

**CASE NO.: 16-CI-003504
(ELECTRONICALLY FILED)**

**COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
DIVISION SIX (6)
JUDGE OLU A. STEVENS**

PHILLIP CUNDIFF

PLAINTIFF

v.

PLAINTIFF'S TRIAL MEMORANDUM

DR. ALLEN CHENG, et al

DEFENDANTS

Comes the Plaintiff, Phillip Cundiff, by counsel and pursuant to Court's Civil Jury Trial Order dated August 7, 2017, submits the following memorandum of fact and law:

I. FACTS

Phillip Cundiff is a 73-year-old man. He retired from a 30-year career as an HVAC inspector with American Air Filter in approximately 2002. Following his retirement from American Air Filter, he then worked for Home Depot for eight years as a hardware salesman until retiring completely in 2010. Prior to the medical incident relevant to this case, which occurred in 2015, Mr. Cundiff was an extremely active person, and relatively healthy and fit for his age. He was an avid and regular golfer, and he also enjoyed yard work, cooking, and housework. He is married to his wife, Rebecca, and has an adult daughter and three grandchildren.

Mr. Cundiff underwent an open-heart quadruple bypass surgery on 7/24/15 in which the surgeon, Dr. Allen Cheng, purposefully left the patient's chest packed with sponges (with the chest partially open to allow swelling to subside) at the completion of the procedure. On 7/29/15, Dr. Cheng performed a second surgical procedure intended to remove all foreign objects from the chest cavity that were left behind from the initial procedure on 7/24/15. On this occasion, (7/29/15), several sponges were removed but Dr. Cheng was unsure if they were all accounted for. Dr. Cheng consulted with the on-call radiologist, Dr. Erik Dowden, who reviewed a chest X-ray of Mr. Cundiff and confirmed that there were no foreign bodies remaining inside Mr. Cundiff's chest. Dr. Cheng then closed the patient's chest.

Between 7/29/15 and 8/5/15, Mr. Cundiff failed to recover as expected. He failed to regain consciousness and his heart was not beating in a normal fashion. Mr. Cundiff continued to deteriorate with dangerously low blood pressure (hypotension). Dr. Cheng prescribed high-

dosage vassopressor medications to remedy the hypotension. Mr. Cundiff's fingers and toes began to turn black from loss of circulation and his kidneys ceased to function requiring dialysis. Neither Dr. Cheng nor anyone else could figure out the cause of the hypotension.

On 8/5/15, upon further review of a chest CT scan by another radiologist, Dr. Jason Yewell, two Ray-Tec surgical sponges were located inside the patient's chest on the left side of the patient's heart. These Ray-Tec's were immediately removed from the patient's body on 8/5/15 by Dr. Cheng. These sponges had been accidentally left in the patient's body by Dr. Cheng and the nursing staff. According the testimony of Plaintiff's medical expert, the retained sponges caused permanent kidney damage as well as gangrene of the fingers and toes requiring the eventual amputation of all ten toes and nine fingers. Mr. Cundiff will remain on kidney dialysis for the rest of his life and cannot walk unaided due to the loss of his toes, and cannot perform such basic daily tasks as bathing, zipping a zipper, using the toilet unaided, etc, due to the loss of his fingers. He is now wheelchair-bound and can no longer walk unaided. Mr. Cundiff is permanently disabled as a result of this incident and now resides in a nursing home.

In addition to lay witness testimony from Plaintiff's family and friends, Plaintiff expects to call one or more of the following experts – Irving David, M.D., Morgan Camp, M.D., Laura Lampton, R.N., Sarah Ferrell, RN, and Evangeline (Vangie) Dennis RN, – to establish liability and causation. Defendants are expected to call Imelda Wright, RN, Richard Freeman, M.D., Stephen Fadem, M.D., Defendant Dr. Allen Cheng, Baron Hamman, M.D., and Phillip Buescher, M.D. to rebut the criticisms of Plaintiff's experts.

According to the Plaintiff's experts, Dr. Cheng, the operating room staff, and the radiologists associated with the case all violated the standard of care in the manner in which they accounted for (or failed to account for) the retained sponges. This error caused two sponges to be inadvertently left in the patient's chest which led to the catastrophic injuries described above. According to the Defense experts, neither the nursing staff nor Dr. Cheng committed any error and the Plaintiff's injuries were completely unrelated to the two sponges which were left inside him.

The Plaintiff claims the following damages:

- A. *Past medical expenses: \$1,133,990.00*
- B. *Future medical expenses: \$7,003,867.00*
- C. *Past pain and suffering: \$10,000,000.00*
- D. *Future pain and suffering: \$5,000,000.00*
- E. *Lost Wages: None*

TOTAL DAMAGES: \$23,137,857.00

II. RELEVANT STATUTES & CASELAW

KRS § 411.182: KRS § 411.182 sets forth the procedure the Court must follow in instructing the jury on apportionment. The law states (in part): “In all tort actions...involving fault of more than one party to the action...the court shall instruct the jury to answer interrogatories...indicating... (1)(b) the percentage of the total fault of all the parties to each claim that is allocated to each claimant [or] defendant; and (2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.”

Please also note that there is currently a motion for partial summary judgment filed on behalf of Defendant Jewish Hospital/Kentucky One and a counter-motion filed by the Plaintiff as to the issue of the agency relationship of the radiologists to the hospital. *See Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). This issue has already been briefed and argued at length and is currently pending before the Court. The radiologists are not named parties to the case, therefore, the Court’s ruling on this issue will likely affect some of the arguments of the parties at trial, as well as the format of the jury instructions.

The issues of liability for and causation of Plaintiff’s injuries and damages are issues for trial, insofar as Plaintiff’s claims against Defendants are concerned. Specifically, the legal issues are whether: 1) Defendants failed to exercise that degree of care and skill expected of reasonably competent and prudent medical providers, acting under the same or similar circumstances as those in this case; and 2) whether such failure was a substantial factor in causing permanent injury to the Plaintiff. *See Andrew v. Begley*, 203 S.W.3d 165, 170–71 (Ky. Ct. App. 2006).

III. ISSUES FOR THE JURY

The jury will be called upon to decide the following issues:

- (1) Did Dr. Cheng violate the standard of care?
- (2) Did the O.R./Nursing staff violate the standard of care?
- (3) If the answer to #1 or #2 is yes, did the Defendants' negligence cause the Plaintiff's injuries?
- (4) What is the extent/value of the Plaintiff's damages?
- (5) How should fault be apportioned between the Defendants?

Respectfully submitted,

/s/ Andrew S. Epstein

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CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing has been filed on December 20, 2018 with the clerk of the Court via the Courtnet CM/ECF system which will send notice to all counsel of record. I further certify that a true and accurate copy of the foregoing was served via electronic mail to the below individuals on December 20, 2018.

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