

RENDERED: December 6, 1996; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 94-CA-002803-MR

BONNIE J. MAGGARD

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 93-CI-00150

BRENDA A. CAIN and
HANOVER INSURANCE COMPANY

APPELLEES

AND

NO. 94-CA-002821-MR

HORACE MANN INSURANCE COMPANY

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 93-CI-00150

BRENDA A. CAIN and
HANOVER INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

* * * * *

BEFORE: HUDDLESTON, JOHNSON and SCHRODER, Judges.

JOHNSON, JUDGE: Bonnie J. Maggard and Horace Mann Insurance
Company (Maggard) appeal from a judgment entered September 27,

1994, by the Knox Circuit Court in favor of appellees, Hanover Insurance Company and Brenda A. Cain (Cain) following a jury trial. We affirm in part, reverse in part and remand.

This matter arises from an automobile accident which occurred on January 15, 1993, when Cain's vehicle struck Maggard's vehicle. The collision was relatively minor, and Maggard did not seek medical treatment until approximately 24 hours after the accident. At that time, she was seen in the emergency room of a local hospital for headache, neck pain and stiffness, and numbness in her arms and legs. She was given a pain shot and told to see her family doctor.

Maggard was seen by Dr. David Delapena several days later. Dr. Delapena prescribed pain medication and referred her to Dr. John W. Gilbert, a neurosurgeon. Dr. Gilbert saw Maggard on January 27, 1993. He diagnosed a soft tissue injury and recommended physical therapy and a CT scan. However, Maggard testified that she did not like Dr. Gilbert and thus did not follow through with his recommendations for physical therapy or further testing. Following Maggard's visit to Dr. Gilbert, she returned to work at a McDonald's restaurant. She testified that she could not lift or stand for long periods of time, and that she usually had to go home early. She continued to work for several months.

Maggard was referred to Dr. Christa U. Muckenhausen, a neurologist, by her attorney. Dr. Muckenhausen first saw her in April 1993. An MRI of her cervical spine showed a slight disc protrusion at the C6-7 level. Dr. Muckenhausen told Maggard not to return to work, and treated her with physical therapy and electri-

cal stimulation therapy. In Dr. Muckenhausen's opinion, Maggard would continue to have problems, incur further medical expenses, and could only return to light-duty work. Maggard has also been seen by Dr. Emerich Grinbaum and Dr. Nael Tarakji, and their testimony was consistent with Dr. Muckenhausen's.

Dr. Kenneth B. Graulich examined Maggard on August 25, 1993, on behalf of Cain. Dr. Graulich testified that in his opinion, Maggard could resume her previous employment. Furthermore, although her pain would continue for a period of time, in his opinion, it would not be permanent. Dr. Graulich diagnosed Maggard as having a significant whiplash injury. Dr. Graulich also indicated that the herniated disc was not causing her problems because the herniation was on the wrong side to be causing her alleged symptoms. He felt Maggard could be treated with an in-home exercise program. He felt that her prognosis for recovery was good, and that she should be able to function despite her pain.

Prior to trial, the parties stipulated that appellant Horace Mann Insurance Company paid \$19,707.27 for Maggard's medical expenses and lost wages.¹ Of this amount, the parties stipulated that \$11,856.86 was for medical expenses. Following the close of evidence, Cain conceded liability and entered no objection to Maggard's motion for directed verdict with respect to liability. Maggard's claims for damages were submitted to the jury, which returned a verdict finding that Maggard was entitled to \$0.00 for her damage claims. Judgment in favor of Cain was entered by the

¹ Horace Mann Insurance Company was an intervening plaintiff. It elected not to appear at trial pursuant to the stipulation.

trial court on September 27, 1994. Maggard moved for a new trial on the grounds that the verdict was not sustained by the evidence and that the damages were inadequate. The trial court denied Maggard's motion for a new trial, and this appeal followed.

In its brief Cain argues that Maggard has failed to properly set forth in her brief any reference to the record where the issues were properly preserved for appeal. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv). Considering the fact that this appeal relates to an alleged inadequate damage award, we are of the opinion that the motion for a new trial and notice of appeal properly preserved the issues for review. Maggard has attached copies of various documents in her appendix that adequately demonstrate preservation of the issues on appeal.

