IN THE COURT OF COMMON PLEAS OF
NORTHUMBERLAND COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

RANE ZIMMERMAN,	:	
	:	
PLAINTIFF	:	
	:	NO. CV-09-1535
	:	
vs.	:	
	:	
WEIS MARKETS, INC.,	:	
	:	
DEFENDANT	:	

OPINION

SAYLOR, J.

Presently before the Court is the Defendant's (hereinafter "Weis Markets") Motion to Compel Disclosure and Preservation of Plaintiff's ("Zimmerman") Facebook and MySpace Information. At issue is access, by court order, to the non-public portions of these websites established by Zimmerman through his disclosure of passwords, user names and log in names to counsel for Weis Markets.

The case at bar involves an accident that occurred on April 21, 2008 while Zimmerman was operating a forklift at Weis Markets' warehouse located in Milton, Pennsylvania.[1] Zimmerman seeks damages for the injuries caused to his left leg as a result of the accident, including lost wages, lost future earning capacity, pain and suffering, scarring and "embarrassment." He avers that "his health in general has been seriously and permanently impaired and compromised" and, that "he has sustained a

[1] Zimmerman was an employee of a subcontractor of Weis Markets.

permanent diminution in the ability to enjoy life and life's pleasures." *See* Complaint, paragraph 25 (b),(e) and (f).

Weis Markets, upon review of the public portion of Zimmerman's Facebook page, discovered that his interests included "ridin" and "bike stunts" and his MySpace page contains more recent photographs depicting Zimmerman with a black eye and his motorcycle before and after an accident. Additionally, there are photographs of Zimmerman wearing shorts, and his scar from this accident is clearly visible. Weis Markets argues that this is relevant because at his deposition, Zimmerman claimed he never wears shorts because he is embarrassed by his scar. Based on what was observed on the publicly available portions of Zimmerman's Facebook and MySpace pages, Weis Markets believes there may be other relevant information as to Zimmerman's damage claims on the non-public portions of his Facebook and MySpace pages.

Zimmerman argues that his privacy interests outweigh the need to obtain the discovery material.[2] Weis Markets urges this Court to adopt the holding in *McMillen v. Hummingbird Speedway Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Jefferson Co. Com.Pl. 2010), which granted a request for access to plaintiff's Facebook and MySpace pages. *McMillen* appears to be the only published opinion in Pennsylvania which relates to access to social networking information through discovery.[3] For the reasons that follow, this Court will grant the Motion to Compel.

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[2] In the alternative, Zimmerman also argued that the Court should conduct an in-camera review and decide what materials should be provided to Weis Markets. This argument is flatly rejected as an unfair burden to place on the Court, which would not only require the time and resources necessary to complete a thorough search of these sites, but also would require the Court to guess as to what is germane to defenses which may be raised at trial.

[3] Most recently, on May 5, 2011, in the Bucks County Court of Common Pleas, in the case of *Piccolo v. Paterson*, the Honorable Albert J. Cepparulo denied a motion to compel filed by defendant seeking access to photographs the plaintiff had posted on her Facebook page. As discussed in the article "Facebook Postings Barred from Discovery in Accident Case," published in *The Legal Intelligencer* on May 17, 2011,

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This Court agrees with the rationale of the opinion in *McMillen,* authorizing access for the reasons that no privilege exists in Pennsylvania for information posted in the non-public sections of social websites, liberal discovery is generally allowable, and the pursuit of truth as to alleged claims is a paramount ideal.[4] Upon review of this area of the law, this Court further finds the analysis and rationale, with discussion of instructive cases from other jurisdictions, as set forth in *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (Suffolk Co. 2010), well reasoned and applicable to the present case. The defendant in *Romano* sought access to plaintiff's current and historical Facebook and MySpace pages and accounts, including deleted pages, based on the fact that the plaintiff had posted information on those sites inconsistent with her claims in the personal injury action. As in the case at bar, the plaintiff in *Romano* alleged that she could no longer participate in certain activities and that her injuries affected her enjoyment of life. Contrary to those claims, pictures on her Facebook and MySpace pages demonstrated an active social life and travel to other states, despite assertions that her injuries prohibited travel.

Likewise, the defendant in *Romano* had gained access to its initial information from the public portions of plaintiff's Facebook and MySpace accounts, but sought

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the motion to compel followed the plaintiff's deposition, where she indicated that she had a Facebook page, and the information was publically available. Despite this claim, when defense counsel attempted to view the plaintiff's Facebook page, it was discovered that only "friends" of the plaintiff could view her postings and photographs. Defense counsel sought to have the plaintiff accept a "friend request" so that her photographs could be viewed, and cited *McMillen, supra* in support of her position. Counsel for plaintiff argued that she was only questioned about photographs at her deposition, and an extensive number of photographs both before and after the accident had already been provided, and there was no assertion that the textual postings on her Facebook page would likely lead to the discovery of material evidence. Following a review of briefs, Judge Cepparulo denied the motion, without amplification.

[4] As set forth in *McMillen*: "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* [*Koken v. One Beacon Ins. Co.,* 911 A.2d 1021 (Pa.Cmwlth. 2006)] 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." *McMillen* at page 12.

access to the non-public portions of these sites, arguing there was a reasonable likelihood therein that additional evidence relating to plaintiff's claims of loss of enjoyment of life's activities would be found. The court in *Romano* agreed, finding that the information sought by the defendant was both material and necessary. *Id.* at 654.

The *Romano* court, faced with a dearth of any New York case law directly on point, actually reviewed a Canadian case which had previously addressed this issue. In the case of *Leduc v. Roman,* 2009 CarswellOnt 843 (February 20, 2009), the Superior Court of Justice of Ontario, Canada permitted access to plaintiff's private Facebook profile, stating:

> To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial. *Romano* at 655.

