COURT OF COMMON PLEAS OF JEFFERSON COUNTY
PENNSYLVANIA
CIVIL DIVISION

BILL R. MCMILLEN, SR.,	:	
Plaintiff,	:	
	:	
vs.	:	
	:	**No. 113 – 2010 CD**
HUMMINGBIRD SPEEDWAY, INC., a	:	
Pennsylvania Corporation; LOUIE	:	
CALTAGARONE; DAVE RESINGER; and	:	
JOSIE LEE WOLFE,	:	
Defendants.	:	

OPINION ON DEFENDANTS' MOTION TO COMPEL DISCOVERY

Factual and Procedural History

The plaintiff, Bill R. McMillen, Sr., has filed suit in an attempt to recover damages for injuries he allegedly sustained when Defendant Wolfe rear-ended him during a cool down lap following a July 7, 2007 stock car race. McMillen alleged substantial injuries, including possible permanent impairment, loss and impairment of general health, strength, and vitality, and inability to enjoy certain pleasures of life.

As discovery progressed, Defendant Hummingbird asked in its second set of interrogatories whether McMillen belonged to any social network computer sites and, if so, that he provide the name of the site(s), his user name(s), his login name(s), and his password(s). McMillen answered that he belonged to Facebook and MySpace but maintained that his user names and login information were confidential and thus would not be provided. Counsel for Hummingbird responded by letter, denying that McMillen was entitled to claim confidentiality or privilege as recognized under the Pennsylvania Rules of Evidence.

After reviewing the public portion of McMillen's Facebook account and discovering comments about his fishing trip and attendance at the Daytona 500 race in Florida, Defendants Hummingbird, Caltagarone, and Resinger filed a Motion to Compel Discovery. They asked the Court to compel the production of McMillen's user names, log-in names, and passwords, contending that those areas to which they did not have

access could contain further evidence pertinent to his damages claim. Specifically, they wanted to be able "to determine whether or not plaintiff has made any other comments which impeach and contradict his disability and damages claims."

Defendants filed a brief in support of their Motion, and on July 13, 2010, the parties appeared for oral arguments. The Court offered McMillen additional time to file a written reply, but none was forthcoming.

Discussion

Under Pennsylvania's broad discovery rules, as long as it is relevant to the litigation, whether directly or peripherally, a party may obtain discovery regarding any unprivileged matter. Pa.R.C.P. 4003.1. As a practical matter, that means that nearly any relevant materials are discoverable, because this Commonwealth recognizes only a limited number of privileges. *See* Bernstein, *Pa. Rules of Evidence*, Art. 5 (enumerating and discussing Pennsylvania's recognized privileges).

In this case, McMillen asks the Court to recognize communications shared among one's private friends on social network computer sites as confidential and thus protected against disclosure. Because Rule 4003.1 only makes privileged materials non-discoverable, he is essentially asking the Court to recognize a privilege for those communications. He does not cite any binding or persuasive authority to support his position, however, and indeed, no "social network site privilege" has been adopted by our legislature or appellate courts. As a general matter, in fact, the law disapproves privileges. *See Joe v. Prison Health Serv.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001) ("Pennsylvania law does not favor evidentiary privileges").

'"Evidentiary privileges are not favored; . . . exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.'" *Hutchison v. Luddy*, 606 A.2d 905, 908-09 (Pa. Super. 1992) (quoting *Herbert v. Lando*, 441 U.S. 153, 175 (1979)). Even in the arena of testimony, where the evidence will be publicly divulged, the courts sanction the application of privilege '"only to the very limited extent that [it] has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1027 (Pa. Commw. Ct. 2006) (quoting *Joe*, 782 A.2d at 31)). The less public arena of discovery,

according to *Peppard v. TAP Pharmaceutical Products, Inc.*, 904 A.2d 986 (Pa. Commw. Ct. 2006), necessitates even greater latitude, for "the purpose of allowing a broader standard is to ensure that a party has in its possession all relevant and admissible evidence before the start of trial." *Id.* at 994.

