

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001036-MR

RUBY OLIVER AND FELIX L. OLIVER

APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 94-CI-002797

SIBU P. SAHA, M.D., AND
CARDIOVASCULAR AND THORACIC
ASSOCIATES, PSC

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, COMBS, and McANULTY, Judges.

McANULTY, JUDGE: Ruby (Ruby) and Felix (Felix) Oliver, both proceeding pro se, appeal from the March 30, 1998, trial judgment and verdict dismissing their medical malpractice suit with prejudice and from the April 7, 1998, order overruling their motion to set aside verdict and for a new trial. A unanimous jury found that the defendant, Sibü Saha, M.D., did not fail to perform his duty to inform Ruby of the risks of the surgical operation and of any alternative procedures which were medically available or his duty to exercise the appropriate degree of skill in his treatment of Ruby. Having reviewed the trial court record, and the parties' respective briefs, we find no error. Therefore, we affirm.

At the outset of this opinion, the Court notes that Ruby attached several exhibits to her brief which were not presented to the jury at trial. Because those "exhibits" are not a part of the record on appeal, they have been disregarded in our consideration of the merits of the appeal. Croley v. Alsip, Ky., 602 S.W.2d 418 (1980).

This lawsuit arose as a result of a November 1, 1993, surgery to remove what was later identified as a mediastinal cyst from below Ruby's clavicle. Prior to the surgery, Ruby and her husband, a licensed and practicing radiologist, met with Dr. Saha to discuss Ruby's condition and future treatment. Ruby neither sought a second opinion, nor did she ask or seek to ask any questions of Dr. Saha regarding the proposed surgery. On October 31, 1993, prior to surgery, Ruby signed an operative permit form in the presence of a witness which stated in part that:

5. I have talked to the above named doctor and he has explained to my satisfaction the nature and purpose of the operation, with possible alternative methods of treatment as well as complications. No guarantee or assurance has been given to me by anyone as to the results that may be obtained by surgery or anesthesia.

Drs. Saha, Rogers, Earle, and Wilcox were the named physicians on the operative permit form. The following day, Dr. Saha performed a thorocotomy, which is an invasive procedure, to remove the mass. She sustained one (1) broken rib in the course of the operation.

Following this procedure, Ruby developed a condition known as post-thorocotomy pain syndrome and has continued to experience pain.

Ruby and Felix filed a complaint on September 16, 1994, against Michael G. Estridge, M.D., Lexington Clinic, P.S.C., Siby P. Saha, M.D., and Cardiovascular and Thoracic Associates, P.S.C. for the failure to properly evaluate, diagnose, and treat the condition from which Ruby was suffering and that this failure caused Ruby to incur permanent injuries and damages. As to Dr. Saha in particular, the complaint alleged that he failed to disclose less invasive procedures, to properly treat the condition, to mention possible complications, or to obtain the proper informed consent. Felix's claim was for the loss of society and services of consortium of Ruby, his wife. The claims against Dr. Estridge and Lexington Clinic were later settled and dismissed. The claims against Dr. Saha and Cardiovascular and Thoracic Associates were not settled, and proceeded to a trial by jury from March 2 through March 5, 1998. Ruby and Felix were represented by counsel at trial.

At trial, both sides presented expert testimony regarding the appropriate procedure to follow in Ruby's situation and whether Dr. Saha obtained informed consent from Ruby for the operation. Ruby and Felix presented testimony that Dr. Saha should and could have performed a less invasive surgery (either a video-assisted thoroscopic surgery or a needle aspiration), and that Dr. Saha should have told Ruby of these other less invasive procedures available to her. Ruby argued that due to Dr. Saha's failure to tell her of the other options available and the possible side effects of the procedure performed, she did not give an informed

consent for the thorocotomy. On the other hand, Dr. Saha presented testimony that a thorocotomy was the only viable option under the circumstances and that he did receive informed consent from Ruby for the proposed operation.

At the close of the evidence, the judge read the instructions and interrogatories to the jury. After reviewing the conflicting evidence presented at trial, the jury returned a unanimous verdict for the defense on both instructions. The lawsuit was dismissed with prejudice on March 20, 1998.

On March 30, 1998, Ruby and Felix moved to set aside the verdict and for a new trial. The grounds cited in the motion were a defense witness's contact with the jury during a break in the course of the trial, errors in the instructions relating to causation, and other errors at trial. Following an oral argument on the motion, at which time only the first two grounds were argued, Judge Overstreet orally overruled the motion from the bench and then issued and had entered a written order overruling the motion on April 7, 1998. This appeal followed.

Ruby's brief filed in support of her appeal to this Court appears to be a recitation of the contested matters presented to the jury, along with some statements which are admittedly not a part of the record on appeal. The appellees have argued that this Court should not disturb the jury verdict and that Ruby and Felix have failed to present any error committed by the trial court in their brief. We agree with the appellees.

It is well settled in Kentucky that a reviewing court may not usurp the province of the jury and disturb its findings on

conflicting evidence. In Stewart v. Sizemore, Ky., 306 S.W.2d 821, 823 (1957), the Court stated that:

it is not within the province of the Court to usurp the prerogative of a jury and decide as a matter of law which set of witnesses is worthy of belief. A definite issue was developed on the point in question, which was supported by substantial competent evidence on behalf of each of the parties, and neither the trial court nor this one may exercise independent judgment in evaluating this particular testimony.

Id. at 823. Citing the Stewart case, the Court in Fields v. Baker, Ky., 329 S.W.2d 376 (1959), held that when there was evidence on each side that was substantial enough to go to a jury, a reviewing court could not usurp the prerogative of the jury and disturb its findings. In Horton v. Union Light, Heat & Power Co., Ky., 690 S.W.2d 382, 385 (1985), the Supreme Court stated that "an appellate court must not substitute its findings of fact for those of the jury if there is evidence to support them." In our review of the trial, we found substantial evidence presented at trial to support the jury's unanimous verdict. Therefore, we will not disturb the jury's findings.

Ruby also failed to present any errors of the trial court in her brief. "It is incumbent upon the litigant who seeks reversal of a trial court's judgement to demonstrate to an appellate court that the trial court has committed error which is prejudicial to the substantial rights of the litigant." Bingham v. Davis, Ky., 444 S.W.2d 123, 123 (1969). Citing Ballard v. King, Ky., 373 S.W.2d 591 (1963), this Court later ruled that "a reversing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." Milby v.

Mears, Ky.App., 580 S.W.2d 724, 727 (1979). Because Ruby failed to demonstrate that the trial court committed any error, her appeal must fail.

Based upon the foregoing, the judgment of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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