

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 8, 2009**

David R. Schanker  
Clerk of Court of Appeals

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**Appeal No. 2008AP3017**

**Cir. Ct. No. 2007CV156**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**ALBERT E. PROST,**

**PLAINTIFF-APPELLANT,**

**V.**

**PROGRESSIVE NORTHERN INSURANCE COMPANY AND PATRICK D.  
CASPER,**

**DEFENDANTS-RESPONDENTS,**

**US SECRETARY OF THE DEPARTMENT OF HEALTH & FAMILY SERVICES,**

**DEFENDANT.**

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APPEAL from orders of the circuit court for Fond du Lac County:  
STEVEN W. WEINKE, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. At issue in this lawsuit are personal injury and property damages related to a single-vehicle accident that occurred when driver Patrick D. Casper's vehicle left the road and went through a dairy farmer's fence and into a cow pasture.<sup>1</sup> The dairy farmer, Albert E. Prost, appeals from nonfinal orders limiting the admission of evidence and granting a motion for mistrial.<sup>2</sup> Prost argues the trial court erroneously exercised its discretion when it: (1) prohibited Prost from presenting evidence during the compensatory damages phase of the trial that Casper was intoxicated at the time his vehicle entered Prost's property; (2) precluded Prost from asking Casper if he had ever been convicted of a crime; (3) granted a mistrial on the first day of the jury trial; and (4) ordered Prost's trial counsel to pay costs and fees related to the mistrial. We reverse the orders and remand for further proceedings.

## BACKGROUND

¶2 The following facts, provided for background purposes, are mostly undisputed, except as noted. On December 8, 2005, Casper went to a bar, drank beer and shots of alcohol and then proceeded to drive home in snowy weather conditions. On the way, he lost control of his vehicle and crashed through the fence of a pasture located on Prost's dairy farm. Some cows were standing in that pasture. There is no claim Casper hit any cow. According to Prost, he saw Casper trying to drive out of the pasture and up an embankment to get back on the road, but the vehicle got stuck. Based on this incident, Casper was ultimately arrested

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<sup>1</sup> Casper's insurance company was Progressive Northern Insurance Company. In this opinion, references to arguments made by Casper refer to those made by Casper and his insurer.

<sup>2</sup> By order of February 16, 2009, we granted Prost's petitions for leave to appeal the trial court's nonfinal orders dated November 20, December 15, December 18 and December 24, 2008.

for and convicted of operating with a prohibited alcohol content, first offense, contrary to WIS. STAT. § 346.63(1)(b) (2005-06),<sup>3</sup> and driving too fast for conditions, contrary to WIS. STAT. § 346.57(3) (2005-06). Both are non-criminal traffic offenses.

¶3 Prost claims that when he saw Casper trying to drive out of the pasture, he became worried that Casper would injure his cows, so he stepped in front of Casper's vehicle and waved his arms in an attempt to make Casper stop driving. Prost further claims that Casper drove toward him and Prost was forced to push himself off the vehicle and onto the ground, causing injuries that he did not immediately discover or report to the sheriff's deputies who arrived on the scene. Casper contests the facts concerning Prost's alleged injuries and asserts that Prost did not suffer any injuries.

¶4 Prost filed suit against Casper and his insurer, alleging that Casper's actions were negligent and that Casper's operation of a motor vehicle while under the influence of an intoxicant and/or controlled substance was done maliciously and/or in an intentional disregard of the rights of others. Prost sought both compensatory and punitive damages.

¶5 Prior to trial, Casper sought to preclude Prost from introducing evidence of Casper's alcohol use and to preclude Prost from seeking punitive damages. In the alternative, Casper sought to bifurcate the trial, so that the compensatory damages case would be tried first. The trial court decided to hold open the issue of whether punitive damages were precluded. It granted Casper's

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<sup>3</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

motion to bifurcate the trial, ordering that the compensatory damages case would be tried first. Further, it ordered that “there will be no evidence or testimony regarding drunk driving, consuming alcohol, citations issued, field sobriety tests, drinking at a bar, blood alcohol content or any other statements from which a jury could conclude that intoxication is an issue.” The trial court in its oral ruling explained that that evidence was “too prejudicial” during the compensatory damages phase of the trial.

