COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3129 **Cir. Ct. No. 2002CV5929**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARK HALBMAN,

PLAINTIFF-APPELLANT,

AAA INSURANCE COMPANY AND
BLUE CROSS-BLUE SHIELD OF OREGON,

PLAINTIFFS,

V.

FARMERS INSURANCE GROUP,
ALLSTATE INSURANCE COMPANY,
CHARLES L. SCHANTNER, JR. AND
DENNIS M. HAPPE,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 KESSLER, J. Mark Halbman appeals from an order declaring a mistrial of his first trial in this personal injury matter and from an order dismissing his future earnings loss claim. We determine that: (1) the trial court did not erroneously exercise its discretion in declaring the mistrial; (2) the trial court's dismissal of the future loss claim was appropriate based upon the lack of sufficient evidence presented by Halbman at his first trial and the fact that Halbman should not be allowed to benefit from his and his counsel's own conduct which was the cause of the mistrial; and (3) the trial court's conduct of the proceedings did not demonstrate bias against Halbman. We affirm.

BACKGROUND

¶2 This case arises from a vehicle collision which took place on July 29, 2000, just south of Minocqua, Wisconsin, on U.S. Hwy. 51 (Hwy. 51). Halbman was sitting in his vehicle in a gas station driveway, waiting to enter Hwy. 51. Dennis M. Happe was driving his van northbound on Hwy. 51. Charles L. Schantner, Jr. was driving southbound on Hwy. 51. Schantner turned left to enter into the gas station area, in front of Happe, causing Happe to have to swerve to attempt to miss Schantner's passenger door. The vehicles collided, pushing Happe's vehicle into Halbman's vehicle. Halbman sustained a neck injury as a result of the collision.

¶3 Halbman commenced this action against Schantner, Happe and their insurers[1] to recover damages to compensate Halbman for "past, present and future

[1] Hereinafter, unless obvious from the text that we are referring to Schantner individually, we will use "Schantner" collectively to refer to Charles L. Schantner, Jr. and his insurer, Farmers Insurance Exchange (incorrectly listed in the caption as Farmers Insurance Group). Similarly, we will use "Happe" collectively to refer to Dennis Happe and his insurer, (continued)

pain and suffering, loss of wages, loss of work opportunity, and past[,] present and future medical bills." An eight-day trial on Halbman's claims began on November 12, 2004.

¶4 During Schantner's testimony at trial, he could not recall seeing any contact between Halbman's and his vehicles or between Halbman's and Happe's vehicles. Happe also testified that his van never hit Halbman's vehicle. Halbman testified:

> HALBMAN'S COUNSEL: You also heard testimony this afternoon that Mr. Happe doesn't remember his vehicle even having contact with your truck that you were driving. Do you remember him saying that?
>
> HALBMAN: That is completely false. His grill was in my grill. He backed it off. That is why he had to put it in reverse and back off of it. He said that he doesn't remember hitting it. Their insurance company paid my damage --
>
> HAPPE'S COUNSEL: I would object, Your Honor. That is not a true statement.[2]
>
> HALBMAN: Well, Farmers Insurance --
>
> HALBMAN'S COUNSEL: Wait.
>
> THE COURT: We'd better -- Mr. Barrock [Halbman's counsel], be careful.

Allstate Insurance Company, unless from the text it is apparent that we are referring only to Happe himself.

[2] The dissent's assertion, Dissent ¶36, that defense counsel never objected to Halbman's statement that defendant's insurance paid for damage to Halbman's vehicle is not consistent with the record. Additionally, the trial court noted in granting the motion for mistrial that it was well aware of the grounds for the objection, a key component in whether grounds for appeal on the issue are preserved or waived. *See* ***State v. Nelis***, 2007 WI 58, ¶31, __ Wis. 2d __, 733 N.W.2d 619 ("An objection is sufficient to preserve an issue for appeal, if it apprises the court of the specific grounds upon which it is based."); ***State v. Agnello***, 226 Wis. 2d 164, *174, 593 N.W.2d 427 (Wis. 1999) ("All that we have required of a party is to object in such a way that the objection's words or context alert the court of its basis.").

HALBMAN'S COUNSEL: And again, judge --

THE COURT: You are asking the questions.

HALBMAN'S COUNSEL: Right.

HALBMAN: Sorry.

HALBMAN'S COUNSEL: Just answer my questions, please.

HALBMAN: Could you repeat that.

HALBMAN'S COUNSEL: What damage had -- what things had to be replaced on your truck?

HALBMAN: My bumper – the whole bumper had to be replaced. The fender had to be replaced. The hood had to be replaced, and the grill – well, the grill itself and the whole light area around my headlight, that was all smashed.

HALBMAN'S COUNSEL: You personally knew that all that was replaced?

