

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 9, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0280

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**JOSEPH DERR, and MARGARET
DERR,**

Plaintiffs-Appellants,

v.

**LEE M. TYNE, M.D., PHYSICIANS
INSURANCE COMPANY OF WISCONSIN,
INC., and WISCONSIN PATIENTS
COMPENSATION FUND,**

Defendants-Respondents,

**FAMILY HEALTH PLAN COOPERATIVE,
and ST. PAUL FIRE AND CASUALTY
INSURANCE COMPANY,**

Defendants.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE GRAM, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Joseph and Margaret Derr appeal from a judgment dismissing their medical malpractice complaint against the defendants following a jury verdict of no negligence on the part of Dr. Lee M. Tyne. The Derrs claim that there was insufficient evidence to support the jury's finding of no negligence and that the trial court erroneously exercised its discretion in admitting certain evidence. We reject both claims and affirm.

On May 2, 1988, Joseph Derr broke his leg while playing softball. Dr. Tyne operated on Derr's leg, using a metal plate and metal screws to achieve fixation. On April 20, 1989, Dr. Tyne removed the hardware. According to the Derr's amended complaint, Derr claims that his leg was not completely healed before the second surgery and that following this surgery he "sustained a stress fracture with substantial biplanar angulation or developed a substantial biplanar angulation of the prior unhealed fracture." The Derrs alleged that Dr. Tyne's removal of the hardware was done without having first taken an x-ray. Because no x-ray was found in the medical records and because there was no bill for an x-ray, the Derrs argued that the x-ray was not taken or reviewed by Dr. Tyne and therefore Dr. Tyne was negligent. The jury, however, found that Dr. Tyne had not been negligent, and following motions after verdict, the trial court entered judgment for the defendants.

The applicable law regarding the Derr's insufficiency-of-the-evidence argument has been succinctly stated:

The standard of review of a jury verdict is that it will be sustained if there is any credible evidence to support the verdict. When the verdict has the trial court's approval, this is even more true. The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict. This court is not to search the record on appeal for evidence to sustain a verdict that the jury could have reached, but did not.

Fehring v. Republic Ins. Co., 118 Wis.2d 299, 305-306, 347 N.W.2d 595, 598 (1984) (citations omitted).

Mr. Derr testified that no x-ray had been taken prior to the second surgery. Additionally, Dr. Tyne admitted that it would have been negligent to do the second surgery without first reviewing a current x-ray. Defense counsel, however, presented the following evidence: (1) Dr. Tyne's testimony that it was his habit and practice to have an x-ray taken prior to removing hardware and his belief that he had done so in Mr. Derr's case; (2) Dr. Tyne's operative report, dictated on the day of surgery, which stated, "There had been one screw placed through a tibial fracture, *which is still apparent on the x-ray ...*" (emphasis added); and (3) a preoperative note dictated by R. McMahon, D.O., from Family Health Plan which stated, "Patient to undergo surgery by Dr. Tyne for hardware removal from this ankle. The x-rays show healing to the point that this may be attempted now." Thus, there was evidence on both sides of the issue of whether Dr. Tyne reviewed a current x-ray before performing the second surgery. The jury resolved the issue of the credibility of the witnesses in favor of Dr. Tyne. Therefore, we will not interfere with the jury's verdict.

The Derrs also argue that the trial court "committed reversible error by admitting prejudicial testimony regarding the role of dismissed co-defendant Family Health Care Plan in the maintenance of [Mr. Derr]'s medical records." The gist of the Derrs' claim is that under § 904.03, STATS.,¹ the trial court should have excluded the evidence that Family Health Plan was responsible for keeping the records and that it might have lost the records. In ruling on plaintiff's objection to admission of the evidence, the trial court stated: "I see this as minimal on both sides. It isn't horribly relevant but I don't think it's horribly prejudicial either, and I really don't see undue prejudice."

A trial court's decision to admit or exclude evidence is within the discretion of the trial court. *Lievrouw v. Roth*, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990). "Section 904.03, STATS., favors admissibility; if the

¹ RULE 904.03, STATS., states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

probative value of the evidence is close or equal in value to its prejudicial effect, the evidence must be admitted.” *State v. Brewer*, 195 Wis.2d 295, 310, 536 N.W.2d 406, 412 (Ct. App. 1995).

During presentation of its case, defense counsel argued that Family Health Plan was responsible for maintenance of the records and if there were no records of an x-ray having been taken and no x-ray, then that was not Dr. Tyne's fault. The Derrs claim that this violated a stipulation agreeing that the action against Family Health Plan would be dismissed and that defense counsel would “make no allegations of Family Health Plan Cooperative negligence during the trial ...; that she will not ask that Family Health Plan Cooperative be put on the verdict; and that she will not use the Dr. McMahon entry relative to it being ‘ok to remove the hardware based on the x-rays’ as a basis for blaming Family Health Plan Cooperative.”

Plaintiff's counsel, however, made maintenance of the Family Health Plan records an issue during trial by suggesting during the questioning of Dr. Tyne that Dr. Tyne had not produced relevant materials or had removed materials from Family Health Plan records. Accordingly, Dr. Tyne's explanation regarding his lack of any role in the maintenance of those records was relevant and admissible for the jury's consideration. The trial court's exercise of discretion was proper.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.