

Digital Evidence Shows Driver in Fatal Motor Vehicle Accident Deleted Relevant Cell Phone Data

Spotted Bird, Sr. v. Sansaver, Cause No. 21-6-082 (Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, of Poplar, Montana)

Introduction

Mobile devices play an integral role in our increasingly digital world. With many of us relying on them to conduct our daily lives, the use of cell phone evidence in litigation has become more common. Digital evidence can contain information ranging from phone calls and text messages to Internet searches and GPS locations. This information can be crucial at trial, but what happens when that information has been deleted? The first step in preparing an argument for spoliation of evidence requires an examination of the relevant mobile devices and other digital forensic evidence.

Carney Forensics was recently hired by counsel for the parents of a child who was hit and killed in a motor vehicle accident to examine digital evidence relating to whether the driver had been using his cell phone at the time of the accident. After conducting the investigation, John Carney, Chief Technology Officer of Carney Forensics, testified that the driver's cell phone had been intentionally wiped of all evidence from that date. At the conclusion of the case, the jury found that the driver's negligence resulted in the boy's death and awarded the boy's family \$5 million in damages.

Case History

A three-year-old Native American boy was riding his bicycle in June 2018 when he was struck by a pickup truck in the street outside his home. The driver failed to stop after the initial

impact and continued to drive before striking the child a second time, traveling an additional ninety-four feet after impact.¹ Tragically, the boy's injuries were fatal.

The driver admitted that he had been distracted by another child on the other side of the street and the Montana State Patrol determined that, after striking the boy, the driver could have stopped his vehicle sooner. He was not charged with a crime or issued a traffic citation relating to the incident.² The child's parents filed a lawsuit against the driver, alleging negligence due to the Defendant driving while distracted and on the wrong side of the road, as well as speeding and failure to brake. At trial, the Plaintiffs' counsel introduced evidence indicating that the Defendant was on friendly terms with several investigating officers and that his cell phone data had been deleted after the accident.³ Specifically, it was suspected that the Defendant had been using his cell phone while driving at the time of the accident.

Digital Investigations Reveals Evidence of Spoilation

Carney Forensics was hired by counsel for the Plaintiffs to review the Defendant's cell phone records and other digital forensic evidence, and to perform an independent forensic examination of the Defendant's mobile device. The investigation was for the purpose of recovering evidence to determine whether the Defendant had been using or was distracted by his cell phone when he struck the boy with his truck.

¹ Trial testimony of Eric Brown, President and Reconstructionist at Crash Tech Reconstruction Services

² Spotted Bird Family Awarded \$5 Million By Jury, Northern Plains Independent, Jul. 14, 2022, *available at* <https://www.northernplainsindependent.com/2022/07/14/spotted-bird-family-awarded-5-million-by-jury/?destination=northern-plains-independent>

³ The Spence Law Firm, *Family of Three-Year-Old Boy Killed by Distracted Driver Awarded \$5 Million by Montana Jury*, Douglas Budget, Jul. 5, 2022, *available at* https://www.douglas-budget.com/news/state/article_cb752ebe-1ad7-540b-8ecf-0bd8c928bc3d.html

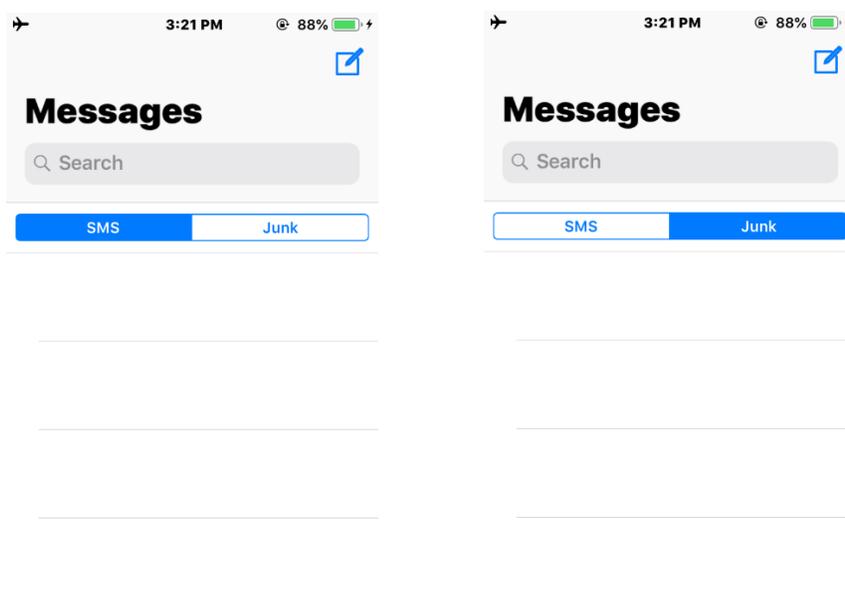
By examining the business records from the Defendant's cell phone service provider, Carney Forensics determined that the Defendant had participated in 26 phone calls and sent or received 89 text messages on the date of the accident. Significantly, the business records indicated that the Defendant's iPhone had been using cell tower data in the half hour before the accident.

