IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

HOWARD TRAIL, individually and as Administrator of the ESTATE OF JESSICA TRAIL, deceased, SUE TRAIL, TAMMIE GRICE, individually and as Administratrix of the ESTATE OF WILLIAM GRICE, deceased, MICHAEL TRAIL, and AMANDA DELVAL,

Plaintiffs

vs.

TIMOTHY LESKO and PITTSBURGH LODGE NO. 11 BENEVOLENT AND PROTECTIVE ORDER OF ELKS, a Pennsylvania Corporation, t/d/b/a B.P.O.E. PITTSBURGH LODGE 11,

Defendants

CIVIL DIVISION

NO. GD-10-017249

FILED
12 JUL -3 PM 3:32
DEPT. OF COURT RECORDS
CIVIL FAMILY DIVISION
ALLEGHENY COUNTY PA

OPINION AND ORDER OF COURT

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OPINION AND ORDER OF COURT

WETTICK, J.

I.

The subjects of this Opinion and Order of Court are the motion of Michael Trail seeking access to defendant Timothy Lesko's *Facebook* profile and defendant's motion seeking access to plaintiff Michael Trail's *Facebook* profile.

I am responsible for discovery disputes in General Docket cases that are not on a trial list. Within the past year, defendants are far more frequently presenting motions seeking access to the plaintiffs' *Facebook* profiles.[1]

Usually, I have disposed of these motions through rulings from the Bench (frequently acceptable to both parties).

In order that I may provide a context for the arguments presented by counsel and the implications of my rulings involving the discovery of *Facebook* content, I have included, at Part II of this Opinion, a brief discussion of what *Facebook* is, how it is used, and what information is available to its users.

In Part III of this Opinion I identify and discuss the Pennsylvania cases in which parties have requested access to information on *Facebook*.[2]

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[1]There are other social networking sites. However, *Facebook* has been the subject of the discovery requests presented to me.

[2]To date, no Pennsylvania appellate court has addressed discovery requests for information contained within an individual's *Facebook* profile.

In Part IV of this Opinion I discuss selected opinions of other state courts and federal courts pertaining to the discovery of *Facebook* content.

In Part V of this Opinion I deny plaintiff's and defendant's motions, which are the subject of this Opinion and Order of Court, because of the protections that Pa.R.C.P. No. 4011(b) affords *Facebook* content.

II.

Social networking sites[3] are web-based services that allow individuals to construct a public or semi-public profile within a bounded system, choose from a list of other service users with whom they intend to share a connection, and navigate among those connections and those made by others within the system. Users create a unique user identity, establish relationships with others who have done the same, join communities of users who share connections, and exchange information among one another.[4]

Social networking sites like *Facebook* utilize "Web 2.0" technology, which allows users to create and edit content on a web page while interacting with other users simultaneously in real time.[5] With respect to *Facebook*, an individual initially creates a

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[3]Although there are numerous sites that fit this classification, this discussion is limited to *Facebook*, which is the largest and most heavily trafficked on the web.

[4]Evan E. North, Comment, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1284 (June 2010). Among the law review articles on the subject, student authors tend to offer the more detailed accounts of the functioning of social networking platforms.

[5]This participatory platform is in contrast to antecedent, Web 1.0, which is produced, edited, and maintained by a single publishing entity. Consider, for example, any run-of-the-mill website, which unilaterally publishes information online for their users' passive perusal. Megan Uncel, Comment, *Facebook Is Now Friends with the Court: Current Federal Rules & Social Media Evidence*, 52 JURIMETRICS J. 43, 46 (Fall 2011).

"profile," which functions as a personal web page and may include, at the user's discretion, numerous photos and a vast array of personal information including age, employment, education, religious and political views and various recreational interests. Once a profile is established, the user is encouraged to connect with other *Facebook* users - so-called "Friends" - with whom they exchange limited access to their respective profile pages and the ability to post pictures, comments and other content thereon.[6] Each time content is posted directly to a user's profile page, the recipient user has the administrative capability to delete the offered content from his or her own profile.

