APL-2016-00222

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Court of Appeals

STATE OF NEW YORK

KELLY FORMAN,

Plaintiff-Respondent,

against

MARK HENKIN,

Defendant-Appellant.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a bar association, whose purpose is to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases and whose representation in such cases is primarily for the defense; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law

schools in emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques for the defense; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just claim and to present effective resistance to every non-meritorious or inflated claim; to promote diversity in the legal profession and to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

DANY respectfully submits that, in issuing its decision in Forman v. Henkin, the Appellate Division, First Department has incorrectly elevated social media to a special, protected position in the realm of litigation disclosure - a position not even enjoyed by a plaintiff's medical records.

This amicus brief is respectfully submitted in support of the position that social media discovery - whether the requested party has designated their social media account to be "private" or otherwise - should be considered pursuant to

the same rules and restrictions as all other discovery in civil matters. Specifically, social media discovery should be considered, as this honorable Court has held, pursuant to the liberal discovery provisions of the Civil Practice Law and Rules, providing for disclosure of all evidence which is material and necessary to requesting party's claims and defenses.

This liberal disclosure rule has never required a predicate demonstration such as that imposed by the First Department in this matter. What the First Department has effectively required is a paradox - a mandate that, in order to obtain social media disclosure, the requesting party must affirmatively prove (through actual documentation of what exists within that social media account) that there is relevant and material information within the social media account.

Beyond providing social media with a special status that is wholly unprecedented, this is untenable as a practical matter. With a click of a button, an individual can designate virtually all information on a social media account as "private," effectively shielding it from public review and destroying any possibility that the requesting party can obtain information necessary to pass the First Department's

threshold. Consequently, the First Department's imposed prerequisite is contrary to both settled precedent as well as to the reality of how social media accounts are utilized in today's society. That the First Department has adopted a nearly unsurmountable requirement for the production of social media could not be clearer than as presented in this matter, where plaintiff expressly testified that her social network went to "nothing" as a result of the accident, that she could no longer send lengthy emails or electronic messages and that she deactivated her Facebook account approximately one year after the accident, which contributed to her claims of social media isolation following the accident. Despite this testimony, because plaintiff's only public Facebook information was an outdated photograph, defendant was prohibited from reviewing any information on her social media accounts.

As such, as more fully set forth below, DANY respectfully submits that the Appellate Division, First Department's majority decision should be reversed, and requests that this Honorable Court clarify that social media discovery is subject to the same liberal standards as other disclosure in the State of New York.

STATEMENT OF FACTS

A. The Incident

On June 20, 2011, Mark Henkin (hereinafter "defendant") and Kelly Forman (hereinafter "plaintiff") met at defendant's home, and then drove to a nearby park with horse riding trails (R 74-6, 303-4, 308-9, 390). While riding one of defendant's horses and using one of his saddles, plaintiff lost her balance and fell because the leather stirrup on the saddle broke (R 313, 389-91, 400-14).

B. Plaintiff's Allegations That Placed Her Medical Condition At Issue

A few months later, plaintiff sued defendant and charged that he negligently tacked up the horse, causing her to fall and as a result, she "suffered serious, severe and permanent personal injuries, has been prevented from attending her usual activities and duties, has sought and will continue to need medical care and treatment, has sustained pain and suffering, and has been damaged in an amount exceeding the jurisdiction of all other courts" (R 389-91).

In her verified Bill of Particulars, plaintiff claimed to have sustained numerous injuries under the following categories: (a) "Head and Brain;" (b) "Spine;" and (c) "Extremities" (R 402-4). With respect to the first category, plaintiff alleged that she sustained a "Traumatic Brain

Injury" that caused cognitive deficits, inability to concentrate, difficulty reading, difficulty in reasoning, difficulty in communicating, difficulty in word-finding, difficulty in multi-tasking, personality changes, social isolation, depression, and inability to watch television and movies (R 403-4).

Plaintiff claimed her injuries "have adversely affected [her] activities of daily living, and have limited her abilities to participate in recreational, family and social activities;" and that these "permanent and progressive" injuries could "lead to chronic pain, depression, early onset dementia, brain atrophy, Alzheimer's disease, and epilepsy" (R 405).

