Invasion of Privacy and Spoliation on MySpace

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It is true that mass communication is no longer limited to a tiny handful of commercial purveyors and that we live with much greater access to information than the era in which the tort of invasion of privacy developed. A town crier could reach dozens, a handbill hundreds, a newspaper or radio station tens of thousands, a television station millions, and now a publicly accessible webpage can present the story of someone's private life, in this case complete with a photograph and other identifying features, to more than one billion Internet surfers worldwide. This extraordinary advancement in communication argues for, not against, a holding that the MySpace posting constitutes publicity.

Judge Kevin Ross, Minnesota Court of Appeals, *Yath v. Fairview Clinics, N.P.,* 767 N.W.2d 34 (Minn. Ct. App. 2009).

The Court of Appeals of Minnesota discussed at length a case involving invasion of privacy on MySpace. The case involved a MySpace profile named "Rotten Candy" being created about the Plaintiff, outing her for contracting a sexually transmitted disease from an extramarital affair and accusing her of being addicted to plastic surgery. *Yath,* 6-7.

The Plaintiff's medical facts were learned from the clinic where she was treated. The case includes a soap opera set of facts with people who knew the Plaintiff gaining unauthorized access to her medical information at the clinic. The MySpace page was not made at the medical clinic, because access to MySpace was blocked by the clinic. The profile was traced back to an Internet Protocol address to a business where the sister of one of the Defendants worked. *Yath,* 7.

Case Procedural History

The Plaintiff sued multiple Defendants for invasion of privacy, negligent infliction of emotional distress and state law claims for disclosing the Plaintiff's medical file. *Yath,* 8.

The District Court denied a spoliation claim for deleting computer files, granted summary judgment for the clinic and for one of the other Defendants. *Yath,* 8-9. The Court also dismissed the claims against two of the other Defendants. *Id.*

Relevant Case Issues

The Court of Appeals address multiple questions, however this article focuses specifically on the following issues:

Issue 1: Did the District Court abuse its discretion by denying the Plaintiff's spoliation of evidence motion against Defendant Phat after she "deleted computer files that might have revealed her involvement in disclosing private medical data?" *Yath,* 9.

Issue 2: Did posting on MySpace meet the "publicity" requirements for invasion of privacy? *Id.*

Issue 3: Did the facts still justify a summary judgment against the Defendants? *Id.*

Spoliation of Browser History & Temporary Files

The Plaintiff claimed Defendant Phat deleted her internet browser history and temporary files, which justified sanctions for spoliation of evidence. *Yath,* 12.

The hornbook definition of Spoliation is "the destruction of evidence." *Yath,* 11-12. Sanctions can be ordered when a person knew or should have known that the destroyed evidence "was relevant to pending or future litigation." *Yath,* 12.

The Court of Appeals found no error in the District Court's finding of no spoliation, because the Plaintiff did not provide sufficient support for her spoliation claims. *Yath,* 12.

Below is a brief timeline of the computer subpoena:

July 3, 4:51 PM: Plaintiff subpoenaed Defendant Phat's computer by fax.

July 5: Defense attorney gets fax due to 4th of July holiday.

July 5: Attorney tells Defendant about subpoena.

July 16: Computer produced for inspection. *Yath,* 12-13.

The Plaintiff's expert stated in affidavit that "No temporary internet files, browser history, internet or browser cache exist prior to July 3, 2007." *Yath,* 13.

The expert also stated that "all internet files were erased and scrubbed clean as of July 3, 2007 at approximately 8:05 p.m." *Yath,* 13.

The Plaintiff argued that the "coincidence" between the timing of the subpoena and the data loss was "too coincidental."

The District Court did not find any spoliation, opining that the data loss may have been a routine maintenance operation. *Yath,* 13. Additionally, the District Court did not find the Plaintiff met her burden to show the Defendant "intended to destroy or hide evidence." *Yath,* 13. The Court of Appeals did note the timing of the deletion was suspect; however the Plaintiff did not provide the District Court with compelling evidence to find spoliation. *Yath,* 14.

Publicity of Information on MySpace

The Court of Appeals "Majority Opinion" and "Concurring Opinion" provide two different views on what constitutes publicity on MySpace. The Majority took a much broader view of "publicity" then the Concurring opinion.

The Court of Appeals disagreed with the District Court that the "temporary posting" of the Plaintiff's medical records "failed to meet the 'publicity' requirements for a successful claim." *Yath,* 14. The Court of Appeals rejected the District Court's view that the posting was not seen by enough people. *Yath,* 14-15.

