

NOT DESIGNATED FOR PUBLICATION

**LEONA WHITE-BARICE AND
GREGORY BARICE**

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NO. 2001-CA-0888

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**ROXANNE CATHERINE
COHEN, M.D. AND
LOUISIANA MEDICAL
MUTUAL INSURANCE
COMPANY (LAMMICO)**

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STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-13644, DIVISION "B-6"
Honorable Roland L. Belsome, Judge**

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., Judge Terri F. Love)

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AFFIRMED

Leona White-Barice and Gregory Barice brought this malpractice action against Dr. Roxanne Catherine Cohen (“Dr. Cohen”), and Louisiana Medical Mutual Insurance Company (“LAMMICO”), her liability insurer, for damages for alleged negligence on the part of Dr. Cohen who, while performing a total abdominal hysterectomy, inadvertently severed Mrs. Barice’s ureter. Following a settlement with Dr. Cohen, plaintiffs filed a motion to dismiss Dr. Cohen without prejudice but to reserve their right to proceed against the Louisiana Patient’s Compensation Fund (“LPCF”) for excess damages. After a three-day bench trial, the trial court rendered a verdict in favor of plaintiffs and against the LPCF. The LPCF now appeals claiming that the trial court erred in finding that Dr. Cohen breached the standard of care by severing Mrs. Barice’s ureter. For the reasons that follow, we affirm.

FACTS

On January 16, 1997, Mrs. Barice visited Dr. Cohen with complaints of fibroid tumors and heavy bleeding. Dr. Cohen performed an ultrasound on Mrs. Barice and suggested that Mrs. Barice have a total abdominal

hysterectomy. On that same day, Mrs. Barice agreed to the surgery and signed the surgical consent forms.

On January 21, 1997, Mrs. Barice underwent a total abdominal hysterectomy at Meadowcrest Hospital. Dr. Cohen, with Dr. Ralph Lupin assisting, performed the surgery. In Dr. Cohen's operative report, she noted, in pertinent part:

The uterus was found to be approximately fourteen to sixteen weeks size and extremely irregular due to numerous fibroids. Four fibroids were shelled out with a combination of blunt and sharp dissection thus making it possible to carry out the hysterectomy.... So at this point, the uterus, cervix, tubes, and ovaries were all removed. The vaginal cuff was found to a slight laceration in the anterior portion. This was sutured separately with 00 vicryl suture in a running locked stitch. Each of the angles were sutured separately and the vaginal cuff was then closed with a running locked 00 vicryl suture. Several small bleeding points were sutured and brought under control with Bovie coagulation. Surgical was placed over the bladder area.

Mrs. Barice was discharged on January 23, 1997.

On January 27, 1997, Mrs. Barice testified that she called Dr. Cohen to inform her that she was leaking urine from her vagina. Later that day, Dr. Sergio Castillo then saw Mrs. Barice. Dr. Castillo's medical records indicate that Mrs. Barice complained that "she was doing well until yesterday – after-straining – started noticing fluid coming out of the vagina – getting wet – smelled like urine." Dr. Castillo performed a speculum exam of the vagina,

which revealed clear fluid, without bleeding. Dr. Castillo also performed a methylene blue test. Although 200 cc's of urine with methylene blue was obtained, none was seen in the vagina; however, a large amount of clear fluid continued to drain from the vagina. Dr. Castillo then performed an intravenous pyelogram ("IVP"), which revealed "obstruction of the left ureter with left-sided hydronephrosis and hydroureter. No definite evidence of extravasation of contrast outside the urinary system was seen." On January 29, 1997, Mrs. Barice was admitted to Meadowcrest Hospital. Dr. Ahmed Fawzy and his assistant, Dr. Fontenot, performed a three cotton test, cystoscopy and bilateral retrograde pyelogram and vaginoscopy. The operative report indicated that the final impression was that Mrs. Barice had a "left ureterovaginal fistula."

On January 30, 1997, Dr. Joseph Macaluso, Jr., and his assistants, Drs. Fawzy and Fontenot, performed a left percutaneous nephrostomy placement, a left antegrade nephrostogram, and an attempted left antegrade stent placement. Dr. Fawzy, assisted by Drs. Deutsch and Fontenot, then performed a left ureteroneocystostomy and placement of a left ureteral stent. Mrs. Barice was discharged on February 4, 1997, with a suprapubic tube in place.