In a departure from the control generally afforded a user over the content of his or her own profile page, *Facebook* employs a system whereby users may "tag" others in photographs and other content, thereby establishing a link from that content to the tagged user's profile page.[7] For example, User A uploads a photo to his or her own profile page of several individuals including User B. User A "tags" User B in the photo. Once tagged, the photo on User A's profile page will contain a link directing individuals to User B's profile.[8] While User B's profile will indicate that he or she has been tagged in User A's photo, and the tagged photo will unwittingly appear among the pictures that User B has selected for publication on his or her own profile page.[9]

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[6]In this Opinion, I briefly discuss some of the more relevant aspects of the *Facebook* user interface; for a more detailed description see Megan Uncel's comment, *supra* n. 5 at 46-50.

[7]See Daniel Findlay, Comment, *Tag! Now You're Really "It" What Photographs On Social Networking Sites Mean For the Fourth Amendment*, 10 N.C.J.L. & TECH. 171 (Fall 2008).

[8]Access to User B's profile will be governed by User B, who can opt to restrict access to his or her page to only Friends, Friends of Friends or, at the least restrictive level, the public at large. Self-regulated privacy settings are discussed briefly, *infra*.

[9]A user who has been tagged has the ability to "untag" the photo and, by altering *Facebook*'s default privacy settings, may restrict the class of individuals who are authorized to view tagged content. However, even if untagged or if otherwise restricted by our tagged user,

Finally, any time any user posts content to their own or their Friends' profile pages, this information appears in the user's and user's Friends' "news feeds." The news feed provides a constantly updating display of activity among the user and the user's Friends. From this page, the user will be notified any time a Friend is tagged in an item, posts a status update or a news story, or comments on another's content.[10]

The sheer volume of potentially relevant information is staggering.[11] In the aggregate, users collectively update their "statuses" (a short indication of what's on a user's mind at a given moment, posted to the their own profile page) more than 60 million times each day. Individual users create on average 90 pieces of content every month (photos, status updates, comments or other posts) with fully half of all *Facebook* users accessing their individual profiles on a given day.[12] Facebook users collectively upload 300 million photos to the site each day.[13]

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the photo will be available for viewing on the page of the user who initially posted it. Only the user who posted the photo is able to remove it from the website altogether. Once a Friend posts a photo of our user, any Friends of the posting user, including our user (or opposing counsel armed with our user's login information), may peruse Friends' photos to locate any material, including unauthorized material.

[10]The purpose of the news feed feature is to facilitate a user's awareness of Friends' online activities without necessitating their constantly visiting each Friend's profile page sequentially. The average *Facebook* user has 130 Friends, and may even have Friends numbering in the thousands. See North, *supra* n. 4, at 1285.

[11]Although not relevant to the current question and, therefore, not addressed herein, sites like *Facebook* collect and store "metadata" about their users, which might reveal more about an individual's use of the site, their Friends' identities, what a user saw on another user's profile, and may track a user's general Internet activity. All of this data is potentially discoverable under the proper circumstances. See Derek S. Witte, *Your Opponent Does Not Need A Friend Request to See Your Page: Social Networking Sites & Electronic Discovery*, 41 MCGEORGE L. REV. 891 (2010).

[12]Uncel, *supra* n. 5 at 49.

[13]*Facebook* has gone public, and in the April 23, 2012 amendments to its S-1 SEC filings, the company disclosed that monthly active users now number 901 million; daily active

Not all information posted on *Facebook* by a user is universally public, viewable by anyone with an Internet connection or even all other *Facebook* subscribers. By adjusting *Facebook*'s default privacy settings, each user is empowered to limit the classification of persons (and, in some cases, specific individuals) who are permitted access to a user's profile page and the content contained therein. Although some information is always considered public and accessible to everyone,[14] other information is accessible only by those people to whom the user grants access, usually limited to the user's Friends or Friends of those Friends. Finally, users can exchange messages not unlike traditional email, which, like email, are only accessible to the sender and recipients.

