

6008 - Medical Negligence - The plaintiff, an elderly woman, suffered a bowel injury during an elective hernia surgery and it was not discovered until 10 days later – in the interim the leakage from bowel led to a cascade of complications including a lengthy hospitalization, multiple surgeries and ultimately sepsis related blindness – in this lawsuit the plaintiff blamed her surgeon (a medical clinic employee) for the initial injury and then also that surgeon and another one covering for him for failing to appreciate the injury in a timely fashion – in an awkward verdict form the jury found the medical clinic at fault because of the negligence of its two employees

Duff v. Graves-Gilbert Clinic, 14-665

Plaintiff: Chadwick N. Gardner and

John C. Grey, II, *Gardner Law*, Prospect

Defense: Frank Hampton Moore, Jr.,

Cole & Moore, Bowling Green

Verdict: \$21,310,887 for plaintiff

Court: **Warren**

Judge: Steve Wilson

Date: 7-29-22

Alice Duff, then age 75, underwent an elective hernia surgery on 5-31-13 at the Graves-Gilbert Clinic. It was performed by a surgeon, Dr. Tage Haase. Haase is a clinic employee. Duff was expected to be hospitalized for a day.

The surgery was more complicated than initially expected and Duff was to be kept at the hospital a few more days. Her condition began to decline and her husband began to implore hospital staff to intervene. Duff was seen on the 8th day after the surgery by a second clinic employee, Dr. Timothy Wierson, Surgery. He saw her again the next day.

Finally on the 10th day post-surgery, Duff's husband prevailed on his wife's internist, Dr. Pravin Avula – Duff had flagged the internist down in the hallway. The internist ordered a CT scan. It revealed free air in Duff's abdomen.

Haase immediately took Duff in for a repair surgery. Haase identified that Duff's bowel was completely transected. Despite making a surgical repair, Duff endured a grueling downward cascade. She was hospitalized for most of the eight next months and underwent multiple abdominal surgeries. A septic infection (related to the initial bowel injury) entered her bloodstream and spread to her eye. It resulted in a retinal injury and despite some five surgeries on her eye, she is legally blind. She was once active but she can no longer drive and the Duffs rarely travel.

Duff filed suit against Haase and Graves-Gilbert Clinic and alleged negligence in her treatment. Haase was implicated (as a clinic agent) in initially injuring her bowel. The plaintiff explained this was not a case of a simple "nicked bowel" but instead it was fully transected. She argued this was either done in the surgery or it resulted because Haase looped a stitch around the bowel. This essentially strangled the bowel and led to the leakage.

Duff did not sue Wierson. However Wierson was blamed for his consult (as a clinic employee) as the on-call surgeon on 6-8-13 and 6-9-13. The plaintiff's case was that Duff had high white blood cell counts and other labs that indicated clearly she had an infection crisis. Had Wierson intervened at that time, the theory went, the crisis could have been minimized. Haase too was implicated for failing to promptly discover the injury.

The plaintiff's experts were Dr. Alan Kravitz, Surgery, Rockville, MD, Dr. Barbara Weakley-Jones, Pathology, Louisville and Dr. David Pombo, Infectious Disease, Hyannis, MD. Weakley-Jones opined that it was a looped stitch that caused the injury. Duff also developed causation for her eye injury and blindness from her treating ophthalmologist.

If Duff prevailed at trial she sought her medical bills of \$1,310,887. The jury could award her \$12,000,000 for her pain and suffering. This case was unusual in that the plaintiff had fully nine years of

pain and suffering since the surgery as contrasted to most cases that are tried in two to four years. She was then able to describe that to the jury and as well that now at 84, her own mother lived to be 93 – the notion was that she will continue to suffer for many more years.

Her husband (Lloyd) sought \$8,000,000 more for his consortium interest. Lloyd was a retired public works employee at the time of this incident and was just transitioning to a career as a funeral home director. He abandoned those plans and became his wife's caretaker.

The defendants (Graves-Gilbert and Haase) denied fault regarding the injury. Haase testified the bowel injury was created when a suture "sawed" through and created the injury. This was described as not being a violation of the standard of care – Haase flatly denied he'd cut the bowel himself. Duff thought the defense "suture as saw" theory was improbable and if it was true, why don't sutures do this all the time?

