

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 1997

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. 96-1971

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

SEUNG J. YUN,

PLAINTIFF-RESPONDENT,

v.

**BETTY J. PAPP AND AMERICAN FAMILY
MUTUAL INSURANCE CO.,**

DEFENDANTS-APPELLANTS,

**FARMER'S AUTOMOBILE INS. ASSOC. AND
PEKIN INSURANCE CO.,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Betty J. Papp and American Family Mutual Insurance Co. (Papp) appeal from a judgment entered after a jury found in favor of Seung J. Yun for damages she sustained in an automobile accident.

Papp raises three claims of trial court evidentiary error requiring either a new trial or remand: (1) failing to admit certain photographs, which Papp asserts would have minimized the claimed injuries; (2) failing to admit or allow cross-examination with respect to certain medical records, which Papp claimed would have minimized damages; and (3) admitting into evidence certain medical bills paid by a non-party subrogated insurance carrier. Because the trial court did not erroneously exercise its discretion in denying the admission of certain photographs, certain medical records, and admitting other medical bills, we affirm.

I. BACKGROUND

On October 10, 1994, in the vicinity of South 60th Street and West Mobile Avenue in the City of Milwaukee, Yun was involved in a multi-car accident. The car she was driving was struck from behind by a car driven by Papp. Yun claimed she sustained severe head injuries because of the negligent manner in which Papp operated her car. A jury returned a verdict in Yun's favor for \$75,500. On motions after verdict, Papp moved for a reduction in the damages or a new trial. The trial court denied the motions and Papp now appeals.

II. DISCUSSION

A. *Photographs.*

Papp first claims that the trial court erroneously exercised its discretion in failing to admit into evidence photographs depicting the condition of Yun's vehicle after the accident and in failing to allow her to lay a proper

evidentiary foundation for admission of the photos. Papp argues that the photos would have minimized the damages claim. From our review, we conclude that the trial court did not erroneously exercise its discretion when it excluded the photographs.

STANDARD OF REVIEW

Whether a photograph should be admitted into evidence or excluded is left largely to the discretion of the trial court. *See Featherly v. Continental Ins. Co.*, 73 Wis.2d 273, 283, 243 N.W.2d 806, 814 (1976). Even if we would reach a different independent conclusion, we must uphold the trial court's decision unless it erroneously exercised discretion. *See id.* To obtain admission of a photograph, the proponent must satisfy the trial court that it is an accurate reproduction of what it purports to portray. *See Wagner v. Peiffer*, 259 Wis. 566, 572-73, 49 N.W.2d 739, 742 (1951).

ANALYSIS

The only issue for the jury was the determination of the severity of Yun's damages. Yun claimed that the impact of the rear-end collision was so significant that it caused her head to shatter the windshield. Papp countered that the excluded photographs, which depicted an intact windshield, were relevant because they make Yun's severe injury claim less probable than it would be without the evidence of the photos. Papp further argues that the trial court's finding that the probative value of the photos was "negligible" because of their "imprecision" was error because "nothing was imprecise about the failure of these photos to support Yun's assertion that her head had shattered the windshield of the car." Papp further asserts that the photos do show less severe damage than Yun claimed regardless of whether the entire auto is shown in the photographs.

The trial court excluded the photos because Papp failed to lay a proper foundation and because of the likelihood of confusing the issues. There is a reasonable basis in the record to support this determination and, therefore, we must affirm the trial court's decision.

The insurance company adjuster said that the photographs did not accurately portray the damage to the car. Papp admits that the photographs do not show the entire car, and Yun testified that she could not say for sure that the photos depicted her vehicle. This evidence supports the trial court's determination that the photographs were imprecise. The trial court also noted that the photographs had been removed from the adjuster's file causing concern and raising the question of whether admitting the photographs would mislead or confuse the issues. The basis for the trial court's exclusion of the photos is clearly stated and not unreasonable considering the state of the record. Its exercise of discretion was not erroneous.

Papp further contends that the trial court erred by not allowing her to lay a foundation for the admission of the photos once the objection to their admission had been sustained. She argues that she could have shown that the photos did substantially depict the car and that any discrepancies could have been explained with further testimony. To the extent that she argues, she is correct, but she has the burden of further advancing her position by making an offer of proof. Papp failed to make an offer of proof and therefore, this assertion of error is waived. See *State v. Hoffman*, 106 Wis.2d 185, 217-18, 316 N.W.2d 143, 160 (Ct. App. 1982).

B. Student Health Record.

Next, Papp claims that the trial court erred when it refused to admit a Student Health Record of Yun's from the University of Wisconsin-Whitewater, which consisted of two exhibits. The exhibits contained a history given by Yun on March 24, 1995 (nearly two and one-half years after the accident), denying frequent or severe headaches and vision problems. Before trial, Papp complied with the requirements of § 908.03(6m), STATS.,¹ thus not necessitating an authentication witness.