HALBMAN: Yes, Farmers Insurance came --

THE COURT: Up, Mr. --[3]

[3] In its decision to grant the motion for mistrial, the trial court notes that the transcript of this exchange may not be complete: "I think the problem was people were talking over each other here. It doesn't follow well when you read the transcript. The reporter has a real problem because we were all talking at once." In his brief to this court, Schantner also references his counsel's affidavit regarding this exchange, filed on January 10, 2005, less than two months after the trial, wherein Attorney Gregory Knapp avers:

> In accord with my personal recollection of the proceedings, the circuit court's final comment to the witness was more extensive than the transcript makes it appear. The circuit court did not merely say "Up, Mr.—" at that juncture. Rather, at that point in the proceedings in the presence of the jury, the circuit court admonished Mr. Halbman and his lawyer specifically – albeit succinctly – that no further comment should be made about matters relating to an insurance company's advance payment of the property damage claim associated with the subject accident and made it clear that the jury should disregard that information. One reason that the transcript may be incomplete on this point is that the judge properly interrupted the

(continued)

> HALBMAN: But there was pictures taken of my truck, okay. Sorry.
>
> HALBMAN'S COUNSEL: Thank you. I have no further questions.

Shortly thereafter, on cross-examination by Schantner, the following exchange occurred:

> SCHANTNER'S COUNSEL: Mr. Halbman, how much was the damage? What was the damage estimate to your car?
>
> HALBMAN: Pretty sure it was right around 3,400 and then the towing. I had to have it repaired later on.
>
> SCHANTNER'S COUNSEL: I thought you testified earlier it was 4,500?
>
> HALBMAN: I think it was 35 or -- I'm pretty sure that is what the check was for to have it repaired.
>
> ….
>
> SCHANTNER'S COUNSEL: You had your truck worked at at National Auto Body, correct?
>
> HALBMAN: Yes, I did.
>
> SCHANTNER'S COUNSEL: We have an estimate or bill here. I guess you would call it an estimate.
>
> ….
>
> SCHANTNER'S COUNSEL: Looks like the bottom line is 2,252.47 and tax 2,367?
>
> HALBMAN: Okay.
>
> SCHANTNER'S COUNSEL: Does that sound about -- is that what you recall would be --

---

> witness in mid-sentence – perhaps talking briefly at the same time as the witness.

> HALBMAN: No, I had two other estimates and I don't know. Like I said, the insurance company paid for it, but I thought it was 34 or $3,500.

There is no objection on the record to this statement by either Happe or Schantner. During Happe's cross-examination of Halbman, which immediately followed that of Schantner, Halbman testified as follows:

> HAPPE'S COUNSEL: Did you take any pictures of the damage to your truck?
>
> HALBMAN: The insurance company did.
>
> HAPPE'S COUNSEL: Did you take any pictures of the damage of your truck?
>
> HALBMAN: No, I didn't.
>
> HAPPE'S COUNSEL: Move that answer be stricken.[4]
>
> HALBMAN: No, I didn't.
>
> HAPPE'S COUNSEL: Thank you. No further questions.

At the conclusion of this testimony, the jury was released for the weekend.

¶5 Relating to Halbman's loss of future earnings claim, his vocational expert, Ronald Iwinski, testified that he had based his calculations upon an income statement provided to him by Halbman's accountant, Thomas Schmitt, not from Halbman's tax returns. During this testimony, it was discovered that the 2001 income statement that Iwinski used to calculate the future wage loss contained different amounts than the 2001 income statement provided by Halbman to Happe and Schantner during discovery. Subsequently, Schmitt testified that the figures on the income statement he had provided to Iwinski had been only preliminary

[4] Again, contrary to the dissent assertion, Dissent ¶36, the record shows defense counsel objecting to Halbman's comments regarding defendant insurance company's conduct.

numbers and were inaccurate, and that the actual figures were reflected in a later income statement and in Halbman's 2000/2001 income tax returns. Halbman's counsel attempted to determine whether Iwinski had based the calculations in his report on the information in the tax returns or on the now superseded income statement. During cross-examination of Iwinski by Happe's counsel, Iwinski restated that the income loss calculations were based on the income statements, not from the tax returns.

¶6 On the morning of the fourth day of trial, at the close of Halbman's case-in-chief, Happe moved to strike Halbman's loss of future earnings claim based on insufficient evidence. Happe argued that because (1) Halbman's accountant had testified that the income statement Iwinski had based his calculation of future income loss was inaccurate; and (2) Halbman had provided no other expert testimony supporting the amount of his future wage loss claim, "there is nothing for the jury to base an opinion of future wage loss on," and therefore, the jury "would have to completely speculate" as to what future wage loss Halbman actually suffered. After argument by counsel, the trial court took the motion under advisement, stating that it would rule on the motion later the same day. As promised, later that day the trial court ruled that Halbman had not made his "foundational showing" as to Iwinski's calculation of future damages because Iwinski had testified that he had relied on an income statement that was discredited by the accountant Schmitt. The court then granted the motion. The trial court allowed the evidence to go to the jury, however, in the interest of judicial economy in the event an appellate court reversed its ruling.

