SUMMARY
June 18, 2020

2020C0A98

No. 19CA0786, *Bocian v. Owners Ins. Co.* — Insurance — Automobile Insurance Policies — Uninsured/Underinsured; Civil Procedure — Change of Judge

This bad faith insurance dispute involves plaintiff's claim for underinsured motorist benefits under an insurance policy with defendant. Following a jury verdict that found defendant had breached the insurance contract but had not acted in bad faith or unreasonably, plaintiff appeals the trial court's denial of her C.R.C.P. 97 motion for judicial disqualification and evidentiary rulings regarding the testimony and report of an expert witness.

On appeal, a division of the court of appeals first considers whether the trial judge should have disqualified himself based on plaintiff's claim that the judge was biased against the law firm representing her. In reviewing plaintiff's allegations, the division

concludes that they are insufficient to support a reasonable inference of actual or apparent bias or prejudice, and do not require disqualification. In doing so, the division further concludes that judicial disqualification is not warranted based on an attorney's campaign contribution against the judge's retention where insufficient facts are alleged to place the contribution in context, the contribution occurred months into the litigation, and judicial disqualification would encourage judge-shopping.

The division further rejects plaintiff's contentions that the trial court reversibly erred when it precluded plaintiff's expert witness from testifying and made other evidentiary rulings regarding the witness's expert report.

Accordingly, the division affirms the judgment.

COLORADO COURT OF APPEALS **2020C0A98**

Court of Appeals No. 19CA0786
Adams County District Court No. 18CV30733
Honorable Edward C. Moss, Judge

Lyubov Bocian,

Plaintiff-Appellant,

v.

Owners Insurance Company,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division VI
Opinion by JUSTICE MARTINEZ*
Richman and Yun, JJ., concur

Announced June 18, 2020

Connelly Law, LLC, Sean Connelly, Denver, Colorado; Franklin D. Azar & Associates, P.C., DezaRae LaCrue, Aurora, Colorado, for Plaintiff-Appellant

Zupkus & Angell, P.C., Muliha Khan, Erica Payne, Anne Murphy, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 This case arises out of a claim for underinsured motorist (UIM) benefits by plaintiff, Lyubov Bocian, under her insurance policy with defendant, Owners Insurance Company (Owners). Bocian appeals the trial court's denial of her C.R.C.P. 97 motion to disqualify the trial judge and evidentiary rulings regarding the testimony and report of an expert witness. For the reasons stated below, we affirm.

I. Background

¶ 2 In September 2016, Bocian was injured in a car accident with another driver (at-fault driver). After Bocian settled with the at-fault driver's insurer for its policy limit, Bocian made a UIM claim with her insurer, Owners.

¶ 3 In addition to medical costs, Bocian sought to recover lost wages resulting from her injuries and subsequent inability to work full-time for six months at the upholstery repair business she co-owns with her husband. In support of this claim, Bocian provided Owners with a report from economist Jeffrey Nehls that calculated $63,600 in wage loss due to the collision.

¶ 4 After reviewing Nehls's report and other documentation, Owners determined that the information was insufficient to support

$63,600 in wage loss and offered Bocian $15,000 to settle her claim. Bocian did not accept Owners' offer and filed suit in May 2018, asserting claims for breach of contract, bad faith breach of contract, and statutory unreasonable denial/delay of insurance benefits.

¶ 5 Before trial, Bocian disclosed Nehls as an expert who would testify regarding her alleged economic loss and the report he had submitted to Owners during the claim process. Owners sought to strike Nehls's testimony and report, arguing that his methodology was not reliable and that his testimony would not be helpful to the jury.

¶ 6 The trial court held a hearing on Owners' motion under CRE 702 and *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001). During the hearing, the trial court extensively questioned Nehls about the methodology he used in calculating lost wages and requested supplemental authority to support his methodology.

¶ 7 Hours after the hearing, Bocian filed a motion under C.R.C.P. 97 to disqualify the trial court judge, alleging the judge had demonstrated actual bias and an appearance of bias against the law firm representing Bocian, Franklin D. Azar and Associates (Azar &

Associates). As grounds for disqualification, Bocian pointed to (1) "disparaging comments" the judge had made against the law firm and its lawyers in three prior cases; (2) the judge's "hostile" inquiry of Nehls during the *Shreck* hearing; and (3) the fact that Franklin Azar had personally donated a "significant amount of money" to a campaign opposing the judge's November 2018 retention. In support of the motion, Bocian attached a previous motion to disqualify the same judge in an unrelated case, a news article regarding Azar's contribution to the anti-retention campaign, and an affidavit signed by one of Bocian's attorneys.

¶ 8 The trial court denied Bocian's C.R.C.P. 97 motion, finding she had waived some of her claims of alleged bias and had otherwise not met her burden to warrant disqualification.

¶ 9 Shortly after, the trial court granted Owners' motion to strike Nehls as an expert. In striking the expert testimony, the trial court also precluded Nehls's report from being presented to the jury. As a result, Bocian performed her own informal calculation and presented a lay opinion at trial that her lost wages totaled $19,200.

¶ 10 Ultimately, the jury found Owners had breached the insurance contract but had not acted in bad faith or unreasonably delayed

payment. Its verdict awarded Bocian $90,000, comprised of $25,000 in noneconomic losses, $40,000 in economic losses, and $25,000 for physical impairment. Following judgment, Owners was deemed the prevailing party for the purpose of awarding costs.

