

COURT OF APPEALS, STATE OF COLORADO

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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 REPLY BRIEF**

**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 5,035 words.

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

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 November 2, 2023.

By: */s/ Anthony Viorst*

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

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## INTRODUCTION

Plaintiff-Appellant Ashley Bullington hereby submits the following reply brief on appeal.

## STATEMENT OF FACTS

In her answer brief, Ms. Barela argues, without record support, that Ms. Bullington's post-accident headaches were unrelated to the accident. This assertion is belied by the evidence presented at trial.

### A. Post-Accident Headache Treatment

In her answer brief, Ms. Barela asserts that "the contemporaneous records to the accident had no mention of headache until more than a month after the accident." Answer Brief at 11. This assertion is false. At the hospital, where she was transported directly from the scene of the 12/18/2020 accident, 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). On December 20, 2016, Ms. Bullington 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). 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). Therefore, Ms. Bullington clearly complained of headaches in the days immediately following the accident.

B. Dr. Ashberger's IME Report

In her answer brief, Ms. Barela maintains further that her IME physician, Dr. John Aschberger, revised his opinion that Ms. Bullington's headaches were accident-related, after receiving her pre-accident medical records. Answer Brief at 18. Again, this assertion is not accurate. It is true that, after writing his initial report (Ex. I), Dr. Aschberger received Ms. Bullington's pre-accident medical records, and that Dr. Aschberger then wrote three supplemental reports (Exs. J, K, L), but his opinion regarding the cause of Ms. Bullington's post-accident headaches never changed.

During the initial examination of Ms. Bullington, she told Dr. Aschberger that she suffered from chronic accident-related 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 initial report, Dr. Aschberger diagnosed Ms. Bullington as suffering from cervicogenic headaches

“consistent with the mechanism of injury [being] the rear end motor vehicle collision.” (Ex. I, p118). After receiving pre-accident records, Dr Aschberger persisted in his opinion relating to the cause of Ms. Bullington’s headaches, stating in his first supplemental report that her “[h]eadache symptomatology does not appear to be pre-existing.” (Ex. J, p123).

Finally, Ms. Barela, in her answer brief, asserts that Dr. Aschberger’s IME reports indicated that *all* of Ms. Bullington’s symptoms, including her headaches, had resolved by early 2017. Answer Brief at 18. However, this assertion is also untrue. In his final supplemental report, Dr. Aschberger opined that “Ms. Bullington was back to her pre-accident status as of 2017 [with regard to neck and back issues but that] **[t]he exception would involve the headache symptomatology.**” (Ex. L, p129) (emphasis supplied).

#### C. Dr. Aschberger’s Trial Testimony

Although Dr. Aschberger testified that Ms. Bullington’s accident-related neck and back injuries likely returned to baseline by early 2017, and that none of her subsequent neck and back treatment was related to the accident (Tr. 11/15/22, p220-221), he had very different opinions in relation to Ms. Bullington’s accident-related headaches. Dr. Aschberger testified that before the accident 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 was recommending cervical facet injections to treat Ms. Bullington’s headaches. (Tr. 11/15/22, p161). Dr Aschberger did not testify that the delay in receiving cervical facet injections, due to Ms. Bullington’s pregnancies and breastfeeding, had any impact upon Ms. Bullington’s recovery.

#### D. Other Evidence of Accident-Related Headaches

Dr. Donner, an orthopedic surgeon who provided post-accident treatment to Ms. Bullington, 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). Dr. Weatherhogg, a physical and rehabilitation medicine specialist, testified that her “number one diagnosis [of Ms. Bullington] was chronic and cervicogenic daily headaches . . . since rear-ended . . . on December 18th of

2016." (Tr. 11/16/22, p69). Dr. Usama Ghazi, a physical medicine and rehabilitation specialist, diagnosed Ms. Bullington with accident-related "severe occipital headaches, as well as temporomandibular referred pain and sometimes photophobia." (Ex. 5, p614).

Contrary to the suggestion of Ms. Barela, no lay witness or medical provider testified that Ms. Bullington's cervicogenic headaches were caused by anything other than the December 18, 2016, motor vehicle accident, or that the child-related delay in receiving those injections had any impact upon her recovery from her accident-related injuries.

## **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). Ms. Bullington agrees with Ms. Barela that, prior to instructing the jury on the affirmative defense of failure to mitigate damages, the trial court must determine whether there is sufficient competent evidence to support it, and that the trial court's ruling will be

overturned only where clearly erroneous. Answer Brief at 31-32; *Burt v. Beautiful Savior Lutheran Church of Broomfield*, 809 P.2d 1064, 1068 (Colo. App. 1990); *accord, Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997).

B. Factual Background

During cross-examination of Ms. Bullington, defense counsel elicited testimony that, 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). Ms. Bullington breastfed all of her children. 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 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>

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 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.

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<sup>1</sup> 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).

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. Applicable Law

In Colorado, 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). Likewise, a woman’s decision to carry her pregnancy to full term is *per se* reasonable, 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). Finally, with regard to breastfeeding, Colorado public policy 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.”

