



## Civil Practice and Procedure

*Donald Patrick Eckler and Howard J. Pikel  
Pretzel & Stouffer, Chartered, Chicago*

# Late to the Party: The Rapid Development of Electronic Discovery Law in Illinois

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Though Illinois was a late adopter of electronic discovery procedures, the rules have now been implemented and the law has begun to develop. One of the first cases to address this issue came in December 2016, in which the Illinois Appellate Court Second District reversed an order compelling a personal injury plaintiff to turn over personal computers to the defendants for forensic imaging of the entire contents of the computers. *Carlson v. Jerousek*, 2016 IL App (2d) 151248.

The electronic discovery issue in *Carlson* arose out of a rear-end motor vehicle accident occurring in April 2012. After admitting liability, the defendants sought possession of the plaintiff's personal computer to search for evidence that would be helpful to defeat the plaintiff's claim of cognitive deficits due to the accident.

The court recognized that there was little authority in Illinois on this electronic discovery issue. Accordingly, it applied fundamental principles of privacy, relevancy, and proportionality under the Illinois and federal civil discovery rules, and United States and Illinois Constitutions, to significantly limit compelled searches of party-opponents' computer databases.

### Personal Injury Lawsuit

On April 11, 2014, the defendant was driving a bus owned by his employer, co-defendant Midwest Motorcoach. The plaintiff was a computer analyst for Baxter Healthcare. Two years after the defendant collided with the plaintiff's car, the plaintiff filed his personal injury lawsuit against the defendants. The plaintiff's injury claims included cognitive disabilities, emotional distress, and loss of a normal life. The defendants admitted liability, but they denied the extent of the plaintiff's claimed injuries. *Carlson*, 2016 IL App (2d) 151248, ¶ 3. The subject matter of the lawsuit did not involve computers or electronically stored information. *Id.* ¶ 57.

In May 2014, the defendants served interrogatories and production requests seeking electronically stored information, including the name, web address, and user name for all blogs, online forums, and/or social networking websites used by the plaintiff, e-mail, blog posts, and electronic communications relating to issues in the lawsuit. *Id.* ¶¶ 4-5. Without waiving his objections, the plaintiff stated that he had Facebook and LinkedIn accounts, and provided his personal email address, and cell phone number and carrier. *Id.* ¶ 4. In July 2014, without waiving his objections, the plaintiff responded to the production request stating that there were no responsive documents other than those already produced and that there were no destroyed or deleted documents. *Id.* ¶ 5.

The defendants filed a motion to compel asking the court to order the plaintiff to conduct a search of his computer databases for the requested electronic documents. *Id.* ¶ 6. The trial court ordered the plaintiff to search his computers for the requested documents, provide a privilege log as needed, and identify the responsive items already produced to the defendants. *Id.* In September 2014, the plaintiff provided supplemental answers. *Id.* ¶ 7.

Six months later, the defendants filed a second motion to compel in which they moved for an order requiring the plaintiff to retain, preserve and protect his five computers, and for a defense inspection of the computers for evidence related to the plaintiff's claimed cognitive deficits. *Id.* ¶ 8. The defendants specifically sought electronic documents including internet searches concerning brain injuries, metadata, plaintiff's social networking information, plaintiff's webpages, and his email. *Id.*

The trial court heard the second motion to compel on March 3, 2015. *Id.* ¶ 9. The court ordered the plaintiff to retain and preserve his computers and entered a briefing schedule on the motion. On May 13, 2015, the court struck the defendants' motion and allowed them to refile. *Id.* The defendant's re-filed their motion seeking inspection of the plaintiff's computers for the requested documents. *Id.* In support, the defendants cited the plaintiff's deposition testimony that he owned five personal computers, that he used a computer from his employer Baxter, and that he was unable to perform his work due to the collision which caused fatigue, loss of concentration and loss of focus. *Id.* ¶¶ 8, 10. The defendants then cited to the deposition of the plaintiff's co-worker who testified, contrary to the plaintiff's testimony, that the plaintiff was very competent and an asset to her team. *Id.* ¶ 10. The defendants also cited a log written by the plaintiff of his post-occurrence symptoms that contained medical terminology that the defendants believed the plaintiff acquired through internet searches. *Id.*

Hearing on the plaintiff's motion went forward in July 2015. *Id.* ¶ 12. The defendants orally moved to inspect the plaintiff's work computer. They also represented to the trial court, without supporting expert testimony or affidavits, that their expert could retrieve metadata which would show whether plaintiff's post-occurrence work was really taking longer as claimed by the plaintiff. *Id.* Further, the defendants asserted that the metadata would show whether the plaintiff was up late into the evening playing video games which would cause the plaintiff to be fatigued at work. *Id.* ¶¶ 11-12.