1	MSID	Call Date	Conn Tm	Calling No	Called No	Dialed No	Orig/Term	Secs	Msg Type	Call Type	Orig Cell	Serv Sid	Serv State	Switch
28		6/12/2018	9:06:20				Orig	1	SMS	Orig SMS	10987	72335	MT	Huawei UMTS
29		6/12/2018	9:33:30				Term	1	SMS	Term SMS	10985	72335	MT	Huawei UMTS
30		6/12/2018	9:45:50				Orig	1	SMS	Orig SMS	10985	72335	MT	Huawei UMTS
31		6/12/2018	9:48:07				Term	1	SMS	Term SMS	10985	72335	MT	Huawei UMTS
32		6/12/2018	9:58:51				Orig	1	SMS	Orig SMS	10985	72335	MT	Huawei UMTS
33		6/12/2018	9:58:53				Term	1	SMS	Term SMS	10985	72335	MT	Huawei UMTS
34		6/12/2018	10:05:03				Orig	1	SMS	Orig SMS	10985	72335	MT	Huawei UMTS
35		6/12/2018	10:05:40				Term	1	SMS	Term SMS	10985	72335	MT	Huawei UMTS
36		6/12/2018	10:13:27				Term	1	SMS	Term SMS	10987	72335	MT	Huawei UMTS
37		6/12/2018	10:22:04				Orig	1	SMS	Orig SMS	10987	72335	MT	Huawei UMTS
38		6/12/2018	11:39:38				Orig	1	SMS	Orig SMS	10813	72335	MT	Huawei UMTS
39		6/12/2018	11:50:43				Term	1	SMS	Term SMS	10813	72335	MT	Huawei UMTS
40		6/12/2018	11:51:49				Orig	1	SMS	Orig SMS	10813	72335	MT	Huawei UMTS
41		6/12/2018	11:52:11				Term	1	SMS	Term SMS	10813	72335	MT	Huawei UMTS
42		6/12/2018	11:52:23				Orig	1	SMS	Orig SMS	10813	72335	MT	Huawei UMTS
43		6/12/2018	11:55:02				Term	1	SMS	Term SMS	10813	72335	MT	Huawei UMTS
44		6/12/2018	11:57:16				Orig	1	SMS	Orig SMS	10813	72335	MT	Huawei UMTS
45		6/12/2018	11:58:07				Term	1	SMS	Term SMS	10813	72335	MT	Huawei UMTS
46		6/12/2018	11:58:39				Orig	1	SMS	Orig SMS	10813	72335	MT	Huawei UMTS
47		6/12/2018	12:21:51				Term	1	SMS	Term SMS	10813	72335	MT	Huawei UMTS
48		6/12/2018	12:22:14				Orig	1	SMS	Orig SMS	10813	72335	MT	Huawei UMTS
49		6/12/2018	14:44:04				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS
50		6/12/2018	14:51:54				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
51		6/12/2018	14:52:39				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS
52		6/12/2018	14:53:36				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
53		6/12/2018	14:54:21				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS
54		6/12/2018	14:54:41				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
55		6/12/2018	14:55:06				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
56		6/12/2018	14:55:20				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS
57		6/12/2018	14:55:57				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
58		6/12/2018	14:56:17				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS
59		6/12/2018	14:56:29				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS
60		6/12/2018	14:57:00				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
61		6/12/2018	14:57:32				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS
62		6/12/2018	14:58:24				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
63		6/12/2018	14:58:50				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS
64		6/12/2018	14:59:21				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
65		6/12/2018	15:06:07				Term	1	SMS	Term SMS	10434	72335	MT	Huawei UMTS
66		6/12/2018	15:06:36				Orig	1	SMS	Orig SMS	10434	72335	MT	Huawei UMTS