¶6 After the motion hearing, Prost moved the trial court to reconsider its decision to deny the admittance of evidence or testimony concerning those intoxication-related matters. Prost argued that because Casper had not conceded negligence as related to Prost’s claimed injuries,<sup>4</sup> evidence of intoxication was relevant to Casper’s ability to maintain management and control over the vehicle. Thus, Prost contended, the probative value of the evidence outweighed any possible prejudice to Casper. On the morning of trial, the trial court denied the motion for reconsideration, stating: “[T]he Court is not of a mind to change its mind about its former ruling.”

¶7 Also on the morning of trial, counsel for Prost asked the trial court about a hearing “on the admissibility of criminal convictions so we know what number Mr. Casper has to answer to.” In response, Casper’s counsel asserted that Casper did not have any prior criminal convictions and that a motion concerning that issue should have been brought previously. The trial court denied the request,

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<sup>4</sup> At some point prior to trial, Casper conceded liability for negligently driving onto the property and damaging the fence. Thus, Casper’s proposed special verdict form answered “Yes” to questions asking if Casper negligently operated the vehicle and caused property damage. However, Casper continued to deny negligence as to, and liability for, Prost’s claimed injuries; Casper disputed that Prost was even injured on December 8, 2005.

initially without explanation. When Prost asked for clarification, noting that Casper had been convicted of a crime related to this incident, the trial court said that Prost could not ask Casper if he had ever been convicted of a crime.<sup>5</sup>

¶8 After opening statements, Prost called Casper adversely, as the first witness. Prost asked Casper a question about his age and then began asking about the night of the accident:

[Prost's trial counsel:] [D]o you remember the evening of December 8th, 2005?

[Casper:] Yes.

[Prost's trial counsel:] Do you feel you have a good recollection of that evening?

[Casper:] It was three years ago, but yes.

[Prost's trial counsel:] You do. Okay. Do you remember what you did—you were involved in an accident on County Highway V, correct?

[Casper:] Correct.

[Prost's trial counsel:] Okay. And do you remember what you did in the hours preceding that accident?

[Casper's trial counsel:] Objection, Your Honor. May I be heard?

THE COURT: The Court has ruled in this area. The objection is going to be sustained.

[Casper's trial counsel:] Thank you.

[Prost's trial counsel:] Okay.

Where were you coming from before the accident happened?

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<sup>5</sup> As we discuss later in this opinion, we are unable to ascertain whether Casper has been convicted of a criminal offense; the penalties related to this incident were non-criminal in nature. Determination of that factual question is not required to resolve this appeal.

[Casper's trial counsel:] Objection, Your Honor. Could I be heard?

THE COURT: Let's take the jury out then.

¶9 Once the jurors left the courtroom, counsel for Casper moved for a mistrial, stating:

I think the two questions that [Prost's counsel] has asked go directly to what he cannot elicit testimony on, and to even ask the question and then have the objection sustained is giving the jury some idea that, oh, wherever he was or whatever he was doing shouldn't be heard. Just to assume things. This is an attempt to get a mistrial in this case which is completely improper.

Prost's counsel disagreed, stating that he was not attempting to get a mistrial. He explained he was asking Casper about his recollection of that night. He continued:

I said, do you remember what happened in the hours preceding what happened? I didn't relate to him what happened in the hours preceding the accident. I asked him where he came from. What is objectionable [about] finding out where he came from? I'm not asking where he drank alcohol right that night.

¶10 The trial court said it would hear an offer of proof. Prost's counsel continued his examination of Casper, outside the jury's presence:

[Prost's trial counsel:] Do you remember where you came from the evening before the accident?

[Casper:] I was coming from West Bend.

Counsel then asked about the time of night, the speed limit, how fast Casper was driving, the weather conditions, how long Casper had been driving and other questions related to the drive and the accident. None of Casper's answers included references to the bar, alcohol or drinking.

¶11 Next, the trial court and Prost's counsel discussed how the witness might be asked questions in a way that would not invite Casper to answer that he was intoxicated. However, Casper's counsel argued that a mistrial should nonetheless be declared because the jury heard the first question asked and that question

leads the jury to believe that there was something in the hours that he was doing before the accident that now cannot be heard by the jury, and I just think that that opens the door to issues of the jury speculating as to what that could be, and [Prost's counsel] knows that he should not have asked that question without even hearing the response. The question itself is prejudicial.

