Another Excellent Facebook E-Discovery Opinion

Friday, November 18, 2011

Here's a rarity for us - two e-discovery posts in a row. This one's about another of our favorite topics, e-discovery for defendants.

We've just been gifted with (thanks, Dan) a downright scholarly opinion on the discoverability of a plaintiff's relevant Facebook information from a Court of Common Pleas in rural Pennsylvania. The case is Largent v. Reed, No. 2009-1823, slip op. (Pa. C.P. Franklin Co. Nov. 8, 2011). It's not a drug/device case (it's an auto accident), but if you're seeking discovery of a plaintiff's Facebook account, it's well worth the read. In particular, there's probably the best discussion of how Facebook works, from a privacy – or non-privacy, as would be a better term – perspective than any other opinion we've yet seen. The discussion of Facebook, its privacy settings, tagging, and the like, is on pages 3-5.

The reason for the Facebook discovery in Largent is typical: The plaintiff "testified that she suffers from depression and spasms in her legs, and uses a cane to walk.," but on her Facebook page, she posted "several photographs that show her enjoying life . . . and a status update about going to the gym." Slip op. at 6,8. Obviously the latter is relevant to debunk the former (although, amazingly, the plaintiff contested that, too).

Briefly, the legal conclusions in Largent are these:

(1) A plaintiff's social networking is discoverable.

> "It is clear that material on social networking websites is discoverable in a civil case. Pennsylvania's discovery rules are broad, and there is no prohibition against electronic discovery of relevant information. Furthermore, courts in other jurisdictions with similar rules have allowed discovery of social networking data."

Slip op. at 8 (referring to a number of cases, all of which this blog has discussed in prior ediscovery posts).

(2) There's no basis for social networking to be considered privileged. "There is no confidential

social networking privilege under existing Pennsylvania law." Largent, slip op. at 9. That's because, given the inherently public nature of social networking, "[t]here is no reasosable expectation of privacy in material posted on Facebook." Id. Further, "making a Facebook page 'private' does not shield it from discovery." Id. (citing, *inter alia*, Patterson v. Turner Construction Co., 931 N.Y.S.2d 311, 312 (N.Y. App. Div. 2011) ("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")). In sum:

"[T]here 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 an online lockbox of secrets."

Largent, slip op. at 10 (emphasis original).

(3) A plaintiff's Facebook account is not protected from discovery by the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2702-03 . That's because the discovery is directed to the plaintiff as the account holder, rather than against Facebook itself, which conceivably could be covered by the statute's archaic (by cyberspace standards that means 1986) definitions:

"{Defendant] seeks the information directly from [plaintiff]. The SCA does not apply because [plaintiff] is not an entity regulated by the SCA. She is neither an [computing or communications service], and accessing Facebook or the Internet via a home computer, smartphone, laptop, or other means does not render her an [entity covered by the SCA]. She cannot claim the protection of the SCA, because that Act does not apply to her."

Largent, slip op. at 11.

(4) The discovery is properly targeted. Plaintiff put her health at issue, thus "[a]ny posts on Facebook that concern [her] health, mental or physical, are discoverable, and any privilege concerning such information is waived." Slip op. at 12.

"Photographs posted on Facebook are not private, and Facebook postings are not the same as personal mail. [Plaintiff] points to nothing specific that leads the Court to believe that discovery would cause

unreasonable embarrassment. Bald assertions of embarrassment are insufficient. . . . Facebook posts are not truly private and there is little harm in disclosing that information in discovery."

Largent, slip op. at 12-13 (footnote omitted).

Facebook and other electronic discovery for defendants are definitely here to stay. In particular, all defendants in mass tort (and other) litigation should be requesting, as well as receiving, litigation hold notices to prevent destruction of relevant electronic information maintained by plaintiffs.