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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001076-MR

JESSICA D. LEPORT APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 11-CI-00234

ALLSTATE INSURANCE COMPANY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Jessica D. LePort (Jessica) appeals from orders entered by the Greenup Circuit Court pertaining to the trial of her complaint for underinsured motorist (UIM) benefits. Jessica contends that had the trial court ruled differently, especially on evidentiary matters, jurors would not have awarded her zero dollars for both future medical expenses and pain and suffering in light of the parties

having stipulated to nearly $22,000.00 in past medical expenses. Upon review of the record, the briefs and the law, we affirm.

FACTS

On June 15, 2009, while sitting at a stoplight waiting to make a turn, the 2000 Dodge Dakota Sport truck in which Jessica was a rear seat passenger was struck from behind by a Dodge Ram 1500 truck driven by Kermit Stone, Jr. Jessica, wearing her seatbelt, braced herself for the impact, but her left hand hit the backside of the front seat and the back of her head struck the back window of the truck's cab. After the impact, Jessica said her back and wrist hurt, but she did not go to the hospital.

The Dakota was being driven by Jessica's younger brother—Daniel LePort (Daniel). Brittany Wilburn—his girlfriend, was the front seat passenger. There was no indication Daniel or Wilburn—both nursing students—were injured. None of the Dakota's three occupants sought immediate medical help.

In describing the collision, Daniel said Stone was traveling at the speed limit—probably forty or forty-five miles an hour[1]—and either did not brake or braked too late, causing the Ram to hit the Dakota's tow hitch and then its bumper. Daniel said Stone struck the vehicle with such force "he jolted us." According to Daniel, Stone approached him with checkbook in hand, offering to pay him money to not call the police, but the police had already been called.

[1] Kentucky State Trooper Detective Jeff Kelly testified the speed limit in the area was probably thirty-five miles per hour.

Daniel drove the Dakota home; it required only minimal body work (replacement of bumper assembly and repair of tailgate) amounting to $853.22.

Det. Kelly arrested Stone at the scene for driving under the influence, first offense. According to the uniform citation, Stone had glassy eyes, constricted pupils and slurred speech; his eyes rolled back into his head in mid-sentence, as if he were falling asleep; white powder was seen under his left nostril; he had a prescription for hydrocodone. Det. Kelly described the motor vehicle accident (MVA) as "a minor noninjury collision."

Jessica, age twenty-one at the time of the collision, had several preexisting health issues. As an infant she had problems with her feet requiring her to wear corrective shoes. At age eleven, she was diagnosed with a heart condition known as positional orthostatic tachycardia syndrome (POTS)—a condition aggravated by heat in which her heart races, her blood pressure plummets, and she cannot stand for long periods of time—but she maintains POTS has never stopped her from doing anything she wants to do because she knows how to handle it. She also has a fused spine—a congenital defect. At some point she developed arthritis in both knees. Since age fourteen she has had a history of depression. At age sixteen or eighteen, she began receiving social security disability due to her father being disabled; she is now deemed disabled herself due to POTS. She lives with her parents and has never held a job.

Jessica described her pre-collision life as doing anything a normal young adult would do—no back, neck or wrist pain. She loved to fish, ride a bike,

go to movies and visit the mall. Since the MVA, she claims she has daily pain and back spasms; her pain never goes away and worsens each morning, midday and evening. She used to walk her dogs, swim and go to the park. Now, if she does anything, it takes a week to recover. She requires help tying her shoes, bathing and washing her hair. She takes medication, but pills do not help. Laying down with four pillows occasionally eases her pain.

The morning after the collision Jessica was "in really bad pain," but bad weather (flooding) prevented her from going to the hospital—she does not like hospitals. Two days after the collision, Jessica went to the emergency room complaining of severe pain in her left wrist, neck and her whole back. Walking and sitting worsened her pain and she could do nothing but lie down. Despite her complaints of pain, x-rays revealed no acute injuries or fractures. Detecting no objective medical abnormality, no treatment was provided other than a recommendation for over-the-counter NSAIDS,[2] as needed. X-rays showed her cervical spine was normal and her lumbar spine was within normal limits, with a congenital fusion at L4/5. Her left wrist showed no bruising or abrasions, but was tender from the wrist to the middle forearm radial border.

