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How Robins Kaplan Secured \$28M In Zip Lining Injury Verdict

By **Emma Cueto**

Law360 (December 8, 2021, 2:17 PM EST) -- After a plastic surgeon suffered a knee dislocation while abroad that led to an amputation, Robins Kaplan LLP took on a case against the global emergency medical provider that refused to transport him back to the U.S., steering the suit to a \$27.8 million jury verdict.

The firm represented Richard Tholen, a doctor based in the Twin Cities, in his suit against Assist America Inc., successfully steering claims including negligence and breach of contract to a favorable jury award.

"We were thrilled by the verdict," said Robins Kaplan partner Patrick Arenz, who led the team representing Tholen. "The jury got it right."

Robins Kaplan handled Tholen's case from the time it was filed in August 2017.



Patrick M. Arenz

Tholen alleged that after he dislocated his knee zip lining in Mazatlán, Mexico, in 2015, Assist America had an obligation to transport him to a different hospital under the terms of the policy he had with the company through his American Medical Association insurance. Under the policy, Assist America would evacuate members to suitable medical facilities if none were available locally.

After the injury, Tholen and his wife, a registered nurse, were concerned about the local doctor's decision to place the injury in a hard cast, and consulted an orthopedic surgeon in Minnesota, who said the cast was not appropriate. Tholen and his wife contacted Assist America later that day with details of his injury and their concerns about the treatment available locally, requesting an evacuation, but a company medical coordinator ultimately rejected the request.

The Tholens eventually paid their own way home after further requests were also denied on the grounds that the hospital in Mazatlán could provide sufficient care. Back in Minnesota, Tholen underwent several surgeries and finally an above-the-knee amputation.

The suit alleged that Assist America did not properly evaluate Tholen's medical case and failed to obtain medical records from the hospital to make an informed decision, and that Assist America's representatives misrepresented themselves as physicians.

Arenz said that the team was able to go into the trial in a strong position after winning several pretrial battles, including fighting off a bid to trim the claims.

The two sides also battled over whether punitive damages were permissible under Minnesota law.

"In Minnesota ... there are restrictions on when and how you can plead punitive damages," Arenz said. "If you were in Minnesota state court, for instance, you cannot plead punitive damages at the initial complaint. ... And there is now a fair amount of case law developing in the federal courts that view that statute as only applying to state courts and not binding on federal courts. So that was a fairly significant dispute."

Arenz and his team initially filed a complaint that did not include punitive damages but sought to

amend after new case law came out, arguing that they should be allowed. The court ultimately agreed in 2018.

Meanwhile, the team took a thorough approach to discovery, conducting over 20 depositions, according to Arenz.

"We prepare for trial from day one at our firm," he said. "Whether cases are tried or settled, we look at them through the lens of trial, and one area affected by that is we have a bespoke approach to depositions."

As a result, he said, they were able to use video footage from depositions at trial in place of witnesses.

The case was originally scheduled for trial in the summer of 2020, but like many trials it was rescheduled, and then rescheduled again several more times, ultimately getting under way in November 2021.

Heading into trial, the team focused on presenting Tholen's story and making sure to lay out for the jury what had happened to him.

"One of the most powerful moments of the trial was [during Tholen's testimony]," Arenz said. "[He] took the stand for over three hours on direct examination, and we covered a lot, obviously. But towards the end we did a demonstration in front of the jury of what he goes through each morning in terms of taking off his prosthetic, putting it back on, the challenges that go along with it."

"I think that demonstration really captivated the jury," he said.

In addition to stressing the ordeal Tholen suffered, the team wanted to tell a parallel story with the experts to show incompetence by Assist America. The team called experts in vascular medicine, orthopedics and, for damages, economics, though they ultimately made a judgment call to forgo two experts on the list, with specialities in trauma and neurology.

They also made sure to stress to the jury that while Tholen was a surgeon by profession, when he was injured, he was a patient.

"All our experts stressed that point," Arenz said. "As a matter of medical ethics, when a patient is a doctor themselves, that is irrelevant."

The jury ultimately sided with Tholen, awarding him \$4.2 million for past harm, \$10.6 million for future harm, \$3 million for breach of contract and \$10 million in punitive damages.

Counsel for Assist America did not respond to a request for comment.

--Editing by Alyssa Miller.