RENDERED: December 13, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-000174-MR

RODNEY MOBLEY APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 92-CI-000581

ALLSTATE INSURANCE COMPANY APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, JOHNSON and KNOPF, Judges.

JOHNSON, JUDGE: Rodney Mobley (Mobley) appeals from an order of the Madison Circuit Court entered on January 4, 1995, that denied his motion for new trial following a jury trial.

Mobley contends that he is entitled to a new trial pursuant to Kentucky Rules of Civil Procedure (CR) 59.01 due to inadequate damages and improper closing argument at trial by counsel for Allstate. We affirm.

In the action below Mobley alleged that he sustained injuries to his neck and jaw following an automobile accident which occurred on September 10, 1991 (the 1991 accident). Mobley, who was insured by Allstate Insurance Company (Allstate), settled his claim against the other driver for her policy limits of $25,000 and

filed suit against Allstate under the underinsured motorist (UIM) provisions of his policy. The jury returned a verdict apportioning 60% of the fault to the other driver and 40% of the fault to Mobley, but held that Mobley was entitled to no award for his damage claims. Mobley's motion for an new trial was denied by the trial court, and this appeal followed.

Mobley contends the trial court erred in failing to grant a new trial pursuant to CR 59.01 on the ground 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, 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 in our opinion the record would more strongly support a different conclusion, if there is substantial reason for his decision, then he has not clearly erred." 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).

The evidence presented at trial showed that prior to the September 1991 accident, Mobley was involved in an earlier accident

which occurred in April 1990 (the 1990 accident). Following the 1990 accident, Mobley received treatment for jaw/facial, neck, shoulder and back pain. He was treated by Dr. Jim Ney, a dentist, on 26 occasions and by Dr. Nicholas Martin on 16 occasions for the injuries from the 1990 accident before the 1991 accident ever occurred.

Dr. Ney testified that following the 1991 accident he treated Mobley between September 1991 and May 1994. While Dr. Ney indicated that Mobley complained of the same injuries in both accidents and that Mobley's injuries from the 1990 accident were permanent, he also attributed Mobley's current problems to the 1991 accident.

Records from Dr. Martin, who treated Mobley following the 1990 accident, were placed into evidence. These records indicated that the injuries sustained by Mobley in the 1990 accident were similar to those he allegedly suffered as a result of the 1991 accident.

Dr. Patrick Leung, a neurologist, testified that he treated Mobley following the 1991 accident. He stated that MRI studies showed no disc herniations, no nerve root impairment or impingement, no pinched nerves, and no spinal stenosis. In Dr. Leung's opinion, the pending lawsuit was a contributing factor to Mobley's pain.

Dr. Kooros Sajadi examined Mobley on behalf of Allstate. He testified in his deposition that Mobley had no spasm or mass, and that Mobley exhibited normal movement. He noted no abnormalities during his examination. X-rays revealed no abnormalities

aside from a congenital birth defect. He reviewed previous MRIs, which showed no herniations, slipped discs, or soft tissue injury. His impression was that Mobley had suffered a soft tissue injury which had resolved with no impairment.

Dr. Joseph Zerga also examined Mobley on behalf of Allstate. He documented prior problems with temporomandibular joint syndrome, which Mobley complained of, as early as 1988. He reviewed the previous MRIs and felt they were not abnormal. In his opinion, Mobley did not sustain what he would call a lasting injury as a result of the accident.

Evidence concerning Mobley's ability to work was also presented at trial. At the time of the 1991 accident, Mobley was employed as a waiter at a Red Lobster restaurant. Records from Red Lobster showed that following the 1991 accident Mobley worked the same number of hours and earned approximately the same amount of money as he earned prior to the 1991 accident. At the time of the trial, Mobley was employed by a car dealership and was making more money than he made prior to the 1991 accident. Furthermore, although Mobley testified at trial that he had been unable to engage in any recreational activities or physically pick up his son since the 1991 accident, he indicated on his job application with the car dealership that he participated in activities such as "skiing, swimming, horseback riding, [and] activities with [his] son."

Thus, although there is evidence which would support Mobley's claim that he suffered injuries as a result of the 1991 accident, there is also ample evidence which supports the jury's

verdict. Mobley argues that there is uncontradicted evidence that he incurred substantial medical bills, missed work, and experienced pain and suffering; and thus, he is entitled to a monetary award. However, this argument completely ignores the fact that there was evidence that Mobley was similarly injured in 1990, his 1991 injuries were not serious and a lot of his problems were related to the pending lawsuit.

Mobley also argued that he is entitled to a new trial due to improper argument by counsel for Allstate during his closing statement. Specifically, Mobley argues that it was improper for counsel for Allstate to bring up the issue of health care reform. Counsel for Allstate argued as follows:

> And that's what this whole case is all about. When this litigation is over, after we're done with this and out of the courtroom, is when Mr. and Mrs. Mobley's case, and life, get back to normal. When they get this out of their heads. When they get out of going to lawyers. When they get out of talking to doctors. This is why we're going through health care reform.

At this point, Mobley's attorney objected and the jury was properly admonished. However, Mobley did not ask for a mistrial, and the closing arguments continued. It is a generally accepted principle of law in Kentucky that a party who claims that a mistrial has occurred due to improper remarks by opposing counsel must make a timely request for relief. Morton v. Commonwealth, Ky., 817 S.W.2d 218, 224 (1991). Additionally, a party claiming error who requests or receives an admonishment but does not seek a mistrial is "deemed to be satisfied with the relief given or, despite the error, desires to have the jury as empaneled render the verdict." Id. at 224. Because Mobley waited until after the jury returned a verdict

to request a new trial due to counsel's remarks during closing argument, the issue is not properly preserved for our review. Id.

We also disagree with Mobley's argument that he is entitled to a new trial pursuant to Smith v. McMillan., Ky., 841 S.W.2d 172 (1992). In Smith, the Court held that a court can consider whether a new trial is warranted due to inadequate damages caused by improper argument when the improper argument is "'re-peated and reiterated in colorful variety by an accomplished orator[.]'" Id. at 174, citing Stanley v. Ellegood, Ky., 382 S.W.2d 572, 575 (1964). It is clear from our review of the record that Allstate's remarks were not "repeated" or "reiterated." Furthermore, Mobley's failure to request a mistrial is not excused by Risen v. Pierce, Ky., 807 S.W.2d 945 (1991).

Having considered the parties' arguments on appeal, the judgment of the Madison Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

KNOPF, JUDGE, DISSENTS BY SEPARATE OPINION.

KNOPF, JUDGE DISSENTING. I respectfully dissent from the majority opinion. First, Rodney Mobley offered uncontradicted evidence of hospitalization and lost wages following the accident. Second, the jury found that the defendant was negligent and that her negligence "was a substantial factor in causing the accident and **injuries**." For the jury to then award nothing to Mobley for damages was inconsistent and clearly the result of passion or prejudice. I would reverse the circuit court and remand the case for a trial on damages.

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