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Tort Trends

The newsletter of the Illinois State Bar Association's Section on Tort Law

Editor's Note

BY JOHN L. NISIVACO

The first article in this edition of *Tort Trends* is written by Rick Pullano and examines the issue of the discoverability of electronically stored information specifically with regard to cell phones. The author uses a discussion of the second district appellate court opinion in the case of *Carlson v. Jerousek* as an example of what the courts will have to consider when evaluating the discoverability of this type of information. The article goes on to discuss the practical aspects of obtaining the information and concludes with the specific considerations the court will consider in making a decision about whether to allow the discovery. This is a must-read for litigators.

The second article of this edition is authored by Al Durkin and discusses the first district appellate court opinion in *Tielke v. Auto Owners Insurance Company*, which dealt with an offer of settlement that was properly accepted before it was

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Uncharted Waters: The Discoverability of Forensic Cell Phone Data in Personal Injury Cases

BY RICHARD L. PULLANO

Everywhere you look, you see people staring at their cell phones. On a crowded city street, there are numerous people walking with their heads down and looking at their phones rather than where they are going. Driving to work in the morning, you are inevitably surrounded by drivers looking at their phones rather than paying attention to traffic conditions ahead of them. Unfortunately, we all see the devastating impact these careless decisions can have on innocent victims on a regular basis. This problem will only worsen as more and more people purchase smart phones. Currently, it is estimated that 64 percent of American adults own a smartphone with the average user spending on average 3.3 hours per day using a mobile device.[1] It is estimated that approximately 6 billion smartphones will be in circulation by the year 2020.

As trial lawyers, it is our job to thoroughly investigate the facts and circumstances surrounding all of our cases. With the rise of smartphone use in our society, the ability to see what a person is doing at any time can be useful in a personal injury case. Electronically stored information contained on cell phones can

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withdrawn, and a trial judge that erred in failing to conduct further proceedings regarding the circumstances behind the offer and acceptance. The author points out that the judge compounded that error when he erroneously advised plaintiff's attorney to file a separate breach of contract claim, which he did. In affirming the dismissal of the breach of contact action by the trial court, the appellate court found that under the collateral attack doctrine, the final judgment rendered by the trial court in the underlying action could only be challenged through direct appeal or procedure allowed by statute.

Thank you to all the contributors. The articles are excellent, and we hope you find the material helpful.■

Uncharted Waters: The Discoverability of Forensic Cell Phone Data in Personal Injury Cases

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provide lawyers on both sides of the aisle a treasure-trove of information about what occurred leading up to and at the time of an incident. However, it can also provide significant amounts of private, irrelevant and possibly embarrassing information as well.

Over the past several years, lawyers are often seeking to obtain information a party posts on their social media profiles and/or text messages sent and received. Obtaining a forensic image of a litigant's cell phone can provide an indisputable trail of whether a person was paying more attention to their phone at the time of a crash rather than the roadway. The value this information may have in a civil case runs the gamut from irrelevant to smoking gun. For example, obtaining a forensic image of a defendant's cell phone can prove the defendant was browsing Facebook at the time of the crash rather than staying focused on the roadway.

In high value commercial litigation cases, forensic images of cell phones are regularly obtained and produced in limited quantities. But, the same is not true for personal injury cases…..yet. This may be the next discovery battle ground for trial lawyers because there are no Illinois appellate court opinions providing the trial courts guidance on this issue. The Illinois Supreme Court has not weighed in either. However, there has been some recent case law that may hint at where the law is moving on this issue.

In *Carlson v. Jerousek*, 2016 IL App (2d) 151248 the second district analyzed the competing interests impacting the discoverability of electronically stored information contained on computers in a personal injury case. This article will discuss the *Carlson* opinion and the basis upon which the court reached its conclusion. By analyzing the issues and reasoning applied by the second district in *Carlson*, one can understand what issues the trial courts and reviewing courts will likely have to consider when evaluating the discoverability of electronically stored cell phone data. This article will also discuss what a forensic image of a cell phone actually is, how cell phone data is obtained, what data can be extracted, and whether a litigant's privacy rights can be adequately protected when doing so.