III. PENNSYLVANIA CASES[15]

McMillen v. Hummingbird Speedway Inc., 2010 WL 4403285, No. 113-2010 CD (Jefferson C.P. Sep. 9, 2010) (Foradora, P.J.). The defendant collided with the plaintiff during the final "cool down lap" in a stock car race The plaintiff sought damages from Hummingbird, Inc., the corporate owner of the racetrack where the alleged injuries occurred. The plaintiff claimed substantial injuries including possible permanent

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users 526 million; monthly mobile users 500 million; users post 300 million photos per day; 3.2 billion likes and comments are recorded each day, and; 125 billion "Friendships" have been forged.

[14]In addition to information the user chooses to make public, *Facebook* considers publicly available the user's name, profile picture, username or user ID and network. See *Facebook* Data-Use Policy, http://www.facebook.com/about/privacy/your-info.

[15]Because these cases are unpublished, because many are simply court orders absent any accompanying rationale, and because most Pennsylvania counties do not maintain electronic dockets, I was compelled to rely on other traditional media outlets including the PITTSBURGH POST-GAZETTE and the PENNSYLVANIA LAW WEEKLY. As a result, the citations, in places, are incomplete.

impairment, loss and impairment of general health, strength and vitality and an ongoing inability to enjoy certain pleasures in life. Upon review of the publicly accessible portion of the plaintiff's *Facebook* profile, the defendant discovered the plaintiff's comments about a fishing trip and his attendance, as a spectator, at another race in Florida. Thereafter, the defendant sought to compel the production of the plaintiff's user name and password to gain access to the private portions of the plaintiff's profile under the assumption that more relevant information might be contained within.

Because the public profile indicated that relevant information might be contained in the private portion showing that the plaintiff's injuries were exaggerated, and because no privilege exists between mere Friends (and even if it did, any privilege was waived once the information was shared with others), the court directed the plaintiff to provide the defendant's counsel with the login and password information on a read-only basis. No information was to be divulged to any defendants in the case unless pursuant to further order of court.

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Zimmerman v. Weis Markets, Inc., 2011 WL 2065410, No. CV-09-1535 (Northumberland C.P. May 19, 2011) (Saylor, J.). The plaintiff injured his leg while operating a forklift and sought damages including lost wages, lost future earning capacity, pain and suffering, scarring and embarrassment. He claimed to have sustained permanent diminution in the ability to enjoy life's pleasures and permanent impairment to his general health. The plaintiff's public *Facebook* profile indicated that he enjoyed "bike stunts" and contained photographs of the plaintiff posing with a black eye and his motorcycle taken both before and after the accident. Furthermore, despite

allegations that the plaintiff was embarrassed to wear shorts due to the scar which resulted from his injury, the plaintiff's public profile contained a photograph of the plaintiff in shorts, his scar clearly visible.

On the basis of the foregoing, publicly-available information, the court concluded that it was reasonable to infer the existence of additional relevant information within the private portions of the plaintiff's profile. Although the plaintiff contended that he had a reasonable expectation of privacy in this information, the court ruled that the plaintiff consented to share the information when he created the account and voluntarily posted information. Moreover, the plaintiff placed his physical condition at issue in the case, and, as a result, the defendant was entitled to conduct discovery thereon.

Although the court ordered the plaintiff to provide the defendant with all login and password information without further limitation, the court did note that the order should not be construed as a blanket entitlement to this type of information in all personal injury cases. Rather, the court limited its holding to requests based on some factual predicate gleaned from the publicly available pages, requiring some threshold showing that the public portions contain information that suggest additional relevant postings are likely to be found within the non-public portions. Fishing expeditions, the court noted, would not be authorized.

