To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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EZQUILA FERANDEZ, as Administratrix of the Estate of ORACIO GALENO, and EZQUILA FERANDEZ, individually,

Plaintiffs,

-against-

CASTLE PROVISIONS, INC. and FRANCESCO P. DITOMASO,

Defendants.

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DECISION & ORDER

Index No.: 55250/2011
NYSCEF

Motion Seq. No.: 3

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR § 3124 compelling disclosure of cellular phone records of defendants Francesco P. Ditomaso and Castle Provisions, Inc. for November 9, 2009.

Order to Show Cause - Affirmation in Support - Exhibits A - H
Affirmation in Opposition - Exhibits A - G

Upon the foregoing papers and the proceedings held on June 24, 2013, the motion is determined as follows:

In this wrongful death action arising out of a motor vehicle accident which occurred on November 9, 2009, plaintiffs now seek an order compelling defendants Francesco P. Ditomaso and Castle Provisions, Inc. to disclose their cellular telephone records for the date of the accident or about the approximate time of the incident. On or about March 2, 2012, plaintiffs served defendants with a Combined Notice and Demand which sought in pertinent part, the defendants' cellular phone records for the date of the incident. In a response dated June 29, 2012, defendants summarily objected to the demand. At a compliance conference conducted on February 27, 2013, plaintiffs' counsel noted that defendants had not provided the cellular telephone records and reiterated his demand for them. Defendants asserted that the records are not discoverable and a briefing scheduled was issued. Subsequently, an amended briefing schedule was issued pursuant to which the instant application is made.

In support of the motion, plaintiffs contend that although an application for cellular phone records in a motor vehicle collision generally requires witness testimony regarding the appearance of the use of such a phone at or about the time of collision, the facts of this particular case militate in favor of disclosure notwithstanding the absence any such observation. Citing

Noseworthy v City of New York, 298 NY 76 (1948), and *Alexy v Stein*, 16 AD3d 989 (3rd Dept 2005), plaintiffs assert, preliminarily, that insofar as plaintiff's decedent is unable to address the issue and there are no witnesses who saw the defendant Ditomaso in his box truck prior to the collision, plaintiffs are entitled to a lesser burden of proof on the issue.

More particularly, plaintiffs proffer the deposition transcript of defendant Francesco P. Ditomaso in support of their motion. Mr. Ditomaso testified that on November 9, 2009, he was driving a delivery route for his business, Castle Provisions, Inc., and that he had one cell phone with him at the time of the collision. According to his testimony, that cell phone was in a bag on the floor of his box truck and it was still in the bag when he next became aware of his personal effects after the accident. He specifically denied using the cell phone at or about the time of the collision which he averred occurred at about 2:20 P.M. on that date. However, plaintiffs assert that Greenburgh Police Department photographs taken at the site of the accident depict a markedly different scene. The cell phone that the defendant identified as his was photographed and recovered by the police in an open configuration on the ground in the roadway outside of the truck on the passenger's side. The cell phone case was photographed and recovered in the roadway behind the rear bumper of the box truck on the driver's side, evidencing, according to plaintiffs, that it fell from the driver's side of the truck well before it came to rest, otherwise it would have been located adjacent to the door of the truck. These circumstances, plaintiffs argue, undermine defendant Ditomaso's statements that his cell phone was in a bag on the floor and cast considerable doubt as to the veracity of defendant Ditomaso's statements that it was not in use at or about the time of the collision.