Carlson v. Jerousek

In *Carlson*, the plaintiff claimed that he suffered a head injury when his personal car was rear ended by a bus. Because of his head injury, the plaintiff claimed that he suffered cognitive deficits that were impacting his ability to do his job. A discovery dispute arose when the defendant requested a forensic image be taken of the entire content

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of all of the plaintiff's personal and work computers in order to test the veracity of the plaintiff's damages claims. The trial court granted the request over the plaintiff's objection and the appeal ensued.

Ultimately, the second district vacated the trial court's order and held that the request for the plaintiff to turn over computer hard drives for a forensic analysis was not justified based on the facts of that case. The second district reasoned that the request (a) was not narrowly restricted to yield only relevant information, (b) posed a high risk of being overbroad and (c) was intrusive in a manner that violated the plaintiff's constitutional right to privacy.

In doing so, the second district applied the 2014 amendments to Illinois civil discovery rules to the facts of that case. Specifically, in 2014, the Illinois Supreme Court adopted rules that provide guidance on the discoverability of electronically stored information. Specifically, Rule 201(c)(3) was adopted by the Illinois Supreme Court regarding proportionality. That section states "[w]hen making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation and the importance of the requested discovery in resolving the issues." Based on the facts in *Carlson*, the court stated a "party may not dredge an ocean of electronically stored information and records in an effort to capture a few elusive, perhaps non-existent, fish." However, the court did not reach a broad conclusion that forensic images of computers is never discoverable. Based on the facts of *Carlson*, the court concluded that any benefit the defendant may get from the electronically stored data was outweighed by the burden of a legitimate intrusion in the individual's constitutional right of privacy.

What Type of Information Is Available From a Forensic Image of a Cell Phone?

Attorneys, trial courts, and reviewing courts should have sufficient knowledge of what a forensic image of a cell phone actually is prior to making a determination on its discoverability. Unfortunately, when it comes to personal electronic devices, there are misconceptions regarding what it is, how information is retrieved, and what type of information can be included and/or excluded from production. Below is just a brief statement aimed at clearing up some of these common misconceptions.

At its core, a forensic image is an attempt to extract as much information from the phone as possible. Once extracted, the data is immediately put into a computer software program that utilizes filters to limit what data is viewable by the investigator. The filters are based on search parameters and terms agreed upon by the parties and included in a protective order previously entered. Thus, the software program filters out only the data that falls within the agreement of the parties. A properly designed search effectively shields the attorneys, the parties and investigators from reviewing private, unrelated and potentially embarrassing information. Contrary to popular belief, the forensic investigator is not scouring through the image for the relevant information himself. Concerns that lawyers, judges and investigators may have unfettered access to potentially embarrassing information is not legitimate.

For example, a narrow request can ask for "all data regarding usage of applications on Mr. Defendant's phone for a period of time of 5 minutes before the crash and 5 minutes after the crash." By setting these parameters, information extracted will be limited to a relevant and reasonable time frame. People like attorneys, judges, and investigators do not have access to the sensitive, unrelated data. Thus, privacy concerns are effectively balanced against the requesting party's right to obtain all relevant evidence regarding material issues in the case.

Additionally, obtaining the forensic image and extracting the relevant requested information is not burdensome and it is more economical than most people realize. The forensic investigator can go to the person's house or the attorney's office and extract the data on site. The software filters the data right then and there. It is not a time-consuming process. Once the filtering process is complete, the producing party's attorney can review the data prior to producing it to the requesting party. If the lawyer has concerns about pieces of information, they can be addressed through a privilege log.

How Will Proportionality and Privacy Issues Impact the Discoverability of Forensic Cell Phone Images?

There is no easy answer to this question. However, given how prevalent the use of smart phones is in our society, the issue of the discoverability of electronically stored information contained on cell phones is obviously ripe for discussion. When judges in personal injury cases are asked to weigh in on the discoverability of forensic cell phone images, it is patently clear that the courts will balance the monetary and nonmonetary factors in producing said content against the probative value of the content sought. This means that the court will consider things like:

1. The specific nature of the request made (i.e., is the request narrowly tailored in time and substance or is it a fishing expedition?);
2. The monetary cost of obtaining the relevant forensic image data from a cell phone;
3. The amount of potential damages sustained by the injured party;
4. The importance of the potential evidence to the litigation at issue (i.e., how relevant is the potential evidence and are there less intrusive means of obtaining it?);
5. The societal importance of the issues at stake (i.e., will ordering production of this data promote public safety by warning people that "Facebooking" when driving can be discovered in litigation); and
6. The extent to which the discovery requests will be an invasion of privacy.

