

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**Question: What sanctions are appropriate for spoliation of evidence during litigation?**

Occasionally, we like to keep readers informed of non-workers' compensation cases with points of interest, and this week's case deals with two such points: evidence tampering and Facebook. Recently, a civil court in Virginia was presented with the question of what sanctions were appropriate against a Plaintiff who failed to produce electronic evidence posted on a Facebook account, and the attorney who told him to destroy it.

*Lester v. Allied Concrete Co.*, Case Nos. CL08-150 & CL09-223, Charlottesville Circuit Court of Virginia, involved a personal injury and wrongful death lawsuit arising from a motor vehicle accident. Throughout the litigation, there were numerous discovery disputes over Plaintiff's Facebook account, and defendants ultimately filed a motion to compel several documents, including photographs from Plaintiff's Facebook page. Plaintiff's counsel acknowledged that there had been destruction of evidence, and the court ordered that the jury be given an "adverse inference" instruction. The case proceeded to trial, at which the jury awarded over \$10 million total to Plaintiff. After the trial, the defendants filed motions seeking additional redress for spoliation of evidence, including dismissal of Plaintiff's claims or a reduction in the verdict amount.

The court conducted a post-trial investigation into the circumstances surrounding the deletion of the photographs, most notably a request for a photograph of the Plaintiff wearing an "I ♥ Hot Moms" T-shirt while partying shortly after his wife's death, and the "deactivation" of the Facebook account. It was later revealed that Plaintiff's attorney had instructed him to "clean up" his Facebook page because "we don't want blowups of this stuff at trial." Discovery responses were also delayed until the Facebook account was taken down by Plaintiff. Ultimately, Plaintiff provided copies of his Facebook page, but could not produce some of the photos that he had intentionally deleted. The Court ordered a reduction of Plaintiff's personal award from \$6.2 million to \$2.1 million, and also ordered counsel to pay \$542,000 and the Plaintiff to pay \$180,000 in sanctions to the defendants.

*Lester* is an important reminder that, as tempting as it may be to destroy or otherwise hide prejudicial evidence, such an action is simply not worth the risks. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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