed for inconsistency if a reading of the record reveals any basis for the verdict." *Kepley v. Kim*, 843 P.2d 133, 137 (Colo. App. 1992).

"Weight of the evidence" appeals where a litigant who loses at trial then assigns error because they believe the evidence was more in their favor than their successful opponent have not been allowed for at least a century. A judgment of a trial court will not be disturbed on appeal on the basis that the appellant contends that the weight of the evidence should have swayed the decider of fact at trial in his favor

instead of in his opponent's favor. *Ziegler v. Cole,* 25 P. 300, 296 (Colo. 1890). As long as there is evidence in the record that could support the verdict, then no appeal will be granted to attack the weight of the evidence. *Keeler v. Chamberlin,* 179 P.141, 141 (Colo 1919).

In the interest of brevity, the facts and evidence presented to the jury are addressed at length above. The jury heard evidence that Plaintiff had pre-accident complaints that were identical to her post-accident complaints (all of which were subjective soft-tissue claimed injuries): of headaches, neck pain, and back pain. [Section II.B.1 and discussion therein]. The jury then heard that Plaintiff's experts were contradictory, they were closely aligned with Plaintiff, and had reason to exaggerate her claims and minimize the truth to help their friend and coworker try to recover money, in addition to their opinions being contradicted by Dr. Aschberger. [Section II.B.2 and discussion therein]. Finally, the jury heard that all of Plaintiff's claimed injuries from the December 2016 accident (if they even believed there were any) were resolved by January of 2017. [Section II.B.3 and discussion therein]. Pain and suffering damages are not required and there is no legal defect in not awarding them where Plaintiff "suffered only very minor injuries from a low impact collision … **that were resolved within a year**." *Steele v. Law, supra,* 78 P.3d 1124, 1127

(emphasis added). If one year of minor soft-tissue complaints from a car accident can be properly compensated with zero pain and suffering monetary damages, then two months is certainly within the law.

Plaintiff does not have a legitimate basis for appeal to simply request that the Court of Appeals re-weigh the conflicting testimony about when her injuries occurred, if they had any relation to the accident, and the reasonable damages attributable to the car accident. Therefore, there is no defect in the jury's award here, and the verdict should be upheld on appeal.

D. The Trial Court Properly Excluded Dr. Doty, Due to Plaintiff's Repeated and Flagrant Abuse of The Civil Rules of Procedure and Defiance of Court Orders

Standard of Review: An appeal attacking a trial court's ruling on excluding an expert from trial is reviewed for abuse of discretion. *JP v. District Court in and for 2nd Judicial Dist. of Denver*, 873 P.2d 745, 747 (Colo. 1994). *Accord, Todd v. Bear Valley Village Apartments*, 980 P.2d 973, 975 (Colo 1999).

Argument:

To address a violation of C.R.C.P. 26(a)(2), the trial court may impose any appropriate sanction proportionate to the harm, and this includes excluding the

evidence at trial. *Trattler v. Citron*, 182 P.3d 674, 682 (Colo. 2008); *Todd v. Bear Valley Village Apartments*, 980 P.2d 973 (Colo. 1999).

In *Todd*, the Colorado Supreme Court articulated how to deal with whether to exclude an expert witness due to disclosure violations: "[i]n evaluating whether a failure to disclose evidence is harmless under Rule 37(c), the inquiry is not whether the new evidence is potentially harmful to the opposing side's case. Instead, the question 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." *Todd, supra*, 980 P.2d at 979. The inquiry boils down to two factors. The first is whether there was a substantial justification for the party's failure to disclose, and the second is whether the failure to disclose is harmless to the opposing party. *Saturn Systems, Inc. v. Militare*, 252 P.3d 516, 523 (Colo. App. 2011). The trial court's repeated rulings on this issue are entirely in line with the Court's authority to control the litigation and the above-cited precedent, discussing and analyzing the law and facts at length. [Court File, p. 2204-2213] There was no error here, and the trial court's ruling should be upheld on appeal.

