**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 29, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP1588** **Cir. Ct. No. 2006CV174**

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

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**MAI YEE XIONG, CHOUADER BENJAMIN YANG, BY HIS GUARDIAN AD LITEM, MART W. SWENSON AND BAYLAO JOSEPH YANG,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**WAYNE C. KULCINSKI,**

**DEFENDANT-APPELLANT,**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**DEFENDANT-CO-APPELLANT,**

**GUNDERSEN LUTHERAN HEALTH PLAN, INC.,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 BRIDGE, J. Wayne C. Kulcinski and American Family Mutual Insurance Company separately appeal from a judgment entered in a personal injury action. The underlying action arises from an accident in which a vehicle driven by Kulcinski struck Chouader Benjamin Yang (hereinafter Benjamin) on a street near a school where the posted speed limit was fifteen miles per hour when children are present. The circuit court determined that Kulcinski was negligent as a matter of law because he was driving in excess of fifteen miles per hour at the time of the accident, in violation of WIS. STAT. § 346.57(4) (2007-08),[1] and a jury subsequently apportioned eighty percent of the causal negligence to him. Collectively, Kulcinski and American Family make three arguments on appeal: (1) Section 346.57(4) is unconstitutionally vague; (2) the circuit court erroneously exercised its discretion in denying Kulcinski's request for a special verdict question as to whether Benjamin was in the crosswalk at the time of the accident; and (3) the jury's verdict should have been set aside because a remark made by Benjamin's attorney during closing argument ran afoul of the circuit court's ruling barring discussion of settlement negotiations.[2] We reject each argument and affirm.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Kulcinski raises all three issues on appeal; American Family joins in only the third issue.

## BACKGROUND

¶2 This action was commenced by Mai Yee Xiong, Baylao Joseph Yang, and their son, Benjamin, by and through his guardian ad litem, to recover damages suffered by them when Benjamin was struck while in a school zone by a truck driven by Kulcinski.[3] American Family was Kulcinski's automobile insurer at the time of the accident.

¶3 The following facts are taken from witness testimony and are largely undisputed. At approximately 5:00 p.m. on November 8, 2005, Houadao Yang, who was thirteen at the time, decided to pick up three of his younger siblings, including seven-year old Benjamin, and walk them home from an after-school program at Franklin Elementary School in La Crosse. The school is located on Kane Street approximately one-half block north of the intersection of Kane Street and Gillette Street. Next to the school is a playground. The boundary of the playground, as it is relevant to the present matter, proceeds south from the school to the intersection of Kane and Gillette, then west on Gillette, passing an alley, and continues to the corner of Gillette and Charles Street. The playground is enclosed by a chain link fence, and children playing in the playground are visible from the street. A speed limit sign was posted on the south side of Gillette, east of the intersection of Gillette and Charles, which read: "SCHOOL[.] SPEED LIMIT 15 WHEN CHILDREN ARE PRESENT[.]"

¶4 After signing his siblings out, Houadao walked towards home with the younger children following. Their path initially traced the boundary of the

[3] For ease of understanding, we refer to Mai Yee Xiong, Baylao Joseph Yang, and Benjamin collectively as the Yangs.

playground, proceeding south from the school to the corner of Kane and Gillette, and then turning west on Gillette until they approached the intersection of Gillette and Charles. Houadao testified that he observed that there were "a lot" of children playing in the playground at the time.

¶5 Houadao and two of the children crossed Gillette in the crosswalk, heading south; however, Benjamin had fallen behind and did not cross the street with them. Houadao testified that he and his other siblings were still in the crosswalk, but almost to the street curb, when Benjamin entered the street. He testified that he and his siblings had fully crossed the street by the time Benjamin was hit by Kulcinski's truck, which was traveling eastbound on Gillette. The parties dispute whether Benjamin crossed Gillette in the crosswalk. However, it is undisputed that Benjamin was traveling on the sidewalk in front of the playground prior to crossing Gillette.

¶6 Kulcinski testified that he was likely driving twenty to twenty-five miles per hour as he approached the intersection. He testified that he was looking only straight ahead and did not see Benjamin before the accident occurred. Kulcinski also testified that prior to the accident, he did not see any children on the street, sidewalk, playground, or elsewhere in the vicinity.

