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“Unlike”, “Delete Post”, “Delete Photo” and “Delete Comment”: The New Buzzwords in Twenty-First Century Spoliation, and Their Impact on the Trucking Industry

Spoliation of Evidence. Hearing those words, one usually thinks of a cold, calculated effort by a party or its attorney to destroy a piece of physical evidence through document shredding, burning, or other methods of physical destruction.

Usually, clicking “delete” on one’s Facebook or other social media post, picture or comment does not bring about thoughts of spoliation or the potential of an adverse inference jury instruction. With a click of a button, one can delete an incriminating photo or comment forever. This practice seems so harmless and easy, that many attorneys may be advising their clients to simply hit the delete button on incriminating social media posts and photos. However, courts are beginning to say otherwise.

Like so many other industries, the trucking industry is heavily impacted by new advances in social media and possible spoliation ramifications. A driver’s communications with family and friends while on the road may suddenly be items that are not only discoverable, but also items that must be preserved. Practitioners in trucking cases must be cognizant of the ramifications of Facebook and other social media postings. Plaintiffs’ attorneys will undoubtedly attempt to form a timeline of a driver’s activities in order to confirm a driver’s whereabouts. Social media is a source for timeline entries.

Likewise, attorneys representing a truck driver or trucking company must be diligent in their search of social media outlets to “catch” a plaintiff’s posts before they are deleted forever, placing defendants in an uphill battle advocating for spoliation sanctions. Defense attorneys must counter these measures and do their own investigations of plaintiffs to avoid the risks of items being deleted. These initial posts are the stepping stones when arguing for spoliation sanctions because any imposition of sanctions needs proof of incriminating entries being present. These items must be identified and found in a timely manner.

Accordingly, courts are beginning to note the powerful and potentially incriminating nature of social media posts, and are recognizing that there is a duty to preserve these social media items. There have been multiple court decisions around the United States which have held that Facebook posts and pictures are not simply pictures or words, but pieces of potential evidence.

While many reviewing courts have not yet addressed the issue of social media spoliation, most have begun to assess spoliation in the digital age, and have stated that digital communications, such as emails, email accounts and digital data files, are pieces of evidence to which spoliation sanctions may attach. It is only a matter of time before courts around the country are faced with factual scenarios that involve spoliation of social media communications. It is clear that while these items may not be physical objects, they are pieces of evidence which a party may be under a duty to preserve.

The Serious Consequences of Facebook Deletions

Ordering a client to delete a Facebook photo, comment or other social media post has been held to be sanctionable both monetarily, and through an adverse inference jury instruction at trial. The Virginia Supreme Court has analyzed the sufficiency of such sanctions when Facebook data is destroyed. In *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 701 (2013), a defendant's attorney accessed a plaintiff's Facebook page and found a distinguished picture of plaintiff accompanied by other individuals, holding a beer can while wearing a T-shirt emblazoned with "I ♥ hot moms." *Id.* at 699. Defendant then requested screen shots of all photos, messages and status updates on plaintiff's Facebook. *Id.* at 703. Plaintiff's attorney ordered plaintiff to "clean up" his Facebook, and plaintiff subsequently deleted sixteen photos and other materials from his Facebook account, and produced the remaining photos and materials. *Id.*

Ultimately, the trial court decided that Allied Concrete was entitled to sanctions against plaintiff and plaintiff's attorney. The trial court sanctioned plaintiff's attorney in the amount of **\$542,000** and plaintiff in the amount of **\$180,000** to cover Allied Concrete's attorney's fees and costs in addressing and defending against the misconduct. *Id.* The plaintiff's attorney also faced a disciplinary hearing as a result of the misconduct, and has resigned as managing partner of Virginia's largest personal injury law firm.

As a result of these misrepresentations, specifically the deletion of his Facebook page, the trial court also ordered that the following adverse inference jury instruction be given at trial:

"The Court instructs the jury that the plaintiff, Isaiah Lester, was asked in discovery in this case to provide information from his Facebook account. In violation of the rules of this Court, before responding to the discovery, he intentionally and improperly deleted certain photographs from his Facebook account, at least one of which cannot be recovered. You should presume that the photograph or photographs he deleted from his Facebook account were harmful to his case."

Id.

Astute attorneys must take note of these developments, and realize that ordering a client to delete social media posts may not only harm their case, but may also result in monetary sanctions and harm to their professional reputations.

Moreover, litigants have been found to be under a duty to keep their social media accounts active during the pendency of litigation. *Gatto v. United Air Lines, Inc.*, No. 10-cv-1090, 2013 WL 1285285 (D.N.J. Mar. 25, 2013). In *Gatto*, plaintiff was injured while he was at work, and defendants requested documents and information related to plaintiff's social media accounts, as well as records of online business activities, such as eBay. *Id.* at *2. Plaintiff provided defendant with an authorization to access his Facebook account, but subsequently deactivated his account, which eventually caused the data to be permanently deleted. *Id.* Defendants

sought an adverse inference and further sanctions because they had preliminary printouts from the Facebook page that contained comments and photographs that contradicted Plaintiff's claims and deposition testimony. *Id.*