¶12 In response, the trial court said it would grant the defense motion for mistrial. No further explanation or discussion of the reasons for doing so was given on that day, although the trial court subsequently offered an explanation for its decision at a hearing on Casper's motion for actual attorney fees and costs that were incurred preparing for and attending the trial. In Casper's motion for fees and costs, he asserted that pursuant to WIS. STAT. § 814.036 and case law, the trial court had discretion to impose costs against Prost's counsel for causing a mistrial by failing to obey the pretrial order.

¶13 At the motion hearing on the motion for fees and costs, Prost argued that sanctions were not appropriate, asserting that the questions asked at trial did not violate the court's pretrial order concerning the admissibility of intoxication-related evidence and that there was no prejudice because the questions were never answered. The trial court and Prost's counsel had the following exchange:

THE COURT: And what did [you] think he was going to answer when you asked him where were you were coming from on the night in question?

[Prost's trial counsel:] Here is the thing about that. He never answered the question.

THE COURT: That's because there was an objection.

[Prost's trial counsel:] And there never was any kind of answer to that. So where is the prejudice? There certainly was no violation of the Court's order. There never was a question asked about intoxication. Certainly that question never touched on the issue of intoxication, never touched on any of the issues that were contained within the four corners of the Court's order, so there was never any kind of violation of the Court's order in the first place.

THE COURT: I think that's a disingenuous argument, I really do. When you have the defense stipulating to negligence in the operation of the vehicle causing damage to the fence and the culvert, the only thing in issue was whether or not Mr. Prost was contributorily negligent for his own safety....

... I warned you about the fact that if you got into this and left the impression that there was something about this defendant affecting the operation of his vehicle, that you would be looking at a mistrial and that this Court would assess costs against you personally...

What did you think he was going to answer to that question?

[Prost's trial counsel:] Your Honor, there was never any part of the order that said I could not ask him what he remembers about where he came from.

THE COURT: What did you think he was going to say?

[Prost's trial counsel:] What he said in his offer of proof is West Bend. Obviously there is nothing prejudicial. All he had to say was where he came from.

The trial court rejected Prost's arguments and ordered Prost's trial counsel to pay attorney fees and costs of \$7074.14 to Casper's counsel, which appeared to include \$804.86 in previously ordered costs for the jury and two bailiffs, \$316.09

for the editing of a deposition excluding information about intoxication and \$6758.05 in other costs related to the mistrial.<sup>6</sup>

¶14 Prost sought leave to appeal the trial court's nonfinal orders. We granted the motions on February 16, 2009. This appeal follows.

## DISCUSSION

¶15 Prost asks this court to overturn four trial court rulings. We consider each in turn.

### I. Exclusion of evidence related to intoxication.

¶16 The first issue on appeal is whether the trial court erroneously exercised its discretion when it excluded evidence of Casper's intoxication during the compensatory damages phase of the trial. "Generally, the decision whether to admit or exclude evidence is committed to the [trial] court's discretion; we affirm discretionary decisions if the court applied the correct law to the facts of record and reached a reasonable result using a rational method." *Staskal v. Symons Corp.*, 2005 WI App 216, ¶15, 287 Wis. 2d 511, 706 N.W.2d 311. An appellate court "may reverse a discretionary decision if the [trial] court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." *State v. Fernandez*, 2009 WI 29, ¶50, 316 Wis. 2d 598, 764 N.W.2d 509.

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<sup>6</sup> The precise breakdown of costs is not entirely clear from the record. Two of the orders appealed from reference a \$316.09 cost associated with editing a deposition record pursuant to the trial court's order prohibiting reference to Casper's intoxication or drunk driving. Because we hold that the trial court incorrectly barred reference to Casper's intoxication, it is unfair to assess the costs necessary to comply with the court's erroneous order against the party objecting to the order. We do not attempt to resolve the discrepancies in the record and briefs because we reverse the orders requiring the payment of costs and fees.

¶17 Applying those legal standards here, we conclude that the trial court erroneously exercised its discretion when it precluded Prost from introducing evidence of Casper’s intoxication during the compensatory damages phase of the trial. This evidence was relevant to Casper’s liability for the alleged personal injuries and the danger of unfair prejudice did not outweigh the evidence’s probative value. Casper’s stipulation only to negligence causing the damage to the fence and the land does not equate with a stipulation to negligence for any other purpose. Whether Casper was negligent when he drove around the field and whether that negligence caused injury to Prost were still disputed issues.