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Largent v. Reed, 2011 WL 5632688, No. 2009-1823 (Franklin C.P. Nov. 8, 2011) (Walsh, J.). The plaintiff was injured when the motorcycle on which she was a passenger collided with the defendant's van. As a result of the accident, the plaintiff claimed serious and permanent physical and mental injuries, pain and suffering. During

her deposition, the plaintiff testified that she had an active *Facebook* profile and had accessed it as recently as the previous evening, but refused to provide defense counsel with her login and password information. In the defendant's motion to compel, the defendant argued that the plaintiff's profile was recently public and that certain posts contradicted the plaintiff's severe injury claims. Specifically, the defendant claimed that the plaintiff had posted "several photographs that show her enjoying life with her family and a status update about going to the gym."

As a threshold matter, the court found the information sought clearly relevant and discoverable in light of the plaintiff's testimony that she suffers from depression and uses a cane to walk as such information might prove that the plaintiff's injuries were exaggerated. Furthermore, because non-public information posted on *Facebook* is shared with third parties, there is no reasonable privacy expectation. Indeed, the court reasoned, the very purpose of *Facebook* is to share information with others, which purpose abrogates any claim of privilege.[16]

Like the court in *Zimmerman*, *supra*, the *Largent* court limited its holding to those instances whereby the party seeking discovery is able to articulate in good faith that further discovery will lead to relevant information. On the foregoing bases, the court ordered the plaintiff to provide the defendant with her login and password for a period of 21 days, after which time the plaintiff would be permitted to change her password to preclude any further access to her account by defense counsel.

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[16]The plaintiff also argued the Stored Communications Act ("SCA"), Pub. L. No. 99-508, 100 Stat. 1848 (1986), codified at 18 U.S.C. §§ 2701 *et seq*, prohibited the disclosures sought by the defendant. The SCA regulates service providers, not individuals. Therefore, although the Act might preclude *Facebook* from disclosing information directly to the defendant in response to a civil subpoena (citing *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d 965 (C.D. Cal. 2010)), the plaintiff could not claim the protection of the SCA because that Act does not apply to individuals.

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Arcq v. Fields, No. 2008-2430 (Franklin C.P. Dec. 2011) (Herman, J.). The plaintiff was injured in an automobile accident and sought damages for, *inter alia*, continuing medical care, disfigurement and infertility. The defendant, upon learning that the plaintiff had a *Facebook* account, requested the plaintiff's login and password information.

The court, noting the paucity of Pennsylvania authority, reviewed the few instances whereby the courts had granted similar requests and determined that each was predicated on a showing that the public portions of the subject profile contained some relevant information that established a gateway to the non-public pages. Thus, the court denied the defendant's discovery request because the defendant had not articulated some reasonable, good-faith basis for believing the private profile contained relevant information. The mere fact that the plaintiff had an account was categorically insufficient to justify the discovery sought by the defendant.

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Martin v. Allstate Fire & Casualty Ins. Co., Case ID 1104022438 (Phila. C.P. Dec. 13, 2011) (Manfredi, J.). The plaintiff suffered serious injuries as a pedestrian when she was struck by a passing car and sought damages for physical injury, pain, trauma, humiliation, anxiety, and mental anguish. At her deposition, the plaintiff was asked whether she had a *Facebook* account and, upon affirmation, for her password. The defendant moved to compel the login and password information, citing the plaintiff's lack of privilege and the absence of any reasonable expectation of privacy. The plaintiff opposed the defendant's motion to compel on the ground that the defendant never

asked how the plaintiff used the site or whether she commented on or posted photographs of her injuries. Thus, the defendant failed to make any threshold showing that the plaintiff's *Facebook* profile might contain relevant information. The court denied the defendant's request without amplification.