On February 14, 1997, Dr. Fawzy removed Mrs. Barice's suprapubic tube. Thereafter, on February 25, 1997, Dr. Cohen examined Mrs. Barice and found no leakage. On March 6, 1997, Dr. Fawzy performed a cystoscopy with stent removal as an outpatient procedure.

Mrs. Barice subsequently saw Dr. Cohen on March 3, 1997, May 9, 1997, and June 4, 1997. On September 26, 1997, Mrs. Barice had another IV,

which was normal. On November 7, 1997, Mrs. Barice also had a renal ultrasound, which was normal. Mrs. Barice's last visit with Dr. Fawzy was on November 7, 1997. **PROCEDURAL HISTORY**

On September 17, 1997, Mrs. Barice filed this medical malpractice complaint with the Louisiana Patients' Compensation Fund against Drs. Cohen, and Lupin. Her complaint was presented to a medical review panel composed of three Obstetrics and Gynecologist: (1) Dr. L. Lewis Wall, (2) Dr. James C. Bellina, and (3) Dr. Neil Wolfson.

On June 8, 1998, the Medical Review Panel found that the evidence did not support the conclusion that the defendants, Drs. Cohen and Lupin, failed to meet the applicable standard of care as charged in the complaint; however, the panel did find that there was a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court.

The panel made the following five findings:

1. The patient was adequately informed.
2. The surgery was necessary based upon the patient's presenting signs and symptoms.
3. The injury was sustained as a result of the surgery.
4. The patient experienced a complication which was recognized and she was referred to the proper specialist for treatment.
5. There was a lack of documentation in this case, in that the operative report does not mention that the ureters were searched for and identified, this is a factual question.

Plaintiffs filed this malpractice suit on August 4, 1998. After considering the law and evidence, the trial judge found that Dr. Cohen was

negligent. In his reasons for judgment, the trial judge stated, in pertinent part:

After hearing the testimony, arguments of counsel and subsequently reviewing relevant pleadings and depositions, this Court holds that the Defendant committed malpractice by failing to visualize and identify the natural course of the ureter in this patient. By failing to take these steps Dr. Cohen was unaware of the course of the ureter while she proceeded with Mrs. Barice's hysterectomy. Dr. Cohen's Operative Report from Mrs. Barice's hysterectomy did not make any mention of these steps being taken and Dr. Cohen admitted in her testimony that she was unable to recall whether these steps were taken. This Court finds Dr. Cohen fell below the standard of care by not taking the necessary steps to assure the ureter was protected throughout the surgery. As a result of Dr. Cohen's negligence Mrs. Barice's ureter was damaged. Mrs. Barice had to undergo additional surgery to correct the damage caused in the first surgery performed by Dr. Cohen.

The damaged ureter caused Mrs. Barice months of discomfort and embarrassment. Even today Mrs. Barice continues to complain of discomfort while having sex and in her own words is convinced "something is going to fall out" of her. This reality is further demonstrated by the fact she is afraid to have any physician examine her female organs.

The trial judge awarded Mrs. Barice \$150,000.00 for general damages and \$45,511.83 for special damages. The trial judge further awarded Mr. Barice \$50,000.00 in special damages. The judgment is subject to a \$100,000.00 credit owed to the Louisiana Compensation Fund.

DISCUSSION

The Louisiana Patient's Compensation Fund briefed nine assignments

of error, arguing that the trial court erred in: (1) finding in favor of plaintiffs; (2) finding any actionable negligence or fault on the part of Dr. Cohen; (3) finding any legal or casual connection between the alleged negligence or fault of the surgeon and the alleged injury and/or damages; (4) finding that “Dr. Cohen admitted in her testimony that she was unable to recall whether” she visualized and identified the natural course of the ureter in Mrs. Barice; (5) finding that Dr. Cohen committed malpractice and/or that she did so by “failing to visualize and identify the natural course of the ureter” in Mrs. Barice; (6) finding that Dr. Cohen was “unaware” of the course of the ureter while she proceeded with Mrs. Barice’s hysterectomy, because of her “failing” to visualize and identify the natural course of Mrs. Barice’s ureter; (7) finding that “Dr. Cohen fell below the standard of care by not taking the necessary steps to assure the ureter was protected throughout the surgery;” (8) finding that Mrs. Barice’s ureter was damaged “as a result of Dr. Cohen’s negligence;” and (9) denying defendant’s Motion for New Trial.

