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Appeals court hears arguments on blogging juror

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Judges always remind jurors to avoid talking about their case with anybody, but what happens when a juror blogs about it during a trial?

This question, which appears to be one of first impression in Illinois, is pending before a state appeals panel.

In 2009, a Cook County jury awarded \$5 million to the widow of a man who was killed by a train at a Metra stop in Berwyn.

The jury attributed 85 percent liability to BNSF Railway Co. and 10 percent fault to Metra. The victim, Scott Eskew, was found 5 percent liable, reducing the verdict to \$4.75 million.

Metra and BNSF appealed on a dozen points with two arguments involving a juror who maintained an Internet blog during the trial.

The juror used her blog to address topics such as the attractiveness of the plaintiff's lawyer and how it's "killing" her to be discredited about what's happening in the case.

She also wrote that the jurors "are guarding our objectivity fiercely" until the end of testimony.

But the defendants, Metra and BNSF, argue on appeal that the blog establishes that the juror talked about the case with her husband; that jurors discussed the case among themselves before it was time to deliberate; and that another juror made up her mind on liability before the close of evidence.

The defendants also point to a recent amendment to the Illinois Supreme Court pattern jury instructions that didn't exist at the time of trial. The rule requires judges to tell jurors that they can't use the Internet to communicate about the case.

On Wednesday, attorneys headed to the 14th floor of the Blandic Building to present oral arguments to a 1st District Appellate Court panel of Justices Mary K. Rochford, Thomas E. Hoffman and Themis N. Karnezis.

Representing the defendants, Raymond H. Groble III of Daley, Mohan, Groble P.C. said the combination of trial errors and revelations on the blog put the defendants in a position to try the case "with both hands tied behind their back."

Hoffman handled most of the panel's discussion on the issue. He said juror prejudice can't be presumed and he mentioned that the blog only involved one juror.

"Tell me where you presented evidence of prejudice," Hoffman said, mentioning at least four times that prejudice has to be shown to allege juror misconduct.

Groble said the trial judge — Circuit Judge Donald J. Suriano, who originally declined the defense motion alleging juror misconduct — should have investigated to decide if there was prejudice.

For the plaintiff, sole practitioner Michael W. Rathack talked about the blog for just a minute or two.

Rathack said there was no evidence that anybody outside of the jury room had contact with the jury. The case also lacks any evidence that the blog affected jury deliberations, Rathack contended.

Regardless of how the court rules, the issue raises a question of whether jurors should be blogging during a trial.

"No, no, no," said Leonard L. Cavise, a professor at DePaul University College of Law.

"Jurors should not be making comments to the world and they should not be receiving comments from the world."

Cavise said blogging during a trial is definitely a mistake, but the question is whether that mistake is harmful or harmless.

"It's very dangerous to allow jurors to communicate with the outside world until there's a verdict," Cavise said. "But we all know they're talking to their family and their friends."

There could be a potential problem if somebody comments online to the juror to encourage the juror to handle the case in a certain way, Cavise said. But the defendants in the Metra case didn't present any evidence of that.

While the issue could be the first time this has come up in an Illinois appeal, it's one that has gained attention in other jurisdictions.

"This happens all the time. ... The system was pretty slow to respond and many judges don't really grasp the whole blogging, Facebook, Twitter idea," said Panagiota Kelali, acting director of the Center for Information Technology and Privacy Law at The John Marshall Law School.

While a juror could taint a case by using social media during a trial, the juror could also provide insight to a lawyer about how he or she views a case.

"You have a defense attorney reading a tweet, let's say," Kelali said. "They can understand how the jury works, how their mind works and adopt a strategy."

There's no timeline for the appellate court to rule on the Metra case. The juror's blog entries can be found through the "justice" link on the right side of the page at greenroomthoughts.blogspot.com.

The case is *Gary Eskew, etc. v. BNSF Railway Company, etc.* No. 1-09-3450.