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Kennedy v. Norfolk Southern Corp., Case ID 100201473 (Phila. C.P. Jan. 4, 2011) (Tereshko, J.). The plaintiff sought damages for personal injuries including loss of life's pleasures in connection with a vehicle collision with a train. At his deposition, the plaintiff indicated that he enjoyed shooting skeet with his children prior to the accident but was no longer able to do so. On the public portion of his *Facebook* profile, his interests included "shooting" (among others such as "Starbucks" and "Breast Cancer Awareness"). Although the defendant argued that the inclusion of "shooting" among his interests on his public profile was inconsistent with his deposition testimony, the court denied the defendant's motion without further explanation.

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Kalinowski v. Kirschenheiter, No. 2010-6779 (Luzerne C.P. 2011) (Van Jura, J.). The plaintiff was injured in a car accident. He alleged that his injuries limited his ability to perform his job and other daily activities, and, because he could no longer drive long distances, his ability to travel was similarly limited. The defendant learned at the plaintiff's deposition that the plaintiff had a *Facebook* page and requested his login and password information. In support of its motion to compel, the defendant claimed that one picture available on the plaintiff's public page depicted the plaintiff "lounging comfortably, on a bar stool with one foot up on another barstool." Presumably because

the public content was not sufficient to impeach the plaintiff's claims, the court denied the defendant's request without prejudice (or explanation) but ordered the plaintiff to refrain from deleting any content from his profile.

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Piccolo v. Paterson, No. 2009-04979 (Bucks C.P. Mar. 2011) (Cepparulo, J.). The plaintiff was injured while a passenger in the defendant's vehicle, sustaining severe lacerations to her face which required at least two surgeries and multiple subsequent laser treatments to repair the scarring. At her deposition, defense counsel asked if the plaintiff would accept his "Friend request," thereby allowing him access to the photographs on the plaintiff's non-public profile on the same footing as her other "Friends." After the plaintiff denied this request, the defendant moved for an order requesting only access to photographs. The plaintiff had already provided numerous photographs taken both before and after the accident. Furthermore, the defendant apparently failed to establish a threshold need for the information or articulate any prejudice that could result from nondisclosure. The court denied the request without an accompanying opinion.

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Gallagher v. Urbanovich, No. 2010-33418 (Montgomery C.P. Feb. 27, 2012) (Carpenter, J.). The plaintiff, who was assaulted during a recreational soccer game, moved to compel the defendant's *Facebook* login and password information. Although the plaintiff did not point to anything in the defendant's public profile to trigger access to the non-public pages, and did not appear to have any articulable expectation of what a search of the defendant's *Facebook* profile might reveal, the court, without discussion,

ordered the defendant to provide the plaintiff's counsel with the requested information for a period of seven days after which time the plaintiff would be denied further access to the defendant's profile.

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As the foregoing cases suggest, the Courts of Common Pleas that have considered discovery requests for *Facebook* information appear to follow a consistent train of reasoning. The courts recognize the need for a threshold showing of relevance prior to discovery of any kind, and have nearly all required a party seeking discovery in these cases to articulate some facts that suggest relevant information may be contained within the non-public portions of the profile.[17] To this end, the courts have relied on information contained in the publicly available portions of a user's profile to form a basis for further discovery.

IV. OTHER JURISDICTIONS

The decisions of other state and federal courts are largely in line with the Pennsylvania case law. As in Pennsylvania, courts elsewhere agree that content posted by the plaintiff on *Facebook* is not privileged, either because communications with Friends are not privileged or because, if the communications were privileged, such privilege was waived by sharing the content with others. Also like the Pennsylvania courts, other jurisdictions disfavor "fishing expeditions" and tend to require some factual

[17] *Gallagher v. Urbanovich*, *supra*, is the outlier. In that case, the court granted a plaintiff's request for the defendant's *Facebook* username and password without the plaintiff's identifying any factual basis for an investigation or representing any expectation of what that investigation might uncover.

predicate suggesting the existence of relevant information prior to ordering access to the sought-after information. See e.g. *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D.Mich. 2012) (because the publicly available information was not inconsistent with the plaintiff's claims, further discovery was denied as overly broad); *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, 2007 WL 119149, No. 06-cv-00788 (D.Nev. Jan. 9, 2007) (regarding email-type communications on a social networking site, because the defendant based its request for production on nothing more than suspicion or speculation as to what information might be contained within, the request was denied).

