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Piccolo v Paterson et al. and Zimmerman v Weis Market

Case No. 2009-04979, Order of May 5, 2011 and Case No. CV-09-1535, 2011 WL 2065410 (Pa. Com. Pl. 19 May 2011).

The recent decisions of two US courts illustrate whether there is a reasonable expectation of privacy associated with social media postings.

Who has not received that email telling you that Mr. or Ms. XYZ has asked to be your 'friend' on your Facebook page or has made an equivalent request on other social media accounts such as MySpace. You can decide to decline or 'ignore' the request of friendship, or accept it, and then, depending on the privacy settings that you have selected, you may allow that person full or limited access to your life, photographs, thoughts, musings, philosophies, 'likes' and dislikes. So, you get to do the choosing - right? Well, not always.

US courts are being asked to weigh in on whether an expectation to privacy protects a person's social media postings, such as on a Facebook page, from required disclosure during the discovery phase of civil litigation - and so far, it seems that only one court has limited a party's access to an opposing party's Facebook page. Indeed, two weeks after that decision was made, another court, in a nearby jurisdiction rejected that view and instead followed a line of cases - albeit the very small line of cases that have even addressed the question - finding that social media postings are not 'private' when it comes to litigation regardless of the privacy settings that the person may have used to limit the information to 'friends' only.

The first case, Piccolo v Paterson, which is pending in the Court of Common Pleas of Bucks County, Pennsylvania, concerns claims for personal injury brought by Piccolo against the driver of the car in which she was traveling when she was injured. Specifically, when riding in the car, the safety airbag was activated resulting in significant injury to Piccolo's face, which required a series of corrective surgical and cosmetic procedures. During the course of the litigation, defendants were permitted to take photographs of Piccolo's face and also collected numerous photographs that had been taken before and after the accident. However, upon hearing at her deposition that Piccolo had a Facebook page, defendants sought full access to the account in an effort to determine if Piccolo's regular posting to her hundreds of 'friends' were consistent with her claims of injury and damages.

Ms. Piccolo's attorney declined the request on the grounds that defendants had obtained many photographs of plaintiff over the course of the case; that defendants had failed to make a showing of materiality as to the text of Ms. Piccolo's Facebook postings; and that, accordingly, requiring Ms. Piccolo to 'friend' defendants represented an unreasonable annoyance, embarrassment, oppression or burden, contrary to Pennsylvania's rules of civil procedure. Defendants brought the question to the court, which on 5 May 2011, issued a very brief order, with no explanation, that simply states '[U]pon consideration of [Defendants'] Motion to Compel Access to Plaintiff's Facebook account postings, and the Plaintiff Sara Rose Piccolo's response thereto, and after a hearing held thereon, it is hereby ORDERED and DECREED that Defendants' Motion to Compel is DENIED'. Score one victory for privacy.

Two week later, a judge sitting in the Court of Common Pleas of Northumberland County, Pennsylvania, faced a very similar situation. In Zimmerman v Weis Market, the plaintiff filed claims for injuries to his leg while operating a forklift at defendant's warehouse. However, the public portions of plaintiff's Facebook and MySpace pages indicated that plaintiff's injuries were not as substantial as claimed given that his social media pages stated that he engaged in motorcycle stunts and included photographs showing him with a black eye after a motorcycle accident. Moreover, plaintiff had posted pictures showing himself in short pants even though he testified at his deposition that because of his forklift injury he never wore shorts due to being embarrassed by his scar. Believing that other relevant information may be located on the non-public, 'private' portions of those accounts, defendants sought access to the entirety of plaintiff's postings. The Northumberland County judge noted the recent issuance of the terse Piccolo decision, but instead looked to the few other decisions that have emerged in recent years and instead ordered that within 20 days plaintiff was to provide defendant with all passwords, user names and log-in names for any and all MySpace and Facebook accounts and that plaintiff was to take no steps to delete or alter any existing information on his pages.