¶7 Immediately prior to the accident, Thomas Alford was driving westbound on Gillette, approaching the intersection of Gillette and Charles. He testified that immediately after the accident, he observed multiple children "on the sidewalk up by the [L]aundromat." The Laundromat is located on the south side of Gillette at the intersection of Gillette and Charles. Alford further testified that immediately after the accident, he noticed that there were children on the sidewalks on both sides of Gillette.

¶8 Laura Schefelbine, a passenger in Alford's vehicle, testified that she saw Benjamin, who she described as a "shadowy blur," immediately before he was hit by Kulcinski's vehicle. She further testified that at "about the same time," she saw a person later identified as Houadao come from the opposite corner of Gillette from which Benjamin had come and that "shortly after, I don't know how long, within [a] second, minute maybe, his other siblings came over to see what had happened."

¶9 The final witness to the accident, Jane Lang, observed the accident from her home, which was located on Charles north of Gillette. She testified that she saw children playing at the playground, the children exited the playground through a hole in the fence in the alley between Kane and Charles, and four or five children then crossed Gillette heading south. She testified that she observed one of the children cross Charles at the Laundromat heading west, and two of the children travel south on Charles past the Laundromat. She also testified that she observed one child, who was lagging behind the others, cross Gillette when he was hit by a white car.

¶10 The Yangs moved for partial summary judgment on the issue of Kulcinski's causal negligence. The circuit court granted the motion, ruling that Kulcinski was negligent as a matter of law for driving in excess of fifteen miles per hour in the posted zone. The court determined, however, that the apportionment of fault as between Benjamin and Kulcinski was a question for the jury. The court also granted a motion in limine brought by American Family to bar the parties from introducing evidence of, making any reference to, or making any arguments regarding any settlement negotiations, demands, or offers. In addition, the court denied Kulcinski's request that a special verdict question be

given to the jury asking it to determine whether Benjamin was in the crosswalk at the time of impact.

¶11 At the end of the Yangs' closing argument, American Family moved for a mistrial based on a statement made by the Yangs' attorney, which we discuss in more detail in ¶¶31-42 below. American Family argued that the statement violated the court's earlier ruling prohibiting any reference to settlement negotiations. The court denied American Family's motion, explaining that the statement had not tainted the jury in light of both the court's remaining instructions to the jury, and the overall context of the remainder of the attorney's argument.

¶12 The jury ultimately apportioned eighty percent of the causal negligence to Kulcinski, and twenty percent to Benjamin. Following the jury's verdict, American Family and Kulcinski moved to change the answer to special verdict question number one, which addressed whether Kulcinski was negligent, from "Yes" to "No." They also moved to set aside the verdict and for a new trial, arguing that a new trial was warranted in the interest of justice because the Yangs' attorney violated the court's ruling prohibiting any reference to settlement negotiations and because the verdict was contrary to law and against the great weight of the evidence. Kulcinski and American Family also argued that a new trial was warranted because the circuit court erred in failing to provide Kulcinski's requested special verdict question regarding whether Benjamin was in the crosswalk at the time of the accident, and because the verdict was the result of the jury's "passion, prejudice and perversity," shocked the conscience, was speculative and was unsupported by the evidence. The circuit court denied the parties' motions and these appeals followed. We address additional facts as necessary in the discussion below.

## DISCUSSION

¶13 Kulcinski makes three arguments on appeal: (1) WIS. STAT. § 346.57(4) is unconstitutionally vague; (2) the circuit court erroneously exercised its discretion when it denied Kulcinski's request for a special verdict question as to whether Benjamin was in the crosswalk at the time of the accident; and (3) the circuit court should have set aside the jury's verdict and granted him a new trial because the remark by the Yangs' attorney during closing argument ran afoul of the circuit court's ruling barring the discussion of settlement negotiations. American Family joins in the last of these arguments. In addition, the Yangs seek frivolous appeal costs and fees under WIS. STAT. § 809.25(3). We address each issue in turn.

