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RAWLE'S REPORTS

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PITTSBURGH MELANOMA LITIGATION

Defense Verdict

Charles A. Buechel, Jr.

A jury in Pittsburgh, Pennsylvania, found in favor of Rawle & Henderson's client, Tropical Illusions Tanning Salon, resulting in a defense verdict that saved Tropical Illusions from substantial monetary exposure. **Charles A. Buechel, Jr.**, a partner in our Pittsburgh office, built a strong defense in the complex case based on science, logic and credibility.

Plaintiff Kristin Powell brought a lawsuit against nine indoor tanning salons following the diagnosis of malignant melanoma allegedly as a result of her use of indoor tanning beds from approximately March, 2000 to June 18, 2009. A melanoma is a malignant growth of the cells that constitute a mole. Melanoma, if left untreated, usually becomes fatal. If an individual has developed a melanoma, it is important that it be promptly removed. Of the nine entities sued, some were dismissed, two ultimately settled by way of joint tortfeasor releases, and two defendants, including Tropical Illusions, proceeded to a jury trial.

Plaintiff alleged that the indoor tanning salon defendants were negligent by failing to warn her that any exposure to ultraviolet rays would increase the risk of cancer; the use of tanning beds was dangerous to human health; and the use of tanning beds increased the risk of cancer. Plaintiff faulted the indoor tanning salons for intentionally making false and material misrepresentations to her that there were positive health benefits to indoor tanning; that indoor tanning does not cause cancer; and that indoor tanning is safer than outdoor tanning. It was estimated that plaintiff used indoor tanning beds between 400 and 500 times.

Early in the case, defendants filed Preliminary Objections to plaintiff's Complaint asserting that federal law pre-empted state statutory law. The U.S. Food and Drug Administration has promulgated regulations for the use of indoor tanning beds, including the requirement for warning statements that manufacturers of tanning beds are required to place on their products. The Court entered an Order permitting the pre-emption issue to be raised after discovery was completed.

Ultimately, in motions for partial summary judgment, the three remaining indoor tanning salons, including Tropical Illusions, asserted that plaintiff's lawsuit sought to impose safety obligations on defendants, owners and operators, not manufacturers, by way of their negligent failure to warn claims. The argument was that plaintiff sought to create regulations that were different than, or in addition to, what Congress had enacted for the regulation of tanning beds. Thus, the claims were pre-empted by federal law.

After hearing arguments, the Judge denied all three indoor tanning salons' motions for partial summary judgment and the matter proceeded to a jury trial.

At trial, plaintiff, then 28 years old, was cross-examined by defense attorney Charlie Buechel of Rawle & Henderson and she testified that she was an educated woman: a *cum laude* college grad, 3.5 GPA, who had internships with financial investment companies while in college. She held jobs from 2004 through 2012 as a performance analyst with financial investment companies focusing on ultra-high net worth clients. She testified that she possessed excellent analytical skills and strengths, all of which were bolstered by her resume.

Plaintiff told the jury that she did not see warnings on the indoor tanning beds at Tropical Illusions during her visits from 2000 through 2009. The tanning beds used by plaintiff at Tropical Illusions were compliant with federal regulations, *all* displaying warning stickers as was evidenced by photographs produced into evidence. The warning labels, mandated by the FDA and displayed prominently on Tropical Illusions' tanning beds, began with the word "Danger".

An important area of contention regarding the defendants' alleged negligence was the amount of time that individuals were in the tanning beds. According to records of Tropical Illusions, there was a conflict between the manufacturer's recommended time and the actual time spent by plaintiff. The time an individual is in the tanning bed depends on a number of factors: base tan, bulb intensity, and skin type to name a few. According to testimony from the Tropical Illusions owner, the manufacturer recommended time was a guideline and if a customer had prior indoor tanning experience, the time spent in the tanning bed could be adjusted accordingly. Plaintiff placed into evidence records from Tropical Illusions showing that in the first two sessions at that salon, plaintiff exceeded the recommended "first-time tanner" time. The argument advanced by plaintiff was that she was in Tropical Illusions' tanning beds consistently for longer than the stated maximum time allowable.

Charlie Buechel introduced evidence that the bulbs in the tanning beds were changed and that Tropical

Illusions went from 20-minute bulbs when plaintiff tanned to 15-minute bulbs later.