¶7 During closing arguments, Schantner's counsel argued that Halbman had not proven that Happe's vehicle had actually collided with Halbman's vehicle.

In his rebuttal closing argument, Halbman's counsel made the following argument:

> In this case you have the defendants and they have tried, just like this bully on the playground who is not paying attention, to lie and shift responsibility by saying you can find that there's an accident, but we do not even think there was an accident.
>
> I am sorry, ladies and gentlemen, maybe the insurance company forgot that they did an estimate on repairing Mr. Halbman's car. You heard Mr. Halbman testify that he had it all repaired. He had it all fixed. Somebody paid for it. It was Farmers Insurance. Gee, are they in the business of paying for damage that they do not cause?
>
> You know, to have Mr. Schantner and Mr. Happe come up here showing a complete lack of integrity and saying you can find there was an accident, but we do not even think there was, is all about integrity, ladies and gentlemen or lack of integrity just like a bully on the playground.

Later in his rebuttal argument, Halbman's counsel stated: "You have an insurance company. We all know insurance companies are some of the richest companies in the world. You know why? It is because it is like a one way valve. The money comes in, but they never want to give it out."

¶8 Final jury instructions were given and the case was then submitted to the jury. After the jury had left the courtroom, Schantner's counsel objected to Halbman's counsel's reference to Farmers Insurance in his rebuttal closing argument, noting that he chose not to object during the closing "because [he] didn't want to draw any attention to it" and that he was "objecting now … to get it in there for the record." The following day, during the jury's second day of deliberation and prior to it returning a verdict, Schantner moved the trial court for a mistrial based on Halbman's counsel's (1) showing of an exhibit during rebuttal

closing argument that was never admitted into evidence (Exhibit 11—a repair estimate used by Schantner's counsel in his examination of Halbman); and (2) comments regarding Farmers Insurance paying for the damages to Halbman's vehicle, which Schantner argues were based on facts not in evidence and the improper introduction of settlement discussions during trial. The motion was made before the jury returned its verdict; however, the trial court took the motion under advisement, noting that it would not rule on the motion for mistrial until after the jury had returned its verdict, and then only after briefing and citation to the record was provided by counsel.

¶9 The jury returned a verdict finding Schantner 90% negligent, Happe 10% negligent and Halbman not negligent. The jury awarded Halbman the following damages: Past medical expenses—$15,000; Past pain, suffering and disability—$19,000; past loss of earning capacity—$8,250; future medical expenses—$50,000; future pain, suffering and disability—$75,000; and future loss of earning capacity—$15,000.

¶10 The parties filed post-verdict motions which included Schantner's and Happe's renewal of the motion for mistrial and Halbman's request for reconsideration of the trial court's dismissal of his claim for loss of future wages. The trial court held a hearing on all of the pending motions on February 21, 2005. At this hearing, the trial court granted the motion for a mistrial. In so doing, the court discussed its concerns and reasoned:

> That was the third reference. This time I interrupted him in mid-sentence. He didn't finish his sentence. I said, this is what the transcript indicates. "Up, Mr. –" I may have said more than that. Again, I was talking over Mr. Halbman because of what he had said. What I would have liked to have done was to have admonished him that he can't talk about payments made to him by the insurance company, but I have got the jury sitting here. Perhaps I

should have asked the jury to go upstairs for a minute and I could have admonished him outside the presence of the jury. 20/20 hindsight maybe that should have been done. I concede that. However, that doesn't give Mr. Halbman the right to do what he did. So there are three references. After I said, "Up, Mr. -- ", then the witness said, "But there was pictures taken of my truck, okay. Sorry." [Halbman's counsel] said, "Thank you. I have no further questions." And we went on from there.

Now that standing alone, it was sort of out there, but the problem then comes on closing after being admonished to be careful. As I said, I think I have a legitimate right to expect that [Halbman's counsel] would know what I am talking about without an express reference to statute numbers. He is deemed to know the rules as a practicing attorney in this state. He was admonished to be careful, [Halbman's counsel], on the closing, further exacerbates the situation with his comments. Here is what he said. "Maybe the insurance company forgot that they did an estimate on repairing Mr. Halbman's car. You heard Mr. Halbman testify that he had it all repaired. He had it all fixed. Somebody paid for it. It was Farmers Insurance. Gee, are they in the business of paying for damage they do not cause?"