Plaintiff submitted a written statement on the first day of her deposition, advising she felt "hopeless that any form of having a meaningful life, being able to function or connect with people the way [she] once did was a distant past life" (R 416) She wrote that her "whole life had changed drastically" and she "became isolated from [her] friends." She noted she no longer had "the energy to keep up with the world that [she] was a part of and it's left [her] behind" (R 416). Plaintiff listed a number of other deleterious effects, including that she could not express herself in the

same way; that the impact of too much noise could take her days or weeks to recover; that an email could take her hours to draft; that she could no longer engage in activities such as cooking, travel, photography, sports, riding, theater, painting, drawing, making jewelry, and reading; and that her "social network went from huge to nothing" (R 416-17). Her only reprieve was going to dinner (R 417).

C. Plaintiff's Deposition Where She Placed Her Medical And Emotional Status At Issue And Admitted Facebook Use

Plaintiff testified in general terms as to the physical and emotional impact of the alleged accident, and claimed that she could not perform mundane activities without becoming fatigued and that she becomes "really depressed" (R 357). Among the many every-day activities plaintiff claimed she could no longer perform was that she was no longer able to read "whatsoever," that she could barely read or compose texts and required hours to compose simple messages on the computer, including the statement she submitted on the first day of the deposition (R 352). Plaintiff claimed using a computer exhausted her, and testified "it can take [her] hours to write something that's just a paragraph because [she has] to keep going over it over and over it and over it" (R 351). She said her doctors counseled her against using a computer, and plaintiff testified she "couldn't handle the

computer for more than 10 minutes without really, really harming [herself]" (R 351).

Plaintiff complained she could no longer socialize and experienced feelings of near total isolation (R 353). Because of her inability to socialize, she claimed to have largely stopped communicating with or seeing her friends (R 353-54). Before the accident, plaintiff had a rich social life filled with travel and recreational activities, which she admittedly documented on Facebook (R 244). Plaintiff acknowledged that she placed "a lot" of photographs on Facebook that showed "everything," including those with friends, her dogs, "or, you know, different, fun, nice things in Australia with koalas and kangaroos, or at the beach" (R 244).

But plaintiff could not testify with any detail about her post-accident Facebook usage (R 244). She could not explain whether she ever posted a status message to how she was feeling (R 244). Plaintiff admitted that her Facebook account remained active until she deactivated it in June or August 2012, approximately one year after her accident (R 243). Plaintiff said the deactivation of her Facebook account contributed to her social isolation (R 193). Her public Facebook account just before deactivation revealed a

single, outdated photograph of her (R 43).

D. Defendant's Demand For Necessary And Material Facebook Discovery

Following the deposition, defendant requested authorization to access information from plaintiff's Facebook account (R 431). Despite having placed her medical state and her ability to interact through social media at issue, plaintiff objected to the demand as "beyond the scope of discovery" (R 436). Defendant moved for an order compelling full access to plaintiff's Facebook records, including photos and messages before the deactivation of her account (R 30-47).

E. The Supreme Court's Decision

The trial court granted defendant's motion, ruling that plaintiff had placed at issue her physical ability to socialize, use the computer, and perform simple tasks, including composing emails and text messages (R 5-9). The court issued a tailored order attempting to balance defendant's right to information that was material and necessary to defend this lawsuit against plaintiff's interest in protecting against the disclosure of irrelevant and personal information (R 5-8). The court ordered plaintiff to produce (a) all photographs of herself posted on Facebook before the accident that she intends to introduce at trial;

(b) all photographs of herself posted on Facebook after the accident; and (c) Facebook records, including archived or deleted records, showing each time plaintiff posted a private message and the number of characters or words in the text of each private message, from the date of her injury until she deactivated her Facebook account (R. 9).

F. The Decision And Order Of The Appellate Division, First Department

The Appellate Division, First Department granted plaintiff's appeal and reversed the trial court's order with respect to items (b) and (c), above. In doing so, the Appellate Division recognized that plaintiff "alleges that the accident resulting in cognitive and physical injuries that have limited her ability to participate in social and recreational activities" (R 503). The majority's opinion made only passing reference to plaintiff's discovery submissions: "[A]t her deposition, plaintiff testified that she maintained and posted to a Facebook account prior to the accident, but deactivated the account at some point after" (R 503). Rather than considering the relevance of plaintiff's testimony or written submissions, the First Department simply ruled that defendant was not entitled to disclosure of plaintiff's Facebook account because defendant had not submitted proof from the Facebook account itself that

contradicted her claims (R 502-12).

