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November 3, 2015
Labor & Employment Seminar
Turf Valley, MD

April 19, 2016
Maryland Workers' Compensation Seminar
Hunt Valley, MD

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MARYLAND HIGH COURT ISSUES RULES ON USE OF SOCIAL MEDIA EVIDENCE

TWEETS, GRAMS, CHATS, AND POSTS: MARYLAND HIGH COURT WEIGHS IN ON USE OF SOCIAL MEDIA AT TRIAL

There was a time, not so long ago, when a "tweet" came from a bird, and a "post" was part of a fence. Now, with social media platforms like Instagram, Twitter, Facebook, Snapchat, KIK, and countless others, claimants, and even corporate entities, are "sharing" information on a scale never known before. As such, the use of that information in investigating claims and at trial has become a standard part of civil litigation. And as with any "new" technology, the use of that information has faced legal challenges and has been the subject of appeals across the country.

This spring, the Maryland Court of Appeals rendered a decision related to the use of information collected from social media as evidence at trial. The cases focused on the authentication of documents (an important evidentiary standard that must be met in order for certain documents, photographs, and information to be admitted at trial) obtained via a Facebook timeline, tweets on Twitter, and direct messaging between social media users. The Court established a standard for Maryland trial courts to follow in considering authenticity of social media evidence. That new standard requires a "context-specific determination whether the proof advanced is sufficient to support finding that the item in question is what its proponent claims it to be."

In order to establish authenticity of certain writings or posts, the Court set forth several examples for trial attorneys to follow. First, and the most straightforward, is to ask the individual with personal knowledge about the social media profile (i.e.: Is this your Facebook profile?), and also if she created the post that is trying to be admitted into evidence (i.e.: Did you post this message?). Second, the attorney should present testimony which would establish when the profile was created and the internet history of the device(s) used to make the post to establish that the device was used to create the social networking profile and post in question. Third, the attorney can present evidence directly from the social networking website which could link together the profile, the posting, and the person who made the post. Finally, social media posts can be authenticated by content within the post, private conversation, or tweet, which contains "distinctive characteristics," for example, when the contents of the post or conversation were not a matter of common knowledge.

In ruling on specific issues presented in two trials where social media content was offered as evidence, the Court of Appeals held that the trial court did not err in admitting "direct messages" and

"tweets" into evidence, and Facebook messages authored by the Defendants as authenticity was established by the postings' "distinctive characteristics." In one case, the Defendant's plan to shoot the victim was reflected in "direct messages" sent via Twitter, as well as public "tweets" taken from screen shots from the Defendant's actual phones. The direct messages were sent on the same evening the plan was concocted and the "tweets" were sent within minutes of the messages. Thus, Court of Appeals upheld the trial judge's admission of the messages and tweets into evidence as there were sufficient distinctive characteristics from which a trial judge could infer the "tweets" and "messages" authentic. In another case, the State sought to introduce Facebook messages received by the victim from the Defendant, stating that he got "carried away by the anger." The messages were received shortly after a stabbing, at a time few people were aware of what happened, and were written in Spanish. After the messages were sent, the Defendant also called the victim within minutes of sending the messages, and returning from the hospital after seeing the victim. Again, in light of these distinctive characteristics, the Court upheld the use of the social media communications as admissible evidence.

In yet another case, the trial court excluded four pages of a Facebook conversation, and exclusion was upheld on appeal. The charges against a criminal defendant arose from a fight with his girlfriend. During the cross-examination of the victim/girlfriend, defendant's counsel sought to introduce four pages of a "conservation" from the victims Facebook timeline. There was a statement from her account that "her boyfriend was a dead man walking." The victim denied posting this statement. The trial judge sustained the State's objection to the admit the entirety of the conversation, based on the testimony that the victim's password was known by several other people and that other people have previously hacked into her Facebook page, or inserted information on her page in the past. Further, the post in question was not in any way connected to the previous posts, which the victim had authored.

In sum, the comprehensive opinion from Maryland's high court should serve as a guideline for how to effectively introduce evidence obtained from social media. In the modern age, social media is a literal treasure trove of information, sometimes good, and sometimes bad, for parties to civil litigation. If you have any questions about how social media postings can impact your case or any questions about the effective use of social media in resolving claims, please contact Carrie Bohrer at cbohrer@fandpnet.com or 410-230-3061.