Because "evidentiary privileges are to be narrowly construed, *Joyner v. S.E. Pa. Transp. Auth.*, 736 A.2d 35, 38 (Pa. Commw. Ct. 1999), our courts have routinely declined to extend the scope of existing privileges beyond their historical purpose and application or the strictures of the statutory language creating them. *See e.g. id.* (attorney-client privilege); *Hutchison, supra*, *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997) (clergy-penitent privilege); *Joe, supra* (attorney-client, deliberative process, and Peer Review Protection Act privileges); *In re Subpoena No. 22*, 709 A.2d 385 (Pa. Super. 1998), *M. v. State Bd. of Med.*, 725 A.2d 1266 (Pa. Super. 1999) (psychologist-patient privilege); *Grimminger v. Maitra*, 887 A.2d 276 (Pa. Super. 2005) (physician-patient privilege). Additionally, a new privilege ought not be recognized unless the claimant can establish four things: 1.) that his communications originated in the confidence that they would not be disclosed; 2.) that the element of confidentiality is essential to fully and satisfactorily maintain the relationship between the affected parties; 3.) community agreement that the relationship must be sedulously fostered; and 4.) that the injury potentially sustained to the relationship because of the disclosure of the communication outweighs the benefit of correctly disposing of litigation. *Matter of Adoption of Embick*, 506 A.2d 455, 461 (Pa. Super. 1986) (citing 8 J. Wigmore, *Evidence*, § 2285 (McNaughton's rev. Ed. 1961)). McMillen cannot satisfy those requirements.

Facebook, MySpace, and their ilk are social network computer sites people utilize to connect with friends and meet new people. That is, in fact, their purpose, and they do not bill themselves as anything else. Thus, while it is conceivable that a person could use them as forums to divulge and seek advice on personal and private matters, it would be unrealistic to expect that such disclosures would be considered confidential.

Both sites at issue here do guarantee a modicum of privacy insofar as users may, with the exception of certain basic information, choose what information and posts to make public and which ones to share with only those persons they have identified as friends. Yet reading their terms and privacy policies should dispel any notion that

information one chooses to share, even if only with one friend, will not be disclosed to anybody else.

Facebook, in section 3, **Sharing information on Facebook, Other**, of its Privacy Policy, cautions users as follows:

> Some of the content you share and the actions you take will show up on your friends' home pages and other pages they visit.
>
> . . .
>
> Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users. You understand that information might be reshared or copied by other users.
>
> . . .
>
> When you post information on another user's profile or comment on another user's post, that information will be subject to the other user's privacy settings.

Facebook, http://www.facebook.com/policy.php (revised 04/22/2010). Then under section 6, **How We Share Information, To respond to legal requests and prevent harm**, users are informed that Facebook's operators may disclose information pursuant to subpoenas, court orders, or other civil or criminal requests if they have a good faith belief that the law requires them to respond. *Id.* They likewise reserve the right to share information with companies, lawyers, courts, or other government entities "when we have a good faith belief it is necessary to prevent fraud or other illegal activity, to prevent imminent bodily harm, or to protect ourselves or you from people violating our Statement of Rights and Responsibilities." *Id.*

Facebook users are thus put on notice that regardless of their subjective intentions when sharing information, their communications could nonetheless be disseminated by the friends with whom they share it, or even by Facebook at its discretion. Implicit in those disclaimers, moreover, is that whomever else a user may or may not share certain information with, Facebook's operators have access to every post.

Similarly, if one goes to MySpace's Terms and reads section 2, **Term**, he will find that the operators of that site may, at their election, reject, refuse to post, or remove any posting, whether it be a private message, an email, or an instant message. MySpace, http://www.myspace.com/index.cfm?fuseaction=misc (June 25, 2009). Section 7.1,

Content Posted, further states that "MySpace may reject, refuse to post or delete any Content for any or no reason, including, but not limited to, Content that in the sole judgment of MySpace violates this agreement or which may be offensive, illegal or violate the rights of any person or entity, or harm or threaten the safety of any person or entity." *Id.* It then provides that MySpace may choose to monitor users' content or conduct, thereby explicating the fact of the operators' unfettered access to a member's communications, and may, with his or her implied consent, scrutinize those communications at any time and for any reason.

