ATTORNEYS FOR APPELLANT:

COLIN J. REILLY
BRIAN M. KUBICKI
Jones Obenchain, LLP
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

JEFFREY J. STESIAK
DOUGLAS E. SAKAGUCHI
Pfeifer, Morgan & Stesiak
South Bend, Indiana

IN THE
COURT OF APPEALS OF INDIANA

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,	)	
Appellant-Defendant,	)	
vs.	)	No. 50A03-0610-CV-485
JOHN HOUIN,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARSHALL CIRCUIT COURT
The Honorable Michael D. Cook, Judge
Cause No. 50C01-9508-CT-24

November 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant American Family Mutual Insurance Company ("American Family") appeals a jury verdict awarding Appellee-Plaintiff John Houin ("Houin") $112,000. We affirm.

Issues

American Family raises three issues on appeal, which we re-state as follows:

I) Whether the trial court abused its discretion in allowing evidence of two insurance policies, when the parties had stipulated to a judicial statement concerning precisely that information;

II) Whether the trial court abused its discretion by allowing Houin's attorney to remark on the underinsurance policy and the length of the litigation; and

III) Whether the trial court abused its discretion in denying American Family's motion for mistrial after Houin's ex-wife stated that the negligent driver was "drunk" at the time of the accident.

Facts and Procedural History

In 1994, Mark Milliser's ("Milliser") automobile struck the rear of Houin's automobile. At the time of the accident, Safeco/American States Insurance Company ("Safeco") insured Milliser up to $100,000 for bodily injury. Houin sued Milliser. In 2000, Houin settled his claim against Safeco in consideration for the full policy limits.

Meanwhile, Houin carried underinsured motorist coverage of $250,000 through American Family. After settling with Safeco, Houin amended his complaint to pursue payment from American Family.[1] The parties stipulated to Milliser's dismissal from the litigation, leaving American Family as the only defendant. American Family did not dispute

liability, but contested Houin's alleged damages arising from the accident. The American Family policy provided that its liability would be reduced by certain awards received. American Family paid Houin $4406 for medical expenses. Accordingly, subtracting the funds received by Houin from Safeco and the medical expenses previously paid, American Family's potential liability for the underinsured policy provision was $145,594.

In 2002, the trial court denied American Family's motion for summary judgment and certified its decision for interlocutory appeal. This Court affirmed the trial court's denial of American Family's motion. Amer. Family Ins. Group v. Houin, 777 N.E.2d 757 (Ind. Ct. App. 2002), trans. dismissed. In 2006, after more than fifteen months of inactivity, American Family moved unsuccessfully for dismissal, pursuant to Indiana Trial Rule 41(E), for failure to prosecute a civil action.

The trial court issued a Pretrial Order on August 7, 2006, allowing the parties to offer into evidence the American Family policy. American Family then filed a motion in limine, seeking to exclude evidence of Milliser's intoxication. On September 8, 2006, American Family submitted a proposed preliminary jury instruction acknowledging that "Milliser's insurer settled the Houins' claims against Mark Milliser" and acknowledging Houin's underinsured policy, but explicitly omitting the limit of either policy or the amount paid by Safeco. Appendix at 110. American Family filed two additional motions in limine, seeking to exclude any argument that it had failed to cooperate with Houin, acted in bad faith, or breached the underinsurance contract. It also sought to exclude the amount paid by Safeco and the limits of both policies.

[1] Houin also sought recovery for his former wife's damages. The trial court granted American Family's

The day before trial, the trial court heard argument on American Family's three motions in limine. The trial court indicated that it would exclude evidence of Milliser's intoxication, but would allow evidence of Safeco's policy limit and the amount it paid Houin. The trial court explained, "it is my intention to essentially inform the jury as to the true status of this case except for leaving out the intoxicated – to the drunk driver as being the root cause of why we're here." Transcript at 31. American Family objected that such evidence would invite argument that it had acted in bad faith or breached its policy with Houin. The following exchange occurred:

> Court: Okay. At the beginning, do you want to stipulate in front of the jury that there's a contract that exists between the two? That's all we really need to talk about premiums. That's fine too. I'm okay with that.
>
> American Family: Fine.
>
> Court: Okay.
>
> American Family: Okay.
>
> Court: So you guys can draw up a stip – whatever you want me to read to the jury. You can draw – you can tender me something which includes any stipulations you want the jury to be aware of. Okay?

Id. at 34-35. Neither party interjected comment before the trial court then considered American Family's final motion in limine. Over objection, the trial court indicated that it would allow introduction of evidence of the $250,000 underinsured policy limit.