Screenshot of business records for SMS message detail records dated June 12, 2018 produced by Nemont Telephone Cooperative in Montana. Exhibit was created in Carney Forensics laboratory by John J. Carney, certified mobile device forensics examiner.

In order to determine which mobile applications were in use and exactly what time they were in use in the half hour prior to the accident, Carney Forensics then conducted forensic examinations on the Defendant's iPhone. In contrast to the evidence of cell phone usage found in the business records, the cell phone data, including text messages and call records, from the date of the accident and for several weeks prior to and after the accident was missing from the device.

The Defendant testified that he had sent at least one text message following the accident.⁴ When asked why his cell phone contained no record of that message being sent or any other data from the date of the accident, the Defendant testified that he did not know how they may have been deleted and that he had not had any trouble with his cell phone that would otherwise explain it.⁵



Screenshot of Defendant's iPhone Messages app screens for text messages (SMS) and junk, showing no messages. Exhibit was created in Carney Forensics laboratory by John J. Carney, certified mobile device forensics examiner.

Given the missing cell phone data from the time of the accident inconsistent with the business records, combined with the general stability and reliability of iPhone data, Carney Forensics concluded that all evidence of phone calls, text messages, and mobile applications from the date of the accident had been intentionally deleted or wiped from the Defendant's iPhone in violation of civil procedure rules requiring the evidence to be preserved in anticipation of litigation.

⁴ Sansaver Dep. 65: 6-8 (Apr. 4, 2022)

⁵ Sansaver Dep. 68: 25 – 69: 1-7 (Apr. 4, 2022)

At the conclusion of the trial, the six-member jury found that the driver's negligence caused the boy's death and awarded his family \$3.8 million for wrongful death and \$1.2 million in survival damages.

Spoilation: Even In The Absence of Data, All Hope Is Not Lost

While nothing can bring back their little boy, Plaintiffs' counsel achieved some measure of justice for the Plaintiffs and their family. Using the tools of digital investigation, Carney Forensics assisted Plaintiff's counsel in establishing evidence that the driver that fatally hit their child actively deleted relevant evidence of possible cell phone usage at the time of the accident.

Mobile devices contain a wealth of information upon which a client's case may hinge. In a perfect world, all relevant evidence would be preserved in anticipation of litigation. Unfortunately, that is not always the case. While it may seem a daunting task, there are methods available to locate that evidence or to explain why it is missing. Absent direct information about what the Defendant may or may not have been doing on his cell phone at the time of the accident, Carney Forensics used its expertise to examine the Defendant's cell phone and relevant records, locate inconsistencies and gaps in the data, and conclude that the Defendant failed to take any steps to preserve the data and instead wiped it from the phone so it could not be used at trial. A digital expert can provide crucial assistance to an attorney seeking to use digital evidence to establish an argument of spoilation. Even when the data has been deleted, there is still value in the digital evidence.

About the Authors:

Emily Blaeser is an attorney based in St. Paul and a graduate of Mitchell Hamline School of Law. While at Mitchell Hamline, she also earned a Certificate in Law and Business.

Prior to attending law school, she worked as a real estate and commercial law paralegal at a law firm in St. Paul.

John Carney is the Chief Technology Officer at Carney Forensics, a digital evidence recovery and expert witness company based in Scandia, MN. He is a graduate of MIT, where he studied computer science, and software engineering after which he had a 30-year computer technology career.

John went to law school later in life and earned his JD from Hamline University School of Law. He is a federally and state licensed Minnesota attorney. He serves on the Council of the Minnesota State Bar Association's Computer and Technology Law Section and is a voting member of the American Academy of Forensic Sciences (AAFS).