That is making it worse. Now he has nailed it down. If it wasn't clear before, it sure is now. It is out there front and center. It couldn't be plainer. That is improper. It's grossly prejudicial on an issue that was in dispute in this case. That's an absolutely improper argument. It is using clearly inadmissible evidence to try to cut down or to undercut the opponent's position on a matter that was in dispute.

….

There is one other issue or one other area that I would also like to refer to in the record in closing. This goes to the damage issue here….

Here is what [Halbman's counsel] said on closing in part. This is, I believe, in rebuttal. "You have an insurance company. We all know insurance companies are some of the riches [sic] companies in the world. You know why? It is because it is like a one way valve. The money comes in, but they never want to give it out."

That is absolutely improper and blatantly prejudicial…. That is a blatant appeal to prejudice. I think

> it may go some to explain the size of the verdict here, $182,000 for a neck strain. I think the jury would well have been impassioned and inflamed by that rhetoric, so I am declaring a mistrial for these reasons.

The trial court denied Halbman's motion to reconsider dismissal of his loss of future wages claim and granted Schantner's and Happe's motions for sanctions, ordering Halbman and his counsel jointly and severally liable for payment of a $2,500 sanction each to Schantner and Happe.

¶11 Halbman petitioned for interlocutory review of the grant of the mistrial, which this court denied. A new trial date was scheduled.

¶12 Prior to the second trial, Schantner and Happe moved to preclude Halbman from retrying his loss of future earnings claim. The trial court denied the motion and allowed Halbman to obtain a supplemental vocational report and time for additional discovery. When Halbman submitted the supplemental report, his claim rose from the original claim of $296,000 to a range topping at $631,600. Upon receipt of this new report, the defendants moved for reconsideration of the trial court's denial of their motion. The trial court granted the motion for reconsideration and dismissed Halbman's loss of future earnings claim.[5]

¶13 The second trial commenced on September 12, 2006. The jury found Schantner 100% liable for the accident. The jury awarded Halbman the following as damages: past medical expenses—$16,500; past pain, suffering and disability—$5,000; past loss of earning capacity—$11,000; future medical

[5] The trial court did extend the trial date and allow for additional discovery on the loss of future earnings claim so as to save judicial resources should this court reverse its order and allow Halbman to retry this claim.

expenses—$0, future pain, suffering and disability—$0; future loss of earning capacity—$0. Halbman appeals.

DISCUSSION

Trial court properly granted the motion for mistrial

¶14 Halbman argues that the trial court erroneously granted a mistrial because: (1) his reference in closing argument to the insurance payments was a proper reference to facts in evidence; (2) or, if not in evidence, proper under WIS. STAT. § 904.08 (2001-02)[6]; and (3) reference to the insurance company in closing was proper; but (4) if not proper, it was harmless error. Schantner argues that the trial court's grant of a mistrial was correct because of Halbman's improper reference to prior partial settlement numerous times in his testimony and Halbman's counsel's expounding on this prior partial settlement in his rebuttal closing argument. Schantner further argues that because this testimony was timely and repeatedly objected to, or even if not objected to, was so blatant and inflammatory that it did not need a formal objection for the trial court to address it; and because the comments in the rebuttal argument were to establish liability, in violation of § 904.08, the trial court properly granted the motion for mistrial.

¶15 Happe argues that the trial court properly granted the mistrial because: (1) Halbman's testimony regarding payments made by an insurer for the damage to his vehicle and Halbman's counsel's improper comments in rebuttal closing argument referencing the payment of the property damage claim violated

[6] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

WIS. STAT. §§ 885.285 and 904.08; (2) Halbman's counsel's highly prejudicial comments relating to insurance companies in general and his use of Halbman's inadmissible testimony as the central theme of his rebuttal argument were improper; and (3) this testimony and these comments created a likely impact or effect on the jury warranting mistrial.

¶16 Whether to grant a motion for mistrial is within the trial court's discretion. ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980); ***Priske v. General Motors Corp.***, 89 Wis. 2d 642, 663, 279 N.W.2d 227 (1979). This "'discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Southeast Wis. Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc.***, 2007 WI App 185, ¶39, ___ Wis. 2d ___, 738 N.W.2d 87 (citation omitted).