Two days later, because her left wrist still hurt, Jessica saw her family physician. An x-ray of her left wrist again showed it to be normal. Six months later, complaining of pain in her lower back, she had an MRI that showed only

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[2] Nonsteroidal anti-inflammatory drugs including over-the-counter medications like Aleve and Midol.

mild degenerative changes and the congenital fusion, although the radiologist did note a minor disc herniation.

In subsequent days, months and years, she continued complaining of persistent pain and underwent more x-rays, several MRIs and range of motion studies—which were essentially "normal." Surgery was never indicated. According to Jessica, Dr. Ushma Patel recommended steroid injections but said they wouldn't work; Jessica declined them because she does not like needles and she deemed the risks to be too great. Physical therapy was recommended, but Jessica declined that too because a doctor had told her it would not work. For about two months Jessica used a TENS unit prescribed by Dr. Phillip Tibbs. While it provided relief, she ceased using the device because she did not like being shocked. Between June 17, 2009—two days after the impact—and April 8, 2013—the date trial commenced—Jessica was the subject of numerous diagnostic studies, but received essentially no treatment.

PROCEDURAL BACKGROUND

On March 25, 2011, Jessica filed a civil complaint against Stone alleging negligent operation of his vehicle while under the influence of oxycodone. She demanded both compensatory and punitive damages, as well as a jury trial. Ultimately, she sought $22,660.00 in past medical expenses; $144,760.00 in future medical expenses; $500,000.00 for past pain and suffering; and another $500,000.00 for future pain and suffering. Settlement negotiations were unsuccessful.

In June 2011 Stone pled guilty in Greenup District Court to operating a motor vehicle while under the influence. On June 29, 2012, an agreed order was entered in Greenup Circuit Court settling any and all claims against Stone (for policy limits) and dismissing with prejudice all court claims against him resulting from the MVA.

Prior to Stone's dismissal from the case, Jessica was granted leave to amend her complaint to add Allstate Insurance Company as a defendant from whom she sought personal injury protection (PIP) benefits and UIM benefits. Allstate's sole connection to the collision[3] was insuring the truck[4] in which Jessica had been a passenger. When the jury trial was convened, Allstate was the sole defendant in the courtroom.

In preparation for trial, Allstate moved *in limine* to exclude evidence of Stone's intoxication and guilty plea. Allstate argued the only issues for jurors to resolve were contractual in nature and proof of Stone's intoxication, impairment and/or criminal conduct/charges and subsequent conviction was irrelevant to this UIM case, particularly since all claims against Stone had been dismissed with prejudice and punitive damages[5] were prohibited by the insurance contract.

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[3] Allstate did not elect to stand in Stone's shoes for personal liability purposes upon Stone's release from the case.

[4] Named insureds on the Allstate policy were Vickie and Louie Bentley, Jessica's mother and stepfather. As a "resident relative" of the Bentleys, Daniel, the driver of the Dakota, was covered by the Allstate policy. Additionally, as a passenger in the insured vehicle, Jessica was covered.

[5] The relevant language in the policy read:

Additionally, Allstate argued evidence of Stone's impairment should be excluded under KRE[6] 403 as unduly prejudicial and inflammatory since jurors would tend to punish Allstate for the actions of Stone with whom it had no connection and for whom it had no responsibility. *Pexa v. Auto Owners Insurance Co.*, 686 N.W.2d 150 (Iowa 2004) (danger of unfair prejudice from tortfeasor's intoxication outweighs probative value in MVA victim's suit to recover UIM benefits; tortfeasor's intoxication not probative of nature and extent of victim's injuries).

During a pretrial conference, the trial court sustained Allstate's motion *in limine* and granted Allstate a partial summary judgment on any demand for punitive damages.[7] The trial court also denied Jessica's motion that judicial notice be taken of Stone's district court conviction. Despite Jessica's repeated protests, jurors never heard details of Stone's physical condition at the time of impact.

At that same pretrial conference, the trial court denied Allstate's motion that testimony from Jessica's expert, Dr. Bruce Guberman, be excluded. The trial court also denied Jessica's motion to exclude references to a "report" by

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> [**Allstate**] will pay damages because of bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured or underinsured auto. **Bodily injury** must be caused by accident or arise out of the ownership, maintenance or use of an uninsured or underinsured auto. **We** will not pay any punitive or exemplary damages.

