SUMMARY
May 23, 2024

2024COA56

No. 23CA0364, *Bullington v. Barela* — Torts — Personal Injury — Civil Jury Instructions — Affirmative Defenses — Failure to Mitigate Damages

In this car accident case, the plaintiff contends that the district court erred by instructing the jury on the affirmative defense of failure to mitigate damages. In deciding to give the instruction, the district court found that the plaintiff's "voluntary decision" to get pregnant twice after the accident could be considered by the jury as evidence of her failure to mitigate damages because "the fact that she was both pregnant and nursing delayed her treatment." A division of the court of appeals concludes that the record does not support the district court's finding that the plaintiff "voluntarily" elected to get pregnant. The division further concludes that, under the circumstances of this case, a personal

injury plaintiff for whom an otherwise recommended medical treatment is contraindicated while pregnant or nursing has no duty to terminate the pregnancy or forgo nursing in order to receive the treatment. The division therefore reverses the judgment and remands the case for a new trial on damages.

COLORADO COURT OF APPEALS **2024COA56**

Court of Appeals No. 23CA0364
Weld County District Court No. 19CV30947
Honorable Shannon D. Lyons, Judge

Ashley Bullington,

Plaintiff-Appellant,

v.

Courtney Barela,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE YUN
Welling and Lum, JJ., concur

Announced May 23, 3024

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¶ 1 In this car accident case, plaintiff, Ashley Bullington, appeals the judgment entered on a jury verdict in her suit against defendant, Courtney Barela. At the close of the evidence, the district court instructed the jury on the affirmative defense of failure to mitigate damages. As the basis for this instruction, the court found that Bullington's "voluntary decision" to get pregnant twice after the accident could be considered by the jury as evidence of her failure to mitigate because "the fact that she was both pregnant and nursing delayed her treatment."

¶ 2 We conclude that the record does not support the district court's finding that Bullington chose to get pregnant or that she did not take reasonable measures to avoid getting pregnant. We further conclude that, under the circumstances of this case, a personal injury plaintiff for whom an otherwise recommended medical treatment is contraindicated while pregnant or nursing has no duty to terminate the pregnancy or forgo nursing to receive the treatment. Accordingly, we reverse and remand for a new trial on damages.

I. Background

¶ 3 Bullington was seven months pregnant in December 2016 when Barela's car struck hers in a low-speed rear-end collision. Paramedics transported Bullington to the hospital, where she told doctors that she felt tenderness in her neck and pain in her head and abdomen. Tests showed that her spine was uninjured and the fetus was healthy.

¶ 4 Bullington saw her obstetrician-gynecologist and primary care physician later that week and told both doctors that she was still suffering from neck pain and headaches. Her primary care physician diagnosed a whiplash injury but noted that pain management options were limited due to her pregnancy. Bullington resumed treatment with a chiropractor she had seen before the accident, who also diagnosed a whiplash injury, and began treatment with a physical therapist.

¶ 5 In February 2017, Bullington's son was born healthy. Two months after the birth, she consulted an orthopedic surgeon, Dr. Jeffrey Donner, about her neck pain and headaches. Dr. Donner advised her that steroid injections might help alleviate her pain but might not be safe while she was breastfeeding.

Bullington subsequently consulted two other doctors, a neurologist and a physiatrist, who treated her neck pain and headaches with occipital nerve blocks, Botox injections, and trigger point injections. About a year after her visit with Dr. Donner, Bullington consulted a second physiatrist, Dr. Usama Ghazi, who likewise recommended steroid injections but noted that he was "in agreement with Dr. Donner [that] it is best to avoid injections of steroids in patients who are breastfeeding."

¶ 6 In October 2018, when Bullington had stopped nursing, Dr. Ghazi cleared her for steroid injections. But before the injections could be performed, she became pregnant again. Dr. Ghazi noted that "[n]o injections can be performed while she is pregnant. She may revisit with us for injections once she has delivered her baby and is no longer breastfeeding."

¶ 7 Bullington returned to Dr. Donner in November 2020, and he again recommended steroid injections. But before she could receive the injections, she again became pregnant.

¶ 8 Bullington sued Barela in November 2019, asserting claims for negligence and negligence per se. Barela admitted fault but

disputed the extent of Bullington's injuries and the degree to which they were caused by the accident.

¶ 9 At trial, the defense's medical expert, Dr. John Aschberger, testified that Bullington's medical records showed she suffered from neck pain before the accident. He testified that her neck pain had been briefly exacerbated by the accident but had returned to its "pre-accident status or baseline" by January 2017. He opined that her headaches, in contrast, were not documented as pre-existing and treating them with steroid injections "would be reasonable."

