

**Kuhar v Sherman**

2008 NY Slip Op 32096(U)

July 25, 2008

Supreme Court, New York County

Docket Number: 0103908/2006

Judge: Alice Schlesinger

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SCANNED ON 7/28/2008  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

PART IA Part 16

Index Number : 103908/2006  
**KUHAR, DAVID**  
vs.  
**SHERMAN, ORRIN, M.D.**  
SEQUENCE NUMBER : 001  
TRIAL DE NOVO

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION

**FILED**

JUL 28 2008

COUNTY CLERK'S OFFICE  
NEW YORK

JUL 25 2008

Dated: \_\_\_\_\_

*Alice Schlesinger*  
ALICE SCHLESINGER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
DAVID KUHAR,

Plaintiff,

Index No. 103908/06

-against -

ORRIN SHERMAN, M.D.,

Defendant.

-----X  
SCHLESINGER, J:

**FILED**

JUL 28 2008

COUNTY CLERK'S OFFICE  
NEW YORK

On April 24, 2008, the jury hearing this medical malpractice case resolved it in favor of the defendant, Dr. Orrin Sherman, a well-credentialed and experienced orthopedic surgeon. The controversy in issue concerned a November 6, 2003 surgery performed on David Kuhar to resect a horizontal cleavage tear in his right knee which was seen on a diagnostic MRI performed on September 9, 2003.

Two questions were submitted to the jury on the interrogatories. The first dealt with the issue of informed consent. The jury found, in answer to question 1(a) that Dr. Kuhar (the plaintiff himself is a physician) had not been provided with appropriate information from Dr. Sherman before consenting to the surgery. This was not a particularly surprising result since the defendant had acknowledged that he had not told his patient that his knee could get worse as a result of the surgery. He did not inform him of this because he felt that this was not a reasonably foreseeable risk of the procedure.

However, in response to question 1(b), the jury stated in a 5-1 vote that, despite the failure to impart all the appropriate information, a reasonably prudent person in David Kuhar's position at the time consent was given to the surgery would have consented to the surgery if properly informed.

The one departure question dealt with the advisability of doing the surgery. This issue concerned itself, to a large extent, with whether or not, Kuhar had made any complaints of pain to the lateral part of his knee, in addition to pain in the patella.

Kuhar insisted he had not but Sherman testified that in two telephone conversations with Kuhar, the latter had added these complaints to the others he had made during the past year. The calls were to discuss the results of the MRI and to decide how to proceed.

It was the plaintiff's position, as articulated by his expert and actually agreed to by Dr. Sherman himself, that an asymptomatic miniscus should be left alone, despite a large tear in it, as documented by the MRI.<sup>1</sup>

The problem was that Sherman never documented these new complaints in his records. Therefore, the jury had to decide this question, to a large extent on the credibility of the parties. Dr. Kuhar's knee did get worse after this surgery and pursuant to the proof, he underwent two additional surgeries and an extremely altered lifestyle.

Before me now is a motion by plaintiff pursuant to CPLR 4404 to set aside the verdict and enter judgment in his favor or alternatively grant him a new trial. The defendant strongly opposes. The defendant's position is the more persuasive.

On the issue of informed consent, counsel argues that there is nothing in the record that contradicts or renders unbelievable plaintiff's testimony that he would have undergone surgery had he been informed of all the risks.

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<sup>1</sup>Despite the defendant's agreement with Kuhar's expert Dr. Christopher Cassels on this point, his own expert, Dr. George Zambetti opined that surgery was indicated with or without symptoms for someone of Kuhar's age and activities.

However, on this point, Kuhar's trial testimony as to what he would have done if additional information about an unlikely poor result had been given to him, while relevant, is not dispositive. The question asked is what a reasonably prudent person in his position would have done. On this question, defendant's counsel argues that the jury could have rationally concluded based on various theories that Dr. Kuhar, as a reasonably prudent person, would have undergone the arthroscopy, even with the information that his knee could get worse.

For example, the jury may have inferred that Dr. Kuhar, as a physician himself, had to know and consider that a poor result could occur but since this was unlikely would have proceeded. Or they may have concluded that Dr. Kuhar's love of running and active lifestyle was so important to him that balanced against the possibility of a poor result, he would have agreed to the surgery. Or alternatively they may have found that since all conservative options had been tried and had failed, that again balanced against the unlikely result of a worsening of his knee, Dr. Kuhar would have proceeded with the surgery. In other words, there was evidence in the record that Dr. Kuhar would have consented to the surgery, even if he had been told about a possible poor outcome and even though he testified to the contrary.

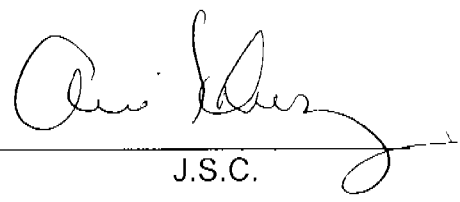
As to the advisability or not of the surgery itself, as mentioned above, that question was resolved not only on an evaluation of the competing opinions of the proffered experts, but also largely on whether the jury believed that Dr. Kuhar had in fact made additional, relevant complaints to Dr. Sherman in the period before the surgery was planned. The response to 2(a) therefore, finding that the defendant had not departed from acceptable surgical standards in proceeding with the surgical procedure, had a rational basis in the

evidence.

The other arguments made by moving counsel, as to striking Dr. Zambetti's testimony and as to the Court's response to a jury note simply have no merit.

Therefore, based on the above, the motion to set aside the verdict is, in all respects, denied.

Dated: July 25, 2008  
**JUL 25 2008**

  
\_\_\_\_\_  
J.S.C.

**ALICE SCHLESINGER**

**FILED**  
JUL 28 2008  
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