II. Judicial Bias

¶ 11 Bocian first contends that the trial court judge abused his discretion in denying her motion to disqualify under C.R.C.P. 97. She further contends that the trial judge manifested additional bias during the case that required his disqualification. We disagree with both contentions.

A. Standard of Review

¶ 12 In civil cases, a trial judge's decision whether to disqualify himself is discretionary and will not be reversed unless an abuse of discretion is shown. *Spring Creek Ranchers Ass'n v. McNichols*, 165 P.3d 244, 245 (Colo. 2007). A judge's failure to disqualify himself in the face of a legally sufficient motion is an abuse of discretion. *Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635, 640 (Colo. 1987). Finally, the sufficiency of a motion to disqualify is a legal determination we review de novo. *Bruce v. City of Colorado Springs*, 252 P.3d 30, 36 (Colo. App. 2010).

B. Legal Principles

¶ 13 Under C.R.C.P. 97, disqualification is appropriate when the motion and supporting affidavits allege sufficient facts from which it may reasonably be inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased, against a party or counsel to the litigation. *Johnson v. Dist. Court*, 674 P.2d 952, 955-56 (Colo. 1984); *see also* C.J.C. 2.11(A); *People v. Roehrs*, 2019 COA 31, ¶ 12 ("The court must examine both the actuality and the appearance of fairness in light of the facts alleged.").

¶ 14 Actual bias exists if "a judge has a bias or prejudice that in all probability will prevent him . . . from dealing fairly with a party." *People v. Julien*, 47 P.3d 1194, 1197 (Colo. 2002); *see also* § 16-6-201(1)(d), C.R.S. 2019. Even where there is no actual bias, a judge must disqualify himself if his "involvement with a case might create the *appearance* of impropriety." *People in Interest of A.G.*, 262 P.3d 646, 650 (Colo. 2011) (emphasis added).

¶ 15 In ruling on the sufficiency of a motion to disqualify, a judge must accept the factual statements contained in the motion and affidavits as true and determine as a matter of law whether they allege legally sufficient facts for disqualification. *S.S. v. Wakefield*,

764 P.2d 70, 73 (Colo. 1988). Where the motion and supporting affidavits merely allege opinions or conclusions, unsubstantiated by facts supporting a reasonable inference of actual or apparent bias or prejudice, they are not legally sufficient to require disqualification. *Id.*; *see People v. Schupper*, 2014 COA 80M, ¶ 59 (the record must clearly establish bias, meaning that there must be more than mere speculation).

C. Motion to Disqualify

¶ 16 The parties initially dispute whether the trial court properly denied part of Bocian's motion to disqualify based on waiver, given that two grounds for alleged bias — disparaging comments in prior cases and Azar's campaign contributions against the judge's retention — occurred well before the motion was filed. *See A.G.*, 262 P.3d at 652 (a motion to disqualify should be "promptly raised" if grounds for disqualification are known).

¶ 17 However, assuming without deciding that all of Bocian's claims for disqualification were timely raised, we conclude that the motion to disqualify did not, as a matter of law, allege sufficient facts supporting a reasonable inference of actual or apparent bias or prejudice to require disqualification.

1. Prior Disparaging Comments

¶ 18 The first ground for disqualification asserted in the motion concerned three unrelated cases where the judge allegedly made "disparaging comments" against lawyers at Azar & Associates.

¶ 19 In two of the cases, Bocian alleged that the judge improperly denied motions to exclude the law firm's name from evidence. The motions were apparently filed based on the concern that the firm's advertising would prejudice jurors against the firm's clients in those cases. In denying the motion in the first of those cases, the judge stated in a footnote that, if the lawyers believed the firm's "advertising prejudices their clients, the lawyers may wish to consider whether the advertising violates [Colo. RPC] 1.7(a)(2) . . . . If advertising truly creates the claimed prejudice to the firms' clients, it is simple enough to discontinue the advertising." Although not clear from the motion or affidavit, Bocian alleged that the judge made "an identical allegation in denying" the same motion filed in the second case. According to the disqualification affidavit, these orders "ignored the issue of relevance [and] distorted [Azar & Associates'] argument concerning potential prejudice."

¶ 20 In the third case, Bocian alleged that the trial judge had accused a different attorney at Azar & Associates of malpractice. There, the question arose whether an attorney at the firm might be deposed by opposing counsel. In addressing this issue, the judge appears to have asked the attorney if permitting the deposition would require her to withdraw as counsel. From this question, the following exchange occurred between the Azar & Associates' attorney and the judge:

> MS. BROWN: I think it will. I think would — I think it's then up to us to decide whether that's going to be prejudice to our client to the point that we need to withdraw.
>
> THE COURT: Sure. And if you do, there's a Colorado Bar Association ethics opinion on disclosing malpractice to your client.

¶ 21 As an initial matter, we note that Bocian did not provide the underlying record or orders from which these allegedly "unfounded" comments came. Thus, to the extent Bocian relies on *Brewster v. District Court*, 811 P.2d 812, 814 (Colo. 1991), for the proposition that disqualification is required where a judge's criticisms of counsel are not "supported by the record," we have no basis to

make such a determination here. *See* C.A.R. 28(a)(7) (requiring appellants to support their contentions with record citations).

¶ 22 Nevertheless, accepting these allegations as true, we find them insufficient as a matter of law to allow us to reasonably infer the judge's actual or apparent prejudice or bias against Bocian's counsel. *See Johnson*, 674 P.2d at 955-56.