¶ 10 Bullington testified that, after her son was born in February 2017, she and her husband thought their family was complete, and they "were definitely preventing" pregnancy when her next two babies were conceived. She testified that she had planned to receive the steroid injections after her consultation with Dr. Ghazi, but "[a]s soon as we found out I was pregnant, he wouldn't do them." She said that she did not see Dr. Donner between 2017 and 2020 because "[h]e told me . . . that as long as I was pregnant or nursing, it's just a waste of time to see him." As long as the treatment "didn't involve [steroid] injections," according to Bullington, she "did everything [she] could" to recover from the

accident, and she had planned to "do the injections as soon as possible."

¶ 11 During the jury instruction conference, Bullington's counsel objected to a proposed instruction on the affirmative defense of failure to mitigate damages, arguing that there was no evidence to support it. The court found that Bullington's "voluntary decision" to become "pregnant twice more after the accident" could be seen as a failure to mitigate her damages from the accident because she could not receive the recommended steroid injections while pregnant or nursing. Specifically, the court stated the following:

> Well, at the risk of being politically incorrect, I will make the following findings. I think the testimony from Ms. Bullington herself was that she was supposed to receive treatment from Dr. Ghazi in [2018]. . . . But he wouldn't perform that treatment on her because she was pregnant at the time. . . . And she was also told by Dr. Donner that he wouldn't do any treatment on her as long as she was pregnant and nursing, it was a waste of her money to come to him. . . . 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 . . . the fact that she was both pregnant and nursing delayed her treatment in certain areas. . . . [T]hat was a voluntary decision on her part, and it could be argued by the defense

> that that [constituted] failure to mitigate damages resulting from this car accident.

¶ 12 Accordingly, the court overruled Bullington's counsel's objection and instructed the jury that the affirmative defense of failure to mitigate was proved if it found both of the following:

> 1. The Plaintiff failed to follow the reasonable instructions and/or recommendations of her medical care providers, and
>
> 2. The [P]laintiff had increased injuries, damages and/or losses because she did not take such reasonable steps as recommended by her treating medical care providers.

The court further instructed the jury that, if it found that both propositions had been proved by a preponderance of the evidence, it "must determine the amount of damages caused by the Plaintiff's failure to take such reasonable steps" and exclude that amount from its award of damages.

¶ 13 During closing argument, defense counsel called the jury's attention to the mitigation of damages instruction, noting that while Bullington had "an obligation to . . . make herself better by following the . . . reasonable instructions and recommendations of her medical providers," she had "not gotten [a recommended treatment] due to her choice to have additional children."

¶ 14 The jury awarded Bullington $23,638 in economic damages, $0 in noneconomic damages, and $0 in physical impairment damages. The verdict form did not contain a specific interrogatory relating to failure to mitigate damages.

II. Analysis

¶ 15 Bullington appeals, contending that (1) the district court erred by giving the mitigation of damages instruction; (2) the jury verdict was legally inconsistent; and (3) the court erred by excluding expert testimony. Because we agree with the first contention and remand for a new trial on damages, we need not address the other contentions.

A. Mitigation Instruction

¶ 16 Bullington argues that the district court reversibly erred because there was no evidence that she failed to take reasonable steps to mitigate her damages. Specifically, she argues that the court erroneously found that she made a "voluntary decision" to become "pregnant twice more after the accident" and that the only voluntary decisions she *did* make — to carry her unintended pregnancies to term and to nurse her babies — cannot be considered unreasonable as a matter of law.

1. Standard of Review

¶ 17 "Trial courts have a duty to correctly instruct juries on all matters of law." *Banning v. Prester*, 2012 COA 215, ¶ 9. We review de novo whether the instructions as a whole accurately informed the jury of the governing law, but we review a court's decision to give a particular instruction for an abuse of discretion. *Id.* "A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Id.*

¶ 18 "We review a properly preserved objection to a jury instruction for harmless error." *Herrera v. Lerma*, 2018 COA 141, ¶ 7 (citation omitted). An instructional error is harmless unless it prejudices a party's substantial rights. *Id.* A party's substantial rights are prejudiced when the jury "might have answered differently if a proper instruction had been given." *Banning*, ¶ 10.

2. Governing Law

¶ 19 An injured party has a duty to take "such steps as are reasonable under the circumstances" to minimize or mitigate her damages. *Id.* at ¶ 11. Thus, a plaintiff may not recover damages for injuries that she might reasonably have avoided. *Id.* "In the

personal injury context, a failure to mitigate usually concerns a plaintiff's unreasonable failure to seek medical advice or unreasonable failure to follow that medical advice once received." *Id.* at ¶ 12; 1 Dan B. Dobbs et al., *The Law of Torts* § 229, Westlaw (2d ed. database updated Apr. 2024) ("[A] plaintiff who unreasonably delays in obtaining medical attention for her injury, or who unreasonably refuses to follow medical advice, cannot recover for exacerbation of the injury caused by her own delay or refusal.").