Papp argues that the statements contained in the records which are attributable to Yun are inconsistent with her trial testimony in that they also make the existence of her claimed frequent and severe headaches less likely. Papp sought to cross-examine Yun as to the content of these records. The trial court refused to allow the cross-examination and also refused to admit the offered version of the record into evidence.

STANDARD OF REVIEW

¹ Section 908.03(6m)(b), STATS., provides:

HEALTH CARE PROVIDER RECORDS...

Authentication witness unnecessary. A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer health care provider records into evidence at a trial or hearing does one of the following at least 40 days before the trial or hearing:

1. Serves upon all appearing parties an accurate, legible and complete duplicate of the health care provider records for a stated period certified by the record custodian.
2. Notifies all appearing parties that an accurate, legible and complete duplicate of the health care provider records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

The decision to admit or exclude evidence is within the trial court's broad discretion and ought not be reversed short of an erroneous exercise of discretion in its determination amounting to prejudicial error. See *Wikrent v. Toys "R" Us, Inc.*, 179 Wis.2d 297, 306, 507 N.W.2d 130, 133 (Ct. App. 1993). Appellate courts traditionally look for reasons to sustain a trial court's discretionary determinations. See *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968). That determination may be sustained even though the trial court's reasoning may itself have been erroneous or inadequately expressed. See *id.* Whether the ground assigned by the trial court is correct is immaterial if, in fact, the ruling is correct and the record reveals a factual underpinning that would support the proper finding. See *Mueller v. Mizia*, 33 Wis.2d 311, 318, 147 N.W.2d 269, 273 (1967). This "all's well that ends well" standard is otherwise expressed as the trial court having reached the "right result," but for the "wrong reason." See *State v. Holt*, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

ANALYSIS

It is evident from the record of the chambers conference examining the objection to the cross-examination of Yun on her medical record, that Papp sought to impeach Yun's statements that she had frequent and severe headaches as the result of the accident. Papp intended to challenge Yun's claim with the Student Health Record that the trial court excluded. The medical record, which was generated when Yun sought gynecological treatment, indicated that Yun denied having any frequent or severe headaches. The record consisted of a series of question, where a health care provider would mark a "yes" or "no" box, after asking Yun the questions on the form. Yun's counsel objected to use of this record because she had no way of cross-examining the individual who had

completed the form. Papp's counsel argued that certification under § 908.03(6m), STATS., was intended to obviate the necessity of producing the records custodian and, therefore, he should be allowed to use the interview form for cross-examination. He further noted that the document he wished to use and submit into evidence was a redacted version of the original and had "whited out" most of the gynecological information with the exception of the important "no" answers.

We have examined the subject records, which consist of two documents. The first, which is the original document, is stamped "confidential medical record" and consists of a gynecological history interview form containing thirty questions and answers of an extremely personal nature. The second is a copy of the first, but has redacted the majority of the original, with the following exceptions. The "Confidentiality" stamp shows and only the first two questions of the thirty questions are readable; i.e., "Frequent or severe headaches" and "Vision Problems," both of which are answered "No" by "Xs." In addition, the redacted version still displays the form as a "Gynecological History Form."

Yun's counsel objected because Yun "didn't fill the form out. I have no way to cross examine the person who did. There's 20 students there and she said, what are you in for, she says vaginal problem, and she checks everything off." This statement obviously provoked the following from the trial court: "I'll adjourn the case so we can bring in people from Whitewater and take a recess ... but I'm not going to get into documents from a source that can't be cross examined."

Papp's protestations notwithstanding, the offered redacted version of the confidential interview form cries out for an explanation of its meaning and

understandably so. Reasonably, some of the answers “Xed” on the unredacted form might relate to the “Xed” answers on the offered redacted form.

Having examined the documents in question, we now must determine whether there is a basis to support the trial court’s conclusion that there is no relevancy between a negative response about the frequency of headaches in a gynecological examination context and the complaint of headaches as a consequence of an accident. Even if we would independently conclude that these records are admissible, our ruling does not control in view of the proper standard of review—i.e., whether the trial court erroneously exercised discretion. Was the trial court’s ultimate determination without reason? We conclude it was not.

It is evident from the record, however sparsely expressed, that the trial court desired explanatory testimony from witnesses who could fill in the evidentiary space of trustworthiness before it made its ruling. Even though the trial court expressed its obvious concerns about the usage of the redacted document for impeachment purposes, it did not withhold from Papp the ability to sufficiently demonstrate its evidentiary value. The trial court offered to adjourn the proceedings so that proper parties could appear to explain the entries. In succinct terms, Papp did not avail herself of the opportunity to prevail. The trial court was acting well within the orbit of its discretionary powers for determining whether evidence otherwise hearsay in nature should be admitted into evidence. *See Noland v. Mutual of Omaha Ins. Co.*, 57 Wis.2d 633, 641, 205 N.W.2d 388, 392 (1973). It committed no err.

C. Medical Bills.

Lastly, Papp contends the trial court erred in admitting into evidence medical bills totaling \$2,000 which had been paid by a non-party subrogee insurance carrier, Pekin Insurance Co., and in allowing Yun to recover these damages in the verdict.

