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PENNSYLVANIA

ACCESS TO SOCIAL NETWORK INFORMATION

David J. Samlin

NOTIFICATION: DEFENDANT HAS SENT YOU A "FRIEND" REQUEST

With the explosion in the popularity and use of social networking sites, it is becoming more and more likely that information relevant to a personal injury suit may be posted by plaintiff on these sites. The question is: can a defendant seek access to the non-public portions of plaintiff's social networking account, such as Facebook or MySpace, for purposes of discovery in a personal injury suit? Pennsylvania Rule of Civil Procedure 4003.1 states that *"a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party…."* However, plaintiff may claim confidentiality of, or a right to privacy in, their social network information which allegedly overrides defendant's right to such discovery. Under certain circumstances, courts have concluded that plaintiffs do not have a valid claim of confidentiality and privacy given liberal discovery rules and the very nature of social networking websites. *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535 (Northumberland County. May 19, 2011), is one such case, and it as well as other cases impliedly set forth the framework a defendant must follow should it seek to gain access to plaintiff's social networking account.

Zimmerman involved an accident which occurred while plaintiff was operating a forklift at defendant's warehouse. Plaintiff claimed that his health had been seriously and permanently impaired and that he sustained permanent diminution in the ability to enjoy life. Based on information gleaned from the public portions of plaintiff's

Facebook and MySpace pages (such as photographs of plaintiff with his motorcycle and a black eye after the incident at issue), defendant sought access to plaintiff's private pages, believing there might be additional information relevant to plaintiff's claims. Plaintiff opposed defendant's discovery requests, arguing that his privacy interests outweighed the need to obtain the discovery.

In ruling on defendant's request, the court relied upon *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & County. Dec. LEXIS 270 (Jefferson County. Sept. 9, 2010), which was, at the time, the only published decision in Pennsylvania relating to access to social networking information through discovery. The court also found the New York case of *Romano v. Steelcase, Inc.*, 30 Misc.3d 426 (N.Y. 2010) to be well-reasoned and informative. Although *McMillen* and *Romano* ultimately come to the same conclusion, relying, in part, on liberal discovery rules, the focus of each case is significantly different.

In *McMillen*, plaintiff alleged he suffered permanent impairment and the inability to enjoy certain pleasures of life when he was rear-ended at the conclusion of a stock car race. During discovery, defendant Hummingbird asked if plaintiff belonged to any social networking sites and, if so, to provide his log-in information. Plaintiff objected to the requests, claiming such information was confidential. As the public portions of plaintiff's Facebook page contained information contrary to plaintiff's claims, Hummingbird subsequently filed a motion to compel. In opposing the motion, plaintiff asked the court to recognize a privilege for communications shared between one's private friends on a social networking site. The court declined, noting Pennsylvania's liberal discovery rules.

Instead, the court was of the opinion that it was unrealistic to expect that disclosures on Facebook, MySpace and other social networking sites would be confidential and privileged. Citing to Facebook and MySpace's privacy policies, the court held that the language of such policies made it clear that information posted on these sites would be disclosed to others. In the court's view, it was clear that no person communicating over Facebook or MySpace could reasonably expect that said communications would remain confidential, as both sites express the possibility of disclosure. In the court's view, *"Facebook users are…put on notice that regardless of their subjective intentions when sharing information, their communications could nonetheless be disseminated by the friends with whom they share it, or even by Facebook at its discretion…."* Thus, the very nature of social networking sites was incongruent with an expectation of confidentiality. In coming to this conclusion, the court also recognized that Pennsylvania law did not protect otherwise privileged communications made in the presence of third parties.

Moreover, whatever harm may be suffered by a plaintiff whose social network information is disclosed was *"undoubtedly outweighed by the benefit of correctly disposing of litigation."* Since a user must know that even his or her private posts could be shared with others based upon the user's friends' privacy settings, there was little to no harm in allowing other *"strangers,"* such as litigants, access to those communications. The court therefore concluded that *"[w]here there is an indication that a person's social network sites contain information*

relevant to the prosecution or defense of a lawsuit…and given…the law's general dispreference for the allowance of privileges, access to those sites should be freely granted."

