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RAWLE'S REPORTS

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NEW JERSEY

Defense Verdict in ATV Case

Caroline S. Vahey

John T. Donovan

A Burlington County Superior Court jury recently returned a defense verdict after a three-week trial in the matter of *Kyle Deitrich v. Ward Sand*. **John T. Donovan** of Rawle & Henderson LLP represented Ward Sand and was assisted by senior associate **Caroline S. Vahey**. The defense of the case illustrated the significance of tenacity when it came to a strong legal defense, as well as the growing importance of the internet and social media in the impeachment of plaintiff's claims.

On February 11, 2011, Kyle Deitrich was 17 years old and was riding his ATV on the Ward Sand property in Burlington County, New Jersey. He testified that although it was Ward Sand property, he had ridden there hundreds of times on the past and he did not necessarily know he was trespassing.

The Ward Sand property is almost 500 acres in the Pinelands of New Jersey and is underdeveloped, natural land with the exception of two acres in the middle of the property that consist of the operational quarry. Ward Sand had a difficult time as a defendant contesting the fact that the property was constantly trespassed on by ATV riders after hours who accessed the property without consent. Despite some "No Trespassing" signs, "Wards" was known in the community as a place to ride ATVs and motorbikes.

Prior to the trial, during the course of discovery, we learned that someone had even created a "Wards" Facebook page to post photographs of the terrain and videos of ATV riders. In addition, there are a number of YouTube videos depicting motorcycles and ATV riders accessing the property.

When Kyle Deitrich decided to ride his ATV on Ward's property on February 11, 2011, he entered the property at dusk. He rode up a stockpile he had been riding up for years, expecting

to find a gradual slope, but instead it had been cut away. Deitrich went off the side of the pile and was severely injured. He was airlifted from the site but survived with significant brain trauma. Experts testified that the severe and permanent cognitive deficits he suffered would prevent him from working in any full-time capacity for the balance of his life.

During the course of discovery, we learned that Kyle Deitrich had a Facebook page. On that Facebook page, he often posted pictures of himself riding. We moved the Court for that Facebook page. Our motion was granted so that plaintiff had to provide the non-public portions of the page that may have dealt with riding both before and after the accident.

Incredibly, from these pages, we learned that Deitrich went back to riding his ATV not too long after the accident despite his brain injury and physical limitations. In addition, we discovered that Deitrich wrote under his own name on an ATV forum where he would write about riding and at one point indicated that it was "illegal" to ride at Ward Sand. The various internet investigations and searches of this young plaintiff proved very helpful.

There is a New Jersey statute on point which we believed addressed the situation. The New Jersey statute had not been cited before in any New Jersey case, but suggested no owner of real property shall assume responsibility for any ATV vehicle unless the operation or use if it is with the express consent of the owner. However, that statute (N.J. Stat. § 39:3C-18) does not limit the liability that would exist for the willful creation of a hazardous condition.

As a result of the statute, we filed a motion for summary judgment, contending that plaintiff's admission as a result of requests for admissions and his testimony during his deposition suggested that he did not have the express consent of the owner. In addition, we argued that the statute had to preempt and supersede any traditional duties under common law.

The trial court expressly disagreed, finding in part that the statute may not apply because there were issues as to whether plaintiff had express consent to enter the property and the statute acts as immunity only after liability is established under common law. In addition, the court held that the defendant may have willfully created a hazardous condition negating the protections of the act.

Because we were so disturbed by the court's ruling, we filed for reconsideration and the Judge again denied our motion and we proceeded to trial. Plaintiff's counsel's settlement demand was $3 million prior to trial and never changed during the trial of the case. No offer was made over $100,000.

At trial, plaintiff established that there were trespassers constantly and consistently on the Ward Sand property, including Kyle Deitrich and his father. As a result, they were entitled to a "constant trespasser charge," which raised the level of duty for Ward Sand. Plaintiff also presented expert testimony that Ward Sand violated provisions of MSHA (and its New Jersey equivalent) which governed the quarry.

We moved again for a directed verdict to foreclose plaintiff's suggestion that an employee had once said it was "ok to ride there," as this was not the express consent required under the statute and plaintiff had failed to establish that Ward Sand willfully created the hazardous condition. The court again denied our motion (for the third time), even suggesting that the case may be worthy of punitive damages.

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The Court presented the jury with the following questions:

1. Did plaintiff have the express consent of Ward Sand to enter and use the property?
2. Did defendant willfully create a hazardous condition without reasonable care for plaintiff's safety?
3. Was the defendant's action a proximate cause of plaintiff's injury?
4. Did defendant breach its duty to plaintiff and is therefore negligent?
5. Was defendant's action a proximate cause of plaintiff's injury?
6. Was plaintiff negligent?
7. Was plaintiff's action a proximate cause of plaintiff's injury?
8. Taking the negligence of both plaintiff and defendant, assign a percentage of negligence to each party.

The jury returned after lunch and approximately an hour of deliberations with the first two questions answered in the negative. In other words, the jury did what the court would not legally do. The jury applied the statute as written despite the court's constant denial of our attempts to raise this issue.