Plaintiffs further proffer the Appellate Division - Third Department's decision in *Detraglia v Grant*, 68 AD3d 1307 (3rd Dept 2009), in support of their application. In *Detraglia*, plaintiff moved to compel, inter alia, the defendants to produce billing records for all three of defendant Grant's cellular telephones as well as the Verizon wireless air card for a laptop computer, notwithstanding defendant's testimony that he was not using any of theses technological devices at the time of the motor vehicle accident, although all four devices were in his vehicle. The record in *Detraglia* contained information indicating that the defendant may have been distracted immediately prior to the accident and other evidence regarding his possible use of the laptop computer was conflicting. (*Detraglia*, *id.* at 1308). Defendant "[t]estified at his deposition that the laptop was in a bag, either behind his seat or in the passenger seat, that he never used it while driving and that while driving he never left it strapped to the computer desk bolted to the vehicle" (*Detraglia*, *id.* at 1308). Yet, the tow truck driver who arrived at the scene averred that he saw the laptop on the vehicle's computer desk with the screen flipped up and turned on, indicating recent use (*Detraglia*, *id.* at 1308). Finding that the conflicting evidence raised questions as to whether the defendant used any technological device while driving, and thereby rendering the records relevant to the issue of negligence, the appellate court upheld the trial court's determination that the billing records for the defendant's three cellular telephones and the air card for the laptop computer were subject to disclosure (*Detraglia*, *id.* at 1308).

Defendants oppose the motion. Noting that our courts have routinely ordered disclosure of cellular telephone records only when there is some evidence indicating that the party from

whom the records are sought was using the phone at the time of the accident, defendants maintain there is no factual basis upon which to order the discovery, (*see Morano v Slattery Skanska, Inc.*,18 Misc3d 464 [Queens County 2007]). Defendant Ditomaso testified that the telephone was in his bag on the floor of the vehicle and asserts that our courts have expressly held that the mere presence of a cellular telephone at the scene of an accident is insufficient to warrant court ordered disclosure of the cell phone records, (*see Morano, id.* at 475; *Page v Napier*, 2009 WL 434607 [Sup Ct, Nassau County]); (*Reina-Hudson v Michael & Sons Nursery*, 2010 WL 3392837 [Sup Ct, Westchester County 2010, Index No. 9569/09]. To be sure, defendants here allege that the sole basis upon which plaintiffs seek disclosure "[i]s the simple fact that a cellular phone was found on the ground at the scene of the accident."

Moreover, defendants contend that *Detraglia* is easily distinguished from the matter at bar. In *Detraglia*, a witness suggested that the defendant was using the laptop computer immediately before the accident given that he observed the laptop on the vehicle's computer desk with the screen flipped up and turned on (*Detraglia*, *supra* at 1308). Defendants further maintain that plaintiffs' contention that the recovery of the cellular telephone from the roadway undermines defendant Ditomaso's testimony that it was not in a bag and evinces its recent use is nothing more than speculation and offer an alternative and "more plausible" explanation for its location: the phone was "forced" out of the vehicle only when emergency personnel were extricating the defendant from the vehicle. In sum, defendants assert that there is no good faith basis for plaintiffs' demand for defendants' cellular telephone records because plaintiffs have failed to demonstrate such records would be relevant and material to the prosecution of the action.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Accordingly, the standard to be applied in determining the discoverability of information regarding a party's cellular telephone is whether the information is "material and necessary," (*Morano v Slattery Skanska, Inc.*, *supra*), which "really amounts to whether [it is] relevant" (*Page v Napier*, *supra*). Section 1225-c of the Vehicle and Traffic Law prohibits the use of hand held cellular telephones while operating a motor vehicle which is in motion. The unexcused failure to observe the standard imposed by the statute constitutes negligence (*Reina-Hudson v Michael & Sons Nursery*, *supra*; *Morano v Slattery Skanska, Inc.*, *supra*). However, in order to protect a party's privacy, discovery of cellular telephone records will only be directed where there is evidence that the cellular telephone was being used immediately prior to or at the time of the motor vehicle accident (*Reina-Hudson, supra* at *1; *Morano, supra* at 475). "[T]he mere fact that a defendant was in the possession of a cell phone at the time of an accident, without any

witness testimony as to it being used at that time, would not entitle the plaintiff to said defendant's cell phone records, since such a discovery request would amount to nothing more than a fishing expedition" (*Morano, supra* at 475; *see Carpio v Leahy Mechanical Corp.*, 30 AD3d 554 [2d Dept 2006][defendant's conclusory assertions that plaintiff may have been using her cellular telephone and may have had time to take evasive action were completely speculative]). Additionally, privacy concerns mandate that disclosure should be limited to the time period immediately surrounding the motor vehicle accident, and thus should be obtained via in camera review of the cellular telephone records (*Reina-Hudson, supra* at *1; *Morano, supra* at 475).