¶18 Only relevant evidence is admissible. *See* WIS. STAT. §§ 904.01 & 904.02. Our supreme court has recognized that “[e]vidence of intoxication is a proper consideration in determining negligence,” but “only if it is found that the amount of alcohol consumed so affected the person as to appreciably lessen or impair his ability to exercise ordinary care for his own safety.” *Landrey v. United Servs. Auto. Ass’n*, 49 Wis. 2d 150, 158, 181 N.W.2d 407 (1970); *see also* WIS JI—CIVIL 1035.<sup>7</sup> Here, the arresting sheriff’s deputy testified in his deposition that Casper “failed all the field sobriety tests except reciting the alphabet correctly

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<sup>7</sup> WISCONSIN JI—CIVIL 1035, entitled “Voluntary Intoxication: Relation to Negligence,” provides:

In answering the question(s) of the verdict relating to the negligence of any party, you are not to consider a person’s drinking of intoxicants before the accident unless you determine that the intoxicants consumed affected the person to the extent that the person’s ability to exercise ordinary care (in the operation of the vehicle) (and) (or) (for the person’s own safety) was affected or impaired to an appreciable degree. A person who voluntarily consumes intoxicants must use the same degree of care in the operation of a vehicle or for his or her self-protection as one who has not consumed intoxicants.

with slurred speech and pausing” and that the Intoximeter report determined Casper’s blood alcohol content was .22.

¶19 Although Casper conceded that he was negligent with respect to hitting the fence with his vehicle, he disputed Prost’s allegation that Casper drove his vehicle at Prost and that Prost made contact with the vehicle; thus, issues beyond damages were at issue in the case.<sup>8</sup> Specifically, the jury was being asked to determine which of the two men was telling the truth or correctly remembering whether Casper actually struck Prost with his vehicle or forced him out of the way and injured him. Evidence of Casper’s intoxication was relevant to the jury’s evaluation of Casper’s testimony. See *Ruiz v. State*, 75 Wis. 2d 230, 234, 249 N.W.2d 277 (1977) (“Clearly the state of a witness’ sobriety at the time he makes an observation is relevant, and a jury can ignore the testimony of one it believes to have been so intoxicated as to be unreliable.”). Evidence of intoxication was also relevant to the jury’s evaluation of whether Casper could have maintained management and control over his vehicle as he drove around the field.

¶20 Even relevant evidence may be excluded from trial “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,” see WIS. STAT. § 904.03,

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<sup>8</sup> There is some indication in the record that the trial court may have erroneously believed that negligence had been conceded as to both property damage and personal injury. However, as we noted in footnote 4, it is clear from Casper’s proposed special verdict and opening statement that Casper contests what allegedly occurred when he tried to drive out of the pasture (e.g., whether Prost waved his arms and tried to stop Casper, whether Prost had to dive out of the way of the vehicle and whether Prost had contact with the vehicle). In addition, at the pretrial conference, counsel for Casper agreed that the admission of negligence was solely to do with Casper’s vehicle leaving the roadway.

although the rules of evidence “favor admissibility,” see *Lievrouw v. Roth*, 157 Wis. 2d 332, 350, 459 N.W.2d 850 (Ct. App. 1990). Section 904.03 was apparently the basis for the trial court’s decision to exclude the intoxication-related evidence. We are unpersuaded that barring all intoxication-related evidence was a proper exercise of discretion. The probative value of the evidence was very high because the jury was required to assess the credibility of Casper’s testimony concerning what occurred in the pasture. Casper’s theory of defense, as his counsel told the jury during opening statements, was that Prost was “unbelievable.” To fairly evaluate Casper’s testimony, the jury needed to know that Casper was significantly impaired at the time of his observations, with a blood alcohol content over two and one-half times the legal limit.