We also believe that the jury considered the actions of the plaintiff even more so than the conduct of Ward Sand. The cross-examination evidence we developed in discovery through Facebook and the ATV message boards certainly went a long way to suggest that plaintiff was reckless in his conduct. Despite not dropping their demand from $3 million at any time during the course of trial, plaintiffs did not appeal the decision of the jury.

Kyle Deitrich v. Ward Sand & Materials, et als, Docket No.: BUR-L-213-13

John T. Donovan is a partner in our Philadelphia office and concentrates his practice on premises liability, product liability, catastrophic injury, toxic tort and construction law matters. He is admitted to practice in Pennsylvania and New Jersey and the Third Circuit Court of Appeals. John has tried dozens of cases to verdict in both Pennsylvania and New Jersey. He has been designated Liability Catastrophic Injury Counsel (LCIC) for a major international insurance carrier. He graduated *cum laude* from Lafayette College and received a J.D. from the University of Pittsburgh School of Law, where he was elected Vice President of his class. In the past he taught at Villanova University School of Law and Rutgers School of Law as an adjunct faculty member on trial and pretrial issues. He initiated the program at Temple University School of Law where he continues as an adjunct faculty member. In 2015 he was elected to the National Association of Defense Counsel, an honor award to less than 1% of the defense counsel in the United States. In addition, he volunteers on behalf of the Support Center for Child Advocates and chairs the firm's Child Advocacy Practice Group. He has been selected as a Pennsylvania Super Lawyer by ***Law & Politics*** Magazine each year from 2010 through 2015.

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Caroline S. Vahey is an associate in our Philadelphia office. She focuses her practice in the areas of products liability, premises liability, construction law and general casualty. She is admitted to practice in Pennsylvania and New Jersey. She received a B.A., *cum laude*, from the Catholic University of America in 2003. In 2006, she graduated with a J.D., with honors, from the Chicago-Kent College of Law. She was selected by the faculty of Chicago-Kent as a recipient of the Dean's Certificate of Service Award. The Illinois State Bar Association presented her with Certificates of Recognition in 2005 and 2006 for meritorious public service and professional responsibility activities. Prior to joining Rawle & Henderson, Caroline represented both plaintiffs and defendants in Pennsylvania and New Jersey in civil litigation. Caroline was selected as a "Pennsylvania Rising Star" by Super Lawyers and ***Law & Politics*** Magazine in 2015. Rising Stars are the top 2.5 percent of attorneys in Pennsylvania who are 40 years old and younger or have been in practice for 10 years or less.

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CLAIMS & LITIGATION MANAGEMENT ALLIANCE

Julie Nord Friedman

Julie Nord Friedman, a partner in our Pittsburgh office, has joined the prestigious **Claims & Litigation Management Alliance** (CLM). The CLM is a nonpartisan alliance composed of thousands of insurance companies, corporations, Corporate Counsel, Litigation and Risk Managers, claims professionals and attorneys. Through education and collaboration, the organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows.

Julie Nord Friedman concentrates her practice in the defense of manufacturers, suppliers, and contractors in mass and toxic tort litigation, with an emphasis on asbestos litigation. Her clients range from Fortune 500 companies to regional contractors and suppliers. She is a National Coordinating Counsel for one client and she also acts as trial counsel in the defense of claims in mass tort and toxic tort litigation and regularly handles matters for multiple clients in the courts of the Commonwealth of Pennsylvania and in the State of West Virginia. Julie is active in the Defense Research Institute. She has been rated AV Preeminent by Martindale-Hubbell.

Julie earned her J.D. in 1995 from the University of Pittsburgh School of Law and her B.A. in 1992 from The American University in Washington, D.C. She is admitted to practice in Pennsylvania and West Virginia, as well as the U.S. District Court for the Western District of Pennsylvania and the U.S. District Court of the Southern District of West Virginia.

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WORKERS' COMPENSATION SEMINAR

Zachary M. Rubinich

Zachary M. Rubinich, a partner in our Philadelphia office, co-presented a seminar on ***Risk Management in Workers' Compensation*** to a group of insurance professionals in Radnor, Pennsylvania, in October 2015. The seminar explained how to identify injuries, claimants, and the types of claims that have the potential to be protracted and result in high exposure claims. The seminar also presented cost-effective solutions for settling long-standing claims.

Zach focuses his practice on the defense of insurance carriers, self-insured entities and third-party administrators against workers' compensation claims in Pennsylvania. Based on his extensive experience, the Pennsylvania Bar Association Workers' Compensation Law Section has certified him as Specialist in the practice of workers' compensation law. Zach has handled all aspects of litigation before workers' compensation judges, the Workers' Compensation Appeal Board, the Commonwealth Court and the Pennsylvania Supreme Court. He routinely counsels employers, insurance carriers and third party administrators on claims management, workplace safety, return-to-work programs, employment practices and risk management. Zach is rated AV Preeminent by Martindale-Hubbell. He has been selected as a Pennsylvania Rising Star by Super Lawyers from 2010 to 2014. Rising Stars are the top 2.5 percent of attorneys in Pennsylvania who are 40 years old and younger or have been in practice for 10 years or less.

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