

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Rivers v. Kumar

118 A.D.2d 691 · Decided March 17, 1986

SUMMARY

The plaintiff, Edith Rivers, brought a negligence action against the defendant, Dr. Ish Kumar, a neurosurgeon, for damages resulting from a surgical procedure that caused permanent injury to her right leg. The jury found in favor of the plaintiff, and the defendant appealed. The appellate court affirmed the judgment, finding that the jury's verdict was not against the weight of the evidence. The court also found that the defendant failed to preserve an issue regarding an alleged inconsistency in the jury's verdict for review.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Mangano, J.P.; Gibbons, J.; Lawrence, J.; Kunzeman, J.
JURISDICTION	New York
DECIDED	March 17, 1986
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant physician appealed, as limited by his brief, from the portion of a judgment entered after a jury verdict awarding the plaintiff \$750,000 in a medical-malpractice action.
STANDARD OF REVIEW	A jury verdict will not be disturbed as against the weight of the evidence where the preponderance of the evidence is not so great that the jury could not have found negligence under any fair interpretation of the evidence. Issues of witness credibility and the weight to be given evidence are for the jury. An alleged inconsistency in interrogatory answers must be raised before the trial court discharges the jury to be preserved for appellate review. A jury damages assessment will not be disturbed absent a showing that it was unfair or unconscionable.
PRECEDENTIAL VALUE	Published intermediate appellate opinion
PARTIES	Ish Kumar v. Edith Rivers

TOPICS

medical malpractice

professional negligence

negligence

preservation of error

standard of review

PRACTICE AREAS

medical malpractice

professional negligence

appellate procedure

QUESTIONS PRESENTED

1. Whether the jury's finding that Kumar was negligent in performing the surgery and that his negligence proximately caused Rivers's injuries was against the weight of the evidence.
2. Whether Kumar preserved for appellate review his claim that the jury's interrogatory responses were inconsistent.
3. Whether the jury's damages award was unfair or unconscionable and therefore warranted appellate interference.

HOLDINGS

1. The jury's finding that Kumar negligently performed the surgery and proximately caused Rivers's injuries was not against the weight of the evidence because the evidence was not so preponderant that the jury could not have reached that conclusion under any fair interpretation of the evidence.
2. Kumar's claim concerning an alleged inconsistency in the jury's interrogatory responses was not preserved because he failed to raise it before the trial court discharged the jury.
3. Interference with the jury's assessment of damages was unwarranted because nothing in the record indicated that the award was unfair or unconscionable.

KEY QUOTATIONS

"It cannot be said that the preponderance of the evidence was so great that the jury could not have found the appellant negligent in performing the operation under any fair interpretation of the evidence" (692)

"Issues concerning the credibility of the witnesses and the weight to be given to the evidence are for the jury to determine." (692)

FACTUAL BACKGROUND

Kumar, a neurosurgeon, performed a decompressive cervical laminectomy and foraminotomy on Rivers, causing damage to the long tract of her spinal cord and permanent injury to her right leg. The parties presented conflicting expert testimony regarding whether the surgery was necessary, and the evidence showed that accepted medical practice called for a myelogram before surgery in circumstances such as Rivers's. Kumar claimed Rivers refused the myelogram and consented to surgery without it, but Rivers denied being told about the test and the hospital records did not document such a refusal.

PROCEDURAL HISTORY

The Supreme Court, Nassau County, entered judgment for Rivers after the jury found that Kumar negligently performed surgery and that his negligence proximately caused Rivers's injuries. Kumar challenged the verdict as against the weight of the evidence, argued that the jury's interrogatory responses were inconsistent, and challenged the damages award. The Appellate Division affirmed insofar as appealed from.

DISPOSITION

affirmed

CASES CITED

- Lee v Lesniak, 40 AD2d 756
- Barry v Manglass, 55 NY2d 803, 806
- Torro v Altman, 97 AD2d 819

OPINION

PER CURIAM.

— In a negligence action to recover damages for personal injuries due to medical malpractice, the defendant Ish Kumar appeals, as limited by his brief, from so much of a judgment of the Supreme Court, Nassau County (Berman, J.), entered August 14, 1984, as, upon a jury verdict, is in favor of the plaintiff and against him in the principal sum of \$750,000. Judgment affirmed, insofar as appealed from, with costs.

On November 12, 1975, the appellant Dr. Ish Kumar, a neurosurgeon, performed an operation termed a "decompressive cervical laminectomy and foraminotomy" upon the plaintiff Edith Rivers, who was then 46 years of age. It is undisputed that as a result of this surgery, the plaintiff suffered damage to the long tract of her spinal cord.

The plaintiff claimed that the appellant was negligent in performing unnecessary surgery which resulted in the permanent injury of her right leg, requiring her to use a walker. The appellant maintains that the damage to the plaintiff's spinal cord was a known risk of this type of surgery. During the trial of this action, the parties presented the testimony of expert witnesses whose opinions conflicted as to the necessity for surgery in the plaintiff's case.

It was undisputed, however, that according to accepted standards of medical practice, a myelogram should be performed prior to surgery in cases such as the plaintiff's. The appellant claimed that the plaintiff refused to undergo this test and agreed to undergo the surgery without having the test performed.

The *692plaintiff denied that the appellant ever mentioned anything to her about a myelogram and the hospital records contained no notation indicating her refusal to submit to such test. Contrary to the appellant's position at trial, the plaintiff's expert witness, Dr. Larry Schenck, a neurologist,

testified that based upon his review of the plaintiff's hospital records, his opinion was that a reasonable medical practitioner would not have performed the operation upon the plaintiff.

Dr. Schenck based his opinion upon several factors including the appellant's conclusion that the plaintiff was a poor surgical risk, that there was nothing in the hospital record before the surgery to indicate that she suffered from any spinal cord compression, and that no myelogram was performed. Following deliberations, the jury, in responding to the first interrogatory, found that the appellant was negligent in performing the November 12, 1975 surgery and that such negligence was the proximate cause of the plaintiff's injuries.

On this appeal, the appellant contends that the jury's verdict on this issue was against the weight of the evidence. We disagree. It cannot be said that the preponderance of the evidence was so great that the jury could not have found the appellant negligent in performing the operation under any fair interpretation of the evidence (see, *Lee v Lesniak*, 40 AD2d 756).

Issues concerning the credibility of the witnesses and the weight to be given to the evidence are for the jury to determine. In this case, we find no basis to disturb the jury's verdict. As to the appellant's contention concerning the alleged inconsistency in the jury's verdict based upon its responses to the interrogatories, the appellant failed to raise this issue before the trial court prior to the discharge of the jury, and the issue was thus not properly preserved for our review (*Barry v Manglass*, 55 NY2d 803, 806).

Finally, nothing in the record indicates that the award in the plaintiff's favor was unfair or unconscionable. Accordingly, we conclude that interference with the jury's assessment of damages is unwarranted (see, *Torro v Altman*, 97 AD2d 819). Mangano, J. P., Gibbons, Lawrence and Kunzeman, JJ., concur.