[Emphasis in original].

[6] Kentucky Rules of Evidence.

[7] Plaintiff's counsel argued punitive damages had not been sought from Allstate due to the terms of the policy.

Dr. Tibbs that was "authored" and electronically signed by his nurse practitioner—not by Dr. Tibbs who actually examined Jessica. The trial court ruled the report would be referred to as a report from Dr. Tibbs's "office" since no one argued Dr. Tibbs had not in fact examined Jessica.

Proof at trial was limited to whether Jessica suffered permanent injury entitling her to compensation; and if so, in what amount. Jessica and six family members and friends testified about her life before and after the collision, the changes wrought by the MVA, her pain and her post-collision limitations. Jurors then watched a video deposition of Dr. Guberman, who performed an independent medical evaluation (IME) of Jessica in June 2012 at her request. He found no tenderness or swelling in her wrists, concluding they were "technically normal" with some range of motion results being even better than normal. Still, based on the medical history she had provided regarding the onset of her complaints, Dr. Guberman concluded Jessica had suffered a strain of the left wrist, together with cervical, thoracic and lumbosacral spine strains—all acute, chronic and post traumatic. Based on a life expectancy chart, he predicted she would live 51.7 years[8] and would require over-the-counter analgesics and perhaps prescription anti-inflammatory medications for the remainder of her life which he estimated would cost between $2,500.00 and $2,800.00 annually. He also testified Jessica had

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[8] According to the chart, the proper figure is 51.7, but Dr. Guberman occasionally transposed the number and testified to a life expectancy of 57.1 years.

reached maximum medical improvement (MMI) and her disc herniation would likely worsen over time.

Dr. Guberman admitted he was not Jessica's treating physician and to his knowledge, she had received no treatment. He also acknowledged the history and description of complaints documented in the emergency room report came from Jessica. He explained an evaluator must take a patient's expression of pain into account, but he must also put that pain into context. When pressed, he admitted range of motion tests are "effort-dependent" and a patient might not give "a valid full effort." He also admitted he must rely on the patient "to be truthful" in reporting her symptoms.

When questioned about his own exam of Jessica, Dr. Guberman acknowledged she walked "with a normal gait" and had normal pulses in her feet; he observed no tenderness or spasm in her cervical spine; he saw some loss of motion in her thoracic spine; moderate tenderness but no spasm in her lumbar spine; normal straight leg raises; normal shoulder examination without pain; her right elbow and wrist were normal; there was no tenderness or swelling in her left wrist for which her "range of motion is technically over the normal threshold"; her neurological and sensory exams were normal; also, the reflexes in both arms and legs were normal. In light of all the normal aspects of Jessica's exams, the only objective evidence of ongoing pathology in the cervical spine Dr. Guberman could find was a reduction in her range of motion, which he acknowledged was influenced by the amount of effort Jessica gave or withheld.

Dr. Guberman acknowledged Dr. Patel had performed a neurological examination of Jessica in 2010 which was found to be normal, as was her gait. He also confirmed Dr. Tibbs had evaluated Jessica in 2011 and had reported seeing no herniations.

After Jessica closed her proof, the deposition of Dr. Joseph L. Zerga —who performed an IME of Jessica in October 2012 at Allstate's request—was read aloud. He, too, could not validate Jessica's complaints of neck, back, left wrist and left leg pain, testifying,

> [t]he only abnormalities were the parts of the exam where I was dependent on her to do it, her cooperation, and that was she didn't move her neck as fully as most people do, and she said she couldn't bend over at her waist as most people say they can do. But that's by her report. I have no way of verifying that outside of what she tells me.

Dr. Zerga explained a patient's complaint of pain is "dependent upon the patient's report. They're not an independent observation." In recounting his findings, Dr. Zerga noted Jessica had recently fallen and injured herself while riding a scooter in her backyard, and in his experience, patients with chronic back pain are "not out riding scooters." He further testified, Jessica did not "guard" her neck during the exam; she exhibited normal movement in her left wrist, moving it "without difficulty, without discomfort;" and, she "sat without any difficulty." He concluded, "objectively, her exam was normal" and therefore, there was no need for any therapeutic drugs, medications or treatment as a result of the MVA. Based on Jessica's statement regarding the history and extent of her symptoms and

limitations, together with his review of objective testing and MRI scans, Dr. Zerga agreed Jessica had experienced cervical, thoracic and lumbar strain, as well as a left wrist strain/sprain. However, he opined all ailments should have lasted four weeks at most, and believed any issues had resolved by the time he examined her.