¶ 23 First, it is well established that adverse legal rulings, standing alone, do not constitute grounds for claiming prejudice or bias. *In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007); *People in Interest of S.G.*, 91 P.3d 443, 447 (Colo. App. 2004) (a judge's ruling on a legal issue or opinions formed against a party are not bases for disqualification). Therefore, there is no basis for disqualification to the extent attorneys at Azar & Associates were displeased with the court's rulings in these prior cases.

¶ 24 Second, while hostility between the court and counsel may warrant disqualification in some cases, it is only required where "a judge so manifests an attitude of hostility or ill will toward an attorney that the judge's impartiality in the case can reasonably be questioned." *Wakefield*, 764 P.2d at 73; *see also People v. Dobler*, 2015 COA 25, ¶ 26 (noting that judicial statements that are "critical

or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," unless the opinion comes from an extrajudicial source (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994))); *cf. In re Estate of Elliott*, 993 P.2d 474, 481 (Colo. 2000) ("When a judge becomes 'embroiled in a running controversy' with an individual being held in contempt, it becomes necessary for that judge to recuse herself and permit another judge to adjudicate the issue of contempt." (quoting *Taylor v. Hayes*, 418 U.S. 488, 501 (1974))).

¶ 25 Reviewing the trial judge's comments here, we cannot infer without additional context that such hostility or ill will existed to warrant disqualification. While the comments include discussions of ethical issues, they do not contain express accusations of unethical conduct or malpractice. Indeed, it is well within a judge's discretion to query counsel during proceedings where ethical issues are implicated. *See Mercantile Adjustment Bureau, L.L.C. v. Flood*, 2012 CO 38, ¶ 16 ("[W]here the Rules of Professional Conduct become intertwined with litigation and a potential ethical violation threatens to prejudice the fairness of the proceedings, a trial court

may consider the issue not as a disciplinary matter but rather within the context of the litigation.").

¶ 26 Moreover, Bocian's assertions that the judge's comments were "gratuitous" and "demonstrated bent of mind" against Azar & Associates are simply "statements of mere conclusions," which cannot form the basis of a legally sufficient motion to disqualify. *Johnson*, 674 P.2d at 956 (quoting *Carr v. Barnes*, 196 Colo. 70, 73, 580 P.2d 803, 805 (1978)); *see Edmond v. City of Colorado Springs*, 226 P.3d 1248, 1252 (Colo. App. 2010) (stating that a motion for recusal based on a subjective belief that a judge is not impartial is insufficient as a matter of law when it is unsupported by factual allegations that would reasonably indicate that the judge is interested or prejudiced with respect to the case, parties, or counsel).

¶ 27 Accordingly, we find that these "disparaging comments" do not show actual prejudice or bias against Azar & Associates or the appearance of such to warrant the trial judge's disqualification.

2. Azar's Anti-Retention Campaign Contribution

¶ 28 The second ground for disqualification argued in Bocian's motion concerns Azar's financial contribution to a campaign against the trial judge's retention.

¶ 29 The motion alleges that Azar made an "unprecedented" donation of $224,000 to unseat the judge prior to the November 2018 election. According to a news article attached to the motion and dated October 30, 2018, the campaign ran advertisements that alleged the judge was "on the wrong side of history" and had "consistently taken the side of big shots, like the big insurance companies, over people like you." In light of Azar's contribution, Bocian argued that "the risk of actual bias is substantial and requires disqualification."

¶ 30 To the extent Bocian argues Azar's campaign contribution is legally sufficient to show that the trial judge was actually biased and therefore that disqualification was warranted, we disagree. While the news article attached to the motion to disqualify suggests the judge may have been aware of Azar's contribution, the disqualification affidavit did not attest to this fact. Nor did Bocian allege the judge ever acknowledged the campaign or contribution

during the case prior to her filing the motion. Therefore, there is no allegation that the judge, "through conduct or otherwise, expressed any actual bias against the attorneys or their client[]" based on the anti-retention campaign. *Kane v. Cty. Court Jefferson Cty.*, 192 P.3d 443, 446 (Colo. App. 2008).

¶ 31 Whether Azar's contribution put the judge in a position creating an appearance of bias or prejudice is a closer question. Even if a judge is convinced of his own impartiality, "disqualification is nonetheless required if circumstances compromise the appearance of fairness and impartiality, such that the parties and the public are left with substantial doubt as to the ability of the judge to fairly and impartially resolve pending litigation." *People v. Schupper*, 124 P.3d 856, 858 (Colo. App. 2005), *aff'd*, 157 P.3d 516 (Colo. 2007). When considering whether the appearance of bias exists, courts focus "on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly." *Julien*, 47 P.3d at 1203 (quoting Leslie W. Abramson, *Studies of the Justice System: Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct* 15 (2d ed. 1992)).

¶ 32 Bocian argues the trial judge would naturally have resented Azar for the anti-retention campaign. Citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009), she further contends that "[u]nder any realistic appraisal of psychological tendencies and human weakness, there was too great a risk of actual bias for" the judge not to be disqualified. (Citation omitted.) Thus, Bocian also asserts (quoting *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899, 1905 (2016)) that the trial judge's participation in the case raises due process concerns "by creating 'an unconstitutional potential for bias.'"

¶ 33 In *Caperton*, the United States Supreme Court considered whether a litigant's $3 million campaign contribution in support of a judge's election would create bias in favor of the litigant, requiring the judge's recusal. 556 U.S. at 873-76. The Court held that it would and concluded that a serious risk of actual bias exists "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 884.

