Appellate Division Vacates A $1.1 Million Personal Injury Award Due To The Trial Court's Improper Exclusion Of Facebook Photos

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In *Angeles v. Nieves*, 2018 WL 3149551 (App. Div. June 28, 2018), the plaintiff alleged that as a result of a motor vehicle accident, he sustained a serious low back injury that limited his ability to engage in physical activities but his Facebook photographs revealed otherwise. At trial, the plaintiff testified that he had to stay home permanently because his back hurt a lot from the accident. He further testified that he could no longer run, coach his children in basketball, sit for long periods of time, or work out. The plaintiff's wife similarly testified that the plaintiff could not play with their children, do yard work, or go to the gym anymore.

In order to contradict this testimony, the defense counsel sought to introduce screenshots of photographs posted on the plaintiff's Facebook page. One photograph showed the plaintiff in gym clothes at a gym near exercise equipment. Other photographs were of the plaintiff in a life preserver at the beach standing in front of a jet-ski and of the plaintiff in a wetsuit sitting on a jet-ski. However, after viewing the gym screenshot of the plaintiff at sidebar, the trial court expressed concern about the prejudicial aspect of the photograph. Therefore, the trial judge precluded the defense from cross-examining the plaintiff using the Facebook photographs. Without consideration of the Facebook photographs, the jury awarded the plaintiff $3,000,000 (reduced to $1,100,000 on remittitur).

On appeal, the Appellate Division held in an unpublished opinion that there was no basis to exclude the photographs. Specifically, the Appellate Division found that the photographs of the plaintiff seemingly engaging in strenuous activities had substantial probative value in disproving the plaintiff's disability claim. As the photographs were not inflammatory and directly addressed the issue of whether the plaintiff was as disabled as he claimed, the Appellate Division determined that the probative value of the photographs was not outweighed by any undue prejudice.

Although the Appellate Division agreed with the plaintiff that the photographs should have been produced by the defense during discovery, the Appellate Division ruled that this discovery violation did not warrant the total exclusion of the photographs. Instead, the Appellate Division opined that the appropriate response would have been a recess during the trial to allow the plaintiff's attorney to consult with the plaintiff and examine his Facebook account. The Appellate Division reasoned that even though the plaintiff may have been surprised that the photographs were going to be used at trial, he was well aware of the existence and content of the photographs being that he posed for the photographs, captioned them, and posted them on his Facebook page. Accordingly, the Appellate Division vacated the jury's verdict and remanded the case for a new trial. This case gives new meaning to the old saying that "a picture is worth a thousand words," and furthers our understanding of the negative effect social media can have on a personal injury lawsuit.