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Social Media: The Discoverable Window to the Truth

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Key Points:

- A social media user's indiscreet postings are pertinent to prove the truth or falsity of the claim.
- Any expectation of privacy with regard to Facebook and MySpace is unrealistic.
- The possibilities for finding relevant information in social media postings to successfully defend civil litigation are almost limitless.

In keeping with the times, the growing trend of Pennsylvania trial courts agrees that defense attorneys may use social media postings to poke holes in damages claims. While there is no case law regarding privacy issues and social networking sites on a statewide basis, these opinions offer well-reasoned, scholarly analyses that should be followed throughout the Commonwealth of Pennsylvania.

In *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD (C.P. Jefferson, Sept. 9, 2010), one of the earliest and most noteworthy reported cases on discovery of social media, President Judge John Henry Foradora of the Jefferson County Court of Common Pleas found that user names, log-in names and passwords were not confidential or subject to the protection of any evidentiary privilege, nor was the plaintiff permitted to delete postings from his social media accounts.

In *McMillan*, the plaintiff allegedly was injured when rear-ended during a cool-down lap following a stock car race. Upon review of the public portion of the plaintiff's account, the defendant found comments about a fishing trip and attendance at the Daytona 500 in Florida. The defendants, shortly thereafter, filed a motion to compel to see what truth would be revealed in the private postings. The court agreed, finding that a user's indiscreet postings are pertinent to prove the truth or falsity of the claim.

Judge Foradora specifically found that any expectation of privacy with regard to Facebook and MySpace would be unrealistic. The court reasoned that the relevant policies of the two sites suggest just the opposite. Judge Foradora wrote, "[W]hen a user communicates through Facebook or MySpace . . . he or she understands and tacitly submits to the possibility that a third-party recipient, i.e. one or more site operators, will also be receiving his or her messages and may further disclose them if the operator deems disclosure to be appropriate." The court also pointed out that communications could be disclosed by friends of the account holder with whom the communications were shared.

In *Zimmerman v. Weis Markets*, No. CV-09-1535 (C.P. Northumberland, May 19, 2011), the wave of allowing discovery of social media websites continued to grow. The Honorable Charles H. Saylor similarly rejected the assertion that the privacy of an injured plaintiff outweighed the defendant's right to view evidence on the internet. The plaintiff alleged injuries to his left leg while operating a forklift for a subcontractor at the defendant's warehouse. The plaintiff claimed his injuries rendered him unable to "enjoy life and life's pleasures" or wear shorts because of an embarrassing scar. Pictures posted on the public portion of the plaintiff's Facebook page told a different story. The photos showed the plaintiff wearing shorts, that revealed a large scar, and riding a motorcycle.

The court reasoned that one who voluntarily posts pictures and information on Facebook and MySpace cannot then claim he possesses any reasonable expectation of privacy to prevent a defendant from access. Judge Saylor profoundly and succinctly wrote, "With the initiation of litigation to seek a monetary award based upon limitations or harm 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."

Although these court opinions affect only the counties in which they were issued, they should have longer reach. The search for truth is utmost and expressly permitted by the Pennsylvania Rules of Civil Procedure as follows:

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 the defense of the party seeking discovery

Since Facebook and MySpace account information may well relate to the claims and defenses, other trial courts in Pennsylvania should allow litigants to utilize these rational means for ascertaining the truth. This includes the indiscreet postings of a plaintiff who has no reasonable expectation that his or her communications on a social network site would remain confidential.

When one considers that social media postings may contain relevant, timely and ever-changing profile information - status updates, notes, shares, wallposts, friends, events, videos, photos, etc. - the possibilities for finding relevant information to successfully defend civil litigation is almost as limitless as the internet itself.

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