STANDARD OF REVIEW

The admissibility of evidence is a discretionary exercise on the part of the trial court. *See Wikrent*, 179 Wis.2d at 306, 507 N.W.2d at 133. In reviewing this determination:

we look first to the court's on-the-record explanation of the reasons underlying its decision. And if that explanation indicates that the court looked to and "considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree."

See Steinbach v. Gustafson, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993) (citation omitted).

ANALYSIS

Papp's contention is based on a perceived application of subrogation principles and an abandonment of the collateral source rule. The effort to "impose" subrogation on Yun's proof of damages or ultimate judgment for damages by claiming that the \$2,000 amount of medical bills belonged to Pekin, is based totally upon a letter dated September 21, 1995, from Pekin's claims department, addressed to American Family affirming its subrogation rights for the same sum paid.

While acknowledging the existence of the collateral source rule, Papp asserts it does not apply here because Pekin paid medical bills on behalf of its insured, Yun, and therefore was entitled under its policy to be subrogated for the benefits paid thereby, barring any attempt to recover those medical expenses from either the tortfeasor or its insurer. Papp concludes its argument claiming that inclusion of the medical bills for \$2,000 harms it in two ways. The damages appear within the verdict as “past medical and hospital expenses” to be paid to Yun even though she had no right to them, and the pain and suffering award to whatever extent it is driven by the size of medical bills is unfairly inflated by the inclusion of these bills. Therefore, Papp argues, the past medical expense should be reduced or a new trial granted excluding consideration of the bills.

We are not convinced for two reasons. The mere entitlement to subrogation is not co-terminus to the right to “impose” subrogation when other options exist of record and the burden of proof to permit imposing subrogation has not been met. The mere entitlement to exercise subrogation rights is not the equivalent to the actual exercise of the right. In *Jindra v. Diederich Flooring*, 181 Wis.2d 579, 511 N.W.2d 855 (1994), our supreme court recently had the opportunity to review the application of the subrogation doctrine and the burden of proof required to invoke its consequences. In part, the court declared that a party seeking to apply subrogation has the burden of proving the existence of the right and then its consequences. *See id.*, 181 Wis.2d at 599-606, 511 N.W.2d at 861-63. The court, while noting that in most instances it is the insurer-subrogee who desires to prove the right to subrogation, was careful to point out that the same burden applies to a party who seeks to impose the consequences of subrogation upon another party. *See id.* Explaining, the court requires that when a party seeks to impose subrogation (here Papp), it has the burden of showing both (1) that there

is some basis for asserting subrogation, and (2) that subrogation should be applied under the circumstances. *See id.*

Continuing on, the court declared that inherent in any right to subrogation is the option to waive the same right by failing to exercise the right or by allowing the statute of limitations to run, thereby extinguishing the right. *See id.* If, because of the terms of the insurance contract, the insurer decides not to exercise its subrogation rights—deciding instead to exercise alternative rights, e.g., reimbursements rights,² which require its insured to pay it if payment is received from the responsible party—the insurer will be deemed to have waived subrogation and be precluded from bringing a subsequent claim against the tortfeasor or its insured. *See id.*

We conclude that the supreme court's further refinement of the applicability of subrogation and the methodology to be utilized as set forth in *Jindra* renders the statement that entitlement to subrogation requires abandonment of the collateral source rule inapplicable in the context in which this case exists. The burden of proof is not met by merely showing a subrogation clause exists in the insurance contract and the insurer acknowledges the right as did Pekin in the facts before us. Also in the record is a letter from Pekin's counsel denying it had made any payments under its policy. Here, the trial court correctly placed the burden of proof upon Papp and additionally required a showing that subrogation should be required. Papp did not meet the test.

² Pekin was dismissed from the case by stipulation of the parties. We note that the Pekin policy also contained an identical reimbursement clause as that contained in *Jindra v. Diederich Flooring*, 181 Wis.2d 579, 511 N.W.2d 855 (1994). The policy was a matter of record for the trial court's review.

In addressing this issue in motions after the verdict, the trial court explained:

Pekin does not protect any claim of subrogation, and there's nothing in the record to account for Pekin's dismissal of its cause of action, except that a plaintiff is entitled to recover as damages those sums incurred so long as the defendant is not required to pay twice. The only evidence in the record is a letter indicating that Pekin did not make any payments relative to this case. Any claim that Pekin had subrogation interests has not been established.³

The trial court reviewed the record evidence, applied correct principles of law, and then arrived at reasonable logical conclusion. It did not err.

By the Court.—Judgment affirmed.

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

³ We note that in the transcript for motions after verdict after the trial court made its disposition, counsel for Papp attempted to place in the record the letter dated September 21, 1995, from Pekin's claim department to American Family, but the trial court stated "I can only act based upon the record that's made in this case, and I can't open up the record at this stage." We have searched the record and can find no evidence that this letter was ever received as an exhibit, although we did locate it as attached to a brief that had been submitted earlier to the court. Papp does not challenge the trial court's ruling in this appeal.

