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Judge Upholds \$27.6 Mil. Award for Promo Video Injury

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Philadelphia Common Pleas Court Judge Frederica A. Massiah-Jackson entered judgment for plaintiffs Margo and Daniel Polett June 10, ordering that Margo Polett be paid \$19.6 million in damages and Daniel Polett be paid \$700,000 in damages. Massiah-Jackson said in an opinion last month that she was adopting that June 10 decision as the opinion required under Pennsylvania Rule of Appellate Procedure 1925 because the case is now pending with the state Superior Court.

The jury apportioned 36 percent negligence to public relations company Public Communications Inc., the Chicago firm hired to make the artificial knee video, 34 percent negligence to orthopedic medical device manufacturer Zimmer, and 30 percent negligence to Margo Polett, *The Legal* previously reported.

Polett's orthopedic surgeon and the plaintiffs' expert witness, Dr. Robert E. Booth, helped develop the knee implants Polett received June 27, 2006, and which Public Communications Inc. was hired to market on behalf of Zimmer, Massiah-Jackson said.

Polett, who agreed to participate in the filming of the video a little under two months after her surgery, walked on a treadmill, rode an exercise bicycle and was filmed walking in a garden with her daughter, the judge said. Polett went home from the shoot and right to bed because her knees hurt, the judge said.

After the shoot, Booth concluded that a "direct chain of events" connected Polett's fractured knee cap and ruptured tendons to filming the video, the judge said.

"The jury's net award of approximately \$1 million for each year of Mrs. Polett's surgeries, permanent pain and suffering, embarrassment, humiliation, loss of life's pleasures and disfigurement, while substantial is supported by the record," Massiah-Jackson said. "The jury's award of \$1 million to Mr. Polett for the loss of consortium is supported by the record. Many tangible and intangible items of damages were properly considered by the jurors for a 20-year period."

The evidence showed that Polett was walking extremely well after her knee replacement surgery, but, following the filming of the promotional video, the condition of her knees deteriorated because her tendons were pulled apart, the judge wrote in an opinion in *Polett v. Public Communications Inc.*

Polett has needed four surgeries following the injuries; she has fallen several times and she now is in constant fear of falling; she needs a walker to get around; and she can no longer get on the floor to hold her adopted daughter when she has episodes from post-traumatic stress disorder, Massiah-Jackson said.

Among many other arguments, the defendants argued that there was insufficient evidence to prove that Polett's use of the exercise bike and treadmill "for a few minutes" during the promotional video was the "proximate, direct, and/or actual cause" of Polett's knee injuries, and that the amount of the damages was "excessive and conscience-shocking as a matter of law and was not justified by the evidence," according to their statement of errors complained of on appeal.

The defense expert, Iowa orthopedist Dr. Charles Clark, opined that Polett's pre-existing rheumatoid arthritis was a substantial and significant factor for her knee injuries, and that the bike use during the video shoot was only one of several factors causing her injuries, Massiah-Jackson said.

Defense counsel Troy S. Brown, a partner with Morgan Lewis & Bockius in Philadelphia, said that his co-counsel and he are confident that the verdict will be reversed. Brown said he was not authorized to comment further with the appeal pending.

James D. Pagliaro and Brian M. Ercole of Morgan Lewis are defense co-counsel.

Plaintiffs' counsel Shanin Specter, of Kline & Specter in Philadelphia, said he was "virtually certain" that there was going to be a plaintiff's verdict on the case and that he wouldn't ask a judge to rule in his client's favor unless he thought the trial had resulted in a fair outcome.

"What's the fair value to a 68-year-old woman who's amazingly active and productive being confined to a wheelchair and walker for the rest of her life?" Specter said. "I think if you were to offer \$20 million to a healthy 68-year-old woman and tell her she can have that money in exchange for being in a wheelchair or a walker for the rest of her life, [she would say], ...'Keep the money and I'll keep my mobility.'"

The jury was not persuaded simply by the nature of Polett's injury to give her an award because the jury found Polett comparatively negligent, Specter said.

"Although the specific risk that Mrs. Polett would suffer a ruptured extensor tendon may have been unforeseeable, both the plaintiffs and the defendants presented ample medical evidence that ... inflammation and swelling would occur in her knees after the walk on the treadmill and the exercise on the stationary bike," Massiah-Jackson said.

The makers of the video were aware that the subjects of the video could be injured if they engaged in activities they had not yet resumed post-surgery, and they also knew that Polett had not resumed riding bikes or walking on treadmills, Massiah-Jackson said.