¶21 Generally, evidence tending to establish negligence is prejudicial to the person whose negligence is alleged. A court must balance the probative value of the evidence against the danger of *unfair* prejudice. See *Lievrouw*, 157 Wis. 2d at 349-50. In its oral decision, the trial court identified nothing about this particular case that makes the evidence of intoxication unfairly prejudicial. We cannot affirm an exercise of discretion by concluding that evidence of intoxication is always unfairly prejudicial, given that *Landrey* sanctioned the use of intoxication evidence in negligence cases. See *id.*, 49 Wis. 2d at 158. Further, we are unpersuaded that in this case the danger of unfair prejudice “substantially outweighed” the evidence’s probative value. See WIS. STAT. § 904.03. For these reasons, we reverse the pretrial order excluding all evidence that Casper was intoxicated.

## II. Exclusion of evidence that Casper had been convicted of a crime.

¶22 Prost argues that the trial court should not have prohibited him from asking Casper if he had ever been convicted of a crime and, if so, how many times. *See* WIS. STAT. § 906.09. The existence of a witness’s prior crimes is generally admissible to attack the witness’s credibility unless “its probative value is substantially outweighed by the danger of unfair prejudice.” *See* § 906.09(2). As we explained in *State v. Kruzycki*, 192 Wis. 2d 509, 531 N.W.2d 429 (Ct. App. 1995):

A prior conviction on any crime is relevant to the credibility of a witness’s testimony. Our law presumes that a person who has been convicted of a crime is less likely to be a truthful witness than a person who has not been convicted. The fact and the number of such convictions are therefore relevant evidence.

Whether to allow prior-conviction evidence for impeachment purposes under [WIS. STAT. § 906.09] is within the discretion of the trial court.

*Kruzycki*, 192 Wis. 2d at 524-25 (citations omitted).

¶23 In this case, the trial court denied Prost’s request to ask Casper if he had ever been convicted of a crime without determining whether there were indeed criminal convictions in Casper’s past. Without knowing whether there were convictions and, if so, the nature of the crimes and when they were committed, the trial court could not properly exercise its discretion in deciding whether to preclude Prost from asking about criminal convictions. *See State v. Gary M.B.*, 2004 WI 33, ¶21, 270 Wis. 2d 62, 676 N.W.2d 475 (to determine whether to allow witness to be asked about the existence of prior convictions, trial court must consider “the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, [and] the involvement of dishonesty

or false statement in the crime” in order to determine whether “the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice”) (citation omitted). We reverse the order denying Prost’s request to ask Casper about prior convictions. On remand, the issue of whether Casper has been convicted of a crime, how many times he has been convicted and whether the existence of any convictions can be disclosed to the jury, should be resolved prior to trial.

¶24 We decline to discuss whether Prost’s request for a hearing on the admissibility of prior convictions was in the proper form and timely. In his brief, Casper suggests that Prost may not have properly sought a hearing. However, he stops short of asking this court to affirm the trial court based on an alleged procedural error, asserting that “[i]n any event, if such a request were made, it was properly denied.” The timing and adequacy of Prost’s request was not addressed by the trial court and is not an issue that is fully developed on appeal. We decline to address it. See *State v. Johnson*, 2009 WI 57, ¶71, 318 Wis. 2d 21, 767 N.W.2d 207 (appellate court need not address an issue not fully briefed by the parties).

### **III. Granting a mistrial.**

¶25 Next, we consider Prost’s argument that the trial court erroneously exercised its discretion when it granted Casper’s motion for a mistrial. “The decision whether to grant a mistrial motion lies within the sound discretion of the trial court.” *Forman v. McPherson*, 2004 WI App 145, ¶29, 275 Wis. 2d 604, 685 N.W.2d 603. “The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.” *Id.* “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 will reverse a trial court’s decision on a motion for a mistrial “only on a clear showing of an erroneous use of discretion by the trial court.” *McPherson*, 275 Wis. 2d 604, ¶29. Appellate courts will uphold a trial court’s exercise of discretion if the trial court: “(1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrably rational process, reached a conclusion that a reasonable judge could reach.” *State ex rel. Robins v. Madden*, 2009 WI 46, ¶9, 317 Wis. 2d 364, 766 N.W.2d 542.

¶26 In this case, the trial court offered no immediate explanation for granting a mistrial. It did not indicate that it had considered other alternatives to granting a mistrial. At the subsequent hearing on costs and fees related to the mistrial, the trial court indicated that the mistrial was warranted because Prost had asked questions that violated the trial court’s pretrial order concerning intoxication evidence. The two questions were: “[D]o you remember what you did in the hours preceding that accident?” and “Where were you coming from before the accident happened?”