¶ 34 However, *Caperton* makes clear that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal." *Id.*; *see also City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010) ("It is, in fact, the rare situation that objectively poses such an appearance of or actual conflict of interest that due process compels disqualification."). In the context of campaign contributions supporting a judge's election, the Supreme Court stated that "[t]he inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Caperton*, 556 U.S. at 884 (finding the litigant's $3 million contribution an "exceptional case" requiring the judge's recusal).

¶ 35 While the obvious distinctions between *Caperton* and this case are that, here, Azar was not a party to this case and sought to remove the trial judge from the bench rather than elect him, these *Caperton* considerations about the relative size of the contribution, the total amount spent in the election, and the effect of the contribution may be instructive. However, any attempt to assess

these considerations here is hindered because the disqualification affidavit submitted by Bocian's counsel neither attests to any fact contained in the attached news article nor contains any additional factual allegations to place Azar's contribution in context. Notably, given that the trial judge was ultimately retained, Bocian offers nothing to show that Azar's contribution had an effect on the election. Rather, Bocian's motion simply states the $224,000 contribution was "significant" and "unprecedented," which are merely opinions not legally sufficient to require disqualification. *See Wakefield*, 764 P.2d at 73; *People v. Drake*, 748 P.2d 1237, 1249 (Colo. 1988) ("[M]ere speculative statements and conclusions are insufficient to satisfy [the party's burden of proving bias].").

¶ 36 In addition, we are persuaded that there are other considerations when a party's or counsel's own actions are advanced as the legal basis for disqualification.

¶ 37 In *Smith v. District Court*, 629 P.2d 1055, 1056 (Colo. 1981), the defendant moved to disqualify a judge on the basis that the defendant had made threats to shoot and kill the judge, and the judge commented that he thought the defendant was capable of carrying out the threats. In affirming the denial of the defendant's

motion to disqualify, our supreme court stated that disqualification of a judge is not required "on the basis of a party's subjective conclusion that the judge is not impartial because of acts or statements made by the party." *Id.* at 1057. In a concurring opinion, Justice Erickson noted that "[t]o allow threats towards a judge to cause compulsory recusal would enable a defendant to use vulgarity and threats to disqualify every judge that did not measure up to his own particular specifications or requirements." *Id.* at 1059 (Erickson, J., specially concurring in the result); *see also Moody v. Corsentino*, 843 P.2d 1355, 1374 (Colo. 1993) (concluding that defendant having named judge as a defendant in a civil action, complaining of the same judicial conduct that provided the basis for defendant's recusal motion, is not sufficient to create a reasonable inference of prejudice); *Watson v. People*, 155 Colo. 357, 394 P.2d 737 (1964) (filing of frivolous civil lawsuit against trial judge does not disqualify judge from hearing second trial).

¶ 38 In *In re Marriage of Mann*, 655 P.2d 814, 817-18 (Colo. 1982), one party filed a complaint against the presiding judge with the Judicial Qualifications Commission. In holding that the complaint was not a sufficient basis to require disqualification, the supreme

court stated that "[t]o allow a litigant to file a letter critical of a trial judge or to inform the judge of the filing of a complaint with the Judicial Qualifications Commission and later assert the judge's knowledge of the complaint or file as a basis for disqualification would encourage impermissible judge-shopping." *Id.* at 818.

¶ 39 Similarly, in *Kane*, 192 P.3d at 446, a division of this court found allegations of bias against a judge were insufficient to require recusal where the allegations were based on the attorney's filing of a complaint against the judge with the Judicial Performance Commission.

¶ 40 All of these cases reflect the concern that to allow litigants or attorneys to take an action critical of a trial judge and later assert the judge's knowledge of that action as a basis for disqualification would encourage impermissible judge-shopping. *Mann*, 655 P.2d at 818; *Smith*, 629 P.2d at 1059 (Erickson, J., specially concurring in the result); *Kane*, 192 P.3d at 446; *see also People v. Owens*, 219 P.3d 379, 386 (Colo. App. 2009).

¶ 41 Here, Bocian indicated that Azar's political contribution occurred months after her case had been filed and assigned to the trial judge. Thus, to allow Azar's contribution to serve as a basis to

disqualify the judge would essentially give litigants or attorneys the opportunity to force the disqualification of a presiding judge by contributing to a campaign urging that the judge not be retained or by publicly criticizing the judge.

¶ 42 Because of the concern about giving litigants or attorneys an opportunity to require a judge to disqualify, and in the absence of sufficient context to consider the relative size and effect of the contribution, we decline to require disqualification of the judge based on Azar's anti-retention campaign contribution months into the litigation. Thus, we conclude that the contribution, as alleged in the motion to disqualify, was legally insufficient to reasonably infer the judge's actual prejudice or appearance of prejudice against Azar & Associates.

3. *Shreck* Hearing

¶ 43 The third ground for disqualification alleged in Bocian's motion concerns the judge's inquiry of Nehls during the *Shreck* hearing. Specifically, she alleged the trial judge demonstrated bias or prejudice during the hearing by asking questions outside the scope of Owners' challenges to the expert, exhibiting hostility toward Nehls, and "analogiz[ing]" Nehls's opinions to "quackery"

and "bologna." We find none of these allegations sufficient to warrant disqualification.

