

*ZULLINGER V. KUMAR*

*Medical malpractice; informed consent; denial of directed verdict; post-trial motions for judgment notwithstanding the verdict and for new trial on issue of damages.*

1. In deciding whether to grant a directed verdict, the Court must consider the facts as presented at trial in the light most favorable to the non-moving party; a directed verdict should not be granted if a question of fact exists which must be determined by the jury.
2. A physician who does not obtain a patient's informed consent before pursuing medical treatment is liable for battery, regardless of whether the treatment as performed met the standard of care.
3. A physician must advise his patient of those material facts, risks, complications and alternatives to surgery that a reasonable person in the patient's situation would consider significant in deciding whether to have the operation.
4. At trial, a plaintiff in an informed consent case may present information about treatment alternatives which the physician did not discuss with the patient; it is then for the jury to decide whether that information would have been of material importance to the reasonable patient in choosing a course of action.
5. Where a patient suffers from such severe carpal tunnel syndrome that surgery is, in reality and in practical terms, the only viable treatment, the doctrine of informed consent does not require the physician to give that patient a merely rote or mechanical dissertation on non-surgical forms of treatment which would be futile to pursue for that particular patient.
6. Although the physician conceded at trial that, as a general proposition, non-surgical treatments exist for carpal tunnel syndrome which he did not discuss with his patient, a directed verdict on the issue of informed consent was unwarranted where those "alternatives" remained merely theoretical, and were not, in reality and in practical terms, options for the particular patient in light of the advanced stage of his impairment.
7. A judgment notwithstanding the verdict and a new trial on damages will not be granted where the issue of whether the patient was given all material information and reasonable and realistic alternatives was one for the jury to decide; the jury weighed the testimony and found that the patient had indeed been given all material information which a reasonable patient in his situation would consider important or significant in deciding whether to have surgery.

*Richard H. Wix, Esquire, Counsel for Plaintiff*

*Lee A. Ciccarelli, Esquire, Counsel for Defendant*

OPINION AND ORDER OF COURT

Herman, J., October 6, 1997:

INTRODUCTION

Plaintiff John R. Zullinger filed a malpractice action against defendant V.A.R. Kumar, M.D. Zullinger alleged that Dr. Kumar

was liable for battery under the doctrine of informed consent and that Dr. Kumar rendered negligent treatment of Zullinger's carpal tunnel syndrome. The Court denied Zullinger's motion for a directed verdict. A jury returned a verdict in favor of Dr. Kumar on both counts. Zullinger filed a motion for judgment notwithstanding the verdict on the issue of informed consent and for a new trial limited to the issue of damages. The trial record was transcribed and counsel submitted briefs. This matter is ready for a decision.<sup>1</sup>

DISCUSSION OF THE EVIDENCE

Zullinger visited Dr. Kumar's office on June 16, 1994 complaining of numbness, tingling and weakness in his hands. Zullinger had a history of arthritis. Dr. Kumar diagnosed Zullinger, a retired 77-year-old Navy Captain, with bilateral carpal tunnel syndrome. Dr. Kumar operated on Zullinger's left hand on June 21, 1994. Surgery on the right hand was to follow at a later date. His left hand was in satisfactory condition during an office visit on June 28, 1994; there was no swelling or infection and he was able to move his hand and fingers. He had minor stiffness in his wrist which Dr. Kumar testified was a normal and temporary result of the incision. Dr. Kumar removed the sutures on July 5, 1994. Zullinger flew to California a few days later.

Following the flight, Zullinger developed swelling, pain and stiffness in his left hand and wrist. He was examined at a California hospital in July. Upon his return to Pennsylvania, he began physical therapy under the care of orthopedic physicians. Zullinger alleged he suffers from permanent discomfort, stiffness and loss of grip in his left hand. At trial he maintained Dr. Kumar did not discuss alternative treatments with him or advise him that such symptoms could result from the surgery.<sup>2</sup>

<sup>1</sup>In his motion for post-trial relief, Zullinger sought a new trial on the additional ground that the jury's verdict for Dr. Kumar on the issue of negligence was against the weight of the evidence. Zullinger did not pursue that issue in his brief and therefore we deem it waived.

<sup>2</sup>Zullinger also claimed his condition is the result of Dr. Kumar's failure to provide post-operative therapy. That claim is not the subject of this post-trial motion.

Medical testimony was presented by Zullinger's expert Perry Eagle, M.D., Dr. Kumar's expert William H. Kirkpatrick, M.D., and Dr. Kumar himself. These witnesses agreed that, as a general proposition, alternatives to surgery do exist for the treatment of carpal tunnel syndrome. These include anti-inflammatory medications, splints, chiropractic treatment and physical therapy. Dr. Kumar testified that he did not discuss non-surgical treatments with Zullinger because they were not viable alternatives in light of the advanced stage of Zullinger's carpal tunnel syndrome:

**Q:** Now, and isn't it true with Mr. Zullinger you did not discuss with him any alternatives to surgery, did you, sir? **A:** Because of the nature of the problem. If you see the EMG nerve conduction was six milliseconds that is too far advanced to give him any other type of recommendation. **Q:** Well, the answer to my question is you did not discuss any alternative procedures with him, did you, sir? **A:** No. That was the only procedure was the decompression to get the nerve back.

(N.T. May 27, 1997, pp. 79-80; 81-85). Dr. Kirkpatrick concurred that surgery was the only reasonable treatment for a patient in Zullinger's condition.