Relegating the terse Piccolo decision to a rather dismissive footnote, the Northumberland County judge first turned to yet another Pennsylvania county decision[1] which had granted a request for access to a plaintiff's Facebook and MySpace pages on the grounds that no privilege from disclosure exists in Pennsylvania for information posted on non-public portions of social websites and that 'pursuit of the truth as to alleged claims is a paramount ideal'.

The Zimmerman Court also looked to a recent personal injury decision from a New York state court - Romano v. Steelcare, Inc.[2] - and found it to be well reasoned and instructive. Finding no applicable law in New York, the Romano Court examined a decision from Ontario, Canada and a federal court decision in

Colorado, and explained that 'to deny Defendant an opportunity [to] access these [social websites]...would condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings'[3].

As to claims of privacy rights, the Romano Court also noted: '[W]hen 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...[and knowing that] her personal information may become publicly available, she cannot now claim that she had a reasonable expectation to privacy'[4].

The Zimmerman Court followed the Romano and McMillen analyses, noting that the liberal rules of discovery in Pennsylvania - which are consistent with such open discovery policies throughout the United States - allow for the discovery of any matter, not privileged, which is relevant to the cause being tried, and that by placing his physical injuries at issue, while simultaneously and voluntarily posting information on his social websites, Zimmerman could not rightly claim that he possessed any reasonable expectation to privacy as to the contents of the non-public portion of his social media pages.

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[5]. That said, the Zimmerman Court made clear in a footnote that this decision was not intended to open the door wide to all social media in every personal injury case and that it should not become the norm that full access must be provided in response to the typical interrogatories and document requests that accompany such cases[6]. Rather, the judge stated that in his general view, requests for access to the non-public portions of a party's social media sites should be treated as a 'special type of discovery' and pursued by way of motion with a threshold showing that the publicly accessible portions of a party's social networking sites contain information that would suggest that further relevant information is likely to be found in the non-public portions. In short, according to Zimmermann, 'there must be some factual predicate for the examination of non-public portions of social networking sites' and unlimited 'fishing expeditions' will not be permitted. Thus, the Zimmermann Court voiced a view generally consistent with the arguments made by defense counsel in Piccolo - that is, open access should not be presumed but must be predicated on a showing of relevance and materiality[7].

Where does all of this leave those who avidly 'share' - at least to some degree or another - the special, the mundane, the profound or the merely routine aspects of their lives, complete with photo galleries to document it all? Well, a decision from a single county judge in but one state is not precedential and need not be followed by other courts. Thus, neither Piccolo nor Zimmerman represent controlling law for others. Moreover, the fact that the Zimmerman judge placed his cautionary and limiting views in a footnote rather than in the main text of the opinion suggests that he recognized that his ruling would not extend beyond claimants in his court. Nonetheless, it appears that a trend is beginning to emerge that should give the posting public some pause before readily sharing their lives with their 'best friends forever'. Hackers may pose one threat to privacy and the courts may represent yet another. Post with care my friends![8]

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1. McMillen v Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Jefferson Co. Com. Pl. 2010).
2. 907 N.Y.S.2d 650 (Suffolk Co. 2010).
3. Romano, 907 N.Y.S.2d at 655.
4. Romano at 657. See also McMillen, 2010 LEXIS 270 - noting that information shared with approved 'friends' may, despite the original poster's privacy settings, be disseminated by one 'friend' to that person's other 'friends' or even posted generally on the 'friend's' publicly available page, and that Facebook so warns its users in its terms and privacy information.
5. Zimmerman at WL 2065410, p.4.
6. Id. at n.8.
7. (See also EEOC v Simply Storage Management, LLC, 270 F.R.D. 430 (S.D. Ind. 2010) (person's privacy expectation and intent to limit Facebook communications not a basis for shielding communications from discovery, but only information relevant to the claims raised need be produced and not a person's entire social network site).
8. Indeed, in Barnes v CUS Nashville, LLC, No. 3:09-cv-00764, 2010 WL 2265668 (M.D. Tenn. 2010), to expedite resolution of a discovery dispute, a magistrate judge offered the novel option of allowing himself to become a Facebook 'friend' of certain proposed witnesses so that he could examine in camera their Facebook pages for relevant information, which he would then disseminate to the parties.