Amicus Committee Report: Court Of Appeals Issues Favorable Decision On Social Media Discovery


BY: ANDREW ZAJAC* AND AMANDA L. NELSON**

In the Winter of 2016-2017 Edition of this Publication, we reported that the Amicus Curiae Committee of the Defense Association of New York (DANY) was preparing an amicus brief to the Court of Appeals in Forman v. Henkin,[1] which addressed the parameters of social media discovery.

We are pleased to announce that, in its much-anticipated decision concerning discoverability of plaintiff's Facebook account, the Court of Appeals agreed with the defense position that the Appellate Division improperly employed a heightened threshold for production of social media records. In so doing, it reversed the decision of the Appellate Division, First Department[2] which held that a defendant will be allowed to seek discovery of the non-public information posted by a plaintiff on social media if, and only if, the defendant can first unearth some item from the plaintiff's publicly-available postings on social media which tend to contradict the plaintiff's claims. The Court held that, instead, New York's usual liberal discovery rules should govern this issue.

In Forman, plaintiff Kelly Forman ("plaintiff") started an action against defendant Mark Henkin ("defendant") to recover for injuries she allegedly suffered when she fell from one of his horses. Among other injuries, plaintiff claimed that she suffered traumatic brain damage that caused cognitive deficits, memory loss, inability to concentrate, difficulty in communicating, and social isolation. Plaintiff said she had been an active Facebook user prior to the accident, posting photographs and messages, but she deactivated her Facebook account about a year after her fall. During discovery, defendant moved for an order compelling plaintiff to give him unrestricted access to her Facebook account, arguing the records were necessary to evaluate her alleged injuries and her credibility. Specifically, defense counsel moved for an order compelling the plaintiff to provide an authorization granting them access to the plaintiff's Facebook account, including all photographs, status updates and instant messages. The trial court granted defendant's motion to the extent of directing plaintiff to produce: (a) all photographs posted prior to the accident that she intends to introduce at trial; (b) all photographs posted after the accident (excepting those depicting nudity or romantic encounters) and (c) an authorization for records showing each time plaintiff posted private messages after the accident and the number of characters or words in those messages.

A three-judge majority of the Appellate Division, First Department reversed as to items (b) and (c). The majority reviewed two of the court's prior decisions, and it held that the "threshold factual predicate"[3] in cases of this nature is not met unless the defendant can point to some item from the plaintiff's publicly-available social media postings which conflicts with the claims made in the case. The two-judge dissent stated that the court's prior rulings on the issue inappropriately created a different set of discovery rules for social media information. The dissenting opinion further indicated that "[t]here is no reason why the traditional discovery process cannot be used equally well" in the context of social media as long as the defendant's discovery demand is "limited to reasonably defined categories of items that are relevant to the issues to be raised."[4] The Appellate Division dissent strongly disagreed with the majority's conclusion that a defendant must demonstrate a "threshold factual predicate" before such information may be obtained. The dissent stated that as long as the request was appropriate and narrowly-tailored, the plaintiff must then perform a proper search and turn over any responsive and non-privileged social

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* *Andrew Zajac is a member of McGaw, Alventosa & Zajac in Jericho, New York. Mr. Zajac is also a Past-President of DANY and he currently sits on its Board of Directors. In addition, he is co-chair of DANY's Amicus Curiae Committee.*

** *Amanda L. Nelson is a member of Cozen O'Connor. Ms. Nelson is also a member of DANY's Amicus Curiae Committee.*

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media information.

The defendant then successfully moved for permission to appeal to the Court of Appeals. In addition, DANY's Amicus Committee moved for permission to file an amicus curiae brief. The Court of Appeals granted DANY's motion.

The Court of Appeals reversed and reinstated the trial court's decision. The Court held that the Appellate Division's decision was unduly restrictive: "[T]he Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account."[5] The Court stated that, instead, disclosure disputes of this nature should be controlled by New York's usual discovery standard: "There shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof . . . [and that] the words 'material and necessary' are to be interpreted liberally ..."[6]

The Court then stated as follows:

> New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.
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> That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable.[7]

The Court then emphasized that discovery requests concerning social media should be carefully drafted: "In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each."[8]

The Court indicated that "private materials [on a Facebook account] may be subject to discovery if they are relevant."[9] It also stated that "[a]ttorneys while functioning as advocate for their clients' interests are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process."[10]

The Court concluded that, given the plaintiff's deposition testimony in this case, the trial court's order was appropriate. The plaintiff testified that, before the accident, she posted many photographs which depicted her active lifestyle. Accordingly, "there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations."[11] Additionally, "it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages." [12]

This decision illustrates that detailed questioning at plaintiff's deposition, coupled with a carefully-crafted discovery request concerning plaintiff's social media account, may yield information which can be valuable in defending personal injury cases.

DANY's Amicus Curiae Committee was founded in 1997 by John J. McDonough, who was President of DANY at the time. Since then, the committee has submitted numerous amicus curiae briefs to the New York Court of Appeals on issues of vital concern to the defense community in this State.

The Committee is currently comprised of Andrew Zajac of McGaw, Alventosa & Zajac, who chairs the Committee, as well as Rona L. Platt of Enstar; Brendan T. Fitzpatrick of Goldberg Segalla; Jonathan Uejio / special counsel to Conway, Farrell, Curtin & Kelly, P.C.; Lisa L. Gokhulsingh of Gannon, Rosenfarb & Drossman; Amanda L. Nelson of Cozen O'Connor; Caryn Lilling of Mauro Lilling Naparty LLP, and Jessica L. Foscolo of Kenney Shelton Liptak Nowak LLP in Buffalo, New York. The members of the Committee provide their services on a voluntary basis, free of charge. Printing costs have been borne by DANY. Inquiries with respect to the Committee

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