¶17 In determining whether mistrial is appropriate, the trial court must conclude that the claimed error is sufficiently prejudicial such that mistrial is necessary to protect the rights of the parties, ***Oseman v. State***, 32 Wis. 2d 523, 528-29, 145 N.W.2d 766 (1966), and its inquiry "must center primarily around the facts [of the] case,'" ***id.*** at 528 (citation omitted). "In exercising discretion on whether to grant a mistrial, the [trial] court is in a particularly good 'on-the-spot' position to evaluate factors such as a statement's 'likely impact or effect upon the jury.'" ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 657, 511 N.W.2d 879 (1994) (citation omitted). We give great deference to a trial court's decision to grant a new trial as it stands in the best position to observe the participants and evaluate the evidence. ***Goff v. Seldera***, 202 Wis. 2d 600, 614, 550 N.W.2d 144 (Ct. App. 1996). "On … appeal … the order for new trial must be affirmed unless this court finds no reasonable basis for the trial court's conclusion that the

improper argument was prejudicial." ***Klein v. State Farm Mut. Auto. Ins. Co.***, 19 Wis. 2d 507, 510-11, 120 N.W.2d 885 (1963).

¶18 WISCONSIN STAT. § 885.285(1)(b)[7] specifically states that liability cannot be inferred from an insurance company's payment "for an injury to or destruction of property." WISCONSIN STAT. § 904.08 provides:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

¶19 Halbman first argues that Schantner and Happe are foreclosed from arguing that the subject testimony was inadmissible or improper because they failed to object to it. However, during Halbman's testimony, there was an objection when Halbman started volunteering information on the insurance company's payment of the repairs to his truck. Contrary to Halbman's contention, no "magic words" were required for that objection to be considered a continuing

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[7] WISCONSIN STAT. § 885.285(1)(b), "Settlement and advance payment of claim for damages," states in pertinent part:

"**(1)** No admission of liability shall be inferred from the following:

….

(b) A settlement with or any payment made to a person or on the person's behalf to another for injury to or destruction of property."

objection. Clearly from later exchanges, as noted above, this testimony was objected to by Happe's counsel and from the lack of objection or comment by Halbman's counsel, it can be inferred that he understood that reference to these insurance payments was not proper or admissible under the law. In its decision granting the mistrial, the trial court properly noted that a lawyer is required to understand the existing statutes and, therefore, to know that this testimony was completely inadmissible. *See* ***State v. DeKeyser***, 221 Wis. 2d 435, 451, 585 N.W.2d 668 (Ct. App. 1998) ("Trial counsel is expected to know the law relevant to his or her case."), *overruled on other grounds by* ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447. We agree with the trial court, who was in the best position to evaluate the participants and the evidence, that "[t]here was an objection made right after [Halbman] said it the first time. I don't think they have to keep on objecting."

¶20 Halbman next argues that his comments in the rebuttal closing argument properly fell within WIS. STAT. § 904.08. Halbman then goes on to set out some of the testimony and evidence admitted at trial that counters Happe's claim that Happe's vehicle never struck Halbman's truck or Schantner's testimony that Schantner did not see much damage on Halbman's truck after the accident. Halbman argues that even if the statements were improper, he had to make them in order to impeach Happe's testimony that his vehicle never collided with Halbman's truck or that the damage was minimal.

¶21 We do not agree that the only recourse that Halbman had on rebuttal was to refer to inadmissible or not admitted evidence. Wisconsin law is clear that counsel in closing arguments cannot use facts not in evidence, such as the car repair estimate shown to the jury during the rebuttal closing argument. *See* ***Klein***, 19 Wis. 2d at 512. In ***Klein***, plaintiff's counsel made an assertion unsupported by

admitted evidence, i.e., that from the defendant's failure to counterclaim for recovery of damages relating to the damage to his own vehicle, it could be inferred that he considered the accident his fault. ***Id.*** at 511-12. In denouncing counsel's tactic, our supreme court noted that this tactic was

> highly improper. There was nothing in the evidence to explain why [the defendant] did not counterclaim in the action for damages to his car resulting from the collision with plaintiff's automobile. Possible reasons for his not doing so are that he may have carried collision insurance which covered such damages, or he may have made claim against plaintiff's insurance carrier and arrived at an amicable settlement.

Id. at 512. Similarly, here, Halbman is attempting to demonstrate liability by showing the repair estimate (not admitted into evidence) to the jury and to argue objected to and stricken testimony regarding payment for these repairs. If he wanted to argue about the repair, Halbman could have sought to have the estimates admitted into evidence.

¶22 Halbman was also on notice, both through objections by the parties and comments by the trial court during trial, that discussion of the repair payment by the insurance company was not proper under WIS. STAT. § 904.08. Halbman attempts to argue on appeal that he presented this information solely for impeachment purposes. However, his comments in the rebuttal argument—"Gee, are they [Farmers Insurance] in the business of paying for damages that they do not cause?"—went to the heart of the liability, an impermissible purpose under § 904.08.