¶ 44 The facts alleged in a motion to disqualify must not be based on mere suspicion, speculation, conjecture, or innuendo; nor may they be statements of mere conclusions. *Johnson*, 674 P.2d at 956. Moreover, "a judge's opinion formed against a party from evidence before the court in a judicial proceeding . . . is generally not a basis for disqualification." *S.G.*, 91 P.3d at 447.

¶ 45 Under CRE 702, a trial court is required to perform a gatekeeping role before admitting expert testimony. *People v. Wilson*, 2013 COA 75, ¶ 22. In this role, the court's inquiry "should be broad in nature and consider the totality of the circumstances of each specific case" to satisfy the court that the proffered scientific evidence is reliable. *Shreck*, 22 P.3d at 70; *see Wilson*, ¶ 22.

¶ 46 Here, the factual allegations regarding the trial judge's conduct during the *Shreck* hearing merely constitute speculation and opinions of Bocian's counsel. Therefore, there are not sufficient "actual events and statements which, if true, evidence partiality or the appearance of bias or prejudice against" Bocian or her counsel by the judge. *Johnson*, 674 P.2d at 956; *see Edmond*, 226 P.3d at

1252. "Indeed, to permit such allegations to form the basis of a legally sufficient motion to disqualify would be to permit any party dissatisfied with the outcome of a [proceeding] to file a motion to disqualify and consequently create unwarranted delay and chaos." *Litinsky v. Querard*, 683 P.2d 816, 818 (Colo. App. 1984) (finding disqualification unwarranted where counsel alleged judge "exhibited an extraordinary impatience and animosity toward" party and counsel, "consistently ridiculed questions asked, comments made and objections made by . . . counsel," and "interrupted . . . counsel's questions with objections and comments of his own").

¶ 47 Moreover, our review of the transcript does not support the allegation that the judge exhibited hostility to Nehls during the *Shreck* hearing. While the trial judge's questioning of Nehls was lengthy, it was not disrespectful and did not rise to the level of advocating for either party. Instead, the judge's questions served to aid him in his gatekeeping role to determine whether Nehls's methodology was reasonably reliable. *See People v. Medrano-Bustamante*, 2013 COA 139, ¶ 52 (finding judge's questioning proper during *Shreck* hearing), *rev'd in part on other grounds sub nom. Reyna-Abarca v. People*, 2017 CO 15. Also, the judge

permitted direct questioning by Bocian's counsel, additional redirect, and time for oral argument.

¶ 48 Finally, Bocian's claim that the judge referred to Nehls's opinion as "quackery" or "bologna" is contradicted by the transcript. The judge used those terms in describing a hypothetical scenario as he explored Bocian's argument that, regardless of an expert report's reliability, if an insurer reviewed it to make a claim decision, it should be admitted to determine the reasonableness of that decision.

¶ 49 Accordingly, despite Bocian's argument to the contrary, we find no basis for the judge's disqualification from the transcript of the *Shreck* hearing.

4. Totality of Allegations

¶ 50 Reviewing the totality of Bocian's factual allegations in the motion, we still do not find grounds to require disqualification. *Cf. Goebel v. Benton*, 830 P.2d 995, 1000 (Colo. 1992) (finding disqualification was required based on the totality of the allegations).

¶ 51 As set forth above, most of the factual allegations asserted in the motion consist of opinions, speculation, and unsubstantiated

conclusions, which are legally insufficient to warrant disqualification. *See Wakefield*, 764 P.2d at 73. The sheer number of these allegations does not, by itself, make disqualification more appropriate. While we acknowledge that Azar's political contribution against the trial judge's retention is strong support for the appearance of bias, the importance of discouraging judge-shopping persuades us not to require disqualification under these circumstances.

D. Other Claims of Bias Raised on Appeal

¶ 52 For the first time on appeal, Bocian asserts three other grounds for the trial judge's alleged bias that she did not raise in her motion to disqualify. Specifically, she argues the trial judge manifested further bias after denying her C.R.C.P. 97 motion by (1) treating her and Owners' CRE 702 motions differently; (2) contradicting a prior order and mischaracterizing Nehls's testimony when striking Nehls as an expert; and (3) questioning one of her attorneys about their representation of her husband during trial. Because Bocian did not raise these grounds for disqualification before the trial court, we address them only to the extent they support her claim of actual bias. *See A.G.*, 262 P.3d at 650-51

(stating that while claims of an appearance of bias may be waived, claims of actual bias may not); *Dobler*, ¶¶ 6-7; *Rea v. Corrections Corp.*, 2012 COA 11, ¶ 22.

¶ 53 As to the first allegation, after Owners moved under CRE 702 to strike Nehls as an expert, Bocian filed her own CRE 702 motion to strike Owners' rebuttal expert witness before trial. Based on a review of that motion, the trial court notified the parties that it would not be necessary to hold a *Shreck* hearing on the motion given that it did not argue for "relief under CRE 702 or *Shreck*." On appeal, Bocian contends that this differing treatment of the parties' respective CRE 702 motions further demonstrates the trial judge's bias.

¶ 54 To the contrary, our review of Bocian's CRE 702 motion supports the trial court's determination that a hearing was not warranted. The purpose of a *Shreck* hearing is to aid the trial court in determining the admissibility of expert testimony. *See People v. Rector*, 248 P.3d 1196, 1200 (Colo. 2011); *see also Shreck*, 22 P.3d at 78-79. Where "a party fails to state a specific challenge pursuant to *Shreck*, a trial court may determine that the request does not warrant a *Shreck* analysis." *Rector*, 248 P.3d at 1201.