¶27 However, as we have seen, *see supra*, ¶10, Prost’s offer of proof dispels the conclusion that these questions would have elicited information prohibited by the trial court or, given our evidentiary holding herein, that the questions were improper. Casper testified during the offer of proof; his answer to the question concerning where he was traveling from was “West Bend.” We cannot agree that the questions constituted a *per se* violation of the trial court’s pretrial order prohibiting references to “drunk driving, consuming alcohol, citations issued, field sobriety tests, drinking at a bar, blood alcohol content or any

other statements from which a jury could conclude that intoxication is an issue.” Moreover, to the extent the trial court had concerns about the questions, it could have taken steps short of granting a mistrial to insure that Casper did not give an alcohol-related answer, such as reminding him outside the presence of the jury not to give such answers<sup>9</sup> and deciding in advance how trial counsel could properly ask about Casper’s driving prior to the accident.<sup>10</sup>

¶28 We cannot agree that merely asking the questions—which the witness did not answer in front of the jury—was an error “sufficiently prejudicial to warrant a new trial.” See *McPherson*, 275 Wis. 2d 604, ¶29. The trial court did not explain how Casper had been prejudiced by the unanswered questions. Wisconsin cases have recognized that “[g]enerally, an improper but unanswered question is not sufficient error to require reversal on appeal.” See *Genova v. State*, 91 Wis. 2d 595, 621, 283 N.W.2d 483 (Ct. App. 1979); see also *State v. Edwardsen*, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988). We believe this principle is equally applicable to our review of a decision to grant a mistrial. We fail to see how these unanswered questions—even assuming they were improper—created such prejudice that a mistrial was the only reasonable alternative. As we have recognized: “[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 (Ct. App. 1998) (citation omitted).

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<sup>9</sup> Casper was already aware that the trial court had ordered that evidence concerning Casper’s intoxication was not going to be admitted at the compensatory phase of the trial.

<sup>10</sup> Indeed, prior to granting the mistrial, the trial court suggested several ways the questions could properly be asked and then proceeded to ask the witness those questions outside the presence of the jury.

¶29 Casper contends that the unanswered questions were prejudicial because the “jury could infer that Mr. Casper’s whereabouts and activities were somehow suspect or improper because the objections were sustained.” That argument ignores the routine instruction to the jurors that they are not to draw inferences from unanswered questions or stricken answers. *See* WIS JI—CIVIL 50.<sup>11</sup> Any improper inferences that the jury might have drawn from the court sustaining the objection could easily have been cured by giving this standard instruction. We are not persuaded from this record that the unanswered questions created any prejudice, much less that they justified a mistrial.

¶30 By granting a mistrial without considering other alternatives and where there was insufficient prejudice to justify a mistrial, the trial court erroneously exercised its discretion. *See Madden*, 317 Wis. 2d 364, ¶9.

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<sup>11</sup> WISCONSIN JI—CIVIL 50, which both parties proposed reading to the jury, provides in pertinent part:

At times during a trial, objections may be made to the introduction of evidence. I do not permit arguments on objections to evidence to be made in your presence. Any ruling upon objections will be based solely upon the law and are not matters which should concern you at all. You must not infer from any ruling that I make or from anything that I should say during the trial that I hold any views for or against either party to this lawsuit.

During the trial, I will sustain objections to questions asked without permitting the witness to answer or, where an answer has been made, will instruct that it be stricken from the record and that you are to disregard it and dismiss it from your minds. You should not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. This is because the law requires that your decision be made solely upon the competent evidence before you.

**IV. Ordering costs and fees related to the mistrial.**

¶31 The trial court ordered Prost’s counsel to pay costs and fees as a sanction for asking the questions that led to the mistrial. Our supreme court has recognized that under WIS. STAT. § 814.036, trial courts “have the authority to impose costs on an attorney whose actions have resulted in a mistrial.” *See Schultz*, 181 Wis. 2d at 656. However, in this case, because we have concluded that the trial court erroneously exercised its discretion when it granted the mistrial, we reverse the order directing Prost’s attorney to pay fees and costs associated with the mistrial.

*By the Court.*—Orders reversed and cause remanded with directions.

Not recommended for publication in the official reports.