Maggard argues that the trial court erred in failing to grant a new trial pursuant to CR 59.01 on the grounds that the jury's verdict was given under the influence of passion and prejudice and completely in disregard of the evidence set forth at trial. CR 59.01(d) and (f). We are required to affirm the trial court's ruling unless we find that the trial court's decision was clearly erroneous as to amount to an abuse of discretion. Brown v. Louisville & Nashville Railroad Company, 144 Ky. 546, 548, 139 S.W. 782 (1911). In reaching our decision, we are to presume that the decision of the trial court was correct. Prater v. Arnett, Ky.App., 648 S.W.2d 82, 86 (1983). As long as the verdict "bears any reasonable relationship to the evidence of loss suffered, it is the duty of the trial court and this Court not to disturb the jury's assessment of damages." Hazelwood v. Beauchamp, Ky.App.,

766 S.W.2d 439, 440 (1989). Even if we feel the record "would more strongly support a different conclusion," as long as there is substantial evidence which supports the decision of the trial court, there is no error or abuse of discretion. City of Louisville v. Allen, Ky., 385 S.W.2d 179, 184 (1964), overruled on other grounds, Nolan v. Spears, Ky., 432 S.W.2d 425 (1968).

We hold that the trial court erred in not granting a new trial as to Maggard's medical expenses, lost wages, and past pain and suffering that were incurred as a result of the accident. Our review of the record shows that the parties stipulated that Maggard had incurred \$19,707.27 in medical expenses and lost wages resulting from the accident and further stipulated that this amount was reasonable. We agree with Maggard that Cain failed to show any evidence which would indicate that Maggard's medical expenses were unnecessary. While the jury is free to disregard Maggard's testimony and evidence in regard to future pain and suffering and the necessity for further medical treatment, it is not free to ignore uncontroverted evidence as to medical expenses and lost wages incurred as a result of the accident, especially where that amount as well as the reasonableness thereof has been stipulated to by the parties. Hazelwood, 766 S.W.2d at 441. Due to the evidence presented, the parties' stipulation in regard to the amount of medical expenses incurred, and the fact that Cain conceded the liability issue, the jury was also required to make some award as to past pain and suffering. Biggs v. Toone, Ky., 244 S.W.2d 443, 445 (1951). See also Hazelwood, supra, at 440-441 (holding that trial court abused its discretion in not granting motion for new

trial where jury's meager award for pain and suffering was not supported by evidence); Phipps v. Bisceglia, Ky., 383 S.W.2d 367, 368 (1964) (holding that trial court erred in not granting new trial where jury awarded damages for medical expenses but not pain and suffering). The trial court erred in not granting Maggard's motion for a new trial as to her past medical expenses, lost wages, and past pain and suffering.

However, we do not believe that the trial court erred in refusing to grant a new trial as to her claim for damages for future medical expenses, future loss or impairment of power to earn money, and future pain and suffering. The jury's verdict in regard to the claims of future damages is supported by the testimony of Dr. Graulich who testified that Maggard could return to work, could function despite her pain, and that her prognosis for recovery was good. Both the trial court and the jury had the opportunity to view the parties and their witnesses, hear their testimony and evaluate their demeanor and credibility. Davis v. Graviss, Ky., 672 S.W.2d 928, 932 (1984). Furthermore, the jury is not bound to accept the testimony of Maggard and her witnesses as absolute truth or to award any amount of compensation for particular items of damage. Turfway Park Racing Association v. Griffin, Ky., 834 S.W.2d 667, 670 (1992). See also McVey v. Berman, Ky.App., 836 S.W.2d 445, 448 (1992) (jury not bound to accept testimony of plaintiff and plaintiff's doctors as absolute truth); Spalding v. Shinkle, Ky.App., 774 S.W.2d 465, 467 (1989) (jury not bound to believe plaintiff or her doctors). Whether Maggard "suffered as much as she claimed was a matter within the discretion of the

jury," and because there was evidence supporting the jury's verdict on the claims for future losses, we cannot say that the trial court erred in refusing to grant a new trial as to these claims. McVey, 836 S.W.2d at 448.

Having considered the parties' arguments on appeal, we hold that the trial court erred in refusing to grant a new trial as to the issue of medical expenses, lost wages, and past pain and suffering, and reverse and remand that part of the trial court's judgment for a new trial. The remainder of the trial court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, MAGGARD:

Hon. Edmond Collett, P.S.C.
Hon. Kenneth A. Buckle
Hyden, KY

Hon. Asa P. Gullett, III
Hon. Teresa G. Combs Reed
GULLETT & COMBS
Hazard, KY

BRIEF FOR APPELLANT, HORACE
MANN:

Hon. Ben L. Kessinger, Jr.
Hon. Lisa Kleopfel Ramsey
STITES & HARBISON
Lexington, KY

BRIEF FOR APPELLEES:

Hon. J. Robert Stansbury
Hon. Gary N. Hudson
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