In rebuttal, another video deposition by Dr. Guberman was played in which he testified Jessica had received *treatment* beyond four weeks.[9] He stated he believed the objective proof of back injury was the MRIs, decreased lumbar lordosis, and range of motion findings. While Dr. Zerga believed Jessica's pain was being magnified or faked, Dr. Guberman testified he believed Jessica was being truthful and gave good effort during testing. Dr. Guberman also acknowledged Jessica had not had the scooter injury when he examined her on June 28, 2012.

With Stone's fault having been established early on, the parties stipulated to past medical expenses of $21,805.00, as well as the authenticity of Jessica's medical records. This left only two questions for jurors to resolve at trial —was Jessica injured, and if she was, the extent, if any, to which she was entitled to awards for future medical expenses and/or pain and suffering.

The trial court rejected instructions tendered by Jessica, preferring instead to use bare bones language. After deliberating about ninety minutes, eleven jurors agreed she should receive "$0" for pain and suffering, and all twelve

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[9] As the proof shows, Jessica received no actual treatment; her medical expenses were primarily for diagnostic tests (x-rays, MRIs and range of motion studies).

agreed she should receive "$0" for future hospital and medical services. Motions for a new trial, to set aside the jury verdict and to alter, amend or vacate the verdict were denied. Jessica timely appealed to this Court.

ANALYSIS

Stone's Impaired Driving

Jessica's first complaint is the trial court abused its discretion by excluding references to Stone's impairment at the time of the MVA, thereby preventing her from giving jurors a complete picture[10] of how the accident unfolded. We disagree.

By the time trial began, Stone—the tortfeasor—had been released from the case and his fault was uncontested. Allstate confirmed as much during the first of two pretrial conferences. Furthermore, punitive damages from Allstate —arising from the acts of its insureds—were specifically excluded by the terms of the Allstate contract. Moreover, both competing medical experts agreed Jessica's medical expenses were reasonable, necessary and causally related to the collision. Thus, Stone's impaired condition at the time of the MVA bore no relevance to the issues at trial—namely, the extent of Jessica's resulting injuries, if any, and her entitlement, if any, to awards for associated pain and suffering and future medical expenses.

[10] Jurors knew some facts about how the collision occurred. Daniel testified Stone was traveling between forty and forty-five miles per hour at the time of impact and either did not brake or applied his brakes too late—perhaps because Stone thought he saw his children riding four-wheelers on a nearby track and was oblivious to traffic ahead of him having been stopped by a red light. Daniel also testified Stone approached the Dakota and offered to pay them to not call police.

Stripped to its bare essence, this was a case about Allstate's contractual liability—as a UIM carrier—to a passenger riding in a vehicle it insured, and nothing more. *Kentucky Farm Bureau Mutual Insurance Company v. Ryan,* 177 S.W.3d 797, 801 (Ky. 2005) (seeking "'UIM coverage is a direct action' against the UIM carrier and 'the [UIM] carrier alone is the real party in interest. . . .'" (Internal citations omitted)). Jessica's injuries were not any more intense, severe or compensable because the collision was caused by a driver who was under the influence of oxycodone—someone with whom she had already settled for policy limits, and someone with whom Allstate had no relationship, and for whose conduct it bore no responsibility. If Jessica was seeking retribution, she should not have released Stone from the case. Having done so, Stone's condition at the time of impact was irrelevant and properly excluded by the trial court. *Transit Authority of River City v. Vinson,* 703 S.W.2d 482, 484 (Ky. App. 1985).

Moreover, had Stone's impairment been revealed, it may have influenced jurors to punish Allstate—the only defendant in the room—in contravention of KRE 403. To avoid that possibility, the trial court rightly found—in the exercise of its discretion—any focus on Stone's impairment would have been both irrelevant and prejudicial. Nothing about the trial court's ruling was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). Thus, the trial court properly excluded the proof and no error occurred.