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Social Media Searches: Tips & Best Practices

Searching social media is not as daunting as it may seem. Following these tips and best practices may help with the quick and cost effective resolution of a claim, or may even be the key to a trial victory. While social media evidence can be formally requested via subpoena directly from the media entity (e.g. Facebook, Instagram, Snapchat etc.), this method can be inefficient, as the providers are frequently inundated with requests and the results are sometimes lacking. Often, some quick research can deliver huge returns. Here, we seek to provide a few tips and best practices for social media searches.

Just like most other searches, the best way to start any social media search is with a Google search. What many are unaware of, however, is that there are certain phrases or characters that can be used to narrow down a search within Google. The most efficient addition to any search is quotation marks. Searching for *John Doe* instructs Google to search separately for *John* and *Doe*. Placing this search in quotation marks ("*John Doe*") instructs Google to search only for instances in which *John* and *Doe* appear consecutively, as they do between the quotation marks, leading to more relevant results.

Often times general searches return results for aggregator companies that promise to provide data across several social media platforms. These sites allow the searcher to learn the names of the subject's family members who may have less strict privacy settings for a claimant. Spokeo, for example, provides such a service for around $4 per month for unlimited searches.

Social media searches can also prove useful in ways other than background checks or as alternatives to surveillance. For example, searching using "hashtags" can provide evidence relevant to a given claim from multiple

users, as opposed to just the subject. Hashtags are phrases (without spaces) preceded by the pound sign ("#") which serve as a link to all public posts that contain the hashtagged phrase. An example of the usefulness of this type of search can be illustrated in this scenario: A multiple car pileup has led to severe traffic on Interstate 95. With thousands of people stuck in this traffic, some take to Twitter via their smartphones using hashtags related to this event, one of them being #I95traffic. Later, a plaintiff driver involved in the pileup alleges severe leg injuries based on a negligence claim. The adjuster assigned to the claim takes to Twitter for "tweets" from the date of loss and uses the hashtag, finding a picture of the accident scene as tweeted by a passerby in which the claimant is standing in no apparent distress. This photograph may directly impeach the credibility of the claimant if she is claiming significant damages. Searches like that can be performed on almost any social media site.

If in the course of your searches you discover something you believe may be relevant to your claim or claimant, be sure to save the material. You can attempt to save a copy of the information to a word document, but one helpful tip to remember is that your computer or cell phone will allow you to take a photo (or screenshot) of whatever appears on your screen and save it for future use. This is helpful because the screenshot will show exactly how the post appeared, and the likelihood of alteration of the original content is significantly reduced.

For questions about how to preserve the evidence found during these searches, or for further tips and best practices in searching social media, please contact Ryan Walburn at 410-230-3575 or at rwalburn@fandpnet.com.

In the Trenches: F&P Attorneys Successfully Limit Application of PIP Benefits in Delaware

In *Castiglione v. National Interstate Insurance Company*, No. CV13C-04-016 DCS (Feb. 2015), the Plaintiff John Castiglione filed a claim in Delaware Superior Court for Personal Injury Protection ("PIP") benefits alleging that "he got hung up on a strap of a pallet jack and tripped and fell off the lift gate on the back of his trailer." The Defendant, National Interstate Insurance Company, through Franklin & Prokopik attorneys, filed Summary Judgment arguing that Plaintiff was not entitled to PIP benefits.

The Court opined that the Plaintiff was within a reasonable geographic perimeter of the tractor trailer because he slipped while he was inside the trailer and fell to the asphalt below satisfying the occupancy requirement. However, the Court ultimately granted Summary Judgment to the Defendant holding that the Plaintiff's injuries were not caused by the use or operation of the motor vehicle, except as a stationary platform from which product was being unloaded.

The tractor trailer was the mere *situs* of the Plaintiff's alleged injuries and was not an "active accessory" in causing those injuries. Because Plaintiff was not injured in an accident involving the inherent nature of the motor vehicle, he was ineligible to recover PIP benefits under 21 *Del. C. Sec.* 2118. Given Delaware's PIP benefit laws, and the claims that arise under those laws, if you ever have a question about a PIP claim, please contact Krista Shelvin (kshevlin@fandpnet.com) or William "Skip" Crawford (wcrawford@fandpnet.com) in our Wilmington, DE office at 302-594-9780.

