

EDITOR'S NOTE This report is based on an article previously published by the Legal Intelligencer and information that was provided by counsel for the plaintiff and Northampton Farm Bureau. Counsel for Palmor Products and Canns-Bilco Distributors did not respond to the reporter's phone calls.

—Aaron Jenkins

PHILADELPHIA COUNTY

NEGLIGENCE

Negligent Supervision

Pltf claimed injury after using machine in promotional video

VERDICT **\$27,600,000**
ACTUAL **\$19,320,000**

CASE Margo Polett and Dan Polett v. Public Communications Inc., Zimmer Inc., Steven Rhyker, Video Tracks Productions Inc., Marcel Franck, New City Productions Inc., Pennsylvania Hospital and University of Pennsylvania Hospital System / Marcel Franck and New City Productions Inc. v. Robert Booth M.D. and 3B Orthopaedics P.C., No. 080802637

COURT Philadelphia County Court of Common Pleas, PA

JUDGE Frederica A. Massiah-Jackson

DATE 11/22/2010

PLAINTIFF ATTORNEY(S) Shanin Specter (lead), Kline & Specter, P.C., Philadelphia, PA
Carl E. Jones, Kline & Specter, P.C., Philadelphia, PA

DEFENSE ATTORNEY(S) William J. Conroy, Campbell Campbell & Edwards, P.C., Wayne, PA (Public Communications Inc., Zimmer Inc.)
Kurt Stitcher, Baker & Daniels, L.L.P., Chicago, IL (Public Communications Inc., Zimmer Inc.)

FACTS & ALLEGATIONS On Aug. 23, 2006, plaintiff Margo Polett, 67, a volunteer for several Philadelphia-area charities, was the subject of a promotional video filmed on the grounds of Pennsylvania Hospital in Philadelphia. Roughly two months earlier, Polett had undergone a bilateral knee replacement surgery, performed by Dr. Robert Booth, an orthopedic surgeon. During an Aug. 16 follow-up visit, Booth asked Polett if she was willing to be filmed for a video that would promote the benefits of an artificial knee designed in part by Booth and manufactured by Zimmer Inc. Polett agreed to be filmed for the video.

Zimmer hired a public relations firm, Public Communications Inc., to produce the video. During the video's shooting, Polett was filmed walking around the hospital's garden and using a treadmill and stationary bike in the hospital's physical therapy room. Polett later claimed that operating the biking machine resulted in pain, swelling and a loss of range of motion in her knees. Over the next several weeks, she experienced a series of falls, leading to a fractured patella in her right knee and damage to several tendons. On Nov. 22, Booth performed tendon-repair surgery, which was unsuccessful. Three further similar surgeries over the next two years were also unsuccessful.

Polett sued Public Communications and Zimmer, arguing they had been negligent in directing her to operate the stationary bike without asking her or her physician whether she was medically cleared to do so. (Also originally named as defendants, but dismissed from the litigation by stipulation in spring 2010, were Pennsylvania Hospital and its parent entity, University of Pennsylvania Health System; videographer Steven Rhyker and his firm Video Track Productions; and field producer Marcel Franck and his firm New City Productions. Prior to being dismissed from the case, Franck and New City had sued Booth and his practice group, 3B Orthopaedics, as third-party defendants.)

In response to Polett's claims, Public Communications and Zimmer claimed that a week before the video shoot, Polett had told Zimmer and Public Communications personnel that she enjoyed bike riding, that she was looking forward to riding a bike again and that Booth had cleared her to ride a bike.

Polett did not dispute whether she had said that she enjoyed bike riding and was looking forward to riding a bike again. But she contended that her pre-filming statement regarding Booth's clearing her to ride a bike was not meant to show that she was necessarily able to do so by the time of the shoot, and that the only reason she began using the stationary bike during the shoot was that she assumed personnel from Public Communications or Zimmer had received Booth's approval.

The defense noted that nobody from Zimmer or Public Communications ever told Polett, or suggested to her, that they had spoken to Booth about activities Polett was then able to undertake.

INJURIES/DAMAGES *fracture, patella; loss of consortium; torn extensor pollicis longus tendon; torn patellar tendon*

Polett uses a walker and claimed she has no chance of restoring her knee to its condition from before it was allegedly injured during filming. At trial, plaintiff's counsel called Booth to testify as to the extent of Polett's injuries. Defense counsel presented the videotaped deposition of an expert orthopedist, who did not dispute that it was unlikely Polett would ever be able to ambulate without a walker.

Polett claimed that her injuries left her unable to engage in the numerous philanthropic activities to which she had previously devoted her time. Her suit sought damages for pain and suffering, loss of life's pleasures, embarrassment and humiliation and disfigurement. Her husband, Dan, owner of a successful suburban-Philadelphia Lexus dealership, joined in the action with a derivative claim for loss of consortium.

RESULT The jury found that Public Communications and Zimmer were negligent with respect to Polett's injuries, and apportioned liability at 36-percent and 34-percent, respectively. The jury also found Polett was 30-percent comparatively liable. The Poletts were awarded \$26.6 million, which was reduced to \$19.32 million.

DAN POLETT \$1,000,000 loss of consortium
MARGO POLETT \$26,600,000 compensatory damages
\$27,600,000

TRIAL DETAILS Trial Length: 4 days
Trial Deliberations: 10 hours
Jury Vote: 8-0
Jury Composition: 8 female

PLAINTIFF EXPERT(S) Robert E. Booth, Jr., M.D., orthopedic surgery, Philadelphia, PA (treating physician)

DEFENSE EXPERT(S) Charles R. Clark, M.D., orthopedic surgery, Iowa City, IA (via videotape of deposition)

POST-TRIAL Defense counsel intends to appeal the verdict, and will likely argue that it is supported by neither the facts of the case nor applicable law and that the damages awarded were excessive.

EDITOR'S NOTE This report is based on information that was provided by plaintiff's and defense counsel.

—Asher Hawkins