

## NEW YORK COURT OF APPEALS ROUNDUP

### DISCOVERABILITY OF NON-PUBLIC INFORMATION ON SOCIAL MEDIA

WILLIAM T. RUSSELL, JR. AND LYNN K. NEUNER\*

SIMPSON THACHER & BARTLETT LLP

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The Court of Appeals recently addressed the discoverability of non-public information on social media sites in *Forman v. Henkin*. In a unanimous decision written by Chief Judge Janet DiFiore, the court held that the normal rules of discovery applied to a party's social media posts and the mere fact that certain information had been designated "private" did not require a higher or different discovery standard. In this instance, the Court of Appeals found that the limited scope of discovery into plaintiff's private Facebook posts ordered by the trial court was appropriate.

Plaintiff brought a personal injury action alleging that while she was riding one of defendant's horses, the stirrup leather attached to the saddle broke, causing plaintiff to lose her balance and fall. She alleged that she suffered serious injuries to her brain and spinal cord, which caused memory loss, difficulties with written and oral communication and social isolation. She asserted that defendant had acted negligently in failing to properly prepare the horse for riding and failing to maintain and inspect the equipment.

At her deposition, plaintiff testified that, as a result of her injuries, she had become reclusive and had difficulties using a computer and communicating coherently. She asserted that it could take her hours to compose a single email. She specifically mentioned Facebook in her deposition testimony and asserted that before the accident, she had a Facebook account on which she posted many photographs depicting her lifestyle but that she deactivated her account about six months after the accident and could not recall whether she had posted any post-accident photographs.

Facebook users can control access to different sections of their Facebook account and can designate postings public or private. Public postings can generally be viewed by anyone. Private postings can only be viewed by an account holder's Facebook "friends" or a subset of those friends. Defendant sought an authorization to obtain all of plaintiff's private Facebook postings. Plaintiff refused to provide the authorization and defendant moved to compel. Defendant argued that plaintiff's private photographs and other postings would be relevant to plaintiff's claims that as a result of her injuries she can no longer engage in activities such as cooking, traveling, or attending the theater and that her ability to read, write, reason and use a computer have been negatively impacted. Defendant also noted that the timestamps on plaintiff's Facebook messages would reveal the amount of time it took plaintiff to write a post or respond to a message.

Plaintiff opposed the motion and argued that there was no basis for ordering access to her private Facebook postings, inter alia, because there was nothing in her public postings that would contradict her claims and

\* **William T. Russell, Jr. and Lynn K. Neuner** are partners at *Simpson Thacher & Bartlett LLP*.

accordingly defendant's argument about potential contradicting information in plaintiff's private postings was based only on speculation.

Supreme Court, New York County granted defendant's motion to compel to the limited extent of requiring plaintiff to produce all pre-accident photographs posted privately to her Facebook account that she intended to introduce at trial, all post-accident photographs posted privately to her Facebook account other than those that depict nudity or romantic encounters, and an authorization for Facebook to produce records showing each time plaintiff posted a post-accident private message and the number of characters or words in the message.

Plaintiff appealed to the Appellate Division, First Department, which modified the order to provide for the disclosure of any pre- or post-accident photographs that plaintiff posted on Facebook that she intended to introduce at trial. The First Department denied all other disclosure—including the information concerning post-accident messages. Two justices dissented from the decision, and the First Department granted leave to appeal.

The Court of Appeals reversed the First Department and reinstated the trial court's ruling requiring disclosure of post-accident photographs and information concerning post-accident written messages. The court noted twice in its ruling that defendant's failure to appeal precluded the court from considering the propriety of the trial court's refusal to permit defendant to obtain the actual content of plaintiff's private post-accident messages. The Court of Appeals also noted the trial court's comment at oral argument that defendant could make a follow-up request for these private messages depending on what the other discovery revealed. Although it is possible to read too much into this, the Court of Appeals' discussion seems to imply that the court would have gone even further and directed the disclosure of the post-accident private messages if the issue had been presented.

The Court of Appeals explained that, while social media websites offer a relatively new method of sharing information, there is no reason why existing and long-standing New York disclosure standards should not govern the dispute. The court noted that it was unclear what standard the First Department had applied but that it had relied upon *Tapp v. State Urban Dev.*, 102 A.D.3d 360 (1st Dep't 2013), which required a party to establish a factual predicate for discovery of private Facebook information by identifying information in the public postings that contradicts the other party's allegations. The court rejected this approach and explained that New York discovery rules do not require a party seeking disclosure to establish that the items sought actually exist and that such an approach would allow parties to control the scope of discovery by changing their privacy settings or curating their public postings.

The court noted that it was not adopting a rule that a plaintiff renders her entire Facebook account discoverable simply by commencing a personal injury action. Rather, courts should reject a "one-size-fits-all" approach and consider issues such as the likelihood that relevant material will be found on a party's Facebook account, a balancing of the potential utility of the information against any privacy or other concerns, and the court's ability to impose limits to address those concerns. The court found that defendant in this case had made an adequate showing to obtain the requested information because plaintiff had stated that she posted many photographs before the accident demonstrating her active lifestyle and because plaintiff had alleged that her injuries limited her ability to write and use the computer.

In sum, the court rejected any per se rule regarding the disclosure of non-public information on social media websites and ruled that, as in any other discovery dispute, a court should apply existing discovery rules to the

unique facts of the dispute. While this does not establish any guidelines specific to social media-related discovery disputes, it does make clear that parties are not required to identify contradictory information on the public section of a social media website as a precondition to obtaining discovery of non-public postings. The opinion also lays out a roadmap for the type of deposition testimony that is likely to make social media postings discoverable.

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