

**IN THE SUPERIOR COURT OF PAULDING COUNTY
STATE OF GEORGIA**

██████████ and ██████████
██████████, as the legal guardians of
██████████, a minor,

Plaintiff,

v.

██████████ as the legal guardian of and
on behalf of, ██████████, a minor,

Defendant.

Civil Action No.: ██████████

**PLAINTIFFS' EMERGENCY MOTION TO COMPEL
A FORENSIC CELL PHONE INSPECTION**

1. Introduction

This case arises from a collision between a sedan and a pedestrian on January 11, 2022 between 3:30pm and 3:45pm.¹ Fourteen-year-old ██████████ was more than halfway through a crosswalk at North Paulding High School when seventeen-year-old ██████████ struck her with her vehicle.² The collision has rendered ██████████ “minimally conscious,” meaning she is awake, but not able to communicate or care for herself. Since the collision, she has had four brain surgeries, and has been hospitalized nearly the entire time.

¹ The police report estimates the time of the crash as 3:45pm. *See* Police Report (Ex. A). The 911 call records show an initial call at 3:37pm. *See* 911 Call Records (Ex. B). The GSP investigation file says they received the call from 911 at 3:55pm, which is different from the 911 records. *See* GSP Report (Ex. C).

² The video footage of the collision can be viewed from the following Dropbox link: ██████████. Plaintiffs will also provide the Court with a flash drive containing all of the exhibits.

Plaintiffs contend that [REDACTED] was distracted by her cell phone at the time of the collision. In this motion, Plaintiffs seek a “full file system extraction” of [REDACTED] mobile phone, which will show exactly when [REDACTED] opened text messages or otherwise used her cell phone with precision. *See* Affidavit of [REDACTED]. (“[REDACTED] Aff.”) at ¶¶ 5-7 (Ex. D).³

The initial evidence suggests that [REDACTED] was distracted while driving, but additional information is needed. Defendant previously consented to an initial forensic download of [REDACTED] cell phone. The download was performed by a neutral third party arranged by Defendant. The cell phone download revealed three text messages that [REDACTED] received at or near the time of the collision and three text messages that [REDACTED] sent while she was likely in the car driving before the collision.⁴ Three text messages are of particular interest to Plaintiffs. At 3:28pm and 3:29pm, [REDACTED] received text messages from family members. At 3:41pm, [REDACTED] received a text message from a friend named [REDACTED] with whom she had been engaged in a text message conversation in the time leading up to the crash. The investigating Georgia State Patrol estimated that the crash occurred at 3:45pm (within four minutes of the text message [REDACTED] received from [REDACTED]).

³ “Utilizing a ‘Full File System’ acquisition I will be able to acquire the required data from the phone in order to tell what applications were being used during the time of the collision, as well as what applications were in the foreground of the phone. This is important because this will be able to establish if the user of the phone was physically interacting with the phone at the time of the collision.” [REDACTED] Aff. ¶ 5.

⁴ A copy of the Excel spreadsheet showing the text messages is attached as Exhibit E and is available at the following Dropbox link: [REDACTED].

Agency Case Number	
[REDACTED]	
Estimated Crash	
Date	Time
01/11/22	15:45

However, the downloaded data does *not* show the precise time the messages were opened or if the phone was otherwise in use. *See* [REDACTED] Aff. ¶ 5. Plaintiff has requested a second, more thorough inspection of [REDACTED] phone (called a “full file system extraction” as opposed to the “advanced logical extraction” that was already performed) to retrieve the data showing the precise time [REDACTED] opened the messages down to the minute and second. *See* [REDACTED] Aff. ¶¶ 5-7. The “full file system extraction” Plaintiff now requests would also show whether [REDACTED] was using her phone in any other way at the time of the collision. *See* [REDACTED] Aff. ¶¶ 5-7. Defendant would not consent to the full file system extraction.

The information Plaintiff seeks is clearly relevant to Plaintiffs’ claims because it relates directly to [REDACTED] level of distraction. To limit the intrusiveness of the download, Plaintiff has proposed that their designated expert only provide to them the data for the same period as the first download, i.e., the day of January 11, 2022, withholding the remainder of the data as confidential. Defendant has not agreed.