The Plaintiff's invasion of privacy claim was based on the publication of private facts (the publication of her medical information). *Yath,* 14. To survive a motion for summary judgment, the Plaintiff needed to show the following:

(1) The Defendant gave "publicity" to a matter concerning the Plaintiff's private life;

(2) The publicity of the private information would be highly offensive to a reasonable person; and

(3) The matter is not of legitimate concern to the public. *Yath,* 15.

Rule for "Publicity"

The Court of Appeals cited the Restatement (Second) of Torts definition of "publicity," which states that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Yath,* 15, citing Restatement (Second) of Torts § 652D.

The Court of Appeals further described the rule for publicity as being two separate tests:

…there are two methods to satisfy the publicity element of an invasion-of-privacy claim: the first method is by proving a single communication to the public, and the second method is by proving communication to individuals in such a large number that the information is deemed to have been communicated to the public. *Yath,* 15-16.

Majority Opinion on MySpace Publicity

The majority took the position the MySpace profile was, "publicity per se" and within the first method of publicizing a single communication. *Yath,* 16-17. The Court found that publishing the medical information on the MySpace profile was "materially similar in nature to a newspaper publication or a radio broadcast because upon release it is available to the public at large." *Yath,* 17.

The Court of Appeals rejected the District Court's reasoning that publicity argument failed because only a small group (6 "friends") saw the information over a 24 to 48 hour period. *Yath,* 17-18.

The Majority Opinion compared the "small group" argument to a small newspaper with a small readership or a late night radio show. The Court of Appeals stated the number of people who viewed the posting is irrelevant, because private information was communicated in a public forum (in this case, a public MySpace profile), triggering the invasion of privacy tort. *Yath,* 18-19.

The Concurring Opinion

Judge Matthew Johnson took issue with the Majority Opinion's view of publicity for the invasion of privacy. Judge Johnson argued that the Majority unnecessarily expanded the rule when there was evidence that the MySpace profile was sent to between 60 to 80 people. *Yath,* 41-42.

The Plaintiff polled ten of her MySpace friends after learning about the "Rotten Candy" profile and found out all ten had seen the fake profile. *Yath,* 42. The Plaintiff's now ex-husband had even received a friend request from "Rotten Candy" as well. *Id.*

The Concurring Opinion stated it was "unnecessary to create a per se rule that any posting of private information on the Internet constitutes publicity." *Yath,* 42.

Lost for Other Reasons

The Court of Appeals did not overturn the summary judgment findings because the Plaintiff "did not produce any evidence that Phat or Fairview were involved in creating the MySpace.com" profile. *Yath,* 24. As such, the invasion of privacy claimed failed.

Bow Tie Thoughts

Courts faced with Web 2.0 litigation are adopting traditional tort and contract law principles to online conduct. Defining what constitutes "publicity" is a question courts will have to address as similar cases as litigated.

I think the Court of Appeals had a very narrow reading of the duty to preserve and spoliation. In broad terms, if a party reasonably anticipates litigation, they have a duty to preserve evidence that pertains to the lawsuit.

If the Defendants were on notice after a triggering event (such as being sued for a fake MySpace profile), it does not take any leap of faith that internet history and temporary files go to the heart of the lawsuit for who created, maintained or accessed the fake profile.

While this is a state court action, in the Federal Courts, a party only qualifies for the "safe harbor" protection under Federal Rule of Civil Procedure Rule 37(e) when ESI is lost "as a result of the routine, good-faith operation of an electronic information system." Fed. R. Civ. Proc. 37(e). Moreover, "good faith" requires a party to "intervene to modify or suspend certain features of the

routine operation of a computer system to prevent the loss of information," according to the Advisory Committee Notes to the Federal Rules of Civil Procedure.

One might be able to argue the Defendant in this case did not act in good faith, and thus do not qualify for any "safe harbor" protections for the loss of data, because they did not suspend any routine maintenance operations after being on notice of a lawsuit.

Questioning the Defendant when they reasonably anticipated litigation, if their internet browser only saved visited websites or temporary files for a limited number of days (or until a system restart), when their computer performed routine maintenance (i.e., Friday nights at 8:00 pm), and whether they took any steps to suspend this operation, would be good questions to ask in special interrogatories or deposition. Perhaps showing the computer's routine maintenance was not scheduled until sometime after July 3 would have been sufficient to show the intent to hide or destroy evidence. This examination would be highly fact intensive.