### PARTIAL SUMMARY JUDGMENT RULING

¶14 Kulcinski challenges the circuit court's entry of partial summary judgment against him following its ruling that he was negligent as a matter of law because he was driving in excess of fifteen miles per hour at the time of the accident. We review the grant or denial of summary judgment de novo, employing the same methodology as the circuit court. *See* ***Estate of Thompson v. Jump River Elec. Coop.***, 225 Wis. 2d 588, 593, 593 N.W.2d 901 (Ct. App. 1999). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2).

¶15 Kulcinski contends that summary judgment was inappropriate on the issue of his negligence as a matter of law for exceeding the speed limit because WIS. STAT. § 346.57(4), which imposes fixed speed limitations in various areas,

including locations marked by "school crossing" signs, is unconstitutionally vague.[4] Section 346.57 provides in pertinent part as follows:

> **Speed restrictions.**
>
> ….
>
> **(2)** REASONABLE AND PRUDENT LIMIT. No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of a vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care.
>
> **(3)** CONDITIONS REQUIRING REDUCED SPEED. The operator of every vehicle shall, consistent with the requirements of sub. (2), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, when passing school children, highway construction or maintenance workers or other pedestrians, and when special hazard exists with regard to other traffic or by reason of weather or highway conditions.
>
> **(4)** FIXED LIMITS. In addition to complying with the speed restrictions imposed by subs. (2) and (3), no person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs:
>
> (a) *Fifteen miles per hour when passing a schoolhouse at those times when children are going to or*

[4] Kulcinski also contends that summary judgment was inappropriate because the posted speed limit of fifteen miles per hour "when children are present" "lacks credibility and is uniformly disregarded." However, he has cited no case, and we have discovered none, in which a court has ruled that a driver is free to disregard a posted speed limit sign because the sign "lacks credibility" or is "uniformly disregarded." Because Kulcinski does not support his argument by citation to any legal authority, we decline to address this contention further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider arguments unsupported by citation to authority).

> *from school or are playing within the sidewalk area at or about the school.*
>
> (b) *Fifteen miles per hour when passing an intersection or other location properly marked with a "school crossing" sign of a type approved by the department when any of the following conditions exists:*
>
> 1. *Any child is present.*

(Emphasis added.) Our review of the constitutionality of a statute is a question of law which we review de novo. ***State v. Jensen***, 2004 WI App 89, ¶12-13, 272 Wis. 2d 707, 681 N.W.2d 230.

¶16 We begin by observing that Kulcinski's vagueness challenge is not well developed.[5] As an initial proposition, Kulcinski does not specify whether he is contending the statute is unconstitutionally vague on its face or as applied to the facts of this case. With respect to a facial challenge, a challenger must show that the statute cannot be enforced under any circumstances. *See* ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶44 n.9, 309 Wis. 2d 365, 749 N.W.2d 211. In contrast, a challenger asserting an as-applied challenge need prove only that the challenged provision is unconstitutional as it is applied to the facts of a particular case or to a particular party. ***Id***.

¶17 Kulcinski does not contend that WIS. STAT. § 346.57(4) is impermissibly vague in all its applications. Further, he does not dispute the Yangs' argument that he is not seeking to strike § 346.57(4) as unconstitutionally

[5] We generally decline to address arguments which are insufficiently developed. *See* ***State v. Flynn,*** 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (arguments insufficiently developed, inadequately briefed, or lacking citations to authority need not be addressed). In the interest of completeness, however, we have chosen to address Kulcinski's constitutional challenge to WIS. STAT. § 346.57(4).

vague in all circumstances. *See* ***Schlieper v. DNR,*** 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may deem points conceded when appellants do not dispute arguments in a respondent's brief). Thus, we construe Kulcinski's challenge to § 346.57(4) as an as-applied challenge. We must therefore determine whether Kulcinski has "prove[n], beyond a reasonable doubt, that as applied to him the statute is unconstitutional." ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

¶18 Kulcinski argues that WIS. STAT. § 346.57(4) is unconstitutional because the phrase "when children are present" within the statute is unconstitutionally vague. However, this phrase refers to the wording which appeared on the school speed limit sign located near the site of the accident. Because Kulcinski challenges the constitutionality of § 346.57(4), we instead refer to that statute's provision establishing a fifteen mile per hour speed limit when "any *child* is present." (Emphasis added.)