¶ 20 But a plaintiff is not required to take unreasonable measures in an effort to mitigate her damages. *Francis v. Dahl*, 107 P.3d 1171, 1173 (Colo. App. 2005). For example, a plaintiff's obligation to minimize her injuries does not require her "to submit to surgery which involves substantial hazards or which offers only a possibility of cure." *Hildyard v. W. Fasteners, Inc.*, 33 Colo. App. 396, 404, 522 P.2d 596, 600 (1974). As one treatise puts it,

> [i]f the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable [person] might well decline to incur it, a failure to do so imposes no disability against recovering full damages.

Charles T. McCormick, *Handbook on the Law of Damages* § 35, at 133 (1935).

¶ 21 Failure to mitigate damages is an affirmative defense that must be proved by the defendant. *Powell v. Brady*, 30 Colo. App. 406, 412, 496 P.2d 328, 331 (1972), *aff'd*, 181 Colo. 218, 508 P.2d 1254 (1973), *and superseded by statute on other grounds*, Ch. 107, sec. 3, § 13-21-111.6, 1986 Colo. Sess. Laws 679. "In order for the issue to be submitted to the jury[,] there must be competent evidence to the effect that plaintiff failed to take reasonable efforts to mitigate [her] damages." *Id.* at 412, 496 P.2d at 332.

3. Discussion

¶ 22 We discern two potential bases for the district court's ruling allowing the mitigation instruction: (1) Bullington was required to avoid pregnancy to mitigate her damages, and (2) Bullington was required to terminate her pregnancies or forgo nursing to mitigate her damages.[1] It is unclear on which of these bases the district

[1] We do not see any evidence in the record that any physician advised Bullington that she could receive steroid injections while pregnant or nursing.

court relied, so we address them both and conclude that neither is sufficient to support a failure to mitigate damages instruction.

a. Avoid Pregnancy

¶ 23 In our assessment, the district court likely based its ruling on a finding that Bullington was unable to receive certain injections for her pain because she "voluntarily" elected to get pregnant. We need not decide whether Bullington was obligated to avoid getting pregnant[2] because there is no competent evidence in the record to support the district court's finding.

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[2] As we noted, an injured party is not required to take *unreasonable* measures to mitigate her damages. *Francis v. Dahl*, 107 P.3d 1171, 1173 (Colo. App. 2005). We find the idea of being required, even temporarily, to give up the fundamental right to have children in order to mitigate damages dubious. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 35, at 133 (1935) (if a sacrifice required to mitigate damages is so great that a reasonable person might decline to make it, the failure to make such a sacrifice is not a basis for the reduction of damages); Restatement (Second) of Torts § 918 cmt. j (Am. L. Inst. 1979) ("A person is not ordinarily required to surrender a right of substantial value in order to minimize loss."); *cf. Tremitek, LLC v. Resilience Code, LLC*, 2023 COA 54, ¶ 37 ("Requiring a landlord to sell its property in response to a tenant breach goes far beyond reasonable efforts to reduce damages."); *Burt v. Beautiful Savior Lutheran Church of Broomfield*, 809 P.2d 1064, 1068 (Colo. App. 1990) (Under the circumstances, "it would not have been reasonable to require Burt to incur even [the] initial financial expense [of repairs whose estimated cost increased over time], and therefore, an instruction on mitigation of damages would

¶ 24 The court's finding that Bullington voluntarily decided to become pregnant twice after the accident is not supported by the record. *See Brooktree Vill. Homeowners Ass'n v. Brooktree Vill., LLC*, 2020 COA 165, ¶ 61 (In deciding whether to give a particular jury instruction, a "trial court necessarily abuses its discretion if it bases its ruling on . . . a clearly erroneous assessment of the evidence." (quoting *Schuessler v. Wolter*, 2012 COA 86, ¶ 10)). Rather, Bullington's undisputed testimony was that she and her husband "were definitely preventing" pregnancy. Thus, the record does not support the district court's suggestion that Bullington voluntarily decided to get pregnant and thereby acted unreasonably after the accident. *See Lascano v. Vowell*, 940 P.2d 977, 983 (Colo. App. 1996) (before the jury could reduce plaintiff's damages on grounds that she failed to mitigate by failing to follow her doctor's advice, the

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not have been proper."). Nevertheless, as the record contains no competent evidence supporting a mitigation of damages instruction even under the assumption that Bullington was required to avoid becoming pregnant, we need not decide whether she had such an obligation. But our decision to resolve the issue on this narrow basis should not be viewed as an invitation to the defendant to introduce evidence regarding Bullington's reproductive choices at retrial or otherwise take measures in this case to advance this argument.

jury was required to find plaintiff's decisions in that regard were unreasonable).