### D. Legal Argument

In her answer brief, Ms. Barela argues that there was sufficient evidence to support the giving of the failure-to-mitigate instruction, because the evidence

showed that Ms. Bullington did not obtain all of the treatment recommended by her doctors. Answer Brief at 22, 32-33. However, in Colorado, “a plaintiff is not required to take unreasonable measures in an effort to mitigate his or her damages [and] a plaintiff’s failure to mitigate damages is excused if there were reasonable grounds for the failure.” *Francis ex rel. Goodridge v. Dahl*, 107 P.3d 1171, 1173 (Colo. App. 2005); *accord, Easton v. State Farm Mut. Auto. Ins. Co.*, No. 1:20-CV-03108-RBJ, 2022 WL 19595387, at \*2 (D. Colo. June 22, 2022).

Here, as set forth above, Ms. Bullington testified credibly at trial that the stem cell and steroid injections were contraindicated for a woman who was pregnant or breastfeeding, that she was pregnant or breastfeeding during the years immediately following the accident, and that therefore the injections had to be deferred (Tr. 11/16/22, p219, 235, 245-246). Based upon this testimony, the veracity of which was not disputed at trial,<sup>2</sup> and the well-settled Colorado public policies that support a woman’s right to pregnancy, childbirth, and breastfeeding,

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<sup>2</sup> On appeal, for the first time, Ms. Barela maintains that Ms. Bullington’s testimony was inconsistent, because she received occipital or peripheral nerve block (“PNB”) injections to treat her headaches, but maintained that other injections posed a risk to her unborn or breastfeeding children. Answer Brief at 23. This alleged inconsistency was never raised at trial. In any event, it is well settled that “PNBs for headache can be performed safely during pregnancy for patients with debilitating headaches.” Govindappagari et al., “Peripheral Nerve Blocks for Pregnant Patients with Headache,” Neurology (April 2014), [https://n.neurology.org/content/82/10\\_Supplement/P7.202](https://n.neurology.org/content/82/10_Supplement/P7.202).

Ms. Bullington's failure to timely obtain the recommended treatment was justified as a matter of law. Therefore, the failure-to-mitigate instruction should not have been given. *See Dahl*, supra, 107 P.3d at 1173 (trial court erred in giving failure-to-mitigate instruction with regard to minor child who lacked the financial ability to obtain medical treatment).

Ms. Barela also maintains that the reasonableness of Ms. Bullington's actions was a determination properly left to the jury. Answer Brief at 34. However, in order for the jury to be tasked with determining whether Plaintiff acted reasonably, there must be sufficient evidence that she acted unreasonably, and that therefore the giving of the failure-to-mitigate instruction is warranted. Here, the only evidence of unreasonable conduct by Ms. Bullington, as explicitly stated by the district court on multiple occasions, and by defense counsel during closing argument, was that after the accident she got pregnant, gave birth, and breastfed her children. Under the public policies of this State, this behavior by Ms. Bullington, as a matter of law, cannot be considered unreasonable.

Ms. Barela also argues that Ms. Bullington cannot prove that the erroneous instruction impacted the jury's damage award. Answer Brief at 17, 21, 34. This is technically true, because the verdict form did not explicitly ask the jury to compute any deduction related to the failure to mitigate damages. However, in *Dahl*, supra,

under virtually identical circumstances, this Court ruled that “we have no basis for determining to what extent the final award of damages was predicated upon the jury's finding of a failure to mitigate, and, therefore, prejudice must be presumed.” *Dahl, supra*, 107 P.3d at 1174.

Finally, Ms. Barela argues that the giving of the mitigation instruction was harmless, because there were other grounds—in addition to Ms. Bullington’s pregnancy, childbirth, and breastfeeding—that could have supported a finding of failure to mitigate. Answer Brief at 23, 24. However, there were no other grounds referenced by the district court, or defense counsel, at trial. On the contrary, the only justification provided by the district court for giving the instruction was “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). And, after cross-examining Ms. Bullington extensively about the birth dates of her children and her child-rearing practices, the only argument made by defense counsel, in her closing argument, in relation to the failure to mitigate, was that Ms. Bullington should be denied compensation “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). Thereafter, instead of awarding the documented \$58,000 in past medical bills (Ex. 50, p855), and the sums requested

by Ms. Bullington’s counsel for noneconomic damages and physical impairment, the jury returned a verdict 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).

An erroneous jury instruction will not be deemed harmless if that instruction could have affected the outcome of the trial. *Bedor v. Johnson*, 2013 CO 4, ¶ 15, 292 P.3d 924, 927. Under the authority of *Herrera v. Lerma*, 2018 COA 141, 440 P.3d 1194, in which the trial court erroneously gave an instruction relating to a second motor vehicle accident that did not injure the plaintiff, the erroneous failure-to-mitigate instruction given in this case cannot be deemed harmless:

We also conclude that this error harmed plaintiff. Defendant's main defense at trial was that plaintiff's injuries were caused by the second accident. His counsel cross-examined plaintiff extensively about the second accident. He also focused on it during closing arguments. And most of all, the instruction gave the jury an unsubstantiated reason for denying plaintiff's claim for her medical bills sustained after the second accident, which it arguably did by awarding plaintiff only \$1980.81—a far cry from her requested \$38,356.46 . . .

