

Pa. Court Voids \$28M Verdict Against Zimmer, Marketing Co.

By **Matt Fair**

Law360, Philadelphia (January 02, 2014, 2:27 PM ET) -- Medical device manufacturer Zimmer Inc. and marketing firm Public Communications Inc. will get a second chance to defend themselves against claims stemming from a knee replacement procedure after an en banc panel of the Pennsylvania Superior Court recently struck down a \$28 million verdict in the case.

The court agreed on Dec. 20 that instructions given to the jury had improperly shifted the burden of proof by suggesting that it was up to the defendants to provide medical evidence that something other than plaintiff Margo Polett's participation in a marketing video for Zimmer's so-called Gender Solutions artificial knee had caused her injuries.

"A defendant may choose simply to argue that the plaintiff has not met its burden or proof, without presenting any evidence," the court ruled in an opinion penned by Judge Jacqueline Shogan. "In such a situation, the jury may find for the defendant. Moreover, Pennsylvania case law does not require a defendant to present independent medical testimony specifically linking the alleged injuries to another cause."

Polett's August 2008 lawsuit alleges that her participation in a marketing video for the Zimmer product caused her to reinjure her surgically repaired knees requiring subsequent surgeries and resulting in a permanent damage.

According to court records, plaintiff Margo Polett underwent dual knee replacement surgery in 2006. One of her knees was replaced by Zimmer's so-called Gender Solutions knee, a device specifically designed and manufactured for women.

Several months after her surgery, Polett agreed to appear in a marketing video for Zimmer in which she used both an exercise bike and treadmill. After the filming, however, she claims she developed persistent pain that resulted in a series of surgeries aimed at repairing the damage.

A jury awarded her \$27.6 million in damages in June 2011. According to court records, the jury found Zimmer was 34 percent causally negligent, PCI was 36 percent causally negligent and Polett was 30 percent comparatively negligent.

On appeal, however, a split three-judge panel found that the jury instruction — which emphasized Zimmer and PCI were required to present medical evidence that "something other than the exercise bike" caused Polett's injury — served to mislead the jury and unfairly shift the burden of proof to the defendants.

The court agreed to rehear the appeal en banc in May.

While the court agreed that the jury instructions alone were enough to warrant a new trial in the case, the panel also found that the trial judge had erroneously admitted causation testimony on Polett's behalf from Robert Booth, a co-developer of the knee and one of Polett's treating physicians.

The en banc panel found that the defense had been improperly kept in the dark prior to trial about Booth's role as an expert witness in the case in violation of Pennsylvania Rules of Civil Procedure and agreed that the doctor's testimony had only come after he was presented with a tolling agreement in which Polett agreed not to include him as a party to the suit.

"We conclude that Dr. Booth never reached a pre-anticipation-of-litigation conclusion as to whether Mrs. Polett's riding the exercise bike was a substantial factor in causing her injuries," the opinion said. "Dr. Booth's causation opinions arose under a sword of litigation, not during the regular course of his treating Mrs. Polett."

Shanin Specter, an attorney with Kline & Spectre PC representing Polett, told Law360 on Thursday that he was disappointed in the verdict and suggested that an appeal to the Supreme Court was likely.

"We believe the judgment should have been affirmed and hope the Supreme Court will agree," he said.

While the defendants had also asked that they be granted judgment notwithstanding the verdict, the en banc panel found there was sufficient evidence for a jury to make a causal link between Polett's riding the exercise bike as part of her participation in the video and her subsequent injuries.

"Viewing the evidence in the light most favorable to Mrs. Polett, the record contains sufficient proof of a causal connection between Mrs. Polett riding the exercise bike and her subsequent injuries," the opinion said.

Polett is represented by Shanin Specter, Chip Becker and Carl Jones of Kline & Specter PC.

Zimmer and PCI are represented by Troy Brown, James Pagliaro and Brian Ercole of Morgan Lewis & Bockius LLP.

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

--Additional reporting by Dan Packel. Editing by Katherine Rautenberg.