In early 2022, Plaintiff filed a Motion for Continuance of Trial Date to Enable Plaintiff to Retain a New Expert Witness in the Field of Life Care Planning; on

January 7, 2022, the Court granted Plaintiff's Motion and provided Plaintiff ninety (90) days to disclose a new expert witness in the field of life care planning. [Court File 00167] Plaintiff disclosed Dr. Doty as the replacement life care planner. However, Dr. Doty did not provide a replacement life care plan report, she provided new medical diagnoses and evaluations that went far beyond the scope of a life care planner. As the trial court found, "After two rounds of motions to strike and three expert reports from Dr. Doty, it has now crystalized that Plaintiff is not satisfied with the mere opinions of a life care planner. Rather, Dr. Doty's true purpose is to offer supplemental medical opinions on behalf of Plaintiff in addition to her life care planning expertise." [Court File, 002206]

Dr. Doty's opinions were not those of a life care planner similar to Plaintiff's prior endorsed life care planner expert, Doris Shriver, but were in fact new medical opinions, new medical opinions about future care, and new diagnoses. The key problems with Dr. Doty's report were that Dr. Doty conducted a new medical examination of Plaintiff and diagnosed her with eighteen diagnostic conditions and eight disabilities based upon Dr. Doty's own medical examination and her knowledge and experience not as a life care planner, but as a medical physician. [Court File 000193-199] Dr. Doty's report then went on to prescribe a new course of

treatment for these new diagnoses and "disabilities." [Court File 000194] Even more egregiously, Dr. Doty's report revived a claim that Plaintiff had a pelvic floor injury from the accident; Plaintiff had previously submitted revised interrogatory responses for the express purpose of clarifying that Plaintiff was not claiming that injury; but after discovery closed and Defendant's experts had all done their reports and been disclosed, Plaintiff now sought to sneak in this claimed injury that had been expressly disclaimed in discovery. [Court File 000197-198]

This led to a motion to strike Dr. Doty, which was granted but with leave to provide a revised report without the objectionable new medical opinions. [Court File 000187-204; 000614-617] Plaintiff then violated that order and the prior order granting leave to give a new life care report by providing essentially the same report with the same new/novel medical opinions on top of the "life care plan" opinions, which was again struck. [Court File 000626-634; 002204-2213] Plaintiff then moved to reconsider at trial without removing the objectionable medical diagnoses opinions, which was rebuffed by the trial court yet a third time. [Court File 002316-2320; Trial Day 1, p. 169:4-180:21]

Plaintiff's behavior in this situation is an egregious and deliberate violation of Rule 26, the case management order, and repeated orders from the trial Court.

Plaintiff's antics go beyond just violating the rules and can be characterized as contempt of the trial court's authority. Plaintiff had many, *many* months from the initial continuance in January 2022 until trial in December 2022 to provide a rules- and orders-compliant life care plan. The trial court not only explicitly told Plaintiff what to provide (a replacement life care plan report), but when Plaintiff erred the trial court explicitly told Plaintiff where the problem was and how to cure it. Plaintiff then *deliberately ignored* the trial court, committing the exact same error on purpose. The trial court yet again rebuffed Plaintiff in its order on October 31, 2022. [Court File 002204-2213] Plaintiff still did not cure the problems in a third stretch of time before trial. Plaintiff's behavior here was contemptuous of the trial court's authority and rulings, was a clear attempt to conduct a trial by ambush with untimely and improper new opinions about medical diagnoses after the close of discovery and after expert discovery (including reviving claims of pelvic injury that Plaintiff has explicitly disclaimed in discovery, leading Defendant to not prepare a medical expert on that topic). Plaintiff's egregiously improper gamesmanship was properly curtailed by the trial court.

Finally, while there was no error here, even if it was error it was harmless. The jury found that plaintiff had no permanent impairments or future damages

beyond the $23,638 in past medical bills. Any alleged error in the admission of evidence and instruction where the jury finds no damages of that sort exist is by law a harmless error that cannot warrant reversal. *Dunlap v. Long*, 902 P.2d 446, 448 (Colo. App. 1995). Therefore, any exclusion of an expert to price future damages here, where the jury found no future damages existed, was harmless and does not warrant reversal.

V. CONCLUSION

Plaintiff's arguments on appeal are all ineffective and legally unmeritorious.

WHEREFORE, Appellee/Defendant, Courtney Barela, prays for this Court to deny all aspects and elements of Appellant/Plaintiff's assignment of errors, for an order of mandate from the Court of Appeals affirming the rulings of the District Court and the jury's verdict, and for costs on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2023, a true and correct copy of the foregoing **ANSWER BRIEF BY APPELLEE COURTNEY BARELA** was filed with the Court and served via Colorado E-Filing to the following:

All counsel of record

Printed copy with original signature on file at the office of Lambdin & Chaney, LLP

/s/ J. Park Jennings
J. Park Jennings