¶ 55 Here, Bocian's CRE 702 motion challenged Owners' rebuttal expert on the basis that her testimony was not relevant and that her disclosure was untimely. *See id.* ("In deciding whether a determination of admissibility requires a *Shreck* inquiry, a trial court must consider the issues as framed in the motion before it."). Given that neither of these challenges invokes one or more of the *Shreck* factors, the trial court did not abuse its discretion in denying Bocian's request for a hearing and thus did not show actual bias in doing so. *See id.* at 1202; *Hatton*, 160 P.3d at 330 ("Adverse rulings, standing alone, do not constitute grounds for claiming bias or prejudice.").

¶ 56 Bocian's second allegation of bias raised on appeal is that the trial judge, in the order striking Nehls as an expert, applied a different reasoning from the one used in denying her CRE 702 motion and "twisted" Nehls's testimony to unfairly criticize him. Regarding this latter assertion, Bocian argues the order incorrectly faulted Nehls for not knowing prior to the *Shreck* hearing that Bocian had no ownership interest in her business in 2015.

¶ 57 Unless accompanied by an attitude of hostility or ill will toward a party, a ruling by a judge on a legal issue is insufficient to

show bias that requires disqualification. *See Brewster*, 811 P.2d at 814. The order striking Nehls as an expert shows no such hostility or ill will against Bocian, her attorneys, or Nehls. Rather, and as discussed below, the order contained specific admissibility findings regarding the reliability of Nehls's methodology under the rules of evidence and appropriate case law. To the extent the judge mistakenly thought Nehls did not know when Bocian became an owner, there is no indication, despite Bocian's assertion, that the judge intentionally "twisted" Nehls's testimony and showed hostility or ill will against him. Thus, Bocian's contentions regarding the order striking Nehls as an expert do not warrant disqualification.

¶ 58 Bocian's final contention is that the trial judge demonstrated actual bias at trial in questioning Azar & Associates' representation of her husband. As stated above, however, it is well within the judge's discretion to query counsel during proceedings where potential issues of ethics and conflicts of interest come to light. *See Flood*, ¶ 16.

¶ 59 Indeed, our review of the trial transcript confirms the reasonableness of the judge's question. When Owners' counsel began her cross-examination of Bocian's husband, she asked him

whether he had discussed the case with his wife's lawyer. Bocian's counsel objected, citing privilege, and the court overruled the objections stating, "I don't think this is your client, is it?" As Bocian's husband was not a party to the case, the judge was likely surprised when Bocian's counsel replied that Bocian's husband was her client. Regardless, when the judge later revisited the issue and asked Owners' counsel if she wished to "pursue the attorney-client privilege issue" further, Owners' counsel declined and the issue was dropped.

¶ 60 For the reasons stated above, we find no basis for the trial judge's disqualification on the allegations Bocian now asserts on appeal. Nor do these later allegations change our assessment of whether the totality of Bocian's allegations require disqualification.

E. Conclusion

¶ 61 In sum, the trial court did not abuse its discretion in denying Bocian's C.R.C.P. 97 motion to disqualify. Further, we find no reason for disqualification after also considering the allegations of actual bias Bocian raises for the first time on appeal.

III. Exclusion of Expert Testimony and Economic Loss Evidence

¶ 62 Bocian next contends the trial court erred in (1) excluding the expert testimony and report of her retained economist, Nehls; (2) excluding Nehls's report from evidence; and (3) requiring Bocian to prove her case without reliance on that information. We disagree with Bocian's first two contentions and find no error warranting reversal with respect to the third.

A. Standard of Review

¶ 63 We review a trial court's determination of the admissibility of evidence, including expert testimony, for an abuse of discretion and review its application of a legal standard de novo. *Kutzly v. People*, 2019 CO 55, ¶ 8.

¶ 64 However, trial courts are vested with broad discretion to determine the admissibility of expert testimony. *People v. Ramirez*, 155 P.3d 371, 380 (Colo. 2007). "This deference reflects the superior opportunity of the trial judge to gauge both the competence of the expert and the extent to which his opinion would be helpful to the jury." *Id.* A trial court's exercise of its discretion in this regard will not be overturned unless manifestly erroneous. *City of Aurora v. Colo. State Eng'r*, 105 P.3d 595, 612 (Colo. 2005).

B. Legal Principles

¶ 65 CRE 702 governs the admissibility of testimony by expert witnesses. In determining whether expert testimony should be admitted, the trial court must determine "(1) the reliability of the scientific principles, (2) the qualifications of the witness,[1] and (3) the usefulness of the testimony to the jury." *Shreck*, 22 P.3d at 70. "[A] trial court should also apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice." *Id.*

¶ 66 When determining whether expert testimony is reliable, the trial court "should apply a liberal standard that only requires proof that the underlying scientific principles are *reasonably* reliable." *Kutzly*, ¶ 12. In doing so, the court must consider the totality of the circumstances and is not confined to any specific list of factors. *Id.*

> Therefore, certain factors — such as whether the technique has been tested, whether it has been subjected to peer review and publication, whether it has been generally accepted, its known or potential rate of error, and the existence and maintenance of standards controlling its operation — will be crucial in some cases but inapposite in others.

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[1] Nehls's qualifications as an expert are not in dispute.

Id.

