

Zimmer Gets \$20M Knee Injury Verdict Trashed In Pa.

By **Matt Fair**

Law360, Philadelphia (June 6, 2016, 4:37 PM ET) -- A divided Pennsylvania appeals court stripped a knee-replacement patient of a \$20 million verdict on Monday after ruling that the award against Zimmer Inc. and marketing firm Public Communications Inc. was excessive.

The Superior Court ruled 4-to-1 that the verdict was outsized considering the nature of the injuries that a jury agreed Margo Pollet had suffered during a bike ride she took promoting a Zimmer artificial knee product.

“The ... jury award to Mrs. Polett for non-economic losses deviates substantially from the uncertain limits of what is considered fair and reasonable compensation and, therefore, shocks the sense of justice,” the court said in an opinion penned by Judge Jacqueline Shogan. “Accordingly, we vacate the award to Mrs. Polett and remand.”

The case was back before the Superior Court following a ruling by the state’s highest court in October. The Pennsylvania Supreme Court said last year that the verdict was wrongly voided and that a jury instruction didn't improperly suggest that it was up to the defendants to provide medical evidence that something other than Pollet’s bike ride had caused her injuries, as the lower court initially found.

On remand, however, the Superior Court found a new reason to upend the award as they considered for the first time whether the defendants should have been granted remittitur of the verdict.

The issue had previously not been reached on appeal.

A Philadelphia County jury awarded Pollet \$26.6 million in damages in June 2011, but the award was reduced based on a finding of 30 percent comparative negligence on the part of the plaintiff.

Pollet’s husband, meanwhile, was awarded \$1 million for loss of consortium.

According to court records, the jury found Zimmer was 34 percent negligent, while PCI was 36 percent negligent

The Superior Court’s ruling on Monday, however, found that the award was excessive given the fact that Pollet did not seek compensation for any specific medical expenses. Instead, the opinion said, she’d sought non-economic damages based on the permanent degradation suffered following a string of additional surgeries she required after the injury.

While acknowledging that Pollet was “clearly ... entitled to compensatory damages,” the court said the damage award was “excessive, if not punitive.”

The court remanded the case back to Philadelphia County for remittitur by a trial judge.

Judge Kate Ford Elliott issued a one-page statement on Monday noting her dissent in the case, and pointed to a prior dissent which addressed the remittitur issue when the case was initially before the Superior Court.

Judge David Wecht, who has since been elected to the Supreme Court, said in that dissent that it was not for the court to second guess the damages awarded by a jury.

“The decision to grant or deny remittitur is within the trial court’s sound discretion, and will be overturned only upon a showing of abuse of discretion or error of law,” Judge Wecht said in that dissent. “We cannot substitute our judgment for that of the factfinder, and we must view the record with consideration of the evidence accepted by the jury.”

Shanin Specter, an attorney with Kline & Specter PC representing Pollet, said he would be once again asking the Supreme Court to review the case.

"This opinion is in conflict with clear Supreme Court precedents and we'll be asking the Supreme Court to set this right again," he said in an email. "As for the defendants, they can run but they can't hide and eventually they will have to pay the Poletts for their negligence that has caused so much harm."

Troy Brown, an attorney with Morgan Lewis & Bockius LLP representing the defendants, hailed the decision.

"The \$26.6 million compensatory damages award to plaintiff was grossly excessive, if not punitive, as was the \$1 million loss of consortium award to plaintiff’s husband, and both went well beyond what the evidence warranted and what Pennsylvania law allows," he said. "Given the Superior Court’s clear guidance, we look forward to moving forward with this case in the Philadelphia Court of Common Pleas."

Polett is represented by Shanin Specter and Charles Becker of Kline & Specter PC.

The defendants are represented by Troy Brown, James Pagliaro and Brian Ercole of Morgan Lewis & Bockius LLP and Clifford Levine and Alice Mitinger of Cohen & Grigsby PC.

The case is Margo Pollet et al. v. Public Communications Inc. et al., case number 1865 EDA 2011, before the Pennsylvania Superior Court.

--Editing by Emily Kokoll.