On the morning the three-day trial began, the parties filed a Joint Stipulation of Fact ("Stipulation"), which the trial court read to the jury. American Family did not object. The Stipulation acknowledged that Milliser's negligence caused the accident and noted both

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motion for judgment on the pleadings regarding this count.

insurance policies, their limits, the $100,000 payment by Safeco, Milliser's release from liability, the $4406 medical payment by American Family, the meaning of the underinsurance policy, and the fact that American Family's liability was reduced by the Safeco payment. Finally, the Stipulation identified the critical dispute as the extent of Houin's compensatory damages.

After hearing testimony regarding Houin's injuries, medical costs, lost wages, pain and suffering, the jury rendered the following verdict: "We the jury find that the total damages for John Houin caused by the accident were more than $100,000.00 and we now find for the Plaintiff, John Houin, and against the Defendant, American Family Mutual Insurance Company, in the amount of $112,000.00." App. at 13. The trial court entered judgment consistent with the verdict.

American Family now appeals, seeking a new trial.[2]

Discussion and Decision

I. Evidence of Insurance Policies

American Family argues that the trial court abused its discretion in allowing the introduction of evidence regarding the two insurance policies, their limits, and payments made on them. It failed to preserve this issue for appeal, having stipulated to all of this information.

We review the admission of evidence for an abuse of discretion. Blocher v. DeBartolo Prop. Mgmt., Inc., 760 N.E.2d 229, 233 (Ind. Ct. App. 2001), trans. denied. Our Supreme Court has "explicitly held that the denial of a motion in limine does not preserve

error and that the failure to make a timely objection to the evidence at trial waives the error on appellate review." Warren v. State, 757 N.E.2d 995, 1002 (Ind. 2001) (citing Clausen v. State, 622 N.E.2d 925, 927-28 (Ind. 1993) (holding that the ruling on admissibility occurs "in the context of the trial itself")).

The trial court invited the parties to stipulate to certain matters, indicating that it would read such a statement to the jury at the beginning of trial. American Family did so. It did not object when the trial court read the fourteen-paragraph Stipulation to the jury.[3] A party cannot stipulate to evidence at trial then contest its admission on appeal. American Family failed to preserve this issue.

II. Statements by Houin's Attorney

American Family asserts that the trial court improperly allowed argument that it was not honoring its contract with Houin, challenging several statements made by Houin's attorney during trial.[4] "A trial judge has broad discretion in determining what is improper argument. This Court will reverse a judgment because of improper remarks by counsel only when it appears from the entire record that those remarks were probably the means of securing an incorrect verdict." Foster v. Owens, 844 N.E.2d 216, 223 (Ind. Ct. App. 2006) (quoting Weinstock v. Ott, 444 N.E.2d 1227, 1241 (Ind. Ct. App. 1983)), reh'g denied, trans. denied. As with evidentiary rulings, a party must object contemporaneously to allegedly

[2] Pursuant to Indiana Appellate Rule 31, American Family filed a verified Motion to Certify Statement of Evidence. The trial court conferred with counsel and certified the Statement.
[3] Also, American Family offered into evidence its policy with Houin.

[4] As part of this argument, it asserts that "the trial court herein should have ordered that no references to insurance be made at trial." Appellant's Brief at 16. For the reasons discussed above, American Family cannot argue on appeal that evidence of insurance was improperly admitted. It stipulated to such. Even its

improper argument to preserve the issue for appellate consideration. Paragon Family Restaurant v. Bartolini, 799 N.E.2d 1048, 1057 (Ind. 2003).

> Not only must a defendant object to alleged misconduct, he or she must also request an appropriate remedy. Generally, the correct procedure is to request an admonishment. However, if counsel is not satisfied with the admonishment or it is obvious that the admonishment will not be sufficient to cure the error, counsel may then move for a mistrial. Etienne's failure to request an admonishment or move for a mistrial results in waiver of the issue.

Etienne v. State, 716 N.E.2d 457, 461 (Ind. 1999) (citations omitted). See also Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006); Beverly Enter., Inc. v. Spragg, 695 N.E.2d 1019, 1022 (Ind. Ct. App. 1998).

During the first day's proceedings, Houin's attorney suggested that his client had been "wronged," that an insured is not able to negotiate the terms of a policy or control whether a case goes to trial, made reference to the twelve-year course of the litigation, and suggested that Safeco "stepped up to the plate, [and] accepted responsibility." Tr. at 98, 160-61, 215-16, 218. However, American Family failed to object contemporaneously to these statements. The next morning, American Family unsuccessfully sought admonishment regarding the length of the litigation and the notion that Safeco had stepped up and taken responsibility by paying Houin $100,000. As this motion was made the day after the challenged statements, however, it did not constitute a contemporaneous objection. See Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003) (holding that the objection must provide the trial court an opportunity to make a final ruling within the context of the statement). Thus, the request did not preserve American Family's issue.