Without more, the complete access afforded to the Facebook and MySpace operators defeats McMillen's proposition that his communications are confidential. The law does not even protect otherwise privileged communications made in the presence of third parties. *See e.g. In re Condemnation by City of Philadelphia*, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009) ("Confidentiality is key to the [attorney-client] privilege, and the presence of a third-party during attorney-client communications will generally negate the privilege"). When a user communicates through Facebook or MySpace, however, he or she understands and tacitly submits to the possibility that a third-party recipient, i.e., one or more site operators, will also be receiving his or her messages and may further disclose them if the operator deems disclosure to be appropriate. That fact is wholly incommensurate with a claim of confidentiality. Accordingly, McMillen cannot successfully maintain that the element of confidentiality protects his Facebook and MySpace accounts from discovery.

The Court reaches the same result upon considering Wigmore's test for privilege.

Returning to the four factors identified in *Matter of Adoption of Embick*, it is clear that no person choosing MySpace or Facebook as a communications forum could reasonably expect that his communications would remain confidential, as both sites clearly express the possibility of disclosure. Confidentiality is not essential to maintain the relationships between and among social network users, either. The relationships to be fostered through those media are basic friendships, not attorney-client, physician-patient, or psychologist-patient types of relationships, and while one may expect that his or her friend will hold certain information in confidence, the maintenance of one's friendships typically does not depend on confidentiality.

The Court cannot say, therefore, that the community seeks to sedulously foster friendships by recognizing friend-to-friend communications as confidential or privileged. No such privilege currently exists. Friendships nonetheless abound and flourish, because whereas it is necessary to guarantee people that their attorneys, physicians, and psychologists will not disseminate the substance of their discussions in order to encourage the type and level of disclosure essential to those professional relationships, history shows that the same guarantee is not necessary to encourage the development of friendships.

Furthermore, whatever relational harm may be realized by social network computer site users is undoubtedly outweighed by the benefit of correctly disposing of litigation. As a general matter, a user knows that even if he attempts to communicate privately, his posts may be shared with strangers as a result of his friends' selected privacy settings. The Court thus sees little or no detriment to allowing that other strangers, i.e., litigants, may become privy to those communications through discovery.

The countervailing benefits, moreover, cannot be overstated. Take this case, for instance. McMillen has alleged significant and substantial injuries, some of which he claims may be permanent. Accessing only the public portion of his Facebook page, however, the defendants have discovered posts they contend show that McMillen has exaggerated his injuries. Certainly a lack of injury and inability is relevant to their defense, and it is reasonable to assume that McMillen may have made additional observations about his travels and activities in private posts not currently available to the defendants. If they do exist, gaining access to them could help to prove either the truth or falsity of McMillen's alleged claims.

The same may be true in any number of cases. Millions of people join Facebook, MySpace, and other social network sites, and as various news accounts have attested, more than a few use those sites indiscreetly. *See e.g., The Independent, Facebook can ruin your life. And so can MySpace, Bebo . . .*, http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-can-ruin-your-life-and-so-can-myspace-bebo-780521.html (02/10/2008) (Discussing some of the potential social, career, and legal ramifications of inappropriate social computer networking). When they do and their indiscretions are pertinent to issues raised in a lawsuit in which they have been named,

the search for truth should prevail to bright to light relevant information that may not otherwise have been known.

Where there is an indication that a person's social network sites contain information relevant to the prosecution or defense of a lawsuit, therefore, and given *Koken*'s admonition that the courts should allow litigants to utilize "all rational means for ascertaining the truth," 911 A.2d at 1027, and the law's general dispreference for the allowance of privileges, access to those sites should be freely granted.

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ORDER

AND NOW, this **9th day of September 2010,** for the reasons articulated in the foregoing Opinion, it is hereby **Ordered** and **Decreed** that the Motion to Compel Discovery is **GRANTED.** Accordingly, the plaintiff shall provide his Facebook and MySpace user names and passwords to counsel for Defendants Hummingbird Speedway, Louie Caltagarone, and Dave Resinger within the next **FIFTEEN (15) DAYS.**

IT IS FURTHER ORDERED that the plaintiff shall not take steps to delete or alter existing information and posts on his MySpace or Facebook account.

This Order shall afford the defendants' attorneys read-only access to the plaintiff's accounts. The plaintiff's user names and passwords shall not be divulged to the defendants themselves unless and until further order of Court.

BY THE COURT,

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Hon. John Henry Foradora, P.J.