Throughout the time that plaintiff alleged that she utilized tanning salons, plaintiff was seen and treated by Dr. Kristen Stephen, a dermatologist, who testified on her behalf. First seen in August 2000 when plaintiff was 18 years old, Dr. Stephen testified that she was aware that plaintiff tanned at salons as early as 2001. In a February 2001 follow-up office visit, plaintiff was seen for a suspicious mole. At that time, plaintiff admitted to Dr. Stephen that she tanned at tanning salons. Over the next few years, numerous moles were noted by the doctor and biopsies were performed, leading to the excision of atypical moles.

Dr. Stephen testified that given plaintiff's history of two early melanomas which developed in quick succession, her history of *multiple dysplastic nevi (moles)*, and history of tanning bed use, plaintiff was at a high risk for further melanoma development. That scenario consequently led to skin checks every three to four months for the indeterminate future.

During her testimony, Dr. Stephen confirmed that a significant risk factor for melanoma was indoor tanning bed use. Indoor tanning beds use UV rays to induce skin pigmentation through a deeper, penetrating type of radiation that has long been known to cause skin damage. She testified that recent studies showed a 75% increased risk of malignant melanoma with indoor tanning bed usage and that melanoma is the most common form of cancer in people between the ages of 20 and 29.

Plaintiff testified during cross-examination by Charlie Buechel that at no time during her visits with Dr. Stephen up through June 2009 did Dr. Stephen ever speak to her about the risks associated with utilizing tanning beds. She also testified that she was not aware that exposure to UV rays could cause skin problems until after her diagnosis in June 2009.

Dr. Stephen contradicted plaintiff's claim less than an hour later, testifying that she knew that plaintiff was using tanning beds and that on at least three occasions, she had discussions with plaintiff about the risks of being exposed to UV rays regardless of the source.

On March 6, 2006, an excision of a mid-back mole took place. The lab results came back indicating that there was a need to remove more. With the revision scheduled for March 15, on March 14, according to tanning salon records, plaintiff was tanning at an indoor tanning bed.

The stitches were to be removed March 24, 2006. Again plaintiff was tanning on March 21, 2006, three days before the stitches were removed. This conduct certainly was not recommended by Dr. Stephen according to the doctor's own testimony. Verbal discussion and lectures regarding tanning and UV rays had been given twice by this time.

The misrepresentation claims presented by plaintiff against Tropical Illusions alleged that the salon promoted tanning by representing that there were certain health benefits of indoor tanning. The owner of Tropical Illusions testified that she herself did not

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believe that indoor tanning had any health benefits. During cross-examination by Charlie Buechel, plaintiff stated that she actually did not talk to anybody at Tropical Illusions about the benefits of indoor tanning.

Testifying as an expert on behalf of Tropical Illusions was Dr. Arthur R. Rhodes of Rush University Medical Center in Chicago, Illinois. Previously, Dr. Rhodes was the Director of the Pigmented Lesion and Melanoma Intervention Clinic at the University of Pittsburgh Medical Center. At Rush, he is the Director of The Melanoma Surveillance Clinic. Dr. Rhodes has followed several thousand patients who have had melanoma. He has an internationally recognized role in melanoma research, melanoma education and melanoma surveillance.

Dr. Rhodes testified that the role of indoor tanning in the development of melanoma in Ms. Powell was moot, given her elevated baseline risk related to the presence of *prominent and atypical nevi*. Dr. Rhodes found that plaintiff was at a high risk for developing melanoma based on the presence of prominent and atypical moles on her skin. The doctor's opinion on direct and cross-examination was that there was no indication of increased melanoma risk related to ultraviolet radiation exposure from tanning bed usage.

In this case, the jury determined that there was no connection between the tanning beds causing the injury and harm as alleged by plaintiff, and plaintiff could not recover against any of the four defendants listed on the verdict slip.

Kristin Powell vs. Instant Replay Video, Inc. t/d/b/a Instatan, et al., Court of Common Pleas of Allegheny County, Pennsylvania, No. GD 10-017959

Charles A. Buechel, Jr., is a partner in the firm's Pittsburgh office. Charlie focuses his practice in the areas of insurance coverage, medical professional liability, construction, casualty and premises liability, product liability, maritime, and environmental torts. A member of the Academy of Trial Lawyers of Allegheny County, he is a frequent lecturer and author on personal injury law, among other specialty topics. He has been an Associate Opinion Editor and has served as the editor of the ***Jury Verdicts*** project of the ***Pittsburgh Legal Journal***. Charlie is also an Adjunct Professor of the University of Pittsburgh's Swanson School of Engineering Masters of Science program in Construction Management. He earned his J.D. from Loyola University School of Law where he received an Outstanding Academic Achievement Award. He earned a B.S. degree from Villanova University. He is admitted to practice in Pennsylvania as well as the U.S. District Court for the Western District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit.

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