Denial of New Trial Motion

Jessica's second claim is the jury's zero verdict for pain and suffering was both inadequate and unsupported by the evidence, leading her to posit the trial court had abused its discretion in denying her new trial motion. The premise of her argument is jurors *had* to award her *some* amount of money for pain and suffering because: (1) multiple witnesses testified she suffered back, neck and wrist pain lasting a minimum of four weeks to a maximum of the next 51.7 years of her life; (2) Allstate had made a full PIP payout; and, (3) the parties had stipulated her medical expenses were reasonable, necessary and causally related to the MVA. As the jury returned a zero verdict, Jessica argues the trial court could not have rejected her request for a new trial without abusing its discretion. We disagree.

Under CR[11] 59.01(d), a new trial may be granted when "[e]xcessive or inadequate damages, [appear] to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." Granting a new trial is within the trial court's discretion and we will reverse only for clear error. *Miller v. Swift,* 42 S.W.3d 599, 601 (Ky. 2001).

A Kentucky jury need not award an amount for pain and suffering solely because it awards medical expenses. *Bayless v. Boyer,* 180 S.W.3d 439, 444 (Ky. 2005). The fact that medical expenses were stipulated rather than awarded by a jury verdict does not require a different result.

Jurors heard conflicting evidence about the severity of the collision, existence of injury, length of the healing process and duration of associated pain

[11] Kentucky Rules of Civil Procedure.

and physical limitations. When there is conflicting evidence, jurors choose whom to believe and whom to disbelieve; they need not believe any particular party or her witnesses. *Spalding v. Shinkle,* 774 S.W.2d 465, 467 (Ky. App. 1989) (internal citations omitted). So long as the jury's verdict is supported by evidence we will not disturb it.

Jessica was not in perfect health at the time of impact; she suffered from long-term depression, arthritis and POTS, in addition to other maladies. Two days after the collision, she began undergoing x-rays and MRIs—testing that spanned months and years—but results of which were largely normal. The same was true for the majority of her range of motion tests showing her abilities were technically in the normal range. In fact, some test results were even better than normal, and others were only slightly decreased.

Jessica cites a single case—*Hazelwood v. Beauchamp*, 766 S.W.2d 439 (Ky. App. 1989)—for the premise that jurors ignored *uncontroverted* proof in her case to return a zero verdict. In *Hazelwood*, a farm worker's hand was caught in a hay baler for a lengthy period of time, and although three surgeries were required to repair his crushed and mangled palm, jurors awarded him only $250.00 for pain and suffering and $0.00 for lost wages. *Hazelwood* teaches us a jury need not believe a victim's claims of pain, but it cannot "disregard the uncontroverted evidence of the nature of the accident itself and the medical procedures performed." 766 S.W.2d at 441. When compared to the injured farm worker in *Hazelwood,* Jessica was in a minor MVA for which she endured no surgery,

received no injections, participated in no therapy, and her x-rays, MRIs and range of motion studies were largely normal. *Hazelwood* provides no solace for Jessica.

The medical opinions expressed by both Drs. Guberman and Zerga were based on the history and subjective reports provided by Jessica, which they presumed to be accurate. Dr. Guberman, whose practice is limited to performing IMEs, believed Jessica's subjective complaints and predicted she would experience pain for the rest of her life. In contrast, based on Jessica's same reported subjected complaints, Dr. Zerga, who practices in both neurology and psychiatry, testified Jessica's x-rays did not suggest permanent injury; surgery was not indicated; no significant medications had been prescribed; any discomfort should have resolved within four weeks and had, in fact, resolved by the time he conducted his IME in October 2012; and, no future medical expenses were anticipated.

Jessica reads Dr. Zerga's testimony as "uncontroverted" proof she suffered *at least* four weeks of pain and, therefore, she had to be compensated *some* amount. We—and apparently the jury—read his testimony differently.

Dr. Zerga recounted the types of pain Jessica had *told him and others* she had experienced. However, Dr. Zerga was unable to independently verify those complaints with objective diagnostic testing. In fact, he was convinced Jessica did not provide a full effort when asked to perform certain maneuvers during the IME, and believed she was describing nonexistent pain. Close review of his testimony shows his answers were couched in terms of the history and subjective complaints Jessica had related to him (and other health care providers),

not symptoms he (or others) had observed or could objectively explain. Dr. Zerga testified, "[s]o objectively, her exam was normal."

Thus, jurors could have decided—and apparently did—to disbelieve Jessica's subjective complaints of pain following the MVA. In doing so, the jury could reasonably reject any medical opinion regarding the existence and duration of any associated pain or limitations based on Jessica's discredited reports and complaints.

