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## High Court Revives \$27.6M Verdict for Promotional Video Injury

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*Of the Legal staff*

The state Supreme Court has revived a \$27.6 million verdict awarded to a woman who had to undergo four additional surgeries after taping a promotional video to demonstrate the success of her initial double knee-replacement surgery.

A deeply divided court ruled 3-2 Tuesday to reinstate the verdict for Margo Polett and her husband, finding the trial court properly barred a tolling agreement between the Poletts and Margo Polett's treating physician from the trial against the manufacturer of the synthetic knee and the communications company that produced the video.

The majority in *Polett v. Public Communications* also ruled the trial court properly allowed that treating physician to testify as an expert and properly offered a supplemental charge limiting the jury's ability to find something other than Polett's use of a stationary bike in the promotional video caused her injuries.

After hearing testimony from treating physician Dr. Robert Booth that Polett's injuries stemmed from

her riding a stationary bike during the promotional video, a Philadelphia jury awarded the Poletts \$27.6 million in the 2010 trial against defendants Zimmer Inc. and Public Communications Inc. The jury found Public Communications 36 percent negligent, Zimmer 34 percent negligent and Polett 30 percent comparatively negligent. The verdict was then reduced by 30 percent, and after adding delay damages, Polett was awarded \$19.6 million and her husband was awarded \$700,000 for his loss of consortium claim.

An en banc panel of the Superior Court ruled Philadelphia Court of Common Pleas Judge Frederica Massiah-Jackson incorrectly barred the tolling agreement, allowed Booth to testify as an expert and gave the jury a supplemental charge that it could only find another cause for Polett's injuries aside from the bike ride if there was medical evidence to support it.

In rejecting the Superior Court's findings, a three-justice Supreme Court majority, led by Justice Debra Todd, remanded the case to the intermediate appeals court to rule on Zimmer and Public Communications' unaddressed argument that the verdict should be reduced.

**Shanin Specter and Charles "Chip" Becker of Kline & Specter handled the case for the Poletts.**

"We are gratified by the Supreme Court's thorough and perceptive analysis and decision," Specter said. "We look forward to returning to Superior Court to address the remaining issue of remittitur."

Specter said that while the court's decision was thorough, it really was addressing "garden variety" evidentiary and instructional issues that Specter said were well within the trial judge's discretion.

James D. Pagliaro of Morgan, Lewis & Bockius argued the case before the Supreme Court on behalf of the defendants. He did not return a call seeking comment.

The defense argued the tolling agreement between Booth and the Poletts was evidence that he was biased in his opinion that Public Communications' decision to have Polett ride the bike during the video was the cause of her one knee replacement to fail. They wanted to introduce it into evidence to impeach his credibility, Todd said.

Todd agreed that the tolling agreement could show an evidence of bias, but she pointed to Booth's medical notes in Polett's file before

a tolling agreement was signed that her pain began after the bike ride. Todd also noted that the tolling agreement was voided by the time the case went to trial and the defendants stipulated to the fact that Booth was not liable for Polett's injuries.

The potential harm in introducing the tolling agreement outweighed its probative value, Todd said. In order for the jury to understand the circumstances of the agreement, Todd said there would have had to be a separate proceeding in which experts on legal matters testified. She said that would have opened the door to questioning Booth on why he and his attorney decided to enter the tolling agreement.

"Furthermore, this inquiry could have resulted in counsel for the Poletts being called as fact witnesses regarding what they communicated to Dr. Booth which ... could have interfered with their ability to continue to represent their clients," Todd said.

As to whether Booth should have been allowed to serve as an expert witness, the Supreme Court agreed with the Poletts that rules surrounding expert witnesses only apply to those opinions developed in anticipation of litigation. The Poletts noted that Booth developed his theory on causation while treating Polett and before the tolling agreement was a factor.

Todd said the Superior Court supplanted the trial court's findings with its own evaluation of the evidence. She said Massiah-Jackson made a reasonable determination to allow Booth's causation testimony in light of the evidence before her.

Justices Max Baer and Correale F. Stevens joined Todd in the majority. Justice J. Michael Eakin au-

thored a dissent that was joined by Chief Justice Thomas G. Saylor.

Eakin said he thought all three evidentiary and instructional rulings by the trial court were improper.

"The tolling agreement is not, as alleged, a complicated concept—it can be stated clearly in one sentence, and any explanations deemed necessary can be addressed by counsel with ease," Eakin said.

Eakin said the case hinged on causation and only after the tolling agreement was signed did Booth expressly state he thought other specific parties were to blame for Polett's injuries.

"This tends to show that Dr. Booth's opinion regarding causation was potentially biased, making it relevant," Eakin said. "The degree of bias may or may not have been great, but I do not see how notice to a witness that he is the target of a potential lawsuit of this magnitude can be called irrelevant to evaluation of that witness's subsequent opinion testimony."

Former Chief Justice Ronald D. Castille and former Justice Seamus P. McCaffery had heard arguments in this case at the October 2014 argument session, but each retired from the bench before the case was decided.

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