C. Excluding Nehls's Expert Testimony

¶ 67 Nehls opined in his report that $63,600 would compensate Bocian for her past economic losses resulting from the automobile accident. Nehls reached this figure by examining financial records of the business Bocian co-owns with her husband. He then calculated "the difference between [the business's] *revenues minus wages* before the incident versus [its] *revenues minus wages* after the incident." According to his report, "[t]his methodology capture[d] both reduced sales and increased wage expenses" but disregarded fixed expenses and the costs of goods sold as either irrelevant or negligible. Nehls further explained the basis for his methodology in an affidavit submitted prior to the *Shreck* hearing:

> I employed a standard methodology of comparing labor activity related to earnings prior to the incident compared to those following the incident. Because Ms. Bocian owned the business and compensated herself from the business my methodology appropriately examined business earnings. My methodology used in this case is well-established and an accepted methodology for determining losses in the field of economics.

¶ 68 We first reject Bocian's contention that the trial court "applied the wrong legal standard" in disqualifying Nehls. In a lengthy order, the trial court carefully considered the reliability of Nehls's methodology and whether it would be helpful to the jury. The court made specific findings under CRE 104, 403, and 702 based on appropriate Colorado case law and Nehls's report, testimony, and supplemental memorandum submitted after the *Shreck* hearing. *See Shreck*, 22 P.3d at 70. To the extent Bocian takes issue with the court's brief preamble regarding the concerns of methodologies used by economists generally, this discussion simply served as background and does not appear to be a basis for the court's ruling.

¶ 69 We also disagree with Bocian that the trial court's ruling went to the weight of Nehls's testimony rather than its admissibility. Although Nehls purported to calculate Bocian's lost wages, his methodology only focused on her business earnings and losses. At the *Shreck* hearing, he explained that this was because Bocian and her husband were 50% shareholders and officers of the business. Thus, Nehls acknowledged that he neither considered any specific wage information for Bocian nor reviewed her personal W-2 wage statements in forming his opinion.

¶ 70 However, as the trial court noted, neither Nehls's affidavit nor his report "identified any legal or economic texts which recognized [his] methodology." *See Ramirez*, 155 P.3d at 379 ("[A] court may reject expert testimony that is connected to existing data only by a bare assertion resting on the authority of the expert."); *see also Estate of Ford v. Eicher*, 250 P.3d 262, 267 (Colo. 2011). Accordingly, the trial court requested Nehls provide literature supporting his methodology after the hearing.

¶ 71 When Nehls submitted literature for the first time in his supplemental memorandum, the trial court observed that his methodology had apparently changed. This was based on Nehls's explanation in the memorandum that "[e]conomic and financial textbooks note the standard definition of profits (again, the avenue in which . . . Bocian realizes her earnings) is revenues minus expenses (fixed and variable)."

¶ 72 While Bocian argues that it was "legally insufficient" and "unfair" for the trial court to disregard Nehls's prior explanation for why he did not consider fixed and variable expenses, the record belies this assertion. The trial court's order acknowledged the explanation that variable expenses were negligible but took issue

with the fact that he did not utilize the newly ascribed methodology stated in the supplemental memorandum. Accordingly, based on Nehls's failure to adequately explain the basis for his methodology and the incongruous authority he later submitted, the trial court found there was "too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

¶ 73 Even if we would have ruled differently than the trial judge on the reliability of Nehls's methodology, we cannot conclude on the record before us that the trial court abused its discretion in making its determination. Therefore, because the trial court's exercise of discretion was not manifestly erroneous, we refuse to overturn it on appeal. *See City of Aurora*, 105 P.3d at 613.

D. Excluding Nehls's Report

¶ 74 Bocian next contends that, even if the trial court properly excluded Nehls's expert testimony, it nevertheless erred in excluding his report from the jury for purposes of her bad faith claim.

¶ 75 In support of this argument, Bocian relies on the statement in *Schultz v. GEICO Casualty Co.*, 2018 CO 87, ¶ 23, that "the

reasonableness of an insurer's decision to deny or delay benefits to its insured must be evaluated based on the information that was before the insurer at the time it made its coverage decision."

¶ 76 It is undisputed that Owners received Nehls's report concerning wage loss during the claim process and reviewed the report when determining the value of Bocian's claim. Because of this, we agree with Bocian that the report was probative on the issue of whether Owners' decision to deny her claim was reasonable, regardless of the trial court's determination that the opinion within the report was unreliable under *Shreck*. *See id.*

¶ 77 However, in addition to the trial court's conclusion that Nehls's methodology was not reasonably reliable, the court also concluded that the report itself would not be helpful to the jury and that the report's opinion did not meet the requirements of CRE 403. Bocian does not address this issue on appeal. CRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of confusing the issues or misleading the jury, or "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See People v. Garrison*, 2012 COA 132M, ¶ 16 ("Courts are given broad

discretion in performing the CRE 403 balancing test, and a trial court's balancing decision will not be disturbed absent an abuse of discretion.").

¶ 78 Although the report was probative on the issue of whether Owners' decision was reasonable, it does not appear that Owners, which reviewed the report and considered the wage loss calculation unsubstantiated, relied upon it in reaching its decision. Therefore, because Owners did not rely on the report's opinion and the trial court found the opinion unreliable, it may have been more probative of the reasonableness of Owners' decision than of its unreasonableness. *See People v. Rubanowitz*, 688 P.2d 231, 245 (Colo. 1984) (Under CRE 403, courts "must consider the probative value of the proposed evidence . . . in light of the nature of the case, the nature of the offered evidence, and the other evidence admitted during the trial.").