The court held that an adverse inference jury instruction was appropriate in the case because there was actual suppression or withholding of evidence when the plaintiff intentionally deleted his Facebook account. *Id.* Moreover, the court held that it was reasonably foreseeable that the evidence would be discoverable, and thus, the plaintiff had a duty to preserve his Facebook account at the time it was deactivated and deleted. *Id.* at *5. The court further held that even though the plaintiff did not intend to permanently deprive the defendants of the evidence within the Facebook account, it was sufficient that the plaintiff intentionally deleted the account, thereby destroying the information. *Id.*

A Creative Approach

Courts have found creative ways to deal with the new issue of social media and spoliation. In *Katiroll Co., Inc. v. Kati Roll & Platters, Inc.*, plaintiffs moved for an adverse inference after defendant deleted her Facebook profile picture that showed her wearing a dress that was the subject of a copyright infringement lawsuit. *Katiroll Co., Inc. v. Kati Roll & Platters, Inc.*, No. 10-CV-3620, 2011 WL 3583408 (D.N.J. Aug. 3, 2011).

Defendants argued that the court should not impose spoliation sanctions because the website was public and plaintiff could have printed the picture off of the Facebook website itself. *Id.* at *4. The court held that this reasoning was inappropriate because the defendants were merely trying to “pass the buck” and escape their own discovery obligations. *Id.* Moreover, the court held that the defendants knew when the website would be changed, so it was more appropriate for them to have that burden of production. *Id.*

However, because of the changing and fluid nature of Facebook communications, the court ordered that defendant must coordinate with plaintiff's counsel to change the picture back to the allegedly infringing picture for a brief time, so that plaintiff may print whatever posts it believed to be relevant. *Id.* The court ordered that after that period, the defendant must immediately change his profile picture. *Id.* The court chose not to impose an adverse inference instruction. *Id.*

Email and Computer Data

Illinois courts are representative of the approach taken by courts nationally. For example, the U.S. District Court for the Northern District of Illinois has ordered spoliation sanctions in regards to a deleted Yahoo email account. The Northern District has ordered that corporate officers be held in civil contempt and a spoliation/adverse inference instruction be given when an email account was deleted during pending litigation. *F.T.C. v. Asia Pac. Telecom, Inc.*, 788 F. Supp. 2d 779 (N.D. Ill. 2011). In *F.T.C.*, a defendant deactivated a Yahoo e-mail account containing communications relevant to the case after receiving notice of the lawsuit and in violation of a temporary restraining order. *Id.* at 779. The plaintiffs moved for default judgment, and in the alternative, a contempt finding and adverse inference instruction. *Id.* at 791. The court held the defendant corporation and its sole shareholder, officer, and director were in civil contempt for deleting the email account, and imposed a sanction in the form of an adverse inference instruction. *Id.* at 782. The court held that by permanently deleting an email account, the defendants acted in bad faith because their “destruction” of the account was for the purpose of hiding adverse information. *Id.* at 790.

Similarly, the Illinois Appellate Court has recently held that erasing data off of a personal computer during the pendency of litigation constituted spoliation, and dismissed plaintiff's claims with prejudice. In *Peal v. Lee*, 403 Ill. App. 3d 197, (1st Dist. 2010), an ice skating instructor sued his former employer for defamation. During the course of discovery, defendants filed a motion to compel plaintiff to make his computer and electronic storage devices available for inspection. *Id.* at 201. Plaintiff then deliberately deleted thousands of files from his computer. *Id.* at 197. Defendants moved to dismiss the claim as a spoliation sanction pursuant to Illinois Supreme Court Rule 219(c). The circuit court granted defendants' motion, and dismissed plaintiff's claims with prejudice. *Id.* at 202.

The appellate court upheld the dismissal stating that because plaintiff was instructed to preserve the computer via an electronic preservation letter, plaintiff knew that his computer would be subject to the litigation, and, therefore, was under a duty to preserve it. *Id.* at 206. The court also stated that plaintiff's direct bad faith actions of deleting the files demonstrated that the sanction of dismissal was appropriate. *Id.* at 207.

Conclusions for the Future

The 21st century and digital age have brought about new concerns that attorneys for both plaintiffs and defendants must address. The new methods of spoliation will likely be a mouse-click and deletion, as opposed to shredding and burning of documents and other tangible items. Attorneys must be aware of these new considerations, and realize that advising a client to delete an undesirable photograph or incriminating post may lead to spoliation, monetary and professional sanctions. These sanctions apply to truck drivers and trucking companies with equal weight. Attorneys should consider advising their clients accordingly, to prevent the harsh consequences.

Facebook, LinkedIn and other social media posts are pieces of electronic data that contain probative, relevant and discoverable information. While they are not physical objects that one can grasp and manipulate, they contain important physical data that may be invaluable to litigation. Courts are beginning to find a duty to preserve these items during the pendency of litigation, and attorneys should adhere to these new norms, or risk being heavily sanctioned.

Attorneys who practice in insurance defense and trucking litigation must take note of these advancements so as not to subject their clients and themselves to sanctions. Moreover, practitioners in trucking litigation must be vigilant in their investigation of plaintiffs and their social media pages, in order to ensure that plaintiffs do not delete their incriminating social media posts. These initial posts are the stepping stones when advocating for spoliation sanctions. The 21st century has brought on new concerns and issues in the realm of spoliation. The careful practitioner should face these new issues head-on in order to zealously advocate, and avoid the potential imposition of harsh sanctions.

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