Zullinger also contended that Dr. Kumar did not advise him that permanent stiffness was a possible result of surgery. Dr. Kumar explained to Zullinger that the carpal tunnel syndrome in the left hand and wrist was in a very advanced stage and therefore he could not guarantee the surgery would be completely successful. Dr. Kumar also told Zullinger that at least six months might pass before he saw significant improvement.<sup>3</sup> Dr. Kumar did not discuss stiffness with Zullinger because Zullinger was not complaining of stiffness; he

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<sup>3</sup>Zullinger signed an informed consent form before the surgery: "The nature and purpose of the operation and/or procedures, possible alternative methods of diagnosis or treatment, the risks involved, the possibility of complications and the consequences of the operation or procedures have been fully explained to me. I acknowledge that no guarantee or assurance has been made as to the results that may be obtained." (Defendant's exhibit #2).

complained initially only of numbness, tingling and loss of grip. (N.T. May 27, 1997, p. 91). Furthermore, Dr. Kumar testified that permanent post-operative stiffness is not normally a complication of carpal tunnel syndrome surgery unless a patient tears tissue due to excessive lifting, an activity which Dr. Kumar specifically told Zullinger not to do. (N.T. May 29, 1997, pp. 34-35; 44).

Question #1 on the verdict slip was: "Did Defendant V.A.R. Kumar, M.D., obtain the informed consent of Plaintiff, John R. Zullinger, prior to surgery?" The jury found that Dr. Kumar did obtain Zullinger's informed consent.

#### DISCUSSION OF THE LAW

Dr. Kumar preliminarily argues Zullinger waived his right to allege the Court erred in denying him a directed verdict. Both counsel submitted proposed points for charge to the Court in advance of trial which included a charge for a directed verdict. During a conference with counsel upon the close of the evidence, the Court denied both parties' motions. Dr. Kumar argues Zullinger is barred from alleging Court error because he did not place an exception formally on the record. We disagree because we specified during the conference that counsel would be deemed to have preserved an exception to any refused points for charge. Under those circumstances, it is appropriate that we consider Zullinger's arguments on the merits.

A directed verdict should be granted only where the evidence is insufficient to support the plaintiff's cause of action. A directed verdict should not be granted if a question of fact exists which must be determined by the jury. In deciding whether to direct a verdict, the Court must consider the facts in the light most favorable to the non-moving party. The non-moving party is entitled to the benefit of every fact and inference which may reasonably be deduced from the evidence. A directed verdict should be granted only if a jury could not reasonably conclude that the elements of the cause of action have

been established. *Arta, Inc. v. Ryan Corp.*, 110 Pa. Commw. 1, 531 A.2d 857 (1987); *Dible v. Vagley*, 417 Pa. Super. 302, 612 A.2d 493 (1992).<sup>4</sup>

A physician who does not obtain a patient's informed consent before pursuing medical treatment is liable for battery. The fact that the physician's treatment fell within the standard of care, i.e., was not negligent, is irrelevant to whether the patient gave his informed consent to the procedure. *Gray v. Grunnagle*, 423 Pa. 144, 223 A.2d 663 (1966). The purpose of the doctrine of informed consent is to maintain a balance between the patient's right to decide what medical treatment to receive, and the need to relieve the physician from a mechanical duty to disclose every risk lest he be liable for battery. *Gouse v. Cassel*, 532 Pa. 197, 615 A.2d 331 (1992); *Stover v. Association of Thoracic and Cardiovascular Surgeons*, 431 Pa. Super. 11, 635 A.2d 1047 (1993).

A physician or surgeon need not disclose all known information; however, the physician or surgeon is required to advise the patient of those *material facts, risks, complications and alternatives to surgery that a reasonable person in the patient's situation would consider significant in deciding whether to have the operation.* Thus, the patient is assured that he will be provided with "all the material facts from which he can make an intelligent choice as to his course of treatment, regardless of whether he in fact chooses rationally."

*Gouse v. Cassel*, 532 Pa. at 203, 615 A.2d at 334 (1992) (citations omitted; emphasis added). At trial, a plaintiff in an informed consent case may present information about treatment alternatives which the physician did not discuss with the patient. It is then for the jury to decide whether that information would have been of material importance to the reasonable patient in choosing a course of action. *Stover*, supra.

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<sup>4</sup>The standard used for reviewing the denial of a motion for a directed verdict is the same as that used to review a judgment notwithstanding the verdict. *Moure v. Raeuchele*, 387 Pa. Super. 127, 563 A.2d 1217 (1989).

It was undisputed that the carpal tunnel syndrome in Zullinger's left hand was severe. At trial Dr. Kumar acknowledged the general proposition that non-surgical treatments exist for carpal tunnel syndrome. However, he and Dr. Kirkpatrick steadfastly maintained that those "alternatives" remained merely theoretical in Zullinger's case; they were not, in reality and in practical terms, options for Zullinger as a particular patient in light of the advanced stage of his impairment.

We disagree that a directed verdict was appropriate in this case. After hearing the evidence and reviewing Zullinger's proposed points for charge, we were not convinced that as a matter of law Dr. Kumar was required to give Zullinger a rote or mechanical dissertation on forms of treatment which would have been futile to pursue. Regarding the motion for judgment notwithstanding the verdict, the issue as to whether Zullinger was given all material information and reasonable and realistic alternatives was one for the jury to decide. *Gouse*, supra; *Stover*, supra. The jury weighed the testimony of Dr. Kumar, Dr. Kirkpatrick and Dr. Eagle and found that Zullinger had indeed been given the material information which a reasonable patient in his situation would consider important or significant in deciding whether to have surgery. Zullinger's post-trial motion for judgment notwithstanding the verdict and for a new trial on the issue of damages will be denied. An appropriate Order of Court will be entered as part of this Opinion.

#### ORDER OF COURT

NOW this 6th day of October, 1997, the post-trial motion for judgment notwithstanding the verdict and for a new trial filed by the plaintiff John R. Zullinger is hereby DENIED.