

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-1434

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PATRICIA LAUX AND MARK LAUX,

PLAINTIFFS-APPELLANTS,

v.

**COUNTY OF WAUPACA, DAVID SCHWEDE,
WISCONSIN COUNTY MUTUAL INSURANCE
CORPORATION, AND MILLS COMPANY EMPLOYEE
WELFARE TRUST HEALTH PLAN,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Patricia and Mark Laux appeal from a judgment of the circuit court entered after a jury verdict finding David Schwede not negligent and Patricia Laux to be causally negligent and from an order denying their

motions after verdict. The issues on appeal are whether the Lauxes are precluded from arguing that there was a mistrial when they did not make a motion for a mistrial at trial; whether the jury verdict was perverse; and whether the Lauxes are entitled to a new trial in the interest of justice. Because we conclude that the failure to move for a mistrial is fatal in this case, and that there was sufficient evidence to support the verdict, we affirm.

Patricia was injured in an automobile accident when the car which she was driving collided with a pick-up truck. In her complaint, she alleged that the accident was caused by the negligence of David Schwede, a Waupaca County employee who was driving a sanding truck at the time of the accident. The parties agreed that the roads were icy and foggy at the time of the accident. Patricia testified that as she was driving to work on County Highway C on January 12, 1995, she saw a county truck on the highway ahead of her. She also said she saw a man outside the truck. When she realized the truck was stopped, she swerved to avoid hitting it. She skidded, crossed into the on-coming lane, and collided with a pick-up truck. As a result of the accident, Patricia suffered a head injury which caused her to suffer headaches, and left a permanent scar on her forehead.

Schwede testified that prior to the collision, he stopped the sanding truck because he thought the spinner was not throwing sand as fast as normal and that the sand might be caking. He parked the truck partially on the road's shoulder, got out of the truck to check the box, saw the headlights of a car, got back into the truck, and began driving. As he was moving, the car driven by Patricia, attempted to pass him and collided with a truck in the other lane.

A state patrol officer, Officer Binder, who investigated at the scene of the accident, testified that his notes indicated that shortly after the accident,

Patricia told him: “she saw driver of county truck out of vehicle, get in and start moving. Said he was going very slow and had to change lanes to avoid colliding with the country (sic) truck.”

During closing arguments, counsel for the Lauxes referred to three of the defense witnesses, Schwede, Schwede’s supervisor, and Officer Binder, as “the good ole’ boys.” He suggested that these witnesses “had a court out there” and decided that Patricia was negligent. When he discussed Officer Binder’s testimony, he stated that the officer had not asked certain people questions, had not written things down, and then said: “Why not? Because it didn’t fit his version.”

Counsel for the defendants responded to these suggestions and then concluded by saying:

I want you to seriously consider what you have to do to find that Mrs. Laux’s testimony on the stand was true. You have to go back in the jury room and say, yes, you’re right, a county highway supervisor and a state trooper, sworn officer, got together and cooked up a story and the state trooper lied, even though [he] could probably get fired for falsifying official state documents.

The Lauxes’ counsel objected at this point, saying that it was improper to be talking about perjury and getting fired. The judge responded by saying: “Let’s finish up.” The jury returned a verdict finding Schwede not negligent and Patricia causally negligent. The Lauxes appeal.

The first issue is whether the Lauxes are entitled to a mistrial based on defense counsel’s statement during closing argument. At the time the Lauxes’ counsel objected to defense counsel’s statement, he did not move for a mistrial. Absent plain error, a motion for a mistrial is necessary in order to preserve the

issue for appeal. *State v. Patino*, 177 Wis.2d 348, 380, 502 N.W.2d 601, 614 (Ct. App. 1993). Therefore, the Lauxes have not preserved the issue for appeal and we will not consider it.

Citing to § 752.35, STATS., the Lauxes argue in their reply brief that we should consider the issue in the interests of justice. The Lauxes did not make this argument in their brief-in-chief, however, and therefore we also will not consider it. See *Swartwout v. Bilsie*, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981).

The Lauxes' final argument is that the jury's verdict was perverse.

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, 305-06, 347 N.W.2d 595, 598 (1984) (citations omitted), *overruled on other grounds*, *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559, 576-77, 547 N.W.2d 592, 598-99 (1996).

Our review of the record establishes that there was credible evidence to sustain the jury's verdict. Schwede testified that his truck was moving at the time of the accident. Officer Binder testified that Patricia told him immediately after the accident that Schwede had gotten back into the truck and was moving slowly at the time of the accident. From this and other testimony, the jury could

reasonably find that Schwede was not negligent and Patricia was. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

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