*Herrera, supra*, 2018 COA at ¶ 10, 440 P.3d at 1197. As in *Herrera*, defense counsel in Ms. Bullington’s case cross-examined her extensively about her post-accident pregnancies, she focused on those pregnancies during her closing

argument, and the jury awarded a sum that was much lower than Ms. Bullington's actual damages.

Notably, Ms. Barela's answer brief provides no justification for, nor even any explicit reference to, the district court's rationale for giving the failure-to-mitigate instruction, or the statements made by her counsel during closing arguments. Yet the only grounds cited by the district court for giving the failure-to-mitigate instruction were Ms. Bullington's child-related decisions, and during closing arguments her counsel made the strategic decision to portray Ms. Bullington's pregnancies, childbirths, and breast feeding as irresponsible and unreasonable acts. The district court's ruling, in conjunction with defense counsel's prejudicial statements, constituted reversible error.

**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. Factual Background

Dr. Springfield, an expert chiropractor and acupuncturist (Tr. 11/15/22, p242-260), testified at trial. He stated that, following the motor vehicle accident, he treated Ms. Bullington for her acute accident-related neck and back injuries (Tr. 11/15/22, p269-276). Dr. Springfield confirmed that, in his professional opinion,

Ms. Bullington suffered a Grade 3 whiplash in the accident (Tr. 11/15/22, p270-271; Tr. 11/16/22, p160-168, 174).

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, and he also testified at trial. 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, as set forth above, Dr. Aschberger's opinions relating to Ms. Bullington's neck and back injuries did not apply to her headaches. The headaches, according to Dr. Aschberger, were accident-related, and ongoing. (Ex. I, p112; Ex. J, p123, Tr. 11/15/22, p122, 143-144). He opined further that additional treatment, including the cervical facet injections recommended by Dr. Ghazi, would be appropriate (Ex. L, p129, Tr. 11/15/22, p161).

Dr. Aschberger's opinion that Ms. Bullington was suffering from ongoing accident-related cervicogenic headaches was consistent with the testimony other medical experts, including Dr. Donner (Tr. 11/15/22, p39-42), Dr. Weatherhogg (Tr. 11/16/22, p69), and Dr. Ghazi (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), 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 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, p3184-85).

Following the trial, Ms. Bullington'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).

#### B. 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.

In her answer brief, Ms. Barela asks this Court to affirm the jury award of zero noneconomic damages, and relies primarily upon *Gonzales v. Windlan*, 2014 COA 176, ¶ 40, 411 P.3d 878. Answer Brief at 29-31. In *Gonzales*, 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.” *Gonzales, supra*, 2014 COA 176 at ¶ 40. 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, supra*, 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 reject Ms. Barela's argument, and 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. Legal Argument**

In her answer brief, Ms. Barela maintains that the district court's ruling was correct, because counsel for Ms. Bullington's counsel engaged in "flagrant abuse of the Civil Rules of Procedure and defiance of court orders," by failing to comply with the district court's order to remove all medical opinions from Dr. Doty's life care plan. Answer Brief at 37. Ms. Bullington denies that her counsel acted improperly, and maintains that the process of sanitizing the life care plan authored

by Dr. Doty, a board-certified physician, so as to remove all medical opinions, was extremely difficult, due to Dr. Doty's inability to view Ms. Bullington's medical condition from a non-physician perspective.

In any event, Dr. Doty was not excluded because Plaintiff's counsel acted "defiantly," but because the Court believed that her expert report violated C.R.C.P. 37(c)(1). That Rule requires that the opposing party show "significant harm caused by the late disclosure." Although Ms. Barela's answer brief provides six pages of support for the trial court's ruling, Answer Brief at 37-42, in which Ms. Barela's counsel accuses Plaintiff's counsel of "egregious" behavior, "antics," and "contempt for the court's authority," there is no real description of the prejudice caused by Dr. Doty's late-disclosed opinions. In light of the fact that Ms. Barela was given 60 additional days to disclose her own responsive expert, as well as the fact that the retained defense IME expert, Dr. Aschberger, wrote a responsive report challenging the diagnoses and treatment recommendations made by Dr. Doty, no such prejudice existed.

Under these circumstances, the district court abused its discretion in striking Dr. Doty as a witness.

## **CONCLUSION**

WHEREFORE, for all of the foregoing reasons, as well as those stated in the opening brief, Plaintiff-Appellant asks this Court to reverse the order of judgment, and to remand this case for a retrial on the merits.

Dated this 2<sup>nd</sup> day of November, 2023.

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

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

*/s/ Anthony Viorst*

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Anthony Viorst, #18508

ATTORNEYS FOR PLAINTIFF-  
APPELLANT

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 2<sup>nd</sup> day of November, 2023, the foregoing **PLAINTIFF-APPELLANT'S REPLY BRIEF ON APPEAL** was served via Colorado Courts E-filing system and/or first-class mail, postage prepaid, addressed to the following:

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