The same conclusion was noted by the court in *Romano* to have been reached by a Colorado court in *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018 (D.Colo. 2009)(the content of social networking sites in the public areas contradicted the allegations as to the effect of the injuries on their daily lives). Persuaded by these authorities, the *Romano* court specifically found:

> Thus, it is reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages, that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence. To deny Defendant an opportunity [to] access to these sites not only would go against the liberal discovery policies of New York favoring pre-trial disclosure, but would condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings. *Id.*

II

The plaintiff in *Romano* contended that production of her entries on Facebook and MySpace would violate her right to privacy, which outweighed the defendant's need for the information.[5] However, as *Romano* aptly noted, "[t]he Fourth Amendment's right to privacy, protects people, not places" citing *Katz v. United States*, 389 U.S. 347 (1967) and the reasonableness standard imposed thereunder (i.e. a reasonable expectation of privacy). As noted by *Romano,* it was stated by the United States District Court of New Jersey in *Beye v. Horizon Blue Cross Blue Shield of New Jersey,* 06-5337 (D.N.J. December 14, 2007): "[t]he privacy concerns are far less where the beneficiary herself chose to disclose the information." Further, *Romano* found both California and Ohio courts that rejected the notion of a reasonable expectation of privacy as to MySpace postings. *See Moreno v. Hanford Sentinel Inc.*, 172 Cal.App.4th 1125 (Cal.App. 5 Dist. 2009) and *Dexter v. Dexter,* 2007 WL 1532084 (Ohio App. 11 Dist. 2007). All the authorities recognize that Facebook and MySpace do not guarantee complete privacy. Facebook's privacy policy explains that users post any content on the site at their own risk and informs users that this information may become publicly available.[6] The *Romano* court therefore concluded:

> Thus, when 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…Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. *Romano* at 657.

[5] This contention was not addressed in *McMillen, supra*, which focused on the issue of whether a privilege for such non-disclosure existed.

[6] It is well publicized that Facebook's privacy policy and its revisions have been the subject of criticism and controversy that may be never ending. One need only "Google" search the terms "Facebook privacy" for an exhaustive list of access to articles on the topic.

In view of the sound, logical approach of the court in *Romano*, this Court is likewise persuaded that the argument of Zimmerman that his privacy interests outweigh the discovery requests is unavailing.

It is well recognized that the Pennsylvania Rules of Civil Procedure, like New York, provide for liberal discovery: "Generally, discovery is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried. Pa.R.C.P. 4003.1." *Rohm and Haas Co. v. Lin*, 992 A.2d 132, 143 (Pa.Super. 2010).[7] Zimmerman placed his physical condition in issue, and Weis Markets is entitled to discovery thereon. Based on a review of the publicly accessible portions of his Facebook and MySpace accounts, there is a reasonable likelihood of additional relevant and material information on the non-public portions of these sites. Zimmerman voluntarily posted all of the pictures and information on his Facebook and MySpace sites to share with other users of these social network sites, and he cannot now claim he possesses any reasonable expectation of privacy to prevent Weis Markets from access to such information. By definition, a social networking site is the interactive sharing of your personal life with others; the recipients are not limited in what they do with such knowledge. With the initiation of litigation to seek a monetary award based upon limitations or harm to one's person, any relevant, non-privileged information about one's life that is shared with others and can be gleaned by defendants from the internet is fair game in today's society.

Accordingly, Weis Markets' Motion to Compel is granted.[8]

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[7] The proposed amendments to Pa.R.C.P. 4009.1, 4009.11, 4009.12, 4009.21, 4009.23 and 4011, which relate to e-discovery and electronically stored information, do not address the issue of access to information contained on social networking sites. However, the proposed amendments indicate that the discovery of electronically stored information will be governed by the same considerations governing other discovery. *See* 41 Pa.Bull. No. 3, 334-336 (January 15, 2011).

[8] However, this should not be construed as an entitlement to this type of information in every personal injury case where damages are claimed, i.e. a carte blanche entitlement to Facebook and MySpace

Based on the foregoing, the following Order is entered:

ORDER

AND NOW, this 19th day of May, 2011, it is hereby ORDERED that Plaintiff shall provide all passwords, user names and log-in names for any and all MySpace and Facebook accounts to Defendant within twenty (20) days from the date hereof. It is FURTHER ORDERED that Plaintiff shall not take steps to delete or alter existing information and posts of his MySpace or Facebook accounts.[9]

BY THE COURT:

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Charles H. Saylor, Judge

pc: Douglas N. Engleman, Esquire, and Jonathan F. Bach, Esquire, 140 East Third Street, Williamsport, PA 17701
Stephen E. Geduldig, Esquire, and Stephanie L. Hersperger, Esquire, 305 North Front Street, P.O. Box 999, Harrisburg, PA 17108
Jessica Lynn Harlow, Esquire, Law Clerk
Legal Journal
Court

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passwords, user names and log in names as part of a discovery request by way of interrogatories or request for production of documents, as that issue is not before the Court at this time. Generally, this Court is of the view that a motion for this special type of discovery must be made with allegations of some threshold showing that the publicly accessible portions of any social networking site contain information that would suggest that further relevant postings are likely to be found by access to the non-public portions. *See generally McCann v. Harleysville Insurance Company*, 78 A.D.3d 1524 (N.Y.S.2d 2010). As noted herein and in *Romano*, a review of the publicly accessible portions of the Facebook and MySpace sites revealed relevant information, and thus, it was reasonable to expect that further evidence pertinent to the case would be found in the non-public portions of these sites. There must be some factual predicate for the examination of the non-public portions of social networking sites. So called "fishing expeditions" will not be authorized.

[9] The present motion did not request access to deleted pages.