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own proferred jury instruction noted the applicability of both policies.

During Houin's closing argument, his attorney repeated some of these same arguments. Again, American Family failed to object contemporaneously. Tr. at 551-52, 579, 583-84.

American Family preserved its challenge to only one comment made by Houin's attorney during his opening statement. He asked that the jury "help to put this dispute finally to rest. It's been going on since 1994." Id. at 215-16. American Family objected. The trial court requested, "Can we just re-phrase that the accident occurred in '94." Id. at 216. The parties then approached the bench and argued off the record.[5] Resuming his statement, Houin's attorney noted that the accident occurred in 1994. The trial court did not abuse its discretion by instructing Houin's attorney to re-phrase the statement.

III. Reference to "Drunk Driver"

Houin called his ex-wife, Linda Ransom ("Ransom"), to testify regarding how his conditions affected his daily life and his relationships with his family. During her testimony, Ransom referred to the fact that Milliser was intoxicated at the time of the accident. The trial court struck the statement and admonished the jury not to consider it, but denied American Family's motion for a mistrial. American Family now argues that the trial court abused its discretion in denying its motion. "When a trial judge admonishes the jury to disregard an event that occurred at trial, the admonishment is usually an adequate curative measure, and a mistrial is not necessary." Dillard v. State, 755 N.E.2d 1085, 1090 (Ind. 2001) (citing Hazzard v. State, 642 N.E.2d 1368, 1370 (Ind. 1994)); see also Hall-Hottel Co. v. Oxford Square Coop., Inc., 446 N.E.2d 25, 31 (Ind. Ct. App. 1983). Where a trial court has

admonished a jury, but denied a motion for mistrial, we review the likely impact of the evidence on the verdict. Hazzard, 642 N.E.2d at 1370.

To assess the statement's likely impact, we review it within the context of the other evidence presented. Houin's attorney asked Ransom, "[a]fter the accident, did you observe any lifestyle changes of John due to his injuries?" Tr. at 436. She responded at length, concluding as follows: "[H]is life was, the way it had been was over, so basically it was cashed in, in my book, because of a drunk driver, you know, it was like." Id. at 437. American Family's attorney objected, interrupting her response. During a sidebar conference, American Family argued that the statement was irrelevant and unfairly prejudicial. The trial court denied American Family's motion for mistrial, then once back on the record, struck the statement and admonished the jury not to consider it.

The evidence suggested that Houin had abdominal complaints as early as 1980 and lower back pain as early as 1983. His pre-existing conditions included degeneration in the connections between his vertebrae at C5/C6 and C6/C7. On a scale of one to ten, his neck pain went from one before the accident to "ten plus" after the accident. Id. at 248. Essentially, the 1994 accident aggravated his back condition. In addition, the medications for his neck and back pain had a negative impact on his digestive issues. The day he testified, twelve years after the accident, his pain was still a five. Houin's ex-wife gave examples of how the pain and digestive issues associated with the accident negatively affected his daily living and basic functioning. Finally, there was evidence that Houin's medical expenses were as much as $25,000 and that he had incurred lost wages as a result of the accident.

[5] Houin's Verified Statement of the Evidence indicates that his "objection was denied." App. at 170.

American Family had admitted liability before trial, making Houin's compensable damages the remaining factual question. Accordingly, the trial court was correct in excluding reference to Milliser's intoxication, striking Ransom's statement, and admonishing the jury. We cannot conclude, however, that the trial court abused its discretion in denying American Family's motion for a mistrial. The admonishment made clear that the evidence was not to be considered in the jury's deliberations. Moreover, based upon the evidence presented, the verdict does not suggest that American Family was prejudiced by the statement or that the jury was motivated by sympathy. The jury determined, in light of medical expenses, lost wages, and years of pain and a compromised lifestyle, that Houin's compensatory damages were $212,000 total, of which American Family would be liable for $112,000. That constituted an award $38,000 less than the stipulated information indicated was recoverable under the policy. Accordingly, we conclude that the trial court did not abuse its discretion in denying American Family's motion for a mistrial.

Conclusion

The trial court did not abuse its discretion by excluding evidence to which the parties had stipulated, by instructing Houin's attorney to re-phrase a statement, or by denying American Family's motion for a mistrial.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.

However, his objection apparently contained no particular motion.