■ DEFENSE VERDICT

Jurors side with doctor over spinal procedure

MEDICAL MALPRACTICE

■ **Venue:** Knox County Circuit Court

■ **Case number/date:** 12AR-CV00280-01/May 15, 2014

■ **Judge:** Russell Steele

■ **Plaintiff's experts:** Dr. Frank Coufal, San Diego (neurosurgeon); Dr. Randal Trecha, Columbia (orthopedic surgeon)

■ **Defendant's expert:** Dr. Terrence Piper, St. Peters (orthopedic spine surgeon)

■ **Last pretrial demand:** $321,687

■ **Last pretrial offer:** $0

■ **Caption:** Homer Phillips v. John Bailey, D.O. and Mid-America Orthopedic & Spine Institute

■ **Plaintiff's attorney:** Leland Dempsey, Dempsey & Kingsland, Kansas City

■ **Defendant's attorneys:** Ryan Gavin and Mandy Kamykowski, Greensfelder, Hemker & Gale, St. Louis

By Jessica Machetta

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A Knox County jury listened to testimony for four days in a medical malpractice suit stemming from chronic back pain but took only an hour and 15 minutes to decide unanimously for the defendant.

Homer Phillips was a patient of Dr. John Bailey dating back to 1999. In 2006, he began complaining about back pain and was diagnosed with lumbar spinal stenosis. He had undergone a lumbar fusion in the 1980s, and in 2007 Bailey suggested surgically implanting X-Stop interspinous spacers.

"The purpose of the spacers was to create some extra space between the vertebrae, lessen the compression on the neural elements that go through there," said Ryan Gavin, an attorney for Bailey. "The dispute at trial was ultimately whether he appropriately placed them at two separate levels — one de-

Ryan J. Gavin

Mandy J. Kamykowski

vice at each level, or whether he managed to place both of them improperly at a single level."

Gavin said the case was unique in that the plaintiff called upon a non-retained expert, who testified that Bailey had stacked both spacers at a single level, which would have been medically inappropriate. However, the witness, who was a subsequent treating physician, was found to be inaccurate.

"He did have the testimony of a non-retained expert in his favor, but we were able to turn that around because most of that physician's testimony was inconsistent with that same physician's own records," Gavin said.

At the center of the plaintiff's argument was that Bailey performed an unnecessary procedure, and that he also delayed treatment, causing unnecessary pain and suffering. Because of that, Phillips asked for $321,687 in damages about a week before the trial. Bailey's attorneys offered nothing. The request for damages remained the same when the

case went to trial.

Gavin said the request included about $60,000 in medical expenses and $270,000 in noneconomic damages.

The defendant's expert, Dr. Terrence Piper, testified that Phillips was an appropriate candidate for the X-Stop surgery. However, he says that fracture of an adjacent spinous process and dislodgement of the X-Stop devices were known risks and likely the cause for the return of Phillips' chronic lower-back pain. Piper pointed out that immediately following the initial surgery, Phillips did have pain relief.

Phillips' attorney, Leland Dempsey of Kansas City, was disappointed in the verdict but said he respects the jury's opinion.

"We are not going to appeal," he said, noting that he thought the judge "did a wonderful job" and the jury "took their job very seriously and were very attentive."

Dempsey said calling X-Stop devices "experimental" would be going too far, but that they have been found to fail more than half the time and are being used less and less in back surgeries.

"They were tried a little bit in the [early 2000s], and in truth, they failed more than not," Dempsey said. "A surgery had to be done, and a jury could conclude that even had the doc put them in correctly, they could have failed. … That's why I'm not mortally offended by the jury's conclusion, even though I don't agree with it." mo

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>
> *Leland Dempsey, plaintiff's attorney*