¶ 79 Also, evidence was admitted at trial that Owners denied Bocian's claim for lost wages even though she submitted an "economic analysis" and supporting financial documentation during the claim process. Indeed, all of the financial documents Nehls relied on for his report were admitted into evidence for the jury to

review. Thus, admitting the report itself would have been somewhat cumulative of this evidence and would have only injected the collateral issue of the opinion's reliability. *Yusem v. People*, 210 P.3d 458, 467 (Colo. 2009) (noting that although CRE 403 favors the admission of evidence, "the rule is an important tool to 'exclud[e] matters of scant or cumulative probative force'") (citation omitted).

¶ 80 While the report could have been admitted for the limited purpose of determining Owners' bad faith and not the actual amount of Bocian's lost wages, this would have been a difficult distinction for the jury to draw. Therefore, to the extent the report could have been admitted with such a limiting instruction, the risk of jury confusion was significant. *See Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242, 1251 (Colo. 1994) (finding no abuse of discretion where excluded evidence "would cause undue confusion of the issues, interject collateral issues of minimal probative value, and confuse the jury"); *Danko v. Conyers*, 2018 COA 14, ¶ 47 (trial court properly excluded expert testimony over concern of jury confusion). Further, neither party clearly suggested the admission of the

evidence for a limited purpose or offered a limited purpose instruction.

¶ 81 After contemplating all of the considerations under CRE 403, we conclude that the trial court's decision to exclude the report was not manifestly erroneous.

E. Remaining Contention

¶ 82 Bocian's final contention appears to be based on the fact that while the trial court excluded Nehls's report showing $63,600 in lost wages, it allowed Owners to introduce evidence that Bocian never reported the lesser amount of $19,200 in lost wages during the claim process. Because Bocian raised this issue at trial, and the parties followed the direction given by the trial court, the parties agree that this issue is preserved on appeal. We concur and therefore review Bocian's remaining contention for harmless error. *See Rojhani v. Meagher*, 22 P.3d 554, 557 (Colo. App. 2000) ("Harmless error occurs . . . with respect to the admission or exclusion of evidence when no substantial right of a party is affected. A substantial right is affected if the error substantially influences the outcome of the case.") (citation omitted).

¶ 83 According to Bocian, the trial court allowed Owners to present an "unfair and misleading defense that it should not be held liable for acting unreasonably when it had no prior notice of [Bocian's] claimed lost wages." Specifically, Bocian identifies two instances where this "unfairness" occurred. First, Owners' counsel was allowed to ask Bocian's expert witness on insurance conduct whether it was "problematic" that "it's only now that [Bocian] has identified that her hard dollar damages are [$]19,200?" Second, Owners' counsel was permitted to use the lesser $19,200 calculation of lost wages to impeach Bocian, before eliciting expert testimony that it was "surprising" Bocian did not previously report this amount during the claim process.

¶ 84 Even if we assume these two exchanges somehow constituted error, any error was harmless. Concerning the question whether it was "problematic" that Bocian had only now identified $19,200 in lost wages, Bocian's expert witness on insurance conduct answered, "No, not necessarily because I think the insurance company still knew . . . Bocian was claiming lost wages . . . as a component of her damages." Also, when asked how Owners could have committed bad faith if Owners did not know about the $19,200, the expert

further testified: "I don't think the insurance company needs to know a specific dollar amount that is being sought. Again, it's their evaluation to do and to come up with an amount of lost wages . . . which I didn't see the insurance company ever did, to truly evaluate . . . the lost wages claim[.]" Later, Owners' insurance claims handling expert was asked whether Bocian "claiming $19,200 in wage loss, an amount that was never communicated to the adjuster," changed his expert opinion at all. The expert responded, "It doesn't change my opinion."

¶ 85 Thus, to the extent Bocian was prejudiced by a reference during testimony or closing argument to her not reporting $19,200 in lost wages previously, the jury heard testimony that this fact did not make any difference to whether Owners acted unreasonably. Indeed, the jury also heard evidence that Bocian sought lost wages during the claim process and submitted an "economic analysis" of her lost wages to Owners.

¶ 86 Moreover, Bocian testified on re-direct that, although there was a less than $5,000 difference between her $19,200 claim in lost wages and Owners' $15,000 settlement offer, this difference did not account for other damages she sought under the policy.

¶ 87 Under these circumstances, even if we assume the trial court erred in permitting Owners to introduce evidence that Bocian didn't report the $19,200 amount in lost wages earlier, we can't conclude the brief references substantially influenced the verdict or affected the fairness of the proceedings. Thus, any error was harmless. *See Rojhani*, 22 P.3d at 557.

IV. Request for Appellate Fees

¶ 88 Finally, we reject Owners' request for an award of sanctions against Bocian under C.A.R. 38 and section 13-17-102, C.R.S. 2019. "Because a lawyer may present a supportable argument which is extremely unlikely to prevail on appeal, it cannot be said that an unsuccessful appeal is necessarily frivolous." *Mission Denver Co. v. Pierson*, 674 P.2d 363, 365 (Colo. 1984). Even though Bocian has not prevailed, we disagree that her appeal is frivolous or lacks substantial justification. Thus, we decline to award Owners sanctions under C.A.R. 38 or section 13-17-102.

V. Conclusion

¶ 89 We affirm the judgment of the trial court.

JUDGE RICHMAN and JUDGE YUN concur.