The societal importance and public safety factors of this analysis cannot be understated. People think they can get away with using social media applications while driving because of a pervasive "catch me if you can" mentality. People do not believe they will ever get caught. The trial courts

can play a significant role in changing this flawed mentality. The civil justice system can make our roads safer by doing so. As a result, there is a strong public policy benefit of allowing limited cell phone data to be disclosed in litigation that does outweigh the privacy concerns of cell phone users. This is especially true when understanding the limited content from a phone that is actually extracted.

In the near future, the discoverability of cell phone data will surely be addressed by our courts. Clearly, the courts' analyses will likely come down to the specific facts of each case. The trial courts may be more willing to compel production of limited requests for forensic cell phone images in injury cases where the requesting party propounds a tailored request, includes a detailed protocol that ensures that private/sensitive/irrelevant data will not be viewed and/or maintained and the plaintiff actually offers to pay the expense of obtaining this data.■

1. See Pew Research Center, U.S. Smartphone Use in 2015 (2015), *available at* http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf and Salesforce Marketing Cloud, 2014 Mobile Behavior Report 5-6 (2014), *available at* https://www.marketingcloud.com/sites/exacttarget/files/deliverables/etmc-2014mobilebehaviorreport.pdf.

Deal or No Deal

BY ALBERT E. DURKIN

The recent first district opinion in *Tielke v. Auto Owners Insurance Company, et. al.* 2019 IL. App. (1st) (181756), filed August 16, 2019, is a must read for members of the bench and bar who are engaged in litigation. The case involves mistakes made by both a trial judge and a plaintiff's attorney as well as a possible ethical violation by a defense counsel. Those mistakes proved very costly to the plaintiff's personal injury case, resulting in a loss to the plaintiff of nearly $400,000. It also may lead to a malpractice claim against plaintiff's counsel.

In *Tielke*, a plaintiff's personal injury attorney filed a breach of contract claim against the defendants and their attorney in an underlying slip and fall case after the underlying case went to verdict. In the underlying case, the defendants' attorney had extended a $700,000 settlement offer during the course of the trial. That evening, defense counsel confirmed in a text message that the offer was still open. The following day, during a break in testimony, plaintiff's attorney advised defense counsel that plaintiff accepted the offer. Plaintiff's counsel followed up with a text message to defense counsel.

Approximately 15 minutes later and before the court was scheduled to reconvene, defense counsel returned plaintiff's counsel's test with a text of her own stating, "Sorry. Offer was withdrawn, we will proceed." Plaintiff's attorney demanded that the settlement agreement be honored, but defense counsel refused. (Notably, the settlement offer had no deadline for acceptance or withdrawal; nor was there any evidence that plaintiff's attorney had rejected the offer as made or countered with a change in its terms.)

Plaintiff's attorney then brought the settlement matter to the attention of the trial judge who stated:

So the defense is giving you two bites at the apple. So I can't do anything here. The method for you to do then after the trial, if you get a verdict less than the accepted offer, you file a breach of contract lawsuit

* * * *

So I encourage you to do what you need to do to protect your rights, the only thing for me to do is proceed with the trial. I am denying the Plaintiff any relief.

The trial proceeded and ultimately, the jury returned a verdict in favor of the plaintiff and against one of the defendants, but only in the amount of $332,425.00. The trial court entered judgment on that verdict.

Two days following the jury verdict, plaintiff issued a written demand on defendant to tender the full amount of $700,000 settlement agreement. To this, defense counsel responded:

We disagree with your representation and no settlement was effectuated. Our settlement offer was withdrawn…

Defendants then brought a motion before the trial judge to enforce a full satisfaction of this verdict tendering the full amount of the judgment of $332,425.00. Plaintiff's attorney accepted defendant's $332,425.00 check, reserving her right to seek the difference owed by the disputed settlement agreement.

Plaintiff brought a post-trial motion seeking an award of costs and sanctions against the defendants, but did NOT seek reconsideration of the court's denial of the motion to enforce the settlement agreement. Moreover, plaintiff did NOT file an appeal following a denial of the post-trial motion.