Here, the jury obviously concluded Jessica suffered no pain from the minor, non-injury collision which caused only minimal damage to the vehicle in which she was a passenger and did not affect either of the other two passengers. The jury verdict was buoyed by other facts: Jessica sought no treatment for two days; in the four years between the MVA and trial, there were several prolonged gaps in complaints and requests for treatment; the bulk of Jessica's medical expenses was devoted to diagnostic tests rather than actual treatment; and, Jessica did not follow doctor's orders (she did not participate in physical therapy or receive injections, and she discontinued use of a TENS unit). Additionally, Jessica subsequently injured herself while riding a scooter in her backyard; she took a trip to Cincinnati (unrelated to medical issues) with her parents even though she claimed lengthy car trips were arduous; she had numerous preexisting health conditions; she subsequently participated in a run/walk fundraiser because it was important to her; and, Dr. Zerga testified he expected any discomfort would have resolved in—at most—four weeks.

Clearly, the jury's award of nothing for pain and suffering establishes it chose to believe the defense witnesses and arguments rather than Jessica's evidence and arguments. The jury's choice does not make its verdict inadequate, nor does it make the trial court's denial of a motion for a new trial clear error. Because the jury's verdict was reasonably related to the evidence, a new trial is unwarranted. *Hazelwood,* 766 S.W.2d at 440.

Answers to Jury Questions

Jessica's third complaint is the trial court abused its discretion in answering a jury question posed during deliberations. The following *written* exchange occurred between the court and the jury in the presence of both parties:

> Jury: Is a dollar amt necessary or can "0" stand?
>
> *(following discussion between the court and counsel, this written question was sent to the jury room)*
>
> Court: Are you asking the question on pain & suffering or future medicals?
>
> *(after a few minutes, this written response was given to the court)*
>
> Jury: pain and suffering & future medical
> If we award zero dollars can they come back and try to resue latter (sic)
>
> *(after more discussion between the court and counsel, this response was given to the jury)*
>
> Court: You can award 0 dollars for both if that is what

> you wish and there would be no re-trial necessary
> by law.

Counsel for both parties participated with the court in the on-the-record discussion that resulted in the trial court's formulation of a response to the jury's inquiry. Allstate argues the court did not tell jurors how to vote, but merely instructed them on the law at their request. Allstate further argues if the trial court committed error, it was harmless at most because jurors could ultimately award any amount they saw fit, and under *Miller,* an award of $0.00 was perfectly acceptable, just as would have been any other amount supported by the evidence.

The exchange set forth above spanned twenty-eight minutes, was peppered with objections by plaintiff's counsel, and centered on whether the jury could return a zero verdict in light of the parties having stipulated Jessica would receive past medical expenses. Under *Miller,* we know the answer to that question is "yes"—a jury need not award an amount for pain and suffering just because the victim receives medical expenses.

During that nearly half-hour discussion, no mention was ever made of the precise argument now advanced on appeal—that the trial court's response was:

> prejudicial as it was a written indication from the Court that such a verdict would be appropriate under the circumstances despite the fact that there was uncontroverted evidence of injury and at least a four week period of pain.

When the trial court proposed its final response to the jury, counsel asked that she be given time to research the issue—the trial court calmly advised counsel she

could move for a new trial—a ruling with which counsel appeared content and simply said, "please note my objection" without elaboration. Having failed to voice at trial the particular argument now raised on appeal, we decline to review it. "[A]n issue not raised in the circuit court may not be presented for the first time on appeal." *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. App. 2008) (internal citations omitted).

Denial of Directed Verdict

Jessica's fourth claim is she should have received a directed verdict at the close of Allstate's case on the issue of whether she had sustained an injury. CR 76.12(4)(c)(v) requires:

> at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

Jessica has listed four pages in the written record where she believes this argument was preserved. The pleadings cited are her renewed new trial motion, a supplement to her renewed trial motion, her notice of appeal, and her amended notice of appeal. None of the referenced *post-trial* documents preserved this issue for our review. This trial was electronically recorded. Preservation would have occurred *during* trial and should have been documented in the brief for appellant by a pinpoint citation to the video record. It was not.