Unlike our Common Pleas Court cases, however, other jurisdictions have wrestled to establish a middle ground between the wholesale denial of the request on the one hand and the granting of unlimited access to the user's profile on the other. Thus, some jurisdictions, when faced with these questions, fashion more narrowly tailored discovery orders and are more likely to rely on counsel to peruse the client's profile for relevant information in the first instance.

One federal district court, faced with a request for production from a plaintiff who was claiming certain emotional damages in an employment discrimination case, defined the issue as follows:

> ...the main challenge in this case is not one unique to electronically stored information generally or to social networking sites in particular. Rather the challenge is to define appropriately broad limits - but limits nevertheless - on the discoverability of social communications in light of a subject as amorphous as emotional and mental health, and to do so in a way that provides meaningful direction to the parties.

EEOC v. Simply Storage Mgmt., 270 F.R.D. 430, 434 (S.D. Ind. 2010). After concluding that the content was not shielded from discovery simply because the plaintiff had made such content private, and that such information must be produced when relevant to a claim or defense, the court ordered production on the basis that the plaintiff's allegations of severe emotional distress rendered some *Facebook* content relevant, and discovery of this magnitude is the inevitable result of alleging these sorts of injuries.[18]

Rather than ordering complete access to the plaintiff's *Facebook* profile, however, the court defined a relevant period, from the time of the alleged harassment to the present, and ordered the plaintiff to provide all verbal communications (comments, status updates, group memberships, *et cetera*) that reveal, refer or relate to any emotion, mental state or feeling or to events that could reasonably be expected to produce significant emotion, feeling or mental state. The plaintiff was then ordered to produce only those photos depicting the plaintiff during the relevant time period, which the plaintiff posted on the plaintiff's profile. The court concluded that photos of the plaintiff in which she was "tagged" after being uploaded by a third-party, were not sufficiently relevant to warrant disclosure. Similarly, photos depicting someone other than the plaintiff would generally be considered outside the scope of the order.

Pursuant to the court's order, the plaintiff's counsel would make the initial determination of relevance in producing the information, and further inquiry into what was and was not produced would be permitted at the plaintiff's deposition. See also *Held v. Ferrellgas, Inc.*, 2011 WL 3896513 (D.Kan. Aug. 31, 2011) (Slip Op.) (postings

[18]The court explicitly limited its decision to cases involving severe emotional distress, stating that the proper scope of discovery might be different in "garden variety emotional distress claims."

from the period of alleged harassment are relevant, and privacy concerns are mitigated by the fact that the defendant only wants the information, not access to the account).

Finally, a small minority of courts have reviewed *Facebook* content *in camera* so the reviewing court may assess its relevance. See, e.g., *Loporcaro v. City of New York*, 2012 WL 1231021, No. 100406/10 (Richmond Cnty. N.Y. April 9, 2012) (Slip Op.), where the court concluded that the plaintiff had no reasonable expectation of privacy in the content posted on her *Facebook* profile and ordered the information be provided for the court's review.

Also see *Offenback v. L.M. Bowman Inc.*, 2011 WL 2491371, No. 10-cv-1789 (M.D.Pa. Jun. 22, 2011), where, after *in camera* review in which the court found some of the information relevant and other information not relevant, the court admonished the parties to conduct their own reviews in the future, given that the plaintiff is in a better position to determine what content is responsive and, if necessary, to object to the disclosure of other, potentially relevant information. See also *Zimmerman*, *supra*, where the Pennsylvania court declined an invitation for *in camera* review as an "unfair burden to place on the Court" and which would require "the Court to guess as to what is germane to defenses which may be raised at trial."