In the present case, plaintiffs' request for a review of defendants' cellular telephone records on the date of the accident cannot be characterized as a fishing expedition. This court has no quarrel with defendants' assertion that the mere presence of a cellular telephone at the scene of an accident is insufficient to warrant court ordered disclosure of that cell phone's records. Generally, courts will order disclosure of cellular telephone records only when there is some evidence indicating that the party from whom the records are sought was using the phone at the time of the accident. While it is true that there is no direct evidence in this case that the defendant was using his cellular telephone at the time of the accident, there was also no such evidence before the *Detraglia* court. The affiant in *Detraglia*, a tow truck driver who arrived on the scene after the fact, averred that he noticed the laptop in a condition markedly different than that attested to by the defendant, not in a bag, either behind his seat or in the passenger seat, but rather on the vehicle's computer desk with the screen flipped up and turned on, and consistent with recent use. Notably, this evidence sufficed not only for an inquiry into the wireless records for the laptop, but for the three cellular telephones defendant had in the vehicle as well (*Detraglia, supra.* at 1308 ["this conflicting evidence raised questions as to whether Grant used *any* technological devices while driving. . ."][emphasis supplied]).

In addition, defendants' alternative explanation regarding how the cellular telephone ended up on the roadway is far from availing. It is unlikely that a careful extrication of a potentially injured person involved in a serious head on collision through the passenger side of a box truck would "force" a cellular telephone located in a bag on the floor of that truck to become dislodged so as to end up in an open position on the roadway behind the truck on the passenger's side, while the rear case of that cell phone ended up in the roadway on the driver's side of the truck. Under these circumstances, the court can only conclude that plaintiffs have demonstrated that the cellular records of the only telephone defendant had with him, a business phone registered to him personally, may lead to relevant evidence in this action. Accordingly, defendants shall provide the court with the cellular telephone records for the time period of one hour before and one hour after the accident for in camera review. Such records shall include all incoming and outgoing calls. This limited discovery will protect defendants' privacy interests, but also reveal any calls or communications made or received in close proximity to the accident.

Given this court's finding that plaintiffs have met their burden under the established case law despite the absence of the usual requisite eyewitness testimony, plaintiffs' argument that they are entitled to a lesser burden of proof under the *Noseworthy* doctrine because such testimony is

nonexistent in this case is denied as moot (*see Noseworthy v City of New York, supra*).

In view of the foregoing, it is

ORDERED that plaintiffs' motion is granted to the extent that defendants shall, within 14 days of entry of this order, provide the court with cellular telephone records for the only telephone defendant Ditomaso had with him, a business phone registered to him personally, for all incoming and outgoing calls for the period of one hour before and one hour after the subject accident, which occurred on November 9, 2009, for in camera review, and it is further

ORDERED that, in the event that defendants do not possess said records, they shall obtain the records from the service provider and submit them to the court for in camera review within 14 days of entry of this order; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on September 11, 2013 at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
August 7, 2013

HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

Brian P. Hurley, Esq.
Kelner & Kelner
Attorneys for Plaintiffs
140 Broadway, 37th Floor
New York, NY 10005
By NYSCEF

Martin K. Rowe, Esq.
Lewis, Johs, Avallone, Aviles, LLP
Attorneys for Defendants
One CA Plaza, Suite 225
Islandia, NY 11749
By NYSCEF

cc: Compliance Part Clerk