

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-3167-FT
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-376

**IN COURT OF APPEALS
DISTRICT II**

LOYAL L. BERG AND CHERYL A. BERG,

PLAINTIFFS-APPELLANTS,

**WISCONSIN WHOLESALE BEER DISTRIBUTORS AND
EMPLOYERS HEALTH INSURANCE COMPANY,**

SUBROGATED-PLAINTIFFS,

v.

JAMES E. CAULEY, M.D.,

DEFENDANT-RESPONDENT,

AMERICAN CONTINENTAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Loyal L. Berg and Cheryl A. Berg appeal from the judgment dismissing their complaint against Dr. James E. Cauley for medical malpractice. The issue on appeal is whether the trial court erred when it refused to grant the Bergs' motion for a new trial. Because we conclude that the trial court did not err, we affirm.

¶2 The Bergs brought a medical negligence action against Dr. Cauley as a result of injuries Loyal Berg suffered during a procedure to remove a kidney stone. At trial, the defense offered the testimony of Dr. Bruskewitz, a board-certified urologist and professor at the University of Wisconsin. Dr. Bruskewitz testified that Dr. Cauley complied with the appropriate standard of care when he treated Loyal Berg. The Bergs argue that this testimony represented improper vouching for Dr. Cauley and was not based on objective fact. They further argue that this testimony was prejudicial and they should be granted a new trial.

¶3 “A trial court’s decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has ‘a reasonable basis’ and was made ‘in accordance with accepted legal standards and in accordance with the facts of record.’” *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). And “[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury’s judgment, and where more than one inference can be drawn from the evidence, this court must accept the inference drawn by the jury.” *Roach v. Keane*, 73 Wis. 2d 524, 536, 243 N.W.2d 508 (1976). We conclude that the circuit court properly allowed Dr. Bruskewitz’s testimony.

¶4 First, the Bergs' contention that Dr. Bruskewitz's testimony was based only on what he was told by Dr. Cauley is not supported by the record. In preparing for his testimony, Dr. Bruskewitz reviewed records from Dr. Cauley, Mercy Medical Center, and the Mayo Clinic, as well as the depositions of Dr. Cauley and Dr. Boxer, the plaintiff's expert, and summaries of trial testimony. In addition, the record shows he had reviewed Loyal Berg's x-rays and radiology reports. Dr. Bruskewitz relied on more than just Dr. Cauley's own statements.

¶5 Further, it was not inappropriate for Dr. Bruskewitz to testify to Dr. Cauley's version of what he did. An expert may rely, in part, on the defendant's version of the events. In so doing, the expert is not vouching for the credibility of the defendant, but is detailing for the jury what his or her opinion is based on. It is then up to the jury to decide if it accepts the expert's opinion. That is just what happened in this case.

¶6 The Bergs also argue that it was improper for the trial court not to change the jury's verdict to find that Dr. Cauley was negligent. The Bergs base this argument on their contention that Dr. Bruskewitz's testimony was inadmissible, and that all the other evidence supported a finding of negligence. Since we have concluded that Dr. Bruskewitz's testimony was proper, however, we conclude that the trial court did not err when it refused to change the jury's answers. As the trial court stated, a bad result does not necessarily translate into negligence. The trial court found that there was sufficient credible evidence to support the verdict and we see no reason to disturb that finding.

¶7 For the reasons stated, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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