¶19 Next, we observe that Kulcinski does not attempt to establish the facts on which he bases his as-applied vagueness challenge. Instead, from what we are able to discern, Kulcinski contends that WIS. STAT. § 346.57(4)(b) is unconstitutionally vague as a general proposition because the statute does not define the word "present" and thus fails to provide him notice as to when he is required to slow his speed to fifteen miles per hour while driving near a school. Rather than assert vagueness generally, however, a party making an as-applied vagueness challenge must establish beyond a reasonable doubt that a statute is unconstitutionally vague as applied to the specific circumstances at hand. *See* ***Joseph E.G.,*** 240 Wis. 2d 481, ¶5.

¶20 A statute is not vague if "by the ordinary process of construction, a practical or sensible meaning may be given to the … [law]." ***State v. Smith,*** 215 Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997) (citation omitted). Although WIS. STAT. § 346.57(4)(b) does not define the word "present," we may look to its dictionary definition to discern its common meaning. *See* ***Garcia v. Mazda Motor of Am., Inc.,*** 2004 WI 93, ¶14, 273 Wis. 2d 612, 682 N.W.2d 365. "[P]resent" is defined as "being in one place and not elsewhere: being within reach, sight, or call or within contemplated limits: being in view or at hand: being before, beside, with, or in the same place as someone or something." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1793 (1993). It is evident from this definition that the phrase when "[a]ny child is present" in § 346.57(4)(b) means when a child is "within ... sight" or is "in view" or is "in the same place" as the driver.

¶21 The record reveals the following undisputed facts which bear on the issue of whether a child was present within the meaning of WIS. STAT. § 346.57(4)(b) at the time of the accident. By his own admission, Kulcinski was looking only straight ahead and thus did not observe any children in the school zone at the time of the accident. However, the evidence reflects that Benjamin was in the street in front of the school playground when he was struck by Kulcinski's truck. In addition, the evidence reflects that each of the three witnesses observed Benjamin's siblings in view at the intersection in front of the school playground at the time of the accident. All of these children were plainly

visible and were so near the school that they were obviously "present" within the meaning of the statute.[6]

¶22 Construing WIS. STAT. § 346.57(4)(b) according to the common meaning of its terms, we conclude that it put Kulcinski on notice that when children are both visible and so near a school that they are in or next to a street adjacent to the school, he was required to reduce his speed to fifteen miles per hour. We therefore conclude that § 346.57(4) is not unconstitutionally vague as applied to the facts of this case.

¶23 We perceive no further arguments by Kulcinski as to why partial summary judgment was inappropriate under these facts. It is undisputed that Kulcinski was driving his vehicle in excess of fifteen miles per hour when passing an intersection with a properly marked school sign. As discussed above, at least one child was present at the time, and Kulcinski does not dispute this fact. These undisputed facts establish as a matter of law that Kulcinski was in violation of WIS. STAT. § 346.57(4)(b) at the time of the accident. It was therefore proper for the circuit court to grant the Yangs' motion for summary judgment on the limited issue of Kulcinski's negligence as a matter of law in exceeding the speed limit.[7]

[6] Additionally, witness Thomas Alford testified that he noticed children on both sides of Gillette at the time of the accident. Although the remaining two witnesses did not describe the presence of children in this location, they did not testify that no children were present as described, and Kulcinski does not attempt to refute this testimony.

[7] We note that the court's ruling resolved only the issue of Kulcinski's negligence as a matter of law in exceeding the speed limit in a school zone when a child was present. The court's ruling did not resolve whether Kulcinski was negligent in other ways, such as failing to maintain a proper lookout or failing to maintain proper management and control of his vehicle. The court permitted the overall issue of causation to go to the jury, which was free to determine whether Kulcinski and Benjamin were each negligent in other respects, and to compare and apportion the negligence between the two.

SPECIAL VERDICT QUESTION REGARDING CROSSWALK

¶24 Kulcinski contends that the circuit court erred in declining to submit to the jury a special verdict question on whether or not Benjamin was crossing the street in the crosswalk at the time of the accident.