Instead, plaintiff listened to the trial court and filed a separate breach of contract action against the defendants from the slip and fall action, along with their attorney and their liability carrier, Auto Owners. Defendants filed a motion to dismiss pursuant to 735 ILCS 5/2-615 with a memorandum seeking dismissal under Section 2-619 of the court of Civil Procedure, arguing that the breach of contract claim was an improper collateral attack on the judgment entered on the verdict in the underlying case, and

was further barred by *res judicata*, judicial estoppel, and accordant satisfaction. The trial judge agreed that the action was an impermissibe collateral attack on the order in the underlying case. The trial judge denied Plaintiff's Motion to Enforce the Settlement Agreement and granted defendants' Section 2-619 motion to dismiss.

On appeal, Justice Rochford delivered the opinion of the court with Justices Hoffman and Hall concurring. In affirming the dismissal of the breach of contact action by the trial court, and relying upon *Malone vs. Cosentino* 99 Ill. 2d 29 (1983), the court affirmed the dismissal, finding that under the collateral attack doctrine, the final judgment rendered by the trial court a court in the underlying slip and fall action could only be challenged through direct appeal or procedure allowed by statute. It remained binding on the parties unless it was reversed through such a preceding, citing *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 IL. App. 3d 179 (2010). The court further cited to *Bonhomme v. St. James* (2012) Il. 112393 at 26, which stated, "A party should not be excused from following rules intended to preserve issues for review by relying on a trial court's erroneous belief that an issue was properly reserved for review." In relying on *Bonhomme*, the court found that plaintiff erred in relying on the trail court's erroneous direction to file a separate cause of action for breach of contract in order to collaterally attack the court's denial of her Motion to Enforce Settlement. Instead, she was required to follow well established Supreme and Appellate court precedent of filing a proper post trial motion.

Tielke is important and instructive for members of the bench and bar. The trial court issued an imprudent directive—to file a breach of contract action—and the plaintiff's attorney complied. Both were wrong. This issue that could have easily been preserved and possibly resolved through a post-trial motion and possibly an appeal in the underlying case.

Based on the available record, it appears that the offer of settlement was properly accepted before it was withdrawn, and that the trial judge erred in failing to conduct further proceedings regarding the circumstances behind the offer and acceptance, before denying plaintiff's motion to enforce. The judge compounded that error when he erroneously advised plaintiff's attorney to file a separate breach of contract claim.

According to the record, the offer, when made, did not contain a deadline for its acceptance; it was open-ended and it was never rejected or countered by plaintiff's attorney. Assuming this to be true, the elements of a contract were satisfied. *City of Burbank v. Illinois State Labor Relations Board*, 185 Il App. 3d 997, 1002-3 (1989); *CNA International v. Baer*, 2012 Il. App. (1st) 112174.

Plaintiff's attorney dropped the ball by not insisting that the court conduct a full hearing of the circumstances surrounding the purported settlement before the judge threw up his hands and said, "There's nothing I can do" and proceeding with the trial. By conducting an evidentiary hearing, the court would have been in a better position to determine if the offer was, in fact, accepted prior to being withdrawn before denying the motion outright. That would have provided a detailed and accurate record in the case of an appeal. Had the court done so and found, as I believe he should have, that a settlement had been reached, defendant could have appealed. Had the court denied the motion, and allowed the case to proceed to verdict, plaintiff could have easily appealed.

In light of the Appellate court's decision, by following the trial judge's erroneous directive to file the separate breach of contract claim, plaintiff's attorney is open to a potential malpractice claim. Unfortunately, neither the plaintiff's attorney nor his or her client had such a remedy against the trial judge for the bad advice.

In conclusion, this case is instructive for members of our judiciary and bar because of its unfortunate but preventable outcome. When in doubt, the trial judge could have and should have taken a short recess in the proceedings and gone down the hall and sought the advice of other trial judges as to how best to handle the situation knowing full well that if a settlement was effectuated, there would be no appeal and any errors occurring prior thereto would be of no moment.

A trial lawyer must follow his or her own instincts, not be intimidated by a trial judge, and insist on making a record, even if it is only an offer of proof instead of an evidentiary hearing. If in doubt as to how to proceed, the trial attorney should call appellate counsel, who should be on speed dial, to get advice as to how to proceed so that an appropriate record will be made for purposes of a potential appeal.

This case is a must read for all attorneys and judges who practice in this area.■