The dissent pointed out that the majority's opinion and the cases upon which it relied: (1) created a heightened standard that would necessarily and unfairly preclude discovery of social media records relevant to a party's claims; and (2) instituted a policy of mandatory *in camera* inspection by the trial court prior to disclosure and after the heightened threshold had been met.

Thereafter, the Appellate Division granted defendant's motion for permission to appeal.

POINT I

THE MAJORITY OPINION OF THE APPELLATE DIVISION RUNS AFOUL OF NEW YORK'S ESTABLISHED STANDARD ON DISCOVERY MATTERS WHICH PROMOTES LIBERAL DISCLOSURE

A. General Principles

When considering the issue in the instant appeal, it is first necessary to look to the standards applied to disclosure in New York. As this Court has reiterated in a variety of contexts, "the policy of this State favor[s] liberal discovery . . . [and] there [shall] be full disclosure of all matter material and necessary in the prosecution or defense of an action." Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 624 (2016)(citations and internal quotation marks omitted). This comports with the recognized policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371 (1991). See, also, Reid v. Soults, 138 A.D.3d 1091 (2nd Dep't 2016).

This standard of liberal production has been extended to information which would otherwise be privileged. For example, "[i]t is well settled that a party must provide duly

executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR (see CPLR 3121, subd [a]) when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue." Cynthia B. v. New Rochelle Hospital Medical Center, 60 N.Y.2d 452, 456-457 (1983) (citations omitted). Here, as in Cynthia B., a plaintiff has placed her physical and mental condition in issue - indeed, has stated that her damaged condition precludes her from interacting on social media - yet the First Department has applied a more rigid standard to social media than that which this Court has recognized as applicable to medical records, and has precluded defendant from reviewing the very social media accounts which plaintiff claims were impacted.

As discussed below, DANY respectfully submits that the First Department erred in imposing such a hurdle on parties seeking production of social media information, which, as a practical matter, is often unsurpassable and which directly conflicts with the liberal standards afforded to all other manners of discovery. It is therefore respectfully submitted that the First Department's decision and order should be reversed.

B. As The Social Media Disclosure Sought Is Relevant and Necessary, Discovery Should Be Permitted

There can be no question that plaintiff's Facebook account in particular is relevant and necessary to defendant's claims and defenses in this matter. Plaintiff asserts that, as a result of her injuries, she can no longer convey messages to her friends via electronic and e-mail messenger (R 417, 351-352) and that, while her Facebook account depicted her life as full and positive prior to the accident, since the accident she barely posted at all and was so distraught that she ultimately deleted her profile (R 243-244). On this alone, the relevancy of information shared on plaintiff's social media accounts is evident, and should be subject to production. See, e.g. Anderson v. City of Fort Pierce, 2015 U.S. Dist. LEXIS 180408, 2015 WL 11251963 (Fla. So. Dist. Ct. 2015) ("First, the plaintiff has put her mental health and quality of life at issue, and the defendant seeks social media pictures for that reason. Broadly speaking, this is sufficient grounds [for production]. Second, the only way for the defendant to know whether they are truly relevant is to see and review them.")

As numerous Courts have recognized, a plaintiff's social media accounts can (and most likely do) contain relevant and material evidence towards proving or refuting claims of

mental or physical injury. See, e.g. Reid v. Soults, 138 A.D.3d 1091 (2nd Dep't 2016) (reiterating the liberal production standards of CPLR 3101 and directing, inter alia, the production of authorizations to review a non-party's YouTube account); Patterson v. Turner Const. Co., 88 A.D.3d 617 (1st Dep't 2011) (acknowledging social media account information was potentially relevant to claims of physical and psychological damage); Nucci v. Target Corp., 162 So.3d 146, 151 (Fla. Dist. Ct. App. 2015) (finding plaintiff's photographs posted on Facebook to be "highly relevant" in plaintiff's slip-and-fall action)[1]; Howell v. Buckeye Ranch, Inc., 2012 U.S. Dist. LEXIS 141368, 2012 WL 5265170 (S.D. Ohio 2012) (permitting production of "interrogatories and document requests that seek information from the [social media] accounts that is relevant to the [parties'] claims and defenses"); Davenport v. State Farm Mut. Auto. Ins. Co., 2012 U.S. Dist. LEXIS 20944, 2012 WL 555759 (M.D. Fla. 2012) (ordering production of Facebook photographs depicting plaintiff since date of alleged accident since plaintiff's

