

Kentucky Trial Court Review

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Medical Negligence - A forgotten sponge in a 2011 surgery was finally removed in 2016 – however the plaintiff, a diabetic underwent a below-the-knee amputation of her left leg because of a heel ulcer she developed while recovering from the surgery to remove the sponge – in this lawsuit she blamed hospital nurses and the vascular surgeon from the 2011 surgery as well as a second doctor who learned of the sponge in 2015 at an ER, but didn't tell the plaintiff, the sponge then being undiscovered for another 20 months – the jury assessed damages against the hospital nurses (they admitted fault) and the surgeon of \$9.5 million (the ER doctor was exonerated), the jury assessing \$1,000,000 more in punitives against the hospital nurses

Boerste v. U of L Hospital et al,
17-2453

Plaintiff: James M. Bolus, Jr., *Bolus Law Offices*, Louisville and Nicholas Mudd, *Mudd Legal Group*, Louisville
Defense: Karen L. Keith and Sara Clark Davis, *McMasters Keith Butler*, Louisville for U of L Hospital and Morris

Gerald L. Toner and Scott E. Burroughs, *O'Bryan Brown & Toner*,

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Louisville for Nunley
Verdict: \$10,500,000 for plaintiff assessed against U of L Hospital (60%) and Morris 10% – sum includes \$1,000,000 in punitives against U of L Hospital only; Defense verdict for Nunley on liability
Court: **Jefferson, J. Perry,**
12-13-19

Carolyn Boerste, then age 54, had suffered from diabetic complications for many years and underwent an aortobifemoral bypass on 3-10-11 at University of Louisville Hospital. The procedure was designed to improve circulation in her legs. It was performed by a vascular surgeon, Dr. Marvin Morris.

During the procedure Morris inadvertently transected Boerste's left renal vein – this was not a medical error but rather a complication. However it created what Morris would later call a "bloody mess" and

a "crisis." Morris called in another vascular surgeon to help staunch the bleeding.

Morris repaired the injury and moved on to complete the bypass surgery. It turned out to be a success and Boerste did enjoy improved blood flow to her legs.

However she suffered a then unknown complication. During the surgery an 18 x 18 inch sponge was left inside her body. Boerste would later theorize that the bleeding crisis occurred near lunch time and that hospital nurses did not perform a so-called "lunch sponge count" as required by hospital policy. The nurses thought the policy was just a guideline as opposed to a rule.

As the next four years passed, the sponge eroded from Boerste's abdomen and into her small intestine. This was linked to a variety of gastrointestinal

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Underinsured Motorist - The plaintiff complained of chronic neck and back pain after a head-on crash – settling with the tortfeasor, the plaintiff sought UIM coverage from her carrier – the jury then struggled with damages at trial, asking the court what to do if they could not agree on a number – ultimately a verdict was reached, the plaintiff taking the odd number of \$133,750 for pain and suffering which is suggestive of a quotient verdict - \$151,375 p. 6

Medical Negligence - The plaintiff was admitted to the hospital with a small bowel obstruction – he died of aspiration complications five days later – his estate alleged error by hospital employees (nurses and two physicians) in treating the plaintiff conservatively when he needed an immediate surgical intervention – the hospital defended that conservative care was reasonable and the plaintiff's demise was a function of his underlying co-morbidities including diminished respiratory function - Defense verdict p. 9

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Auto Negligence - An extremely intoxicated driver (he'd describe himself as "drunk as piss") crashed into the plaintiff and left her with cracked ribs, a minor brain injury, a broken scapula and a spleen laceration – while the jury awarded \$275,000 in compensatory damages (that included \$132,000 for pain and suffering), the jury rejected the imposition of punitive damages against the drunk driver - \$275,000 p. 4

Dog Negligence - There was a snafu when the plaintiff's took their exotic breed dog (a Wirehair Pointing Griffon) for grooming at Pet Paws – the dog got loose from Pet Paws and alighted forever to parts unknown – the

owners sued Pet Paws and sought \$29,800 for the loss of breeding rights – Pet Paws admitted it was not good to lose the dog, but contested the breeding damages were speculative, the real damages being the \$1,200 the plaintiffs paid for the dog - \$1,200 p. 6

Medical Negligence - A neurosurgeon was blamed for error in performing a Deep Brain Stimulation (DBS) (it involves a neurostimulator with leads to the brain) by improperly assessing the plaintiff has having Parkinson's Disease when in fact he had just an essential tremor – in this complex causation case, when the leads were removed years later, the plaintiff suffered a hemorrhagic stroke and other complications – the defense focused the use of DBS was proper and in any event, the plaintiff's later complications were unrelated to his treatment - Defense p. 8

McCracken County

Auto Negligence - The plaintiff took medicals of \$10,000 in a right-of-way crash case, but this Paducah jury rejected any award for pain and suffering - \$10,000 p. 7

Notable Indiana Verdict

Vanderburgh County (Evansville, IN)

Medical Negligence - A woman criticized her doctor for failing to make a prompt diagnosis of her cauda equina syndrome; the woman underwent surgery once the condition was diagnosed, but the surgery was unsuccessful and has left her a permanent paraplegic - \$3,000,000 p. 9

issues. Boerste went by ambulance to the Baptist East ER on 3-24-15 where she was treated by an emergency room physician, Dr. Mark Nunley. An abdominal CT scan was performed.