The trial court denied the defendants' oral motion for the inspection of the plaintiff's work computer owned by Baxter. *Id.* ¶ 14. The trial court continued the hearing to allow the defendants to draft a protective order setting forth conditions for the proposed defense inspection, and to provide expert testimony to support the efficacy and methodology of the defendants' proposed inspection. *Id.*

On September 23, 2015, the defendants presented their proposed protective order which provided for a defense expert to make an exact copy (forensic image) of each of the plaintiff's computer hard drives in the presence of the plaintiff's representative. . *Id.* ¶¶ 15-16. The defense expert would then search the copies for time stamps related to the duration of the plaintiff's computer usage for work and gaming, internet searches related plaintiff's claimed head trauma, and documents created by the plaintiff related to his injuries. *Id.* The defense expert was to generate a confidential report and summary of his searches, which was not to be disclosed to the defendants or their counsel. *Id.* Both the report and summary were confidentially filed with the court and disclosed to the plaintiff. *Id.*

The plaintiff had ten days to object based on privilege, and to then serve a redacted copy of the summary to the defendants. *Id.* ¶¶ 15-16. The defendants also advised the trial court that they now possessed testimony, which they did not produce to the court, to establish that the plaintiff leased his work computer from Baxter and that the Baxter computer was under the control of the plaintiff. *Id.* Over objection, the court issued the order to compel the plaintiff to produce his work computer and his five personal computers for forensic imaging. *Id.* ¶ 17.

The plaintiff then filed a "motion to advise" the trial court that he would not produce the computers and requested that the court hold him in friendly contempt so that he could file an appeal. *Id.* The plaintiff also moved for leave to file an affidavit of Sarah Padgitt, senior litigation counsel for Baxter, wherein Padgitt stated that the plaintiff neither owned nor leased his work computer. *Id.* The affidavit further stated that the computer was owned by Baxter and contained

proprietary and confidential information. *Id.* The trial court denied the plaintiff leave to file his motion to advise because the plaintiff failed to specify the conditions of the court's order with which the plaintiff would not comply and denied leave to file the Padgitt affidavit. *Id.* ¶ 20.

The plaintiff filed an amended motion to advise for friendly contempt with the court's order attached specifying the reasons for his non-compliance, followed by a motion to reconsider the denial for leave to file the Padgitt affidavit. *Id.* ¶ 21. On November 17, 2015, the trial court found the plaintiff in friendly contempt, issued a fine of \$500, and denied the plaintiff's motion to reconsider the denial of leave to file the Padgitt affidavit. *Id.* ¶ 21.

### Appellate Court Opinion

The sole issue on appeal was whether the trial court abused its discretion in ordering the plaintiff to turn over his personal computers and work computer to the defendants for inspection and forensic imaging of their entire contents. *Id.* ¶ 51. The appellate court vacated the order to compel, holding that the trial court failed to perform a balancing test to determine the utility and relevance of the requested forensic imaging compared to the burden on the privacy interests of the plaintiff. *Id.* ¶ 1. The appellate court also reversed the trial court's order requiring the plaintiff to produce the Baxter computer for forensic imaging because the Baxter computer was not owned by the plaintiff. *Id.*

The appellate court analyzed fundamental considerations of privacy, relevance, and proportionality in the context of discovery seeking electronically stored information. The court began by observing that there was little authority in Illinois as to whether a party's private computer in a civil suit could be searched by a party-opponent. *Id.* ¶ 25. The court then proceeded with a detailed review of the Illinois and federal civil discovery rules, and the United States and Illinois constitutional limitations on disclosure of private information. *Id.* ¶¶ 26-49.

Following its review, the court proceeded with its analysis of the instant case. *Id.* ¶¶ 50-79. The court found that the defendants' order compelling inspection was contrary to established Illinois discovery protocol. *Id.* ¶¶ 52-53. Discovery protocol is regulated by Illinois Supreme Court Rules 201, 213 and 214. *Id.* ¶¶ 27-29. Further, the Illinois Supreme Court expanded Rule 201(b) to include electronically stored information. *Id.* ¶ 43. The discovery rules do not permit a requesting party to "rummage through the responding party's files for helpful information." *Id.* ¶ 29. The court also cited Federal Rule of Civil Procedure 34, which like Illinois Supreme Court Rule 214 does not permit the requesting party to inspect a responding party's files or databases. *Id.* ¶ 54. Contrary to the defense position, the Illinois discovery rules set forth a protocol wherein a responding party will make a diligent search of its own records to produce specific information sought by the requesting party. *Id.* ¶ 53.

