

ALERT

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KEEP YOUR FRIENDS CLOSE, BUT YOUR FACEBOOK POSTS CLOSER

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"Facebook helps you connect and share with the people in your life." That is the Facebook mantra, as displayed on its homepage, and the opening line of a recent – and extremely thorough – Pennsylvania trial court decision regarding the discoverability of a plaintiff's relevant Facebook information. The court's conclusion: a plaintiff's Facebook information is discoverable, provided the defendant has a good faith basis for seeking the material, because there is no confidential social networking privilege under Pennsylvania law and because the Stored Communications Act only applies to Internet service providers. The take-away for Facebook users: be careful what you post – it's not as "private" as you think!

THE FACTS

Defendant Jessica Rosko (Rosko) collided with a minivan at an intersection in rural Pennsylvania, pushing the van into the motorcycle on which Plaintiff Jennifer Largent (Largent) was a passenger. Largent brought suit against Rosko in the Franklin County Court of Common Pleas, alleging serious and permanent physical and mental injuries, pain and suffering. *Largent v. Reed*, No. 2009-1823, slip op. (Pa. C.P. Franklin Nov. 8, 2011). Rosko claims that certain posts on Largent's Facebook account contradict her claims of serious and severe injury. Specifically, Rosko claims that Largent had posted several photographs that show her "enjoying life with her family" and "a status update about going to the gym."

Largent refused to provide any information about her Facebook account during her deposition, and her counsel advised that it would not voluntarily turn over such information. Rosko subsequently filed a *Motion to Compel Plaintiff Jennifer Largent's Facebook Login Information*, which served as the impetus for the trial court's ruling.

THE DECISION

In a methodical and well-written opinion, the court described the purpose and logistics of Facebook, including its "detailed, ever-changing privacy policy," and concluded, "users of Facebook know that their information may be shared by default[.]" The plaintiff raised three arguments in opposition to the motion to compel her Facebook information: (1) the information sought was irrelevant and did not meet Pennsylvania's prima facie threshold; (2) disclosure would violate privacy laws such as the Stored Communications Act, 18 U.S.C. §§ 2701-12 ("SCA"); and (3) the discovery request was overbroad because disclosure would cause the plaintiff unreasonable embarrassment and annoyance. The court debunked each of these arguments in turn.

As to the discovery standard, the court recognized Pennsylvania's broad discovery rules and the slight threshold for relevancy, concluding "it is clear that material on social networking websites is discoverable in a civil case[.]" especially where the plaintiff claims to suffer from chronic physical pain, yet posted information about exercising at a gym. The court also addressed the lack of binding authority in Pennsylvania, noting that Pennsylvania trial courts, as well as courts in other jurisdictions, have allowed discovery of social networking data in civil lawsuits.

As to whether allowing the discovery would constitute a violation of privacy laws, the court held that there is no confidential social networking privilege under Pennsylvania law and that the SCA is inapplicable because Largent is not an Internet service provider, and thus is not regulated by the SCA. Perhaps stating the obvious, the court concluded, "[b]y definition, there can be little privacy on a *social* networking website. Facebook's foremost purpose is to 'help you connect

and share with the people in your life.' That can only be accomplished by sharing information with others. Only the uninitiated or foolish could believe that Facebook is a lockbox of secrets." (Emphasis in original.)

Finally, as to the breadth of Rosko's discovery request, the court stated that unreasonableness is determined on a case-by-case basis. In the case before it, the court found that Largent had not identified any specific facts that would lead to the conclusion that discovery would cause unreasonable embarrassment or annoyance; specifically, the cost of investigating the plaintiff's Facebook account would be borne by the defendant, the plaintiff could still access her account while the defendant was investigating, and the defendant would only be allotted a 21-day window to perform the investigation. The court thereby held that "in filing a lawsuit seeking monetary damages, Largent has placed her health at issue, which vitiates certain privacy interests. Any posts on Facebook that concern Largent's health, mental or physical, are discoverable, and any privilege concerning such information is waived."

WHAT DOES IT ALL MEAN?

The *Largent* opinion, while carefully thought-out and meticulously written, is not an appellate decision, and therefore is not binding as precedent on other trial courts. Nonetheless, it joins *Zimmerman v. Weis Mkts., Inc.*, No. CV-

09-1535, 2011 WL 2065410 (Pa. C.P. Northumberland May 19, 2011) and *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010-CD, 2010 WL 4403285 (Pa. C.P. Jefferson Sept. 9, 2010), other Pennsylvania trial court decisions, in setting a precedent that a plaintiff's social networking information is discoverable in a civil case under Pennsylvania law. We are left to anxiously await a Pennsylvania appellate court decision on this issue.

In the interim, these trial court decisions raise questions about whether the line between public and private has blurred beyond recognition. Are messages sent from one Facebook user to another, and not visible to others, private? Are pictures posted with the strictest "privacy setting," so that only a select few can see them, private? Or is anything and everything that one does on Facebook considered public, and vulnerable to being discovered by an opposing party in a civil suit? In case it is the latter: keep your friends close, but your Facebook posts closer.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact Andrea Cortland at 215.665.2751 or acortland@cozen.com.