¶23 The trial court also found that the language Halbman's counsel used in his rebuttal closing relating to insurance companies, i.e., "You have an insurance company. We all know insurance companies are some of the riches[t]

companies in the world. You know why? It is because it is like a one way valve. The money comes in, but they never want to give it out" was "absolutely improper and blatantly prejudicial." Citing to WIS JI—CIVIL 125, which instructs juries to decide the case in the same manner as if there was no insurance, the trial court notes that Halbman's rebuttal closing "is a blatant appeal to prejudice" and further notes that these statements "may go some to explain the size of the verdict here, $182,000 for a neck strain." The trial court concludes: "I think the jury would well have been impassioned and inflamed by that rhetoric, so I am declaring a mistrial for these reasons."

¶24 Wisconsin law "is clear that evidence of a defendant's liability insurance is immaterial and objectionable." ***Nimmer v. Purtell***, 69 Wis. 2d 21, 36, 230 N.W.2d 258 (1975) (footnote omitted). Excessiveness in a damages award is considered evidence that passion and prejudice influenced it; and could have also influenced the jury's verdict on liability. ***Id.*** at 36. Mistrials have been granted in cases where counsel has attempted, through closing argument, to improperly engender sympathy and/or create prejudice against the other party. *See* ***Schultz***, 181 Wis. 2d at 651-53 (mistrial proper after plaintiff's counsel's announcement in open court that the plaintiff's wife had left the courtroom suffering chest pains because information could invoke an improper sympathy response); ***DeRouseau v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.***, 256 Wis. 19, 26, 39 N.W.2d 764 (1949) (attempt to invoke prejudice by discussing the wealth of the opposing party necessitated grant of mistrial).

¶25 In granting the motion for mistrial, the trial court set forth its reasoning, based upon facts in the record and the appropriate legal principles. *See* ***Southeast Wis. Prof'l Baseball Dist.***, 738 N.W.2d 87, ¶39. Based on our review

of the record, we determine that the trial court did not erroneously exercise its discretion when it granted the motion for mistrial.

Loss of future earnings claim

¶26 Halbman argues that there was sufficient evidence for the jury to determine what amount his earning capacity had diminished and for the jury to determine what fixed amount of damages would compensate him for his impaired earning capacity. Schantner argues that the trial court was correct to preclude the future wage loss claims in both trials. As to the first trial, Schantner argues that Halbman failed to meet his burden of production. As to the second trial, Schantner argues that Halbman waived any appeal rights thereto because he did not move the trial court post-verdict to reconsider the preclusion. However, Schantner argues in the alternative that, if this court finds this failure to be harmless error, the trial court was still correct to preclude Halbman's claim because he should not be "permitted to derive a benefit from engaging in conduct that provoked a mistrial." Happe argues that the trial court's dismissal of the future wage loss claim, after the close of Halbman's rebuttal case in trial one, was proper because after it was determined that the income figures used by Halbman's vocational expert were incorrect, there was insufficient evidence available for the jury to accurately determine the value of any future wage loss claim.

¶27 To prove a loss of future earnings claim, a plaintiff must show: "'(1) the determination of the extent to which such capacity has been diminished, and (2) the fixing of the amount of money which will compensate for the determined extent of impairment.'" ***Ianni v. Grain Dealers Mut. Ins. Co.***, 42 Wis. 2d 354, 364, 166 N.W.2d 148 (1969) (citation omitted). Both of these elements must be supported by expert testimony. ***Brain v. Mann***, 129 Wis. 2d

447, 458, 385 N.W.2d 227 (Ct. App. 1986). Whether to admit expert testimony is a matter of trial court discretion, which discretionary decision will be upheld on review if it is based on the facts of record and the appropriate and applicable law. ***Id.***

¶28 Halbman argues that the inaccuracy of the income statement figures only goes to the weight the jury gives to Iwinski's report. However, both elements of the future wage loss claim must be supported by expert testimony. *See* ***id.*** Here, the wage claim figure determined by Iwinski was not based on correct numbers. The jury is not in the position to determine how the accurate figures, as provided by Schmitt's testimony and related trial exhibits, would be factored into a formula for determining the proper amount of loss of future wages. This is precisely why expert testimony is required. Accordingly, we determine that the trial court did not erroneously exercise its discretion when it determined, after all of the evidence had been presented, that Halbman had failed to meet his burden of production as to the second element of his wage loss claim and affirm the dismissal of this claim.