[1] Florida has adopted a similar discovery standard to that of New York in that a party is entitled to discovery "that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." Fl. R. Civ. Pro. 1.280(b)(1). See, Rasmussen v. South Florida Blood Servs., 500 So.2d 533, 535 (Fl. Sup. Ct. 1987)(holding that "[u]nder Florida discovery rules, any nonprivileged matter that is relevant to the subject matter of the action is discoverable[,]" while recognizing that the courts have the ability to balance the broad discovery necessary "to advance the state's important interest in the fair and efficient resolution of disputes" with competing privacy interests.)

physical condition was at issue); Higgins v. Koch Dev. Corp., 2013 U.S. Dist. LEXIS 94139, 2013 WL 3366278 (S.D. Ind. 2013) ("Koch claims that Rachel and Sarah's Facebook content may reveal relevant information as to the extent their injuries have impacted their 'enjoyment of life, ability to engage in outdoor activities, and employment,' along with their 'claims regarding permanent injuries, lack of pre-existing symptoms, and impairment of future earnings capacity.' Since the extent of Rachel and Sarah's losses in these areas directly impacts the appropriate damages award, the court finds this information relevant.").

Indeed, as a Florida appellate court stated, "[i]f a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury." Nucci v. Target Corp., 162 So. 3d 146, 152 (Fla. Dist. Ct. App. 2015).

The Third Department's decision in Johnson v. Ingalls, 95 A.D.3d 1398 (3rd Dep't 2012), illustrates the relevance of information posted on social media to claims of physical and psychological damage. Like the plaintiff in this matter, the plaintiff in Johnson claimed that she suffered "severe

anxiety, vertigo, constant migraines and pain for a period of about two years, that her anxiety prevented her from going out or socializing with friends, and that she required antidepressant medication." 95 A.D.3d at 1400. The lower court permitted discovery of the plaintiff's Facebook account and, following an *in camera* review, admitted approximately twenty photographs from the account into evidence during trial. The Third Department rejected the plaintiff's argument that the photographs were improperly admitted, noting that the photographs showed the plaintiff "attending parties, socializing and vacationing with friends, dancing, drinking beer in an inverted position referred to in testimony as a 'keg stand,' and otherwise appearing to be active, socially engaged and happy." Id. The court thus found these photographs not merely relevant, but clearly probative of the plaintiff's claimed injuries.

Here, plaintiff claims numerous physical and psychological defects and acknowledges that she utilized Facebook regularly before the accident, but asserts that, as a result of the accident, not only has she suffered mental and physical injuries, but these injuries have prevented her from utilizing Facebook (or electronic messaging) as she had previously done. Thus, there is relevant evidence to be

gleaned, not only from the photographs and statuses posted on Facebook, but from plaintiff's ability to use Facebook at all, which is contrary to her claim that she can spend no more than ten minutes at a stretch on the computer.

Consequently, disclosure of plaintiff's social media accounts - specifically, her Facebook account - goes directly to the very claims which plaintiff has asserted in her analysis of the damages which she has suffered. Plaintiff has therefore clearly "opened the door" to discovery of her social media accounts and cannot be permitted to rely on assertions of privacy infringement to prevent defendant from reviewing the basis of her claims. As this Court has recognized, personal injury plaintiffs who have placed their physical and mental condition at issue may not shield from disclosure material relevant and necessary to the defendant's defense against such claims. See, e.g. Hoenig v. Westphal, 52 N.Y.2d 605 (1981).

C. Social Media Should Not Be Afforded Any Heightened Privacy Protections

There are no bases for assigning social media any heightened privacy protections in the context of civil litigation.

Indeed, the First Department itself has recognized that postings on a plaintiff's "private" Facebook account are not

shielded from discovery merely because plaintiff used privacy settings to restrict access. See, Patterson v. Turner Constr. Co., 88 A.D.3d 617, 617 (1st Dep't 2011) ("The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access, just as relevant matter from a personal diary is discoverable.")(citations omitted). See, also, Romano v. Steelcase Inc., 30 Misc. 3d 426, 434 (Sup. Ct. Nassau Co. 2010) ("[W]hen plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, '[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.'"); Anderson v. City of Fort Pierce, 2015 U.S. Dist. LEXIS 180408, 2015 WL 11251963 (U.S. Dist. So. Fl.