V. PLAINTIFF TRAIL'S AND DEFENDANT LESKO'S DISCOVERY REQUESTS

This case arises from an accident which occurred on September 26, 2009 after defendant, Timothy Lesko, attended a "Gun Bash" event at the Pittsburgh Elks Lodge No. 11. Plaintiff, Michael Trail, is claiming serious injuries from the accident, and defendant has claimed he was not the driver and does not know who may have driven

the vehicle. Plaintiff and defendant have filed cross motions to compel access to each other's *Facebook* accounts.

A. Plaintiff's Motion to Compel

Because defendant in his most recent Answer and New Matter (Feb. 22, 2012) asserted the defense that he was not the driver of the vehicle and does not recall who drove the vehicle, plaintiff urges that any postings surrounding the time period at issue are relevant in determining defendant's whereabouts or in uncovering any potential witnesses who could shed light on the events in question. Some of these posts may have been deleted and are, therefore, in *Facebook*'s sole possession.

In support of plaintiff's assertion that such information may be contained within defendant's non-public profile or among the content deleted from that profile, plaintiff offers the following: (1) after receiving plaintiff's interrogatories seeking information contained on defendant's social networking sites, plaintiff avers that defendant removed, deleted and/or altered significant portions thereof; (2) at approximately 12:01 P.M. on the day of the accident defendant purportedly posted "gun bash today now where is randy at" on his publicly accessible profile page; (3) another status update on defendant's profile, time-stamped 1:38 P.M. on the day of the accident, reads "Gun bash time" followed by a brief dialogue from which it may be inferred that defendant planned to attend the event with someone referred to as "dp," and; (4) a status update posted on defendant's page at 6:33 P.M. two days after the accident, which reads:

> to everyone who left me a line i thank you and your support means everything to me i just came home today and I am hurtin but like i said before thankyou everyone it means alot

> to me to all of you guys you never know just be careful i wouldnt wish this on anyone

(Errors in the original).

As a result of defendant's foregoing verbal representations and plaintiff's (apparently unsubstantiated) belief that defendant may have altered or deleted significant portions of other relevant information, plaintiff seeks access to defendant's profile and the authorizations necessary to compel *Facebook* to provide any deleted content.

However, in Defendant's Response to Plaintiff's First Request for Admissions (Apr. 27, 2012), defendant admitted that he was driving the car, was intoxicated, crossed the center line and that plaintiffs were both seriously injured and not themselves at fault, which admissions render the sought-after information seemingly irrelevant. Indeed, within a month of filing his Answer disclaiming liability, defendant explicitly conceded liability in his Brief in Opposition to Plaintiff's Motion to Compel at 4 (Mar. 21, 2012) wherein he stated, "there is no issue as to defendant's liability." Thus, none of the information which plaintiff seeks would be relevant to the only issue that remains in this case - damages.

Plaintiff does not argue that the information which he seeks is relevant to a punitive damages claim.[19] Furthermore, it is unclear why any information on defendant's *Facebook* profile would be relevant to a punitive damages claim as to this defendant who has admitted that he was driving while intoxicated with a .226% blood alcohol level.

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[19]Plaintiff does not contend that information on Mr. Lesko's *Facebook* profile is relevant to his claim against the Pittsburgh Elks Lodge No. 11.

B. Defendant's Motion to Compel

Defendant asserts that because plaintiff avers in his complaint that "he may suffer great physical pain," "be disabled or limited in his normal activities," and "his general health, strength, and vitality have been seriously impaired and this impairment is possibly permanent," defendant is entitled to access plaintiff's *Facebook* profile, because of the possibility that defendant will find relevant information concerning the extent and severity of plaintiff's injuries.