¶29 As to the renewed preclusion of this claim for the second trial, we again determine that this was an appropriate exercise of discretion. When a party's conduct leads to a mistrial, that party should not be allowed to benefit from its wrongful conduct. *See* ***Lake Bluff Hous. Partners v. City of S. Milwaukee***, 2001 WI App 150, ¶13, 246 Wis. 2d 785, 632 N.W.2d 485 (discussing equitable relief under the "clean hands" doctrine and holding that relief is appropriately denied when it "clearly appear[s] that the things from which the plaintiff seeks relief are the fruit of *its own* wrongful … conduct") (citation omitted; italics in

Lake Bluff). In making its determination to not allow Halbman's future wage loss claim at the second trial, Schantner states that the trial court "followed the lead"[8] of the federal district court in ***Remco, Inc. v. Faber Brothers, Inc.***, 34 F.R.D. 259 (N.D. Ill. 1964). ***Remco*** involved a number of claims, one involving a violation of the Sherman Act, 15 U.S.C. §1-7. ***Remco***, 34 F.R.D. at 260. After the close of the plaintiff's case, the defendants moved for a dismissal of the entire action. ***Id.*** After argument, the court granted the motion in part, dismissing the Sherman Act claim based on insufficiency of the evidence, but allowing the rest of the case to proceed. ***Id.*** The jury was unable to reach a verdict, the court declared a mistrial, and the parties prepared to retry the case. ***Id.*** The plaintiff argued that the dismissed claim should be allowed, reasoning that "a mistrial having often been said to be no trial at all, the retrial is a de novo litigation of all elements of the previous trial." ***Id.*** The ***Remco*** court disagreed, noting that its dismissal of the Sherman Act claim had been "as a matter of law" based upon an insufficiency of the evidence presented. ***Id.***

¶30 Here, the trial court ruled that Halbman had not met his burden of production and, therefore, dismissed, as a matter of law, Halbman's loss of future earnings claim. Also, as we noted above, Halbman's repeated comments regarding the insurance company's prior partial settlement, as well as Halbman's counsel's rebuttal argument which included improper references to insurance companies and to the partial prior settlement, and which included evidence which

[8] Schantner makes this representation in his response brief. No copy of the September 8, 2005 hearing is included in the record, and Halbman has filed no reply brief. *See* ***LaRock v. DOR***, 2000 WI App 24, ¶24 n.1, 232 Wis. 2d 474, 606 N.W.2d 580 ("[W]hen the record is incomplete we must assume that the missing material supports the [trial] court's ruling."), *aff'd*, 2001 WI 7, 241 Wis. 2d 87, 621 N.W.2d 907.

had not been admitted during the trial, all led to the trial court's determination that a new trial was necessary. Halbman should not be rewarded for his and his counsel's improper conduct. This would only encourage future litigants, faced with the same dilemma—dismissal of a claim for relief based upon insufficient evidence or other legal ground—to instigate a mistrial, thereby getting a second opportunity to litigate the otherwise lost claim. Accordingly, we affirm the trial court's dismissal of the future wage loss claim on this ground.

Trial court's conduct demonstrated no bias against Halbman

¶31 Finally, Halbman argues that the "trial court allowed its bias against Halbman to interfere with its decision making." (Capitalization and bolding omitted.) Halbman refers to a number of decisions made by the trial court throughout the course of the first trial, including:

- Requiring the question of Halbman's liability in the accident to go to the jury despite evidence that Halbman's vehicle was stationary at the time of the evidence.

- The trial court's questioning of the vocational expert when no objection existed from Schantner or Happe.

- The trial court's argumentativeness with Halbman's accountant during his cross-examination by Schmitt.

- The trial court's outburst on November 17, for which the court gave a corrective instruction to the jury, regarding Halbman's counsel's failure to provide copies of some charts that were to be used that day at trial.

- The trial court's characterization of the jury verdict, i.e., "$182,000 for a neck strain," during the court's ruling on the motion for mistrial.

¶32 Schantner argues that Halbman's contentions are "baseless criticism[s]" that "warrant an expression of this Court's reproach." Happe argues that Halbman's argument alleging bias is unfounded and baseless, and that the trial court performed its proper role in the jury trial, clarifying testimony and preventing jury confusion.

¶33 "When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences." ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. This is a rebuttable presumption. ***Id.***

> The test for bias comprises two inquiries, one subjective and one objective. Either sort of bias can violate a defendant's due process right to an impartial judge. Judges must disqualify themselves based on subjective bias whenever they have any personal doubts as to whether they can avoid partiality to one side….
>
> The second component, the objective test, asks whether a reasonable person could question the judge's impartiality.… [T]he appearance of partiality can also offend due process ….

Id., ¶¶20-21 (citations omitted). "Misconduct of a trial judge must find its proof in the record." ***Breunig v. American Family Ins. Co.***, 45 Wis. 2d 536, 548, 173 N.W.2d 619 (1970).