Graves-Gilbert further defended that its employee and non-party (Wierson) had complied with the standard of care in evaluating Duff on the 8th and 9th days after the surgery. The plaintiff countered that by the 7th day the signs of the crisis were evident. Moreover the defense argued there was no causation between the blindness and the bowel injury.

The defense experts were Dr. Curtis Bower, Surgery, Roanoke, VA, Dr. Jon Jansen, Surgery, Fishers, IN, Dr. George Nichols, Pathology, Louisville and Dr. Paul Cook, Infectious Disease (causation as to the eye injury), Greenville, NC. Bower's theory was slightly different than that of Jansen.

Bower thought it was likely the injury was caused by the stitch but in any event, even if Haase had looped the stitch and created the strangulation injury, this was not a standard of care violation. Jansen by contrast thought it would be error to loop the stitch . . .but in this case Haase had not done this. Nichols (pathology) didn't believe the bowel was completely transected.

This case was tried for seven days. The jury then deliberated for 45 minutes. The court's liability instruction was awkwardly worded. It asked if Graves-Gilbert, through its agents (Haase and Wierson) failed to comply with the reasonably competent surgeon/physician standard. However there was no individualized finding as to Haase or Wierson.

The instruction was set up either as a standard of care violation by one or both of them (the jury didn't have to specify which one or both it was) or it was no violation at all. The instruction was further odd as there was no apportionment between Haase or Wierson.

This jury answered the question by an 11-1 count that there was a violation of the standard of care. The plaintiffs then took all of their damages as claimed (medicals of \$1,310,887, Duff's pain and suffering of \$12,000,000 and \$8,000,000 more for her husband's consortium interest), all totaling \$21,310,887.

Judge Wilson initially entered a judgment against Graves-Gilbert only. It made no mention of Haase who was also a party-defendant. Duff moved the court to amend the judgment to impose it against Haase as well. The court did enter a second judgment and Judge Wilson made it even more clear – the verdict was against Graves-Gilbert only and Haase was not implicated.

The post-trial period has been exceptionally busy and a flurry of motions have populated the record. The motions have come so furiously it's difficult to keep them in order as the issues are overlapping. The discussion of those motions below (all are pending at the time of this report) is not necessarily in precise order.

First Judge Wilson's amended judgment has led to its own course of litigation. Graves-Gilbert has argued that if Haase was exonerated (as he was in the second judgment), then it too should be off the hook. How could Graves-Gilbert be liable for an agent who was exonerated?

Graves-Gilbert has also moved for a new trial. It has advanced several arguments. They include a purported thinly veiled "Golden Rule" violation by plaintiff's counsel in asking the jury to return a verdict for "all the Alices" and to "stand in her shoes." Graves-Gilbert also cited instruction error by the court in failing to have the instructions separate liability between Wierson and Haase and to make an apportionment finding. The motion alleged this led to an incomplete verdict. The clinic also thought the

large verdict was an impulse (the deliberations were less than an hour) and reflected that the jury's passions were inflamed.

Duff replied that her closing argument was proper and in any event, the defendant had not objected to it. She also believed any apportionment was waived as the clinic didn't seek such a charge, and in any event, the plaintiff only needed to sue the principal.

Duff also defended the damages as reasonable and looked to proof of how her life was dramatically altered. She further characterized the jury as sophisticated and attentive.

Duff too has presented a motion to file an amended complaint against the Graves-Gilbert med mal insurer, State Volunteer Mutual Insurance. The amended complaint alleges bad faith by the insurer in failing to offer any of its \$5,000,000 policy limits.

This case has also enjoyed the entry of new lawyers in the post-trial period. Daniel G. Brown and Robert J. Shilts of *Gazak Brown*, Louisville, have entered to additionally represent Graves-Gilbert. Haase has employed Craig L. Johnson and James N. Martin, Jr. of *Steptoe & Johnson*, Louisville. Christopher G. Johnson, *Frost Brown Todd*, Louisville, represents State Volunteer Mutual Insurance.

Where is *Duff v. Graves-Gilbert* presently? Judge Wilson has indicated a desire to fully resolve the case. He has set a mediation with himself and mediator Pete Palmer this November.

Case Documents:

[Plaintiff Pretrial Memorandum](#)

[Defense Pretrial Memorandum](#)

[Defense New Trial Motion](#)