¶25 Circuit courts are given wide discretion in framing special verdict questions. ***Estate of Hegarty v. Beauchaine,*** 2006 WI App 248, ¶46, 297 Wis. 2d 70, 727 N.W.2d 857. So long as material issues of ultimate fact are addressed by appropriate questions, an appellate court will not interfere with the form of a special verdict. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 445-46, 280 N.W.2d 156 (1979); *see also* WIS. STAT. § 805.12.[8]

¶26 Kulcinski argues that his proposed special verdict question should have been presented to the jury because, under ***Field v. Vinograd,*** 10 Wis. 2d 500, 504-07, 103 N.W.2d 671 (1960), a pedestrian who fails to yield the right-of-way when crossing a street outside a crosswalk is causally negligent as a matter of law. He also directs our attention to ***Wicker v. Hadler***, 58 Wis. 2d 173, 179, 205 N.W.2d 770 (1973), in which the supreme court stated, "[t]his court has, in a number of cases, held that a pedestrian, crossing a *highway* at other than a crosswalk, is as a matter of law, at least fifty percent negligent in the event he is struck by a motor vehicle during the crossing." (Emphasis added.) Kulcinski

[8] WISCONSIN STAT. § 805.12(1) provides in pertinent part as follows:

> The verdict shall be prepared by the court in the form of written questions relating only to material issues of ultimate fact and admitting a direct answer…. In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent.

construes this statement as creating a *per se* rule that in all accidents involving a pedestrian and a motorist, a pedestrian crossing any roadway at a point outside the crosswalk is *always* at least fifty percent negligent, which thereby necessitates a special verdict question on the issue. We disagree.

¶27 Kulcinski is correct that pedestrians who cross a roadway outside a marked or unmarked crosswalk are required to yield the right-of-way to vehicles, and that the failure to do so makes the pedestrian causally negligent to some extent in the event of an accident. WIS. STAT. § 346.25; ***Field***, 10 Wis. 2d at 505. However, we do not agree that, as a matter of law, pedestrians involved in an accident with a motor vehicle while crossing a roadway outside the crosswalk are always at least fifty percent causally negligent.

¶28 We do not construe the supreme court's statement in ***Wicker*** as dictating the result Kulcinski seeks. For example, it is unreasonable to suggest that a person, faced with crossing a rural curving hilly road with limited visibility, and no marked crosswalk for miles, and who looks both ways before crossing, is nonetheless *per se* fifty percent negligent if she is struck by a car being driven at a dangerously high speed by an intoxicated driver. At most, the statement in ***Wicker*** stands for the proposition that in *some* situations, crossing outside a crosswalk has resulted in a pedestrian being found to be at least fifty percent negligent in the event of an accident. The general rule, however, is that the comparison of negligence is for the jury, and "[i]t is only in an exceptional case that a trial court, or reviewing court, may say as a matter of law that the negligence of the pedestrian is greater than that of the driver." ***Staples v. Glienke***, 142 Wis. 2d 19, 34-35, 416 N.W.2d 920 (Ct. App. 1987). We therefore reject Kulcinski's argument that a *per se* rule of negligence must be employed in this case.

¶29 Here, the circuit court presented the jury with the following special verdict questions:

> QUESTION 1: Was Wayne C. Kulcinski negligent?
>
> ANSWER: Yes. (Answered by Court)
>
> QUESTION 2: If you answered Question 1 "yes," then answer this question: Was such negligence a cause of Ben Yang's injuries?
>
> ANSWER: _____ (Yes or No)
>
> QUESTION 3: Was Ben Yang negligent?
>
> ANSWER: _____ (Yes or No)
>
> QUESTION 4: If you answered Question 3 "yes," then answer this question: Was such negligence a cause of Ben Yang's injuries?
>
> ANSWER: _____ (Yes or No)
>
> QUESTION 5: If you answered both Questions 2 and 4 "yes," then you must answer the following question:
>
> Taking all the fault that contributed to the accident to be 100%, what percent or proportion thereof do you attribute to:
>
> a. Wayne C. Kulcinski _____%
>
> b. Ben Yang _____%

¶30 We conclude that all material issues of ultimate fact in the matter were addressed in the special verdict form, and that the special verdict form correctly and adequately reflected the law that applies to this case. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion in denying Kulcinski's request for a separate inquiry on the special verdict as to whether Yang was outside the crosswalk when he was struck by Kulcinski's vehicle.