In support of this request, defendant has attached two photographs obtained from the public portion of plaintiff's profile, which depict plaintiff (1) "at a bar socializing" and (2) "drinking at a party." These photographs do not contain any information as to when they were taken or uploaded. Furthermore, plaintiff has not alleged he is bedridden or that he is otherwise unable to leave the home, and the attached photographs are not inconsistent with plaintiff's alleged injuries.

SUMMARY

I base my rulings on Pa.R.C.P. No. 4011(b) which bars discovery that would cause "unreasonable annoyance, embarrassment, oppression . . . ." This Rule will reach intrusions that are not covered by any constitutional right to privacy or any common law or statutory privileges.

A court order which gives an opposing party access to *Facebook* postings that were intended to be available only to persons designated as "Friends" is intrusive because the opposing party is likely to gain access to a great deal of information that has nothing to do with the litigation and may cause embarrassment if viewed by persons who are not "Friends."

Because such discovery is intrusive, it is protected by Rule 4011 where the party seeking discovery has not shown a sufficient likelihood that such discovery will provide relevant evidence, not otherwise available, that will support the case of the party seeking discovery. However, on a scale of 1 (the lowest) to 10 (the greatest), the intrusion from most *Facebook* discovery is probably at a level of 2. This is so because the party resisting the discovery has voluntarily made this information available, in most instances, to numerous other persons, none of whom has any legal obligation to keep the information confidential, and Rule 4011 bars only discovery that is unreasonably intrusive.[20]

In determining whether an intrusion is unreasonable, a court shall consider the level of the intrusion and the potential value of the discovery to the party seeking discovery. For a level 2 intrusion, the party seeking the discovery needs to show only that the discovery is reasonably likely to furnish relevant evidence, not available elsewhere, that will have an impact on the outcome of the case.

Almost all discovery causes some annoyance, embarrassment, oppression, burden, or expense. However, Rule 4011 bars only discovery which causes "unreasonable" annoyance, embarrassment, oppression, burden, or expense. The use of the term "unreasonable" requires a court to balance the need for discovery and the extent of the annoyance, embarrassment, oppression, burden, or expense. In this case, I denied the discovery requests of both parties because the intrusions that such discovery would cause were not offset by any showing that the discovery would assist the requesting party in presenting its case.

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[20]The intrusion would be greater if, for example, a party's only Friends were a spouse and a daughter.

By way of comparison, a discovery motion that I previously considered arose out of a plaintiff's suit against her doctor who performed breast implant surgery. The plaintiff's case was based solely on a lack of informed consent. Through discovery, the plaintiff sought the names and addresses of the other twenty-six women who received implants during the same month that she received her implant. She sought such discovery because of the possibility that these other women might support the plaintiff's version of what the physician communicated and did not communicate. I regarded this intrusion as reaching a level 9 or 10. I found that these witnesses were not essential because the case could be decided on the basis of the testimony of the plaintiff and the physician. Thus, I denied the discovery request based on Rule 4011.

For these reasons, I enter the following Order of Court:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

HOWARD TRAIL, individually and as Administrator of the ESTATE OF JESSICA TRAIL, deceased, SUE TRAIL, TAMMIE GRICE, individually and as Administratrix of the ESTATE OF WILLIAM GRICE, deceased, MICHAEL TRAIL, and AMANDA DELVAL,

Plaintiffs

vs.

TIMOTHY LESKO and PITTSBURGH LODGE NO. 11 BENEVOLENT AND PROTECTIVE ORDER OF ELKS, a Pennsylvania Corporation, t/d/b/a B.P.O.E. PITTSBURGH LODGE 11,

Defendants

NO. GD-10-017249

ORDER OF COURT

On this 3 day of July, 2012, it is hereby ORDERED that the discovery motions of plaintiff Michael Trail and defendant Timothy Lesko are denied.

BY THE COURT:

WETTICK, J.

Copies mailed. (CL) 7/3/12