Florida Increases Protection to Bike Riders

Bicyclists are required to obey the rules of the road in Florida. Indeed, bicycles are legally defined as vehicles under Florida's motor vehicle statutes. Under current law, this means that bicyclists must follow the same rules and have the same duties as motor vehicle drivers. However, Florida legislature has, and continues, to tilt the scales such that motor vehicle drivers have a greater responsibility for preventing accidents with bicyclists, pedestrians and other non-motorists on Florida roads. In 2006, a bill was passed into law which requires the driver of a vehicle overtaking a bicycle to pass the bicy-

cle at a safe distance of not less than 3 feet between the vehicle and the bicycle. A driver who violates this requirement is subject to a traffic citation. Florida lawmakers now seek to broaden the law with HB 231, which is currently being debated in the legislature. The bill, if it becomes law will (1) define bicyclists, pedestrians, skateboarders and other non-motorists on Florida roads as "vulnerable Users;" (2) define "bodily injury" as anything from a "cut or abrasion" to "disfigurement or impairment of a bodily function;" (3) prohibit drivers from making a right-hand turn at an intersection or at a driveway when the motorist has overtaken a "vulnerable User" travelling in the same direction unless the turn can be made "safely;" (4) permit bicyclists to ride in the center of a travel lane in certain circumstances; and (5) require police officers, if citing a motorist for a violation of the law, to note on the face of the ticket that the violation contributed to the bodily injury of a "Vulnerable User." The proposed legislation is definitely one to watch because any violation of the statute, if it becomes law, will be relied upon in civil cases as "some," albeit, "non conclusive," evidence of negligence of a driver involved in an accident with a non-motorist. The progress of HB 231 can be tracked on www.myfloridahouse.gov.

For more information about this article and about Florida law in general, please contact Natalie Stroud Fenner at nfenner@fandpnet.com or (813) 314-2179.

Virginia Trucking Company Wins Challenge for Venue

In *Nelson v. Thompson Trucking Inc.* - No. CL 14-2005, Roanoke City Circuit Court, Virginia, plaintiff filed suit in the Roanoke City Circuit Court against defendant, Thompson Trucking Inc. (Thompson Trucking). Defendant, Thompson Trucking, objected and moved to transfer venue under Va. Code § 8.01-262(3), specifically, making the argument that it did not conduct "substantial" business activity in the city of Roanoke and thereby venue was improper. The Roanoke City Circuit Court sustained defense counsel's objection and transferred the case from the city of Roanoke to Montgomery County Circuit Court, Virginia.

Va. Code § 8.01-262(3) states in pertinent part: "in any action… one or more of the following counties or cities shall be permissible forums…wherein the defendant regularly conducts **substantial** business activity…".

Plaintiff argued defendant Thompson Trucking regularly conducts substantial business activity in Roanoke City and that venue is thus appropriate in this court pursuant to Va. Code § 8.01-262(3). Defendant argued its business activity in the city is not substantial and therefore plaintiff's choice of venue under § 8.01-262(3) is not proper.

In support of defendant's argument, Thompson Trucking proffered that it employs 251 individuals in three different trucking facilities across Virginia, which are located in Danville, Roanoke and Concord. Of these 251 employees, only 5 are permanently stationed at the Roanoke facility and approximately 22 additional employees, who are drivers, appear to use the Roanoke facility as their hub. Therefore, a total of 27 full and part-time employees, or approximately 10.7 percent of Thompson Trucking's workforce, work in and out of Roanoke.

In addition, Thompson Trucking owns a total of 780 vehicles, of which approximately 27 are located at the Roanoke facility. Therefore, approximately 3 percent of Thompson Trucking's "fleet" is headquartered in and around Roanoke.

Lastly, in 2014, Thompson Trucking had a total revenue of $39,289,000. Thompson Trucking reported it had only one client in the city of Roanoke, from which it derived $831,670.38 of revenue. As of 2014, approximately 2 percent of Thompson Trucking's total revenue is attributable to its sole client in Roanoke.

By way of background, in 2004, the General Assembly amended Va. Code § 8.01-262(3) to provide for venue where the "Defendant regularly conducts substantial business activity." The Court held the obvious difference between the language in the current statute and the earlier version of the statute is the inclusion of the word "substantial" in the amended Code.

The Court held that although Thompson Trucking regularly conducts business activity in the city of

Roanoke, it does not conduct "substantial" business activity in the city of Roanoke. In sum, the Court reasoned that Thompson Trucking has less than 11 percent of its work force in the city of Roanoke, has only one client in the city of Roanoke and in 2014 generated only 2 percent of its total revenue therefore, defendant does not conduct "substantial" business activity in the city under Va. Code § 8.01-262(3) and therefore, venue is not proper in the city of Roanoke. As the location of where a case is tried can play a major role in any litigation, if you have questions about this decision, please contact Simran Rahi in our Herndon, Virginia office at 571-612-5928 or srahi@fandpnet.com.