The required statement of preservation is not a trivial matter. As noted in the previous argument, we do not generally review arguments that were not first made to—and ruled upon by—the trial court. *Keeton.* In light of Jessica's

failure to heed the rules of appellate procedure, we could impose harsh sanctions such as striking her brief or assessing a fine. *Elwell v. Stone,* 799 S.W.2d 46 (Ky. App. 1990); CR 73.02(2). Because such foibles are rarely the client's fault, but rather counsel's misstep, we will not impose sanctions this time, but counsel should be aware we may not be so generous in the future.

Noncompliance with CR 76.12 is not the only problem with this issue. When jurors were given a break and exited the courtroom at the close of all the evidence, the attorneys stood at the bench and made motions. Defense counsel renewed his directed verdict motion, and Jessica's attorney advised the trial court she wanted to request a "directed portion of a verdict." Defense counsel stated the grounds for his motion, Jessica's attorney responded with a recap of evidence, and the trial court denied Allstate's motion. Because the trial court interrupted Jessica's attorney to say he was denying the directed verdict, it might be asserted the trial court was denying her motion. However, at that point Jessica's counsel had not moved for anything, rather she had requested only a "stipulation" on the issue of injury.[12] We know this not because either party told us or cited us to the record—as was their responsibility—but because we reviewed the entire trial.

A directed verdict motion is made to the court; a stipulation is requested from or made jointly with opposing counsel. Perhaps the request for a "stipulation" by Jessica's counsel was an inadvertent slip of the tongue, but on

[12] We note that during a pretrial conference on April 4, 2013, Jessica's counsel also requested a stipulation as to injury—which Allstate rejected. That discussion further supports our belief that Jessica intended to request a stipulation—and not a directed verdict—at the close of trial.

appeal we are limited to what is seen and heard in the record. If we construe Jessica's motion as one for a directed verdict on the issue of injury—as was argued in her brief—she did not request a specific ruling from the trial court and therefore, there is nothing for us to review. *Keeton.* If we construe the request as one for a stipulation—which is what was actually stated at trial—no firm answer was demanded from opposing counsel. Either way, there is no basis upon which we can grant relief.

Even if Jessica had preserved a request for a directed verdict for appellate review, we would affirm the trial court's denial because it drew "all reasonable inferences and deductions" in support of Allstate, *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 285-86 (Ky. 2014) (internal citations and footnotes omitted), and the court issued the correct ruling. Jurors may believe any, all or none of any given witness's testimony. *Robinson v. Commonwealth*, 325 S.W.3d 368, 371 (Ky. 2010); *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926).

Here, as evidenced by their verdict, the jury obviously found Jessica to be untrustworthy, and completely discounted both her testimony and the foundational history and complaints of pain and limitations she had given various doctors and upon which those doctors had based their opinions. In short, the jury was free to reject Jessica's testimony and any medical opinions based thereon—including any impeached medical opinions concerning the existence or duration of associated pain. Jurors could have then lent credence only to that portion of Dr. Zerga's testimony wherein he stated Jessica's tests were normal, with no objective

evidence of injury. Based on such an analysis, jurors could have reasonably concluded Jessica suffered no injury, pain or suffering secondary to the MVA. Therefore, a directed verdict on the issue of injury was properly denied.

Explanation of UIM Coverage

Next, citing *Earle v. Cobb,* 156 S.W.3d 257 (Ky. 2004), and CR 17.01,[13] Jessica maintains the concept of UIM coverage should have been explained to jurors together with disclosure of the amount of insurance money available and the terms of the UIM policy. Allstate counters that *Earle* is inapplicable.

This issue was mentioned at the end of the second pretrial conference in response to the trial court asking whether other issues needed to be addressed. The trial court queried, "there will be no mention of the other policy coverage"—a reference to Stone's policy. Allstate responded affirmatively, adding there was likewise to be no mention of Allstate's policy amount. Jessica's attorney stood mute. On the morning of trial, Jessica submitted a trial brief devoted to this issue, but there is no indication in the record before us it was ever addressed.

