

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

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COURT OF CLAIMS
OF OHIO

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MITCHELL D. POTTERF, IV, et al., :
 :
 Plaintiffs, : Case No. 2015-00729
 :
 v. :
 :
 THE OHIO STATE UNIVERSITY : Judge Patrick M. McGrath
 DEPARTMENT OF HEALTH AND :
 EXERCISE SCIENCE :
 :
 Defendant. :

PLAINTIFFS' PRETRIAL STATEMENT

Now come Plaintiffs, by and through counsel, and hereby file the following information for their pretrial statement.

I. Factual Legal Issues Presented

Plaintiffs own and operate a gym located in Columbus, Ohio called "Fit Club." In January- March of 2012, Plaintiffs agreed to allow Defendant to study its athletes during a 10-week annual fitness challenge (hereinafter the "Challenge"). The goal of the study was to determine the efficacy of a CrossFit workout. At the beginning of the Challenge, and again at the end of the Challenge, the athletes underwent biometric testing conducted by the Defendant. Eleven of the athletes who participated in the Challenge did not attend the post-challenge testing. Each of the 11 people missed the post-challenge testing for reasons unrelated to CrossFit, the Challenge or injury. Yet, when the Defendant published the Study, it concluded that the 11 athletes "dropped out" of the Challenge due to "overuse injury," "overuse" and "injury." This data is false and fabricated.

During discovery, Plaintiffs have established, and Defendant has failed to refute, that none of the 11 athletes suffered from overuse, injury or an overuse injury because of any activity performed during the Challenge. Plaintiffs have further developed evidence that prior to publishing its conclusions about injury, the Defendant did not contact any of the 11 athletes or the study coordinator to determine why those athletes failed to complete the Challenge. Instead, the Defendant simply fabricated the data.

Defendant was able to take the discovery depositions of each of the 11 athletes (Defendant chose not to depose one of the athletes currently living in Florida), yet during those depositions, the Defendant could not develop any evidence that any of the athletes suffered an injury due to their participation in the Challenge. Defendant has not offered any cognizable defense to these facts.

Over a year later, the journal that published Defendant's article issued a retraction, and in the retraction stated that the Defendant's injury data was not factually based and should be ignored. Despite unrefutable evidence that no one suffered an injury because of their participation in the Challenge, the Defendant did not participate in the retraction and has not issued a single public statement acknowledging that the injury data in the article was incorrect. Instead, the Defendant, by its silence, has publicly perpetuated the false injury data through the present date.

Thus, this case presents the following factual and legal issues:

1. Was the Defendant's conclusion that 11 athletes failed to complete the Challenge because of "injury," "overuse," or "overuse injury" false?
2. Did the Defendant properly mitigate any damage that the false publication caused to the Plaintiffs?

3. What amount of damages did the Plaintiffs suffer as a direct or proximate result of the Defendant's publication of false and fabricated data?

Plaintiffs' position is that the injury data was fabricated by Dr. Devor and Dr. Smith, possibly because they believe that article would not be published without some sort of injury data. Through discovery the Plaintiffs have learned that at the outset of the study, the Defendant did not intend to study injury rates (both Dr. Devor and Dr. Smith have admitted this in deposition). During the peer review process, the injury data did not show up in a draft of the article until the third draft was submitted, several months after the initial draft was submitted. Despite ample time to do so during the discovery period, the Defendant has been unable to identify a single athlete who was injured as a result of participating in the Challenge. Instead, all of the athletes have either submitted sworn statements or have testified in deposition that they did not sustain an injury or suffer from overuse as a result of their participation in the Challenge.

Plaintiffs also asserts that the Defendant has not taken any steps to mitigate the damages caused by the publication of the false injury data. Instead, discovery has revealed that after the Defendant was notified by Plaintiffs and their counsel that the injury data was false, Dr. Devor went on the offensive, and publicly disparaged Plaintiff Potterf in various emails to members of the public. And when the publisher of the article decided to issue a retraction of the injury data, Defendant did not participate in that retraction or issue one of its own.

Plaintiffs have asserted various causes of action related to the harm caused by the publication of the false injury data. One of the causes of action, False Light Invasion of Privacy, is a tort that does not require the Plaintiffs to prove actual damages. Instead

the court can award damages based upon the egregiousness of the Defendant's conduct. Plaintiffs have retained an economics expert who will render an opinion as the damages in support of the remaining causes of action. Plaintiffs believe that they have sustained considerable damages as a direct and proximate result of Defendant's actions and failure to mitigate.

II. Plaintiffs' Witnesses

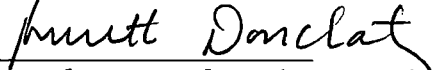
- a. Mitchell D. Potterf IV
- b. Russell Berger
- c. Dr. Steven Devor, on cross-examination.
- d. Dr. Michael Smith, on cross-examination.
- e. Allen Sommer, on cross-examination.
- f. Trevor Clark
- g. Michael Wright
- h. Kimberly Potterf
- i. Joseph Miracle
- j. Michelle Doherty
- k. Katherine Stefaniuk
- l. Theresa Berner
- m. David Ulmer
- n. Ryan Taylor
- o. Jim Sancin
- p. Daniel Saltsman
- q. Chelsea Rankin

- r. Dr. John F. Burke, economics expert.
- s. Dr. Haavi Morreim, causation and standard of care expert.
- t. William Kraemer, as on cross-examination.

III. Plaintiffs' exhibits

- a. Article entitled "Crossfit-Based, High Intensity Power Training Improves Maximal Aerobic Fitness and Body Composition."
- b. Electronic mail history between Plaintiffs and Dr. Steven Devor.
- c. Electronic mail history between Plaintiffs and Dr. Michael Smith.
- d. Spreadsheet of workouts performed during the Challenge.
- e. Records of Fit Club membership data, 2010- present date.
- f. Tax Returns of Fit Club, 2009-present date.
- g. Profit and Loss statement of Fit Club, 2010-present date.
- h. Drafts of the Article submitted to the publishers (including peer review and editorial comments).
- i. Defendant's responses to peer review and editorial comments.
- j. Electronic mail history between Chelsea Rankin and Dr. Michael Smith.
- k. Electronic mail history between Dr. Steven Devor and third parties regarding Plaintiffs.
- l. September 2015 retraction of the injury data.
- m. Sworn statements of each of the 11 athletes allegedly injured.
- n. Report of Dr. Havi Morreim.
- o. Report of Dr. John Burke.
- p. Other documents that may be identified and produced after the date of the filing of Plaintiffs' pretrial statement.

Respectfully submitted,



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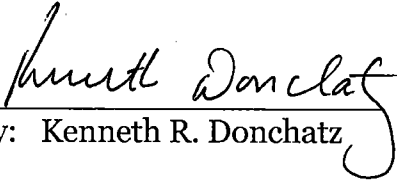
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Plaintiffs' Pretrial Statement was served by hand delivery on this 12th day September of 2016, upon each of the following:

Daniel R. Forsythe
Frank S. Carson
Assistant Attorney General
Court of Claims Defense
150 E. Gay Street, 18th Floor
Columbus, Ohio 43215


By: Kenneth R. Donchatz