



# VERDICT

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## One Step Ahead: Fitness Trackers



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Movies about technology taking over and ruining and/or running the world have been around for decades. As a child of the Disney Channel era, the 1999 movie "Smart House" comes to mind, where a kid enters a contest to win a house that is essentially one gigantic computer named "Pat" that runs their everyday lives. Pat ends up going crazy and locks them all in the house, fearing the outside world is too dangerous. The family has to win over the technology of the house to become free again and Pat ends up "shutting down" for good. Enter 2019 - 20 years later - and the movies and technology have continued. While we may not be close to having a "Pat" to control everything for us, as litigators, we need to be aware of and appreciate the implications of technological advances in lawsuits. The biggest "new" technology that comes to mind for me when thinking of personal injury litigation is fitness "wearables" - Fitbits, Apple Watches, Samsung's Gear and even just fitness-app-equipped cell phones themselves. While fitness trackers' ability to track sleep, calories burned, miles walked, and steps taken is pretty incredible, personal injury attorneys need to be mindful of the implications. I recently had a client who wore his Fitbit to his deposition. No one noticed it until he pushed his sleeves up halfway through the deposition, and there was that familiar black band circling his right wrist. The defense attorney caught it right away and asked what it was, how

long had he had it, does he wear it all the time, etc. The next day, unsurprisingly, I received a second set of Requests for Production of Documents, strictly for plaintiffs Fitbit records. Here was a guy with a bad back and bilateral hip replacements who testified he barely left his house, taking 5,000 "steps" a day. I objected to the Request, and a Motion to Compel came shortly thereafter. My client had mentioned that he would sit in his recliner and throw a tennis ball for his dog, and the motion of the wrist would record "steps." I thought this was a decent argument to make to the Discovery Court Judge; that it is unreliable and not indicative of anything. Alas, His Honor did not agree, and responded "well why did he get the Fitbit then Ms. Dooley? To see how many times he throws the ball for his dog?" Motion was ultimately granted for various reasons, and I had to turn over approximately six (6) months of dreaded Fitbit records. However, as I compiled the information on various spreadsheets from the Fitbit website, I realized that maybe this would not be so bad after all. While it showed a number of unreliable and unauthenticated "steps," it also showed something I thought we could use to our advantage - his sleep cycle. Plaintiff had also testified that he had difficulty falling asleep and would wake up often throughout the night in pain. As I looked at his sleep tracking records, I realized it confirmed his testimony and according to the tracker, he got maybe two (2) hours of sleep at a time, at most, and would wake up and then be awake for 30 or 45 minutes before falling asleep again. So, maybe the Fitbit records would end up just being a draw anyway. The case came up for trial and I filed a Motion *in Limine* on the Fitbit records, arguing they were unauthenticated, unreliable, irrelevant, and prejudicial. They had not been proven to be scientifically accurate or reliable in a court of law and had not been deemed reliable for diagnosing medical conditions. The information was deceptive and misleading, and no experts had been

retained by the defense to authenticate it or rely upon the "data." I even cited to a class action lawsuit that had been filed over concerns of Fitbit's accuracy and reliability. Unfortunately (or fortunately), the case resolved prior to a decision on the Motion to preclude the evidence.

There is always going to be advancing technology that could complicate a personal injury lawsuit. With the ever-growing popularity of Fitbits and Apple Watches, plaintiffs' lawyers need to be mindful of the implications of their clients wearing these items. Your client's deposition is not an ideal time to find out he or she wears a fitness tracker. Have a conversation about it early in the course of your representation, and obtain any available data. The data may be so helpful you'll want to use it in your case, for example if it shows your client was very active before an injury, and not so much afterwards. Or it may point to an inconsistency you'll need to be prepared to address. The data certainly seem discoverable under the broad Rules of Civil Procedure, but this author has been unable to locate a case to date discussing its admissibility at a trial in Pennsylvania. Given my recent experience, it would appear it's only a matter of time.

For now, fitness trackers raise a lot of questions. Will the data require a separate expert to testify regarding its reliability? Will a witness need to be subpoenaed from the tracking technology company to discuss the data's authenticity? Will the jury be prejudiced if they hear a disabled plaintiff meets his 10,000-step goal every day? Or will the data help to establish poor sleep and under 2,000 steps a day, reflective of just walking around the house? If you have a client with a fitness tracker 'start asking!

*Sarah Dooley focuses her practice on representing the catastrophically injured. She is also a member of the Verdict Editorial Board. You may contact Ms. Dooley at: sdooley@duffyfirm.com.*