

## Failure to mitigate can be useful tool in attacking damages

By Donald P. Eckler

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As has been written in this space previously, the purpose of tort law is to place the plaintiff back in the position they would have been but for the conduct of the defendant. The principle extends to a whole range of cases, and two recent decisions, *Mayster v. Santacruz*, 2020 IL (2d) 190840, in the business dispute context, and *Humphrey v. Tuck*, 2020 Ind. LEXIS 701, in the personal injury context, illustrate the point.

Often incorrectly described as a “duty” to mitigate, the law actually is that “the law does not assess damages against a plaintiff who fails to mitigate, it just ‘fails to compensate him for any injury he reasonably could have avoided’ ... the injured party is merely precluded from recovering damages for losses that it could have avoided had it taken such steps.” *Mayster*, 2020 IL (2d) 190840, Para. 41 citing *Wired Music, Inc. v. Clark*, 26 Ill.App.2d 413, 416 (1960), and 3 Edward A. Farnsworth, *Farnsworth on Contracts*, Sec. 12.12 (3d ed. 2004). IPI 33.01, which applies to personal injury matters, sets forth that an argument for failure to mitigate is an affirmative defense (*Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969)) and that evidence necessary to give the instruction is that (1) there is evidence creating an issue of fact as to the plaintiff’s negligence in securing medical attention and (2) the damages resulting to the plaintiff from the failure to exercise due care in obtaining medical care are separable from his other injuries.

In *Humphrey v. Tuck*, the Indiana Supreme Court recently affirmed the trial court’s decision to give a mitigation instruction and reversed the appellate court, in an admitted liability case. 2020 Ind. LEXIS 701, \*2-3. The plaintiff claimed that as a result of the trucking accident, he developed “pituitary apoplexy, a rapid increase in the size of a pre-existing tumor, often triggered by a sudden event and caused by bleeding into the tumor,” which was surgically removed.

The plaintiff subsequently suffered hormonal imbalance, and after initially being unable to afford to take the medication prescribed, when he did take the drug, it improved his condition, but caused side effects. He was instructed to stop taking the medication.

The plaintiff was told to make a follow-up appointment to consider a substitute medication, but he waited over a year before doing so. Once he did take the substitute, his condition again improved.

At trial, which was on damages only, the defense argued that the plaintiff “did not initially take the medicine prescribed for him, that it worked when he did take it, that he stopped taking it because of side effects, that he did not immediately follow up as directed to find an alternative medicine, and that despite claiming vision problems, he failed to fill an eyeglasses prescription.”

Over the plaintiff’s objection, the trial court gave the following instruction, which is very similar to Illinois law: “A plaintiff must use reasonable care to minimize his damages after he is injured. The Plaintiff may not recover for any item of damage that he could have avoided through the use of reasonable care. The Defendant

has the burden of proving by the greater weight of the evidence that the plaintiff failed to use reasonable care to minimize his damages. Do not consider failure to minimize damages as fault. Rather you may consider failure to minimize damages to reduce the amount of damages that the plaintiff claims.” Id. at \*4-5.

The jury returned a verdict of \$40,000, and the trial court denied the plaintiff’s post-trial motion that the instruction should not have been given. In reversing the trial court, the appellate court held that the defendant had failed to support evidence of the second element that “plaintiff’s lack of reasonable care caused him to suffer an identifiable harm not attributable to defendant’s negligence.”

In reversing the appellate court and reinstating the jury verdict, the Indiana Supreme Court held that only a scintilla of evidence, was required to give the instruction. Citing its decision of *Willis v. Westerfield*, 839 N.E.2d 1179 (Ind. 2006), the court noted that expert testimony will often be needed to show the “identifiable harm” caused by the plaintiff’s conduct, but not always. The “quantifiable” extent of damage increased by the plaintiff’s failure to seek treatment, despite plaintiff’s admissions that when he did get treatment it improved his condition, the court stated that “[plaintiff] did not need to quantify his request for damages to any degree of mathematical precision, neither did [the defendants] need to do so on their defense.” Id. at \*13-14.

When available, an argument that the plaintiff failed to mitigate the damage claimed can be an effective defense to reduce the alleged damages, and in the appropriate case, expert testimony should be considered to attack the plaintiff’s claimed damages.