b. Terminate Pregnancies or Forgo Nursing

¶ 25 As to Bullington's decision to carry her pregnancies to term, the parties cite no authority, and we are aware of none, addressing the question of whether a personal injury plaintiff for whom an otherwise recommended medical treatment is contraindicated during pregnancy has a duty to terminate the pregnancy to receive the treatment. But in a different context — that of wrongful conception or wrongful birth suits, as, for example, against a doctor who negligently performed a sterilization procedure — numerous courts have held that a plaintiff has no duty to mitigate damages by having an abortion. *See, e.g.*, *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 620-21 (N.M. 1991) (holding that, as a matter of law, abortion is not "an ordinary or a reasonable measure as that phrase is used in the law relating to mitigation of damages"); *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1377 (Ohio 1989) (holding that a pregnant plaintiff "need not mitigate damages by abortion . . . since a tort victim has no duty to make *unreasonable* efforts to diminish or avoid prospective damages"); *Cockrum v.*

Baumgartner, 425 N.E.2d 968, 971 (Ill. App. Ct. 1981) ("We do not believe it is reasonable for a defendant to require the parents of an unplanned child to consider abortion or adoption. These alternatives are uniquely personal choices which cannot be forced upon parents as a means of mitigating damages."), *rev'd on other grounds*, 447 N.E.2d 385 (Ill. 1983); *Troppi v. Scarf*, 187 N.W.2d 511, 520 (Mich. Ct. App. 1971) (holding that, as a matter of law, no pregnant person "can reasonably be required to abort" their child), *overruled on other grounds as recognized in Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. Ct. App. 1999).

¶ 26 We find the reasoning of these cases persuasive. The decision to terminate a pregnancy is "uniquely personal," *Cockrum*, 425 N.E.2d at 971, and the sacrifice involved "is such that under all the circumstances a reasonable [person] might well decline to incur it," McCormick, § 35, at 133. We thus conclude that, under the facts of this case, a personal injury plaintiff's duty to mitigate damages cannot, as a matter of law, require the plaintiff to terminate a pregnancy.

¶ 27 As to Bullington's decision to breastfeed, our legislature has declared that "[n]ursing is a basic, normal, and important act of

nurturing that should be encouraged in the interests of maternal and infant health." § 8-13.5-102(1)(f), C.R.S. 2023. Further, the American Academy of Pediatrics recommends exclusive breastfeeding for approximately six months after birth and "supports continued breastfeeding . . . as long as mutually desired by mother and child for [two] years or beyond." Joan Younger Meek et al., *Policy Statement: Breastfeeding and the Use of Human Milk*, Pediatrics, July 2022, at 71, 81, https://perma.cc/QAJ5-Y6ZF; *see* § 8-13.5-102(1)(a) (incorporating the recommendation of the American Academy of Pediatrics). Therefore, under these facts, we likewise conclude that a plaintiff's duty to mitigate damages cannot require her to forgo breastfeeding.

¶ 28 Accordingly, the district court erred by finding that the delay in Bullington's treatment while "she was both pregnant and nursing" could be considered evidence of her "failure to mitigate damages resulting from this car accident." Because the court relied solely on Bullington's inability to receive certain treatment while she was pregnant and nursing, and because the record reveals no other evidence of Bullington's failure to mitigate, there was no "competent evidence to the effect that plaintiff failed to take reasonable efforts

to mitigate [her] damages." *Powell*, 30 Colo. App. at 412, 496 P.2d at 332. The issue of Bullington's failure to mitigate therefore should not have been submitted to the jury. *See id.*

¶ 29 We further cannot conclude that the instructional error was harmless. The verdict form did not contain any special interrogatories regarding mitigation of damages. Instead, the court simply instructed the jury to exclude any amount caused by Bullington's failure to mitigate from the total award. And defense counsel argued that Bullington had failed to mitigate her damages by getting pregnant. As a result, "it cannot be known" whether the jury's verdict was based in part on a conclusion that Bullington failed to mitigate her damages. *Banning*, ¶ 19. We therefore conclude that the instructional error was prejudicial, requiring a new trial on damages. *See id.* at ¶ 10.

B. Bullington's Other Contentions

¶ 30 Bullington also contends that the jury verdict was legally inconsistent and that the court erred by excluding an expert witness. Because these other contentions may not occur on retrial under the same circumstances, if at all, we do not address them. *See People v. Becker*, 2014 COA 36, ¶ 29 ("Defendant raises three

additional grounds for reversal, which we do not address. His remaining contentions involve facts specific to how the trial unfolded, and we cannot predict that those facts will occur again or are even likely to occur again.").

III. Disposition

¶ 31 For these reasons, we reverse the judgment and remand the case for a new trial on damages.

JUDGE WELLING and JUDGE LUM concur.