The issue in *Earle* was whether the UIM carrier must be identified at trial—a concern arising when the actual tortfeasor sits at the defense table, but the real question pertains to the unmentioned UIM contract. In those situations, it is a sham or pretense for jurors to be led to believe the defendant is the tortfeasor

[13] The relevant language reads: "Every action shall be prosecuted in the name of the real party in interest[.]"

sitting at the defense table, when the tortfeasor's liability has already been established and the actual defendant is an absent insurance company. The sham was revealed in *Earle* when a juror asked the trial judge whether any jury award would be paid by the individual defendant or an insurance company. That question was not answered and jurors awarded a relatively small amount, prompting the plaintiff to appeal.

The present scenario differs significantly from *Earle*. Here, as jury selection began, the case was announced as "LePort v. Allstate Insurance Company." Thus, it was clear from the trial's outset insurance was involved and the sole defendant was an insurance company. Despite Stone's pivotal role in causing the MVA, the relevance of his actions during trial was virtually nil—reduced to a few mentions of his name. Because Jessica had settled with him prior to trial and he had been released from the action, his name was not included in the style of the case and he did not appear at trial—neither at counsel table nor in the witness box. With Allstate as the sole defendant, there was no sham or pretense. Hence, *Earle* is inapplicable.

Furthermore, because Allstate acknowledged its contractual liability, the terms of the UIM contract were irrelevant to the remaining two issues—whether Jessica sustained an injury, and if so, whether she was entitled to compensation. Even if the terms of coverage bore some relevance, the trial court could have properly exercised its discretion to exclude the topic under KRE 403 to avoid confusing jurors or needlessly prolonging trial.

Report from Dr. Tibbs's Office

Jessica's next claim pertains to an exam conducted by Dr. Tibbs, a neurosurgeon and Director of the University of Kentucky Spine Center. While there is no question he examined Jessica and prescribed a TENS unit for her, his report was authored and electronically signed by his nurse practitioner—not him. Even so, both Drs. Guberman and Zerga referred to Dr. Tibbs's report in their depositions. Jessica argued this was problematic because jurors might infer Dr. Tibbs had actually written and signed a report. In response, Allstate noted the nurse practitioner who created the report worked at Dr. Tibbs's direction and under his supervision.

To resolve the matter, during the first pretrial conference, the trial court ruled the report would be identified as a report from Dr. Tibbs's "office" but no one was to imply Dr. Tibbs had signed the document. During the reading of Dr. Zerga's deposition at trial, the trial court admonished jurors the report was not signed by Dr. Tibbs, but was instead a report from Dr. Tibbs's office signed by his nurse practitioner. We are convinced the admonition cured any possible jury confusion. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Abuse of discretion being the appropriate standard of review for an evidentiary ruling, *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000), we discern no error.

Objection During Closing Argument

Jessica next complains reversible error occurred when her closing argument referencing the eggshell plaintiff rule[14] drew a defense objection. Again she fails to provide a pinpoint citation to the point at which this exchange occurred. Even so, our review of the record shows the trial court allowed her to argue the eggshell plaintiff rule. The defense objected only when Jessica's attorney sought to argue the burden shifted to Allstate to prove she had failed to mitigate her damages.

Moreover, the eggshell plaintiff rule and mitigation of damages are wholly unrelated legal concepts. Allstate never argued Jessica failed to mitigate damages; Allstate argued her injury was dubious. While the burden of proof shifts to the defense when mitigation of damages is asserted, Allstate did not make that argument. In fact, prior to closing argument, neither party had even mentioned mitigation of damages or requested an instruction on that theory. During trial, Allstate merely pointed out Jessica had declined recommended medical treatment. Allstate's argument did not open the door to discussion of mitigation of damages or burden shifting, as properly determined by the trial court. Thus, we discern no error.

Jury Instructions

[14] Kentucky courts have accepted the essence of the eggshell plaintiff rule and expressed it as:

> the tortfeasor takes the claimant as he finds him and is entitled to neither credit nor setoff against the amount of the claimant's damages because of preexisting physical conditions which make the claimant more susceptible to injury, or to greater injury, than would have been the case with better health.

Wemyss v. Coleman, 729 S.W. 2d 174, 178 (Ky. 1987).

Jessica's last claim, without citation to any authority, is her tendered instructions should have been used at trial. She briefly recounts the items included in her proposed instructions, but fails to explain *why* the instructions given to jurors by the trial court were inadequate or—even more importantly—why hers were better. "[I]t is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here." *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) (citations omitted).

WHEREFORE, the trial order and judgment, as well as other orders entered by the Greenup Circuit Court pertaining to trial are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
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