The results from radiology had a marker that indicated the sponge. There was proof radiology informed Nunley. Nunley for his part had no memory of that phone call. He didn't tell Boerste about the sponge and discharged her with the diagnosis of a urinary tract infection.

The hospital then faxed the CT report to Boerste's family physician, Dr. Kimberly Brumleve, who worked at a federally-funded clinic for low-income persons. Brumleve initialed the report but did not mention it to Boerste when she saw her a month later or during the next the 20 months she treated her. Brumleve believed Nunley had handled the matter.

The sponge would remain inside Boerste for 20 more months. In that time she experienced worsening abdominal symptoms. Her bowels were so unpredictable that when she would drive her car, she'd sometimes sit on a garbage bag should she have an unexpected bowel movement.

Boerste's gastrointestinal problems were so intense on 11-23-16 that she presented to the ER at Baptist East a second time. One of Nunley's partners evaluated Boerste and ordered another CT scan. The sponge was still there. It was removed in an exploratory laparotomy a week later.

As Boerste was recovering from her abdominal surgery and while she was inactive, she developed what she claimed was a pressure ulcer on her right heel. This led to an admission at Norton Audubon Hospital where wound care and an additional vascular surgery to again increase her circulation in her right

leg were performed. She was discharged from Norton Audubon to Franciscan Health Center.

While at Franciscan, she was told to push herself up in bed with her left foot because her right heel was still healing and developed a pressure ulcer on her left heel. Both Brumleve and Franciscan were sued but because Brumleve was a federal employee, the case against her had to proceed under the Federal Tort Claims Act. Franciscan was a defendant in this action but settled a month before trial.

Despite a variety of interventions, the ulcer on her left heel did not heal. Her left leg was amputated below-the-knee on 7-12-17. While Boerste has a prosthetic, there was proof the once active grandmother (she was already disabled at the time of the original surgery in 2011), is now frail and limited in her activities.

Boerste sued a variety of defendants in this lawsuit and called her long and arduous course a "tragedy of errors" and "cascade of horrors." The first defendant was U of L Hospital. She alleged error by the nurses in mismanaging the sponge count. Her experts called the error a sentinel event that should never occur in a medical setting. Morris too as the vascular surgeon managing the surgery was blamed for this error.

The hospital litigated the case for years and denied fault. It suggested that the sponge was related to an earlier 1988 gallbladder surgery. A week before trial, U of L conceded fault. Morris testified that the nurses were to blame for the sponge error, but denied he was at fault.

The plaintiff next targeted Nunley for failing to transmit the results of the 2015 CT scan – this error then led to a more than 20 month delay in the ultimate diagnosis. This too was called a second sentinel where a clear

diagnosis of a retained sponge was not told to the patient. The result of these two "never events" (Boerste called this almost unbelievable), was that she suffered years of abdominal complications and ultimately the lower left leg amputation.

The plaintiff's experts were Dr. Verna Gibbs, Surgery, Cathy Kleiner, RN, Carrie Tibbles, Emergency, Boston, MA, Dr. Martin Borhani, Vascular Surgery, Chicago, IL and Laura Lampton, Life Care Plan. If the plaintiff prevailed, she sought medicals of \$744,539 and \$1.8 million more for future care. Her pain and suffering was limited to \$10,000,000.

The plaintiff also sought an award of punitive damages against the hospital. The court's instructions capped punitive damages at \$5,000,000. Punitive damages were sought against only U of L.

There were two other non-party medical providers by the time of trial. Boerste had also pursued a claim against Franciscan. It settled. Boerste separately sued Brumleve in a Federal Tort Claims Act lawsuit. That case is still pending. However for purposes of this case, the jury could apportion fault to any of the three defendants at trial (U of L, Morris and Nunley) as well as the two empty chair defendants, Franciscan and Brumleve.

While U of L admitted fault for the sponge count error, it denied this "simple mistake" rose to a level justifying the imposition of punitive damages. Morris for his part denied fault and indicated the sponge count was the responsibility of the nursing team. Morris and the hospital nurses were jointly represented at trial.