Major Changes to West Virginia Premises Liability Laws

As our readers may recall, we reported in the Winter 2014 Liability Newsletter that the West Virginia Supreme Court of Appeals issued its opinion on November 12, 2013 in *Hersh v. E-T Enterprises, Inc., et al., No. 12-0106, ("Hersh")*, announcing that the Open and Obvious Doctrine was abolished in the State of West Virginia; thus overturning over 100 years of case law. In its 2015 session, the West Virginia Legislature has decided to correct this oversight of the judiciary by enacting Senate Bill No. 13 to re-establish the Open and Obvious Doctrine in the State of West Virginia.

In the November 2014 elections, there was a ground swell of republican victories throughout the entire nation, as well as the State of West Virginia. In fact, the republican party in West Virginia established the majority in both the House and the Senate, and captured three congressional seats. The republican majorities constituted the first time in eighty-three (83) years in the State of West Virginia that the republican party controlled either chamber in the State Capitol. As a result, the republican party established an aggressive legislative agenda, whereupon, they intended to address specific issues relative to overall tort and judicial reform. Specifically, as mentioned hereinabove, Senate Bill No. 13 was introduced for the specific purpose of codifying the previously abolished Open and Obvious Doctrine. In fact, the legislative intent of Senate Bill No. 13 was to limit the liability of a possessor of real property for injuries caused by open and obvious hazards, and to reinstate and codify the Open and Obvious Doctrine of common law that existed prior to judicial abolition. Thus, Senate Bill No. 13 provides that a possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent, or are well known to the person injured as they are to the owner or occupant, and shall not be held liable for civil damages or injuries sustained as a result of such dangers.

Moreover, the Legislature stated that it was their intent and policy to reinstate and codify the Open and Obvious Doctrine in actions seeking to assert liability against an owner, lessee or other lawful occupant of real property to its status prior to the decision of the West Virginia Supreme Court of Appeals in *Hersh*. Finally, Senate Bill No. 13 states that in its application of the doctrine, the court, as a matter of law, shall appropriately apply the doctrine considering the nature and severity, or lack thereof, of violations of any statute relating to a cause of action. Thus, Senate Bill No. 13 codifies the common law Open and Obvious Doctrine, which establishes no duty of care to protect others against dangers that are open and obvious; however, it provides that the application of the doctrine may be limited when it is alleged that the defendant has violated any statute relating to the underlying cause of action.

This reform is a step in the right direction for the State of West Virginia. It provides greater clarity and certainty for landowners in the State of West Virginia, and reestablishes a viable affirmative defense in premises liability actions. Hopefully, it will be the beginning of substantive reform in the next several years, and truly improve the overall environent of West Virginia's plaintiff friendly judiciary.

For more information about this article, contact Gregory E. Kennedy at gkennedy@fandpnet.com or (304) 596-2277.

Why There Will Always be Lawyers . . .

Lawyers give irrelevant information.

Two women are on a transcontinental balloon voyage. Their craft is engulfed in fog, their compass gone awry. Afraid of landing in the ocean, they drift for days. Suddenly, the clouds part to show a sunlit meadow below. As they descend, they see a man walking his dog.

One of the flyers yells to the figure far below, "Where are we?"

The man yells back, "About a half mile from town."

Once again, the balloonists are engulfed in the mist. One flyer says to the other, "He must have been a lawyer."

The other says, "A lawyer! How do you know that?"

The first says, "That's easy. The information he gave us was accurate, concise, and entirely irrelevant."

http://www.ahajokes.com/law028.html

Where We've Been . . .

Bert Randall was a guest speaker presenting "Take the High Road, Medical Marijuana is Here. Are You Ready?", at the SIIA Workers' Comp. Executive Forum, New Orleans, LA May 12 - 14, 2015.

Colin Bell attended the Transportation Lawyers Association annual conference in Phoenix, AZ May 12 – 15, 2015.

Where We're Going . . .

July 27-28, 2015, **Bert Randall** will be speaking at the American Conference Institute's Annual Forum in Chicago, IL.

Bert Randall will be speaking at the 24th Annual National Workers' Compensation & Disability Conference - November 11-13, 2015.

Maryland's Non-Economic Damages Cap Table

Date of Accident			Cap
October 1, 2011	to	September 30, 2012	$755,000
October 1, 2012	to	September 30, 2013	$770,000
October 1, 2013	to	September 30, 2014	$785,000
October 1, 2014	to	September 30, 2015	$800,000
October 1, 2015	to	September 30, 2016	$815,000

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