Plaintiff files this as an “emergency” motion because cell phones overwrite data as time goes on. *See* Ga. Unif. Super. Ct. R 6.7 (“Upon written notice and good cause shown, the assigned judge may shorten or waive the time requirement applicable to emergency motions, except motions for summary judgment, or grant an immediate hearing on any matter requiring

such expedited procedure.”). For that reason, it is critical to perform the download as soon as practicable.

2. Legal standard on a motion to compel

The scope of discovery is broad. Code Section 9-11-26(b)(1) permits parties to obtain discovery regarding “any matter, not privileged, which is relevant to the subject matter involved in the pending litigation.” O.C.G.A. § 9-11-26(b)(1). “Any evidence is relevant which logically tends to prove or disprove any material fact which is at issue in the case, and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant.” *Andrews v. State*, 268 Ga. App. 213, 214 (2004).

The goal of discovery “is the fair resolution of legal disputes, ‘to remove the potential for secrecy and hiding of material.’” *Int’l Harvester Co. v. Cunningham*, 245 Ga. App. 736, 738 (2000) (quoting *Hanna Creative Enterprises v. Alterman Foods*, 156 Ga. App. 376, 378 (1980)). To serve that purpose, the trial court’s discretion in dealing with discovery matters is very broad, and appellate courts will not interfere with the exercise of that discretion absent a clear abuse. *Emmett v. Regions Bank*, 238 Ga. App. 455, 456 (1999); *Ostroff v. Coyner*, 187 Ga. App. 109, 117 (1988).

3. Argument

██████████ cell phone use at the time of the collision is indisputably relevant to liability. *See Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163, 166 (Fla. Dist. Ct. App. 2014) (requiring a cell phone inspection where evidence suggested cell phone use at the time of a collision).

Because Defendant's cell phone data will show her cell phone usage at the time of the collision—and may be the only evidence which does so—it is relevant and discoverable.

“[G]enerally, negligence per se arises when a statute or ordinance is violated.” *Hubbard v. Dep't of Transp.*, 256 Ga. App. 342, 349 (2002). Georgia law prohibits texting while driving. Georgia's distracted driving statute, O.C.G.A. § 40-6-241(b), provides that a driver “shall exercise due care in operating a motor vehicle on the highways of this state and shall not engage in any actions which shall distract such driver from the safe operation of [a] vehicle.” Such activities include various prohibited uses of “wireless telecommunications device[s],” including “cellular telephone[s].” O.C.G.A. § 40-6-241(c) & (d). In other words, evidence of [REDACTED] cell phone use is evidence that she was negligent per se.

Here, the parties consented to an initial inspection of [REDACTED] cell phone. The results from that download show that [REDACTED] received several text messages around the time of the collision and had been texting while she was driving leading up to the collision. However, the download did *not* show whether [REDACTED] has opened any of the text messages she received. *See* [REDACTED] Aff. ¶ 5. In order to understand whether [REDACTED] opened the messages or was otherwise using her cell phone at the time of the collision, a more comprehensive “full file system extraction” is required, as Plaintiffs requested. *Id.* at ¶¶ 5-7. The requested cell phone data is relevant and required to show that [REDACTED] breached the duty of care owed to Plaintiff by engaging in illegal distracted driving. *Antico*, 148 So. 3d at 167 (“[W]e agree with the trial court that [the] discovery request comports with the rules allowing for discovery of relevant information, including information from devices like cellphones . . . and that their interest in the discovery of this particular data is quite substantial.”) (citation omitted). Accordingly, the Court should allow Plaintiffs to inspect [REDACTED] cell phone.

4. Conclusion

██████████ cell phone usage is relevant and not privileged. Plaintiffs tried to obtain the cell records through an initial inspection, but the third-party vendor did not download the information Plaintiffs need to prove ██████████ was using her phone at the time of the collision. The only physical proof of ██████████ cell phone use is the phone itself. Plaintiffs' proposed inspection limits the data to be inspected to the same parameters as the first inspection to which Defendant consented. Accordingly, the Court should compel the full file system extraction of ██████████ cell phone.

CERTIFICATION

Pursuant to Uniform Superior Court Rule 6.4(B), I hereby certify that I attempted to meet and confer before filing this motion.

Respectfully submitted this 8th day of August 2022.

BUTLER KAHN

BY: /s/ Matthew R. Kahn

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this date, I have served the foregoing ***PLAINTIFFS'***
EMERGENCY MOTION TO COMPEL A FORENSIC CELL PHONE INSPECTION upon
all parties to this matter via electronic mail as follows:

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This 8th day of August 2022.

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