Where *McMillen* found social network information to be discoverable because a plaintiff could not legitimately expect confidentiality, *Romano* took up the issue from a privacy standpoint. In *Romano*, plaintiff claimed permanent injuries which prevented her from participating in certain activities. Defendant contended, however, that the public portions of plaintiff's Facebook page revealed that plaintiff led an active life and had traveled out of state during a time which she claimed she was unable to do so. Defendant therefore moved for access to plaintiff's current and historical Facebook and MySpace pages on the ground that plaintiff had posted content which was believed to be inconsistent with her claims.

Just as in *McMillen*, the *Romano* court noted that under New York law, there is full disclosure of all non-privileged matter which was *"material and necessary"* to the defense or prosecution of an action. As this rule pertained to personal injury actions, the court stated,

> *[p]laintiffs who place their physical condition in controversy may not shield from disclosure material which is necessary to the defense of the action…Accordingly, in an action seeking damages for personal injuries, discovery is generally permitted with respect to materials that may be relevant to both the issue of damages and the extent of a plaintiff's injury….*

The *Romano* court concluded that the information sought by defendant was both *"material and necessary"* to defendant's defense, and could lead to admissible evidence. Furthermore, as *"the public portions of plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence…which [is] material and relevant to the defense of this action."*

Although plaintiff claimed that production of content from her Facebook and MySpace accounts would violate her right to privacy, the court found that any privacy concerns were outweighed by defendant's need for the information. The court stated that in determining whether a right to privacy exists via the Fourth Amendment to the United States Constitution, courts apply the reasonableness standard from *Katz v. United States*, 389 U.S. 347 (1951): *(1) a person must have exhibited an actual expectation of privacy; and, (2) that the expectation be one that society is prepared to recognize as reasonable.* As neither Facebook nor MySpace guaranteed complete privacy, plaintiff had no legitimate, reasonable expectation as to same. Consequently,

> *when plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites, else they would cease to exist. Since plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.*

Additionally, defendant's need for information from plaintiff's social networking sites outweighed any countervailing privacy concerns; without access to the

information, defendant would be at a distinct disadvantage in defending itself against plaintiff's claims.

Given the above, there appear to be four main considerations in determining whether a defendant may gain access to a plaintiff's social networking accounts: (1) whether liberal discovery rules allow for the discovery of all relevant, non-privileged material; (2) whether there is a reasonable belief that the private portions of plaintiff's social networking pages contain relevant information; (3) whether the social network's privacy policies inform the user that their information could be shared with others; and, (4) harm or prejudice to defendant if access is denied.

In granting defendant access to plaintiff's Facebook and MySpace accounts, the court in *Zimmerman* noted that the Pennsylvania Rules of Civil Procedure, quoted above, provided for liberal discovery as to any matter which was not privileged. Moreover, a review of the public portions of plaintiff's Facebook and MySpace pages created a reasonable likelihood that additional, relevant information would be contained on the private portions of these pages. Finally, because plaintiff voluntarily posted all of the content on his Facebook and MySpace pages for the purpose of sharing same with others, he could not then claim that he possessed any reasonable expectation to privacy. According to the court, a social networking site, by definition, *"is the interactive sharing of your personal life with others; the recipients are not limited in what they do with such knowledge." Thus, in the Court's view, "[w]ith the initiation of litigation to seek a monetary award based upon limitations to one's person, any relevant, non-privileged information about one's life that is shared with others and can be gleaned by defendants from the internet is fair game in today's society."*

Of note, two Pennsylvania decisions since *Zimmerman* have denied access to a plaintiff's private Facebook page: *Martin v. Allstate Fire and Casualty. Ins. Co.,* Philadelphia County, April Term, 2011, No. 2438, and *Arcq v. Fields,* Franklin County, No. 2008-2430. Access was denied, however, because defendants failed to provide evidence, such as information obtained from plaintiffs' public Facebook pages, that relevant, discoverable material existed on the private portions of said pages. Specifically, in *Arcq*, the court found that defendant had not alleged any basis for believing that plaintiff's private pages contained information relevant to the matter. This reasoning is in line with the second consideration outlined earlier, as a reasonable belief that discoverable material exists on a plaintiff's private Facebook or MySpace page is essential to defendant's request for access to same under liberal discovery rules. Thus, while courts have not given defendants *carte blanche* access to social networking information in all cases, where defendant is able to follow the considerations laid out above, a party should be able to utilize this ever-growing social medium.

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