¶34 There does not appear to be any claim that the trial court was subjectively biased. As to an objective bias, i.e., "whether a reasonable person could question the judge's impartiality," we have reviewed the transcripts included

in the record and conclude that many of the intercessions by the trial court during the course of the trial were in an effort to ensure that correct information was provided to the jury. These intercessions were directed at all parties, not just toward Halbman and his counsel. Additionally, the comments provided by Halbman viewed in isolation do not lead us to conclude that the trial court demonstrated any bias toward Halbman or his counsel. In addition, the record provides other instances where the trial court granted Halbman's requests over the objections of the other parties. For example, prior to the second trial, the trial court granted Halbman's motion for additional discovery and provided Halbman with an opportunity to provide support for his future wage loss claim, with the caveat that Halbman not use the opportunity to enlarge this claim. While this ruling was subsequently reversed, in part because Halbman did attempt to substantially enlarge his future wage loss claim, this record does not establish objective bias by the trial court.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

¶35 FINE, J. (*dissenting*). I respectfully disagree with the Majority's decision to affirm the trial court's grant of the mistrial based on: (1) Mark Halbman's response to the defendants' testimony that neither Dennis M. Happe nor Charles L. Schantner, Jr., hit Halbman's truck; (2) the use by Halbman's lawyer of that evidence in his rebuttal closing argument; and (3) the passing comment by Halbman's lawyer about insurance companies in his rebuttal closing argument. I also respectfully disagree with the Majority's affirmance of the trial court's refusal to allow Halbman to prove in the second trial his lost earning capacity.

1.

¶36 Assuming without deciding that Halbman's reference to the payment by the insurance company was improper, neither defense lawyer objected on WIS. STAT. RULE 904.08 grounds.[1] As shown below, the objection *must be specific*, not the general "objection" that the Majority's footnote two trumpets. That ends the analysis.

¶37 WISCONSIN STAT. RULE 901.03(1) provides, as material:

[1] In my view, a non-frivolous argument could be made that the defendants opened the door to the admission of the evidence that the insurance company paid for the repair to Halbman's truck because that evidence reflected the individual defendants' knowledge of whether there *was* a collision with Halbman's truck —no insured would like his or her insurance company to pay for a loss either that did not happen or was not caused by the insured because that might affect the premiums charged for the policy in succeeding years.

> Error may not be predicated upon a ruling which admits … evidence unless a substantial right of the party is affected; and
>
> (a) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific ground of objection*, if the specific ground was not apparent from the context.

(Emphasis added.) *See also* ***State v. Nelis***, 2007 WI 58, ¶31, 300 Wis. 2d 415, 428, 733 N.W.2d 619, 625 ("A general objection that does not indicate the specific grounds for inadmissibility of evidence will not suffice to preserve the objector's right to appeal."); ***State v. Wolff***, 171 Wis. 2d 161, 165, 491 N.W.2d 498, 500 (Ct. App. 1992) ("[A]n objection preserves for appeal only the specific grounds stated in the objection.") (internal quotation marks and quoted source omitted). Although the trial court did not affirmatively *admit* the evidence, it neither struck it from the Record nor told the jury not to consider it. Thus, the objection was waived, and the evidence was properly before the jury. *See* ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 493, 611 N.W.2d 727, 730 (failure to object waives alleged error in receipt of evidence).

2.

¶38 As noted, the jury could properly consider that the insurance company paid for the repair to Halbman's car because neither of the defendants properly objected to the receipt of that evidence. Accordingly, Halbman's lawyer did not comment on something not in the Record during his closing argument.

3.

¶39 The brief comment by Halbman's lawyer in his rebuttal closing argument, which the Majority quotes in ¶7, in my view did not as a matter of law warrant the drastic mistrial-voiding of an eight-day trial. First, the insurance

companies were named defendants and the jury knew that. Second, Halbman's lawyer said nothing that was not in the ken of any reasonable juror—insurance companies, like all businesses and persons, prefer to take money in rather than to let it go out. Finally, assuming that Halbman's lawyer exceeded the scope of fair argument, which I question, "[n]ot all errors warrant a mistrial and the law prefers less drastic alternatives, if available and practical." ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695, 702 (Ct. App. 1998) (internal quotation marks and quoted source omitted). The trial court could have easily reminded the jury that it had to decide the case on the facts and not who the parties were.

4.

¶40 As noted, I do not believe that the trial court correctly granted a mistrial in the first trial. Thus, Halbman did not *cause* that mistrial. Accordingly, he should not have been prevented from trying to prove in the second trial his lost earning capacity merely because he was unable to prove it in the first trial.

¶41 In my view, the trial court, albeit frustrated for reasons not readily apparent in the Record, erroneously exercised its discretion in granting the mistrial after the first trial, and thus erroneously prevented Halbman from attempting to prove in the second trial his lost earning capacity. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶14, 262 Wis. 2d 426, 436, 663 N.W.2d 789, 793 ("[F]ailure to apply the correct legal standards is an erroneous exercise of discretion."). Accordingly, I respectfully dissent.