## REMARKS OF COUNSEL

¶31 Kulcinski and American Family contend that the circuit court should have set aside the verdict and ordered a new trial because of an improper statement made by the Yangs' attorney, Ardell Skow, during his closing argument.

¶32 The decision to grant or deny a motion for new trial lies within the discretion of the circuit court. ***State v. Harris***, 2008 WI 15, ¶109, 307 Wis. 2d 555, 745 N.W.2d 397. "[S]o long as the record reflects 'the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case,'" we will not reverse the court's discretionary decision. ***Id.***

¶33 In order for a new trial to be warranted for improper remarks, "it must 'affirmatively appear' that the remarks prejudiced the complaining party." ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 329, 417 N.W.2d 914 (Ct. App. 1987). "We must be convinced that the verdict reflects a result which in all probability would have been more favorable to appellants but for the improper conduct." ***Id.*** Our review will consider both the possible prejudicial nature of the claimed error and any steps taken by the trial court to mitigate it. ***Johnson v. State***, 75 Wis. 2d 344, 366, 249 N.W.2d 593 (1977). Prejudice resulting from remarks by counsel is usually indicated by findings that are clearly erroneous or an excessive or inadequate damage award. ***Andritsch v. Henschel***, 27 Wis. 2d 461, 466, 134 N.W.2d 426 (1965).

¶34 The statement which Kulcinski and American Family argue entitles them to a new trial consisted of the following:

> You know, I think there's a natural tendency for us to say, gosh, I feel bad for Mr. Kulcinski. You know what? I do, too, as a father and grandfather. We have got a

> dispute here and we haven't been able to agree with American Family who represents these people --

Following an objection by American Family, a discussion ensued during which Attorney Skow questioned whether he could refer to WIS JI—CIVIL 125, which the court had previously given the jury. WISCONSIN JI—CIVIL 125 states as follows:

> References to an insurance company have been made in this case. The title to this case included an insurance company as a defendant. There is no question as to insurance in the special verdict, however. This is because there is no dispute of fact concerning insurance in this case. In addition, whether a defendant is liable or not liable for any damages is the same, whether defendant is or is not insured. Under your oath as jurors, you are bound to be impartial toward all parties to this case. So, you should answer the questions in the verdict just as you would if there were no insurance company in the case.

The court responded that counsel could talk about the jury instruction, but could not offer argument on the subject.

¶35 Following this discussion, Attorney Skow continued his closing argument as follows:

> The court told you in the instructions that you're not to consider the fact that there is insurance. And you shouldn't decide this case any differently because there's insurance because there's no dispute about it. That's what she told you in the instructions and in the State of Wisconsin, they have faith in the jury system, and so they're in the caption. You should not decide this case any differently whether there is or is not insurance. That is not what worries me about things in Wisconsin. In Wisconsin, we have good solid stock, and we don't give Three Million Dollars for coffee in the lap.
>
> I'm concerned about you deciding this case based upon who has to pay and you shouldn't consider it at all. It should not be considered. Follow the Court's instruction and just call this as you see it.
>
> And so obviously, we have not been able to agree and that's why we are here ….

¶36 No further objections were made regarding Attorney Skow's remark. However, at the end of Attorney Skow's closing argument, American Family moved for a mistrial. The court denied the motion, ruling that it was "satisfied that based upon the Court's instruction and the rest of the [tenor] of [Attorney Skow's] argument that it hasn't tainted this jury."

¶37 Following the jury's verdict, Kulcinski and American Family moved to set aside the verdict and for a new trial based in part on counsel's remark. The circuit court denied the motions, explaining:

> Taking the evidence as a whole, I believe this jury carefully sifted through what they had, made their decisions on credibility, and made their awards and did that without regard to the arguments made by counsel in closing statements.
>
> … [T]he fact of the matter still is that I believe this jury was instructed in various ways, including jury instruction 125, which is the jury instruction about treating this case as if an insurance company is not here, and jury instruction 110 which tells them that the closing arguments of counsel are not evidence.