Nunley diminished his role in the case and cited it was possible he had not been informed of the CT result. He also defended on causation that he had not caused any injury to Boerste and the true offender as to

the 20 month delay was Brumleve. His standard of care expert was Dr. Seth Stearley, Lexington.

The defendants were aligned in defending on causation and relied on two experts, Dr. Aimee Garcia, Wound Care, Houston, TX and Dr. Christopher Abularrage, Vascular Surgery, Baltimore. They concluded that regardless of the sponge issue, Boerste was doomed to lose her leg because of a variety of co-morbidities including worsening diabetes, vascular disease, obesity and smoking. Thus the plaintiff's damages related to the sponge issue were limited through the healing of her abdominal scar in January of 2017, all of which pre-dated the heel ulcers.

This case was tried for two weeks. The jury didn't consider fault by the nurses as it was admitted, but it did determine they were a substantial factor in causing injury to Boerste. The jury also found against Morris as well as the two empty chair non-parties, Brumleve and Franciscan. Nunley was exonerated.

Then moving to comparative fault, the jury assessed it 60% to the hospital and 10% more to Morris. The remaining 30% was equally divided between Brumleve and Franciscan.

Boerste was then awarded \$550,000 of her medicals and \$875,000 more for in the future. Her pain and suffering was \$8.075 million, the compensatory damages totaling \$9.5 million. The jury assessed \$1,000,000 in punitives against the hospital, the total raw damages being \$10.5 million.

The court's judgment did three things. They were, (1) an exoneration of Nunley, (2) an assessment of damages of \$950,000 against Morris (10% of the compensatory damages) and (3) a damage assessment of \$6.7 million against U of L, representing

60% of the compensatory damages and \$1,000,000 more in punitives. At the time of this report, no post-trial motions had been filed but a challenge from the defendants is expected.

Ed. Note - This verdict broke a remarkable streak for defendants in medical negligence cases in Jefferson County. They had won 34 in a row dating to August of 2014. The last plaintiff's verdict was Case No. 5062, a \$328,199 result involving Dental Negligence.

Case Documents:

[U of L Trial Memo](#)

[Nunley Trial Memo](#)

[Plaintiff Trial Memo](#)

[The Jury Verdict](#)

Auto Negligence - An extremely intoxicated driver (he later described himself as "drunk as piss") crashed into the plaintiff and left her with cracked ribs, a minor brain injury, a broken scapula and a spleen laceration – while the jury awarded \$275,000 in compensatory damages (that included \$132,000 for pain and suffering), the jury rejected the imposition of punitive damages against the drunk driver

Starr v. Combs, 16-1498

Plaintiff: M. Austin Mehr and Philip G. Fairbanks, *Mehr Fairbanks &*

Peterson, Lexington

Defense: Daniel E. Murner and Elizabeth J. Winchell, *Landrum & Shouse*, Lexington

Verdict: \$275,000 for plaintiff

Court: **Fayette**, J. L. Van Meter, 6-6-19

Harrison Combs, then age 22, was on a bender on 7-31-15. By his own admission, he was extremely intoxicated. Combs would later describe himself as having been "hammered" and "drunk as piss." A breath test, measuring his intoxication at .266, would confirm his amateur assessment.

Against this backdrop, Combs ran a red light at New Circle Road and Tates Creek Road. He crashed into a vehicle driven by Emily Starr. It was a hard hit angled t-bone type collision.

Starr suffered several injuries including cracked ribs, a broken scapula, a head laceration and a minor spleen laceration. She has also complained of a minor traumatic brain injury and lingering shoulder pain. Dr. Timothy Allen, Psychiatry, confirmed the brain injury.

The injury also had a vocational component. Starr had worked as a nurse's assistant (CNA) at the time of the wreck. While Starr continues to work, there was testimony from a vocational expert (Sara Ford, Louisville) that Starr is underemployed and earns less than she would have but for her injuries.

In this lawsuit Starr sought damages from Combs. Combs stipulated fault on the eve of trial. Starr also presented dram shop claims against outlets that had served Combs that evening including Malone's and Outback Steakhouse. Those claims settled before trial, Combs being the sole defendant.

If Starr prevailed at trial, she claimed medicals of \$57,170. Combs conceded medicals of \$42,801. As this issue was worded for the jury, Starr would take at least \$42,801 in medicals but no more than \$57,170, the difference being the disputed amount. Starr also claimed \$100,000 for future care and \$1,637,536 for impairment. The jury could award her \$1,000,000 each for past and future suffering.

Starr also sought to impose punitive damages against Combs. She cited his extreme intoxication and history of drunk driving. Combs was prosecuted following this wreck and later pled guilty to DUI (it was his second) and felony wanton