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**New York’s highest court sends clear message to plaintiffs: you can’t hide material and relevant discovery from defendants behind Facebook’s privacy settings.**

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The New York Court of Appeals has now decided the issue of the right of defendants to discover plaintiffs’ Facebook profiles, regardless of privacy settings, when they demonstrate that the postings are material and relevant, and stressed that the words “material and necessary” are to be interpreted liberally. In Foreman v. Henkin, 2018 NY Slip Op 01015 (February 13, 2018), plaintiff alleged that she was injured when she fell from a horse owned by defendant and suffered spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation. Plaintiff testified that she had previously posted several photographs showing her pre-accident active lifestyle, but that she deactivated the account about six months after the accident. She further claimed that she had become reclusive as a result of her injuries, had difficulty using a computer, and composing coherent messages.

Defendant sought an unlimited authorization to obtain plaintiff’s entire “private” Facebook account, claiming the photographs and written posts would be material and necessary to his defense under NY S CPLR 3101(a). When plaintiff failed to provide the authorization, defendant moved to compel. In support of the motion, defendant argued that plaintiff alleged she was very physically active before the accident and had posted photos on Facebook reflective of that fact. Plaintiff opposed the motion by arguing that defendant failed to establish a basis for access to the “private portion” of her Facebook account because the “public” portion of plaintiff’s Facebook only included one photograph that did not contradict plaintiff’s claim. Defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff’s credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message.

The Supreme Court (lower Court) granted the motion with the limitation that plaintiff was directed to “produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of character or words in the messages.”

Plaintiff appealed to the Appellate Division, First Department. The Appellate Division in a divided opinion, further limited the lower court’s decision by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial, but eliminating the authorization for the defendant to obtain data relating to post-accident messages. The Court cited to its prior decision in Tapp v. New York State Urban Dev. Corp., 102 AD3d 620 (1<sup>st</sup>

Dep't 2013) which held "to warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account – that is information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities and losses and other claims". Typically, this would require a defendant to find photos or posts on plaintiff's public Facebook page which contradict plaintiff's allegations in order to be given access to plaintiff's private posts and photos.

The Court of Appeals reversed the Appellate Division, holding that they erred in "employing a heightened threshold for the production of social media records that depends on what the account holder has chosen to share on the public portion of the account." The Court acknowledged that a threshold rule requiring the party to "identify relevant information in the Facebook account" permitted disclosure only in limited circumstances, allowing the account holder to "obstruct disclosure by manipulating privacy settings." As such, under the threshold, disclosure would be contingent on whether the information sought is already accessible, and not as it should be: whether it is "material and necessary to the prosecution or defense of an action." See CPLR 3101(a).

The Court of Appeals held that the Appellate Division erred in modifying the Supreme Court's order to further restrict disclosure of plaintiff's Facebook account. The Court stated that "given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations." The Court similarly found that it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiff's claims that she suffered cognitive injuries.

The Court, however cautioned that the commencement of a personal injury action does not render a party's entire Facebook account automatically discoverable. The Court advised that in the event judicial intervention is needed to obtain Facebook content, the courts should apply a balancing test and first consider "the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case to assess whether material is likely to be found on the Facebook account." Then the court must balance the potential utility of the information sought against any specific "privacy". An order tailored to the particular controversy which identifies the type of material to be disclosed should then be issued. The Court noted that in a personal injury action, temporal limitations may also be appropriate – "for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation".

The Court also rejected plaintiff's concern that disclosure of social media material constitutes an invasion of privacy. The Court reiterated the long standing precedent that private materials may be subject to discovery if they are relevant, as is the case with medical records when a party commences an action affirmatively placing their mental or physical condition in issue.

In light of today's decision, we anticipate that defendants will experience greater ease in obtaining access to plaintiff's Facebook profile. Defendants will no longer be barred from obtaining relevant and pertinent material from plaintiff's Facebook account due to arbitrary privacy settings. Discovery demands requesting access to plaintiff's Facebook account should be carefully drafted to ensure that discovery is tailored to obtain material that is relevant to plaintiff's allegations.

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