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Discovery of a Plaintiff's Social Media Profiles Is Not an Invasion of Privacy

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It has become a common cat-and-mouse game for a defendant to request a plaintiff to produce social media materials, only to have the plaintiff vigorously object and allege that the defendant is attempting to invade plaintiff's privacy in violation of various constitutional amendments.

However, courts across the country have repeatedly held that social media materials are not only discoverable, but plaintiffs have no right to privacy when they post to social media—even if the social media page is 'private' or 'restricted.' *See Patterson v. Turner Constr. Co*., 88 A.D.3d 617, 931 N.Y.S.2d 311, 312 (N.Y. App. 2011) (holding that the "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"); *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) (holding that "material posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy"); *Mailhoit v. Home Depot U.S.A., Inc*., 285 F.R.D. 566, 570 (C.D. Cal. 2012) (indicating that social networking site content is neither privileged nor protected, but recognizing that party requesting discovery must make a threshold showing that such discovery is reasonably calculated to lead to admissible evidence).

Florida's courts have specifically held that "Facebook itself does not guarantee privacy. By creating a Facebook account, a user acknowledges that her personal information would be shared with others. 'Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist.'" *Nucci v. Target Corp.*, 162 So. 3d 146, 154 (Fla. 4th DCA 2015) (quoting *Romano v. Steelcase, Inc*., 30 Misc. 3d 426, 907 