Privacy Settings Won't Keep Social Media Posts Out Of Court

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On Jan. 7, 2015, in Nucci v. Target Corp., et al, the District Court of Appeal of the State of Florida, Fourth District, upheld a lower court's order compelling plaintiff Maria Nucci to produce photographs originally posted to her Facebook page. (Fla. Dist. Ct. App. Jan. 7, 2015). The court held there is little, if any, right to privacy in photos posted on Facebook or other similar social networking sites. In this case, the plaintiff asserted personal injuries resulting when she slipped and fell on a foreign substance in a Target store. Specifically at issue on appeal were more than 30 photos the plaintiff posted on Facebook and then removed shortly after the photographs were discussed during her deposition.

The plaintiff objected to Target's written request to produce the photos, asserting that her use of Facebook privacy settings created a right to privacy, and further that the federal Stored Communications Act prohibited disclosure of her Facebook photos. The court balanced the plaintiff's purported right to privacy against the relevance of the photos to her damages claim. While the court recognized that the Florida Constitution provides a broader right to privacy than the U.S. Constitution, it nonetheless held that photos posted on social networking sites are neither privileged nor protected by any privacy rights, despite the use of privacy settings.

This ruling echoes similar recent decisions across the country. In *Tompkins v. Detroit Metro. Airport*, the U.S. District Court for the Eastern District of Michigan held that "material posted on a 'private' Facebook page, which 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." 278 F.R.D. 387, 388 (E.D. Mich. 2012).

The New York Court of Appeals reached a similar result holding that "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." *Patterson v. Turner Constr. Co.*, 931 N.Y.S. 2d 311, 312 (N.Y. App. 2011).

Likewise, the United States District Court for the Central District of California noted that content posted to social networking sites is not privileged or protected, and requests for such information therefore need only be reasonably calculated to lead to admissible evidence. *Mailhoit v. Home Depot U.S.A. Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012). Indeed, in Nucci, the Florida Appellate Court recognized that discovery requests should be reasonably tailored to lead to discovery of admissible evidence, and acknowledged that Target's requests met that standard.

The court gave short shrift to the plaintiff's privacy claim pursuant to the federal Stored Communications Act. It held that while the SCA prohibits providers of communication services from divulging user's private communications, it does not apply to the individual users themselves. The court also rejected the plaintiff's relevance objections, holding that when personal injuries and quality of life are at issue, photos posted on social media websites "are the equivalent of a 'day in the life' slide show produced by the plaintiff before the existence of any motive to manipulate reality" and are therefore "powerfully relevant to the damage issue."

This case adds to the growing body of law holding that data and information posted on social media websites is not subject to special protection. Social media allows previously unimaginable access into the lives of strangers, providing a glimpse of the intimate details of an individual's daily activities, thoughts and ideas. In general, plaintiffs today likely are not conducting themselves all that differently from plaintiffs 20 years ago. The difference is that the proliferation of camera-equipped smartphones and our obsession with documenting and sharing even relatively insignificant activities of daily life provides readily and easily accessible evidence of a person's daily routines. That photo of the plaintiff enjoying a day on the slopes, mountain biking or even performing yard work, that previously would have been forgotten in a box in the hall closet, might now present a significant hurdle to recovery.

For defendants, this opinion provides another valuable tool in responding to personal injury claims by ensuring access to relevant information regarding a plaintiff's physical injuries and quality of life. When a new case comes in, a defense lawyer should consider the possibility that the plaintiff's social media might provide fertile ground for developing a defense to claims

of serious physical or emotional injury. Once discovery begins, this ruling and others provide a basis for defense counsel to ask questions and serve requests directed explicitly to social media postings and photos saved to smart phones and similar devices, as well as requests for the underlying metadata, which often can provide valuable date, time, and location information.

But for the plaintiffs' bar, this opinion serves as yet another cautionary reminder of the relevance and potentially damaging impact of a client's social media postings. Lawyers should consider adding questions about the potential client's social media activity to their screening and intake procedures. This will allow counsel to develop a more complete picture of the challenges that he or she might face in presenting the potential client's claim. Having this knowledge early on is much preferable to seeing for the first time during a deposition, that bombshell photo of your allegedly injured client running a local obstacle race.