2015) ("The mere fact that the plaintiff activated a social media site's privacy settings to restrict who may access and view her postings does not provide blanket exemption from discovery in this civil litigation.").

That social media accounts by their very definition do not implicate any heightened privacy expectations has been recognized nationwide - particularly where, as here, the plaintiff has put the content of such accounts into dispute. See, e.g. Beye v. Horizon Blue Cross Blue Shield, 2007 U.S. Dist. LEXIS 100915, 2007 WL 7393489 (D.N.J. 2007) ("The Court will require production of entries on webpages such as 'MySpace' or 'Facebook' that the beneficiaries shared with others. The privacy concerns are far less where the beneficiary herself chose to disclose the information."); Palma v. Metro PCS Wireless, Inc., 18 F. Supp. 3d 1346, 1347 (M.D. Fla. 2014) ("Social media content is neither privileged nor protected by any right of privacy")(citations omitted); Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012) (holding that "material posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy"). See, also,

Reid v. Ingerman Smith, LLP, 2012 U.S. Dist. LEXIS 182439, 2012 WL 6720752 (E.D.N.Y. 2012) ("Even had plaintiff used privacy settings that allowed only her 'friends' on Facebook to see postings, she 'had no justifiable expectation that h[er] 'friends' would keep h[er] profile private . . ..'")(citations omitted)

Tellingly, Facebook's own privacy policy explicitly warns that there should not be any expectation of privacy when utilizing that social media platform. See, Romano v. Steelcase Inc., 30 Misc. 3d 426, 434 (Sup. Ct. Suffolk Co. 2010) ("Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy.")

The Eastern District of New York addressed a situation where there was a considerably greater and more reasonable expectation of privacy - where the individual's personal diary was sought for review - and even then acknowledged that such private diaries "are discoverable if they contain relevant information regarding contemporaneous mental states and impressions of parties." Reid v. Ingerman Smith LLP, 2012 U.S. Dist. LEXIS 182439, 2012 WL 6720752 (E.D.N.Y.

2012).[2] See, also, Williams v. N.Y. City Hous. Auth., 22 A.D.3d 315, 316 (1st Dep't 2005) (plaintiff's "notes, diaries, journals and other writings" were subject to disclosure as relevant records of her claims of discrimination and harassment); Faragiano ex rel. Faragiano v. Town of Concord, 294 A.D.2d 893, 894 (4th Dep't 2002) (personal diary of former employee of defendant was discoverable).

There can be no question that social media, which gives users the immediate ability to post thoughts, feelings and photographs, contains relevant information as to the user's contemporaneous mental and physical states - particularly where, as here, the injured party is claiming a diminished ability to even create such posts. As there is no enhanced expectation of privacy, and certainly not a greater expectation than that afforded to a personal diary, it is respectfully submitted that any additional hurdles manufactured under the umbrella of protecting such privacy are improper.

Simply put, a defendant should not be precluded from obtaining relevant information from a plaintiff's private Facebook account absent possession of relevant information

[2] Federal Rule of Civil Procedure 26(b)(1), much like CPLR 3101, calls for the production of any matter which is not privileged and which is relevant to the matter at issue. Again, like CPLR 3101, this rule has been broadly construed. See, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

from a public Facebook account, any more than a defendant should be precluded from hard photographs or videos of a plaintiff engaging in activities contrary to her claims, absent possession of similar photographs or videos. To obtain discovery, defendants should not be obligated to, in essence produce discovery. The First Department therefore erred in reversing the lower court and in establishing a pre-requisite before social media information may be disclosed, and it is respectfully requested that this Court reverse the Order.

D. Social Media Disclosure Should Not Be Subjected To A Heightened Standard In Requiring A Prerequisite Showing

Central to the instant appeal is the First Department's imposition of an additional threshold to be surpassed by any party seeking disclosure of "private" social media account information. DANY respectfully submits to this Court that this additional prong is neither warranted nor appropriate.