The thrust of defendant’s arguments goes to the issue of whether plaintiffs satisfied their burden of proof. In a medical malpractice case, the plaintiff’s burden is statutorily set forth in La. R.S. 9:2794(A), which provides:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians, dentists, optometrists, or chiropractic physicians licensed to practice in the state of

Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians, dentists, optometrists, or chiropractic physicians within the involved medical specialty.

(2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill.

(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

At trial, plaintiffs argue that Dr. Cohen breached the standard of care by injuring Mrs. Barice's ureter, which caused the formation of a fistula that required three additional surgeries. In support, plaintiffs offered the expert testimony of Dr. Ronald Young, and Dr. L. Lewis Wall.

Dr. Ronald Young

Dr. Young, the chief of gynecology at Baylor College of Medicine in Houston, testified that he found a couple of areas that troubled him a little bit when he was asked to look at this case. Specifically, Dr. Young testified that Dr. Cohen's documentation was inadequate as to the bladder flap and the ureters, and that either one of those could have led to the type of injury at issue. As to the bladder flap, Dr. Young testified that Dr. Cohen says she cut a bladder flap but then abandons that whole part of the operation.

Consequently, Dr. Young does not know how Dr. Cohen “took the bladder down, whether she did it the way we do it, the way we teach it or whether she did it the old fashioned way and whether doing it the old fashioned way contributed to the injury.” As to the ureters, Dr. Young testified that it is his practice to describe the ureters as “either palpated, visualized or dissected.”

Dr. Young testified that Mrs. Barice’s surgery was a difficult case.

Specifically, Dr. Young stated:

It was a case compounded by obscuring fibroids. She [Dr. Cohen] describes the fact that she couldn’t even proceed with the case until she had done some oscillation procedures in which the fibroids were taken out independently of the uterus. There’s another worrisome track in there in which she describes a vaginal injury which is repaired and again ... there’s no definitive description where that is....

Dr. Young further testified that when a ureter is dissected out, “you obviously are not dissecting the entire ureter from the kidney to the bladder.” Rather, “you’re looking for a portion of the ureter not only to identify if there’s an injury in that particular area where you happen to gain access to the ureter but looking at the ureter can give you a lot of – it can give you an impression as to the function of the ureter.” As Dr. Young further explained:

Let’s say you cut down to a portion of the ureter that you can visualize with your eyes and you don’t know that the ureter has been crushed or blocked or sutured lower than that. Then the fact that the ureter isn’t peristalsing, it isn’t functioning or it’s swelling, there’s a lot of things you can learn about injuries

to the ureter by looking at a healthy portion of the ureter and not necessarily the injured portion of the ureter.

Thus, even though there is a blinded area in the lower portion of the pelvis whereby dissection is rarely carried out, Dr. Young testified that a doctor can gain a lot of insight about the ureter by just looking at a healthy portion of the ureter.

Dr. Young also testified that whether or not Dr. Cohen violated the standard of care in this case is a factual determination to be determined by a jury.

Dr. L. Lewis Wall

Dr. Wall, an expert in the field of obstetrics and gynecologic medicine, testified that Mrs. Barice's ureter was damaged during the course of the hysterectomy. Dr. Wall testified that the ureter could have been injured when Dr. Cohen sutured the laceration on the vaginal cuff.

Specifically, Dr. Walls stated:

The vaginal cuff refers to the portion of the vagina through which the cervix enters the vagina and as the cervix is removed, that area of the vagina is cut open so that there is an opened hole, if you will, in the top of the vagina. There are little blood vessels that run along the edge of the vaginal cuff and they may very well bleed and require additional sutures or other things to be done to control the bleeding.

Because of the nature of female anatomy, the urinary bladder rests on the cervix, the upper vagina and the lower portion of the uterus and it must be peeled off of the uterus to

perform a hysterectomy. It must also be peeled down slightly off of the vaginal cuff in order to open the vagina without injuring the bladder.

The ureters run along the lateral edges, the side edges, of the vagina as they swing into the bladder and, therefore, if you are placing extra sutures along the vaginal cuff, you must be careful not to avoid putting a suture into the bladder or a suture through a ureter. That's just a fact of the way the anatomy runs.

Dr. Wall further testified that the question of whether Dr. Cohen exercised care in looking for the ureter is a question that the jury will have to decide based upon what is presented to them, and that he could not comment further regarding the injury.

At trial, Dr. Roxanne Catherine Cohen testified on her own behalf. Additionally, Defendants offered the expert testimony of Drs. Neil Wolfson, James Bellina, and James Bohm.