¶38 We agree with the circuit court. The remark by Attorney Skow was very brief and was immediately followed by a longer explanation that specifically advised the jury that insurance should not be a factor in its decision making. In addition, the circuit court instructed the jury according to WIS JI—CIVIL 125, which admonishes jurors to answer the questions in the verdict just as they would if there were no insurance company in the case. Further, from the outset of the trial the jurors were aware that the case involved an insurance dispute. It was self-evident from American Family's participation in the trial that whatever the dispute was about, it had not been resolved prior to trial.

¶39 Kulcinski directs us to cases from other jurisdictions in which courts have held that it was improper for an attorney's closing argument to draw the jury's attention to settlement negotiations involving the parties. *See, e.g.*, ***Wagnon v. Porchia***, 361 S.W.2d 749 (Ark. 1962); ***Lasswell v. Toledo, P. & W.R. Co.***, 354 N.E.2d 25 (Ill. App. Ct. 1976); and ***Toledo, St. L. & W.R. Co. v. Burr***, 92 N.E. 27 (Ohio 1910). These cases, however, are readily distinguishable.

¶40 In ***Porchia***, the defendant's insurance carrier settled with the plaintiff, but the defendant continued to prosecute the cross-complaint against the plaintiff. ***Porchia***, 361 S.W.2d at 736. In reference to the fact that the insurance carrier settled with the plaintiff immediately after the accident there at issue, defendant's counsel told the jury that "they settled with Porchia a short time after this happened, and paid him for whatever his damages were." ***Id***. In ***Lasswell***, the plaintiff's attorney referred to the large number of filed cases that settle and argued to the jury, "[w]e don't actually go this far in a trial unless we feel we have a case that is good enough to submit to you …." ***Lasswell***, 354 N.E.2d at 29. In ***Burr,*** the plaintiff's attorney informed the jury that the defendant made an offer of settlement within thirty days of the accident, and had repeated that offer "as late as the day of the commencement of this trial." ***Burr***, 92 N.E. at 28. In short, each of the cases cited by Kulcinski involved statements by counsel that tell a jury much more than the mere fact that there has been no settlement prior to trial in the matter at hand.

¶41 Further, neither American Family nor Kulcinski attempt to explain how the objectionable statement affected the jury's award. American Family directs our attention to ***Horgen v. Chaseburg State Bank,*** 227 Wis. 510, 518, 279 N.W. 33 (1938), in which statements by counsel regarding facts not supported by the record were held to be sufficient to justify a new trial. In ***Horgen***, the supreme

court determined that "the probabilities of either side being right are so nearly equal that the unwarranted insinuations of counsel resulted in a prejudice against defendant which may have affected the outcome." ***Id***. at 518. American Family argues that this is also true in the present case. We disagree.

¶42 American Family's argument relies on its position that the jury's verdict in the present case may have gone the other way absent what it characterizes as the circuit court's erroneous rulings with respect to finding Kulcinski negligent as a matter of law and declining to submit to the jury a special verdict question on whether Benjamin was in the crosswalk at the time of the accident. Because we have concluded that these rulings were proper, however, this contention fails. We are also not persuaded that the verdict probably would have been favorable to Kulcinski and American Family but for the improper remark by Attorney Skow. We therefore conclude that the circuit court did not erroneously exercise its discretion by denying the motions for a new trial.

SANCTIONS FOR FRIVOLOUS APPEAL

¶43 The Yangs seek frivolous appeal costs and fees under WIS. STAT. RULE 809.25(3). A frivolous appeal is one that is filed "without any reasonable basis in law or equity" and for which no "good faith argument for an extension, modification or reversal of existing law" can be made. Section 809.25(3)(c)(2). Although we are not persuaded by Kulcinski's and American Family's contentions on appeal, we cannot conclude that they were made without any reasonable basis in law or equity, as the Yangs argue. Accordingly, we deny the motion.

## CONCLUSION

¶44 For the reasons discussed above, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.