The Eastern District of New York considered, and soundly rejected, the concept that a party must satisfy an evidentiary prerequisite standard to demonstrate entitlement to a review of "private" social media information in Giacchetto v. Patchogue-Medford Union Free Sch. Dist., 293 F.R.D. 112, (E.D.N.Y. 2013). In Giacchetto, the district court permitted disclosure of a social media account, holding

that "[t]he Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it." The Giacchetto court concluded that following such a rule would improperly shield from discovery the information of Facebook users who do not share any information publicly. 293 F.R.D. at 114 n.1.

The district court thus not only discussed the lack of any such requirement in the Federal Rules of Evidence - rules which, like the discovery rules set forth in the New York Civil Procedure Laws and Rules, are to be liberally construed towards the production of evidence - but demonstrated the sound reasoning behind the lack of any such requirement. Other courts have concurred, finding that social media (like all other categories of discovery) need only pass the test of relevancy before production will be required. Indeed, shortly after Forman was decided by the First Department, a United States District Court in Georgia adopted the rulings of other jurisdictions, and held that no threshold demonstration is necessary to establish entitlement to production of privately posted Facebook material which bears relevance to the plaintiff's claims of mental or physical damage. Specifically, in Orr v. Macy's Retail Holdings, Inc., 2016 U.S. Dist. LEXIS 147573, 2016 WL 7339204 (S.D. Ga.

2016), the court directed disclosure of social media information and rejected the necessity of any prerequisite showing, stating: "The Court, however, is unconvinced that the Federal Rules of Civil Procedure require a 'threshold showing' that relevant evidence already exists before a party can request production of that same relevant evidence. . . Because Jacqueline's physical condition and the Orrs' quality of life are both at issue in this case . . . plaintiffs' Facebook postings reflecting physical capabilities and activities inconsistent with their injuries are relevant and discoverable." (citations omitted).

DANY respectfully submits that this Court should follow the same rationale as that expressed in Giacchetto and Orr - that no threshold showing that relevant information exists is required before a party may obtain access to that very information.[3]

As recently as January 2017, and relying on the decision in Giacchetto, a Missouri District Court further addressed

[3] As with any element of discovery, demands as to social media productions must be narrowly tailored to address the claims at issue, be it the injuries suffered, the treatment received, or engagement in any activity in which the plaintiff claims she is prevented from participating. Courts have had no difficulties in effectively limiting the social media disclosure without demanding a prerequisite showing before the door can even be opened. See, e.g. Caputi v. Topper Realty Corp., 2015 U.S. Dist. LEXIS 24969 2015 WL 893663 (E.D.N.Y. 2015) ("Defendants are entitled to a sampling of Plaintiff's Facebook activity for the period November 2011 to November 2013, limited to any 'specific references to the emotional distress [Plaintiff] claims she suffered' in the Complaint, and any 'treatment she received in connection [there]with.'").

this very issue in Brown v. City of Ferguson, 2017 U.S. Dist. LEXIS 11210, 2017 WL 386544 (E.D. Mich. January 27, 2017). In Brown, the court ordered production of all social media content bearing any relevance to the case, rejecting the plaintiff's privacy claims and noting "[t]he Court's analysis of discovery does not change simply because the request involves social media content." (citation omitted). See, also, Robinson v. Jones Lang LaSalle Americas, Inc., 2012 U.S. Dist. LEXIS 123883, 2012 WL 3763545 (D. Ore. 2012) ("I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms.").

This hits on the very heart of DANY's request in this brief: that this Honorable Court reverse the First Department's order, and make it clear that social media discovery is to be considered under the same parameters as any other category of discovery, and that it be granted the same liberal production rights, without the requirement that such a significant threshold first be passed.[4]

[4] Moreover, this does not require an in camera review of the disclosure. As with all other categories of disclosure, a properly tailored demand will obviate the need for judicial review in all but the most exceptional cases.

CONCLUSION

For the foregoing reasons, the decision and order of the Appellate Division should be reversed.

Dated: Jericho, New York
March 27, 2017

Respectfully submitted,

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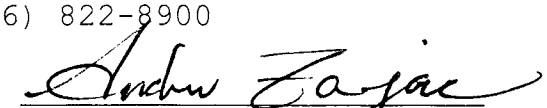
By: 
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CERTIFICATION PURSUANT TO §500.13(c)(1)

Court of Appeals

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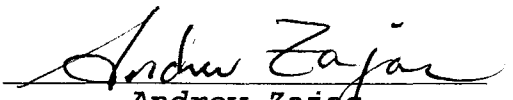

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