The court noted two exceptions under foreign law where inversion of the traditional discovery protocol under Illinois and federal rules may be permitted to allow the search of a party opponent's computer: (1) where the computer itself is directly involved in the cause of action; or (2) where there is evidence of substantial prior discovery violations by the responding party. *Id.* ¶ 55; *Genworth Financial Wealth Mgmt., Inc. v. McMullan*, 267 F.R.D. 443, 447 (D. Conn. 2010); *G.D. v. Monarch Plastic Surgery, P.A.*, 239 F.R.D. 641, 643 (D. Kan. 2007). However, neither of the two exceptions applied to the facts in the instant case. First, the plaintiff's personal computers were not directly involved in the motor vehicle accident. Second, there was no evidence that the plaintiff had a significant history of non-compliance with trial court discovery orders. Accordingly, the court found no basis to uphold the defendants' order inverting the discovery protocol to compel forensic imaging of the plaintiff's five computers. *Carlson*, 2016 IL App (2d) 151248, ¶ 57.

The court next analyzed the privacy limitations on the defense forensic imaging. Illinois civil discovery is subject to the right of privacy set forth in the Fourth Amendment of the United States Constitution and article I, section 6 of the 1970 Illinois Constitution. *Id.* ¶¶ 32-35. While these constitutional provisions prohibit unreasonable invasions of privacy, the Illinois civil discovery rules permit reasonable discovery of private information where it is relevant and proportional under the individual case facts. *Id.* ¶ 35.

The court then analyzed the defendants' order to compel as to relevance and proportionality. *Id.* ¶ 58. As to relevance, the court noted that the trial court had to consider not only the relevance of the information sought by the defendants but also the forensic imaging by which they proposed to discover the information sought. *Id.* ¶ 63. The court held that the defendants' request for forensic imaging had little relevance to the lawsuit because the description of the items sought by the defendants was ambiguous and lacked sufficient detail to allow forensic imaging to proceed. Further, because requests for forensic imaging are naturally complex, computer experts were required to provide a description of the specific search terms and parameters. *Id.* ¶¶ 59-63. The court disposed of the defendants' argument that the plaintiff's computer work, gaming habits, and internet research were relevant to contest the extent of plaintiff's claimed cognitive deficits by finding that the defendants failed to support any of their arguments with expert testimony which was required to allow the trial court to make an evidentiary determination as to relevance. *Id.* ¶¶ 62-63.

The court went on to conduct a balancing test to weigh the proportionality of the burden on the plaintiff's privacy interests compared to the utility of conducting the forensic imaging. *Id.* ¶ 65. The court cited Rule 201(c)(3), amended in 2014, which provides that a court may determine whether the likely burden of the proposed discovery, *including electronically stored information*, outweighs the likely 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 discovery request in resolving the issues. *Id.* ¶¶ 27-29, 43.

Even assuming that the defendants' forensic imaging was relevant, the court found that the low probative value of forensic imaging compared to the burden on the plaintiff's privacy interests weighed heavily against forensic imaging. *Id.* ¶ 65. In support of its finding, the court noted that defense forensic imaging of the entire contents of the plaintiff's computers would produce an enormous volume of information unrelated to the lawsuit, such as financial data and confidential information about the plaintiff's family, friends and third parties. *Id.* The court also focused on the larger proportionality considerations related to the defense requests for forensic imaging, stating that due to concerns of increased privacy risk related to forensic imaging, compelled forensic imaging of a party's computer database should be a last resort. *Id.* ¶ 68. In sum, because the trial court failed to conduct an evidentiary hearing and a balancing test under the proportionality rule, the court remanded the case to the trial court for further proceedings.

## Conclusion

This is case of first impression in Illinois which makes it clear that courts will be reluctant to order compelled forensic imaging of a party-opponent's computers. It contains a thorough review of fundamental discovery law in the context of electronically stored information. Consequently, it is favorable to defendants (specifically large corporate clients with very large databases) to defeat motions by plaintiffs where they seek to use forensic imaging to engage in fishing expeditions for evidence favorable to current and future lawsuits. The opinion is also favorable to defense practitioners in providing a basis for determining whether compelled forensic imaging would be feasible and effective in light of the availability other traditional discovery methods.



### About the Authors

**Donald Patrick Eckler** is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

**Howard John Pikel** is a partner at *Pretzel & Stouffer, Chartered*. He is licensed in Illinois, Indiana and Missouri, and a member of the Federal Trial Bar for the Northern District of Illinois. Mr. Pikel has defended doctors, pharmacists, lawyers, homeowners, businesses and not-for-profit organizations involving wrongful death, catastrophic injuries and property damage. His practice includes professional malpractice, asbestos injuries and death, premises and product liability, construction, contracts, fires and explosions, and auto and trucking liability. Before practicing at Pretzel & Stouffer, Mr. Pikel was a prosecutor for the Cook County State's Attorney's Office, where he supervised the Narcotics Felony Trial Unit, and tried numerous felony jury and bench trials.

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