Dr. Roxanne Catherine Cohen

Dr. Cohen testified that the signs she would look for, if she suspected that the ureter was damaged, are whether the ureter was actually swollen, if the ureter wiggles, and whether there is blood in the urine. Dr. Cohen also testified that she visualized the ureters during the hysterectomy.

On cross-examination, Dr. Cohen testified that she did not remember how she moved the bladder out of the way during the hysterectomy. When asked whether she used a combination of blunt and sharp dissection to remove the bladder, Dr. Cohen testified, "I don't remember. But I normally

do a sharp dissection.” Dr. Cohen also testified that in the course of the hysterectomy, she had to repair a tear in the vaginal cuff. When asked the first time where the laceration was, Dr. Cohen testified that she did not remember; however, later she testified that the laceration was in the anterior portion of the vagina. Dr. Cohen then testified that a ureter could be near the anterior portion of the vagina, and that she was sure she was being careful to stay away from the bladder and the ureter; however, Dr. Cohen testified that she did not use the word “ureter” at all in her operative report.

Dr. Neil Wolfson

Dr. Wolfson, an expert in the field of obstetrics and gynecology, testified that in his opinion “the injury occurred just proximal to the bladder.” He also testified that the ureter could not be visualized at the time of Mrs. Barice’s injury.

On cross-examination, Dr. Wolfson testified that he disagreed with the opinions of Dr. Young and Dr. Wall that Mrs. Barice’s injury could have occurred when Dr. Cohen was sewing up the lacerations in the vaginal cuff. Specifically, Dr. Wolfson testified that, for the most part, the ureter is in the body of the bladder itself and that, “when one has an anterior laceration, that anterior laceration would not be near that area [the ureter].”

Dr. James Bellina

Dr. Bellina, an expert in the field of obstetrics and gynecology, opined that the injury occurred “deep down” in the pelvis, “close to the bladder.” He testified that the bladder flap had nothing whatsoever to do with the injury to the ureter.

On cross-examination, Dr. Bellina testified that he agreed with Dr. Young’s testimony that there is an increased risk of ureteral injury depending on how [whether by blunt or sharp dissection] the bladder is moved during the hysterectomy. He also testified that the ureteral injury could have inadvertently been caused while sewing up the laceration in the vaginal cuff. Further, Dr. Bellina testified that it is still his opinion that “there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration of the court.”

Dr. James Bohm

Dr. Bohm, an expert in the field of obstetrics and gynecology, opined that the injury occurred “where the ureter ducks under the major vessels that supply the blood supply to the uterus.” He testified that the ureter was injured “once the uterus was amputated, because to get it out of the way so the doctor can see better, they lift it up to remove the cervix.” Dr. Bohm also testified that even if Dr. Cohen had inadequately dissected the bladder

flap, “it would have nothing to do with the ureteral fistula.”

On cross-examination, Dr. Bohm testified that he agreed with Drs. Wall and Young that the injury could have occurred when Dr. Cohen was sewing up a tear to the vaginal cuff.

The testimony above indicates that the medical experts’ opinions differed as to where or how Mrs. Barice’s ureteral injury occurred. The experts are in agreement that the injury occurred in an area where Dr. Cohen could not directly visualize the ureter; however, Dr. Young testified that “there’s a lot of things you can learn about injuries to the ureter by looking at a healthy portion of the ureter and not necessarily the injured portion of the ureter.” None of the medical experts could testify as to what Dr. Cohen did in terms of identifying or protecting the ureters because Dr. Cohen failed to mention the ureters in her operative report. Consequently, three of the five expert witnesses, namely Dr. Young, Dr. Wall, and Dr. Bellina, testified that whether Dr. Cohen violated the standard of care was a factual determination to be determined by a jury.

The trial court heard the experts’ differing opinions on how and where the ureteral injury occurred, and the trial court made the factual determination that Dr. Cohen violated the standard of care when she damaged Mrs. Barice’s ureter during the hysterectomy. This court may not

set aside the trial court's findings of fact absent manifest error. *Stobart v. State through Dept. of Transp. and Development*, 617 So.2d 880, 882 (La. 4/12/93). Thus, this Court is not to decide whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. *Id.* Even though this Court may feel that its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Id.*

Applying this deferential standard, we cannot say from our review of the record that the trial court was manifestly erroneous in its finding that Dr. Cohen fell below the standard of care by not assuring the ureter was protected throughout the surgery. Accordingly, we affirm the judgment of the trial court, which found in favor of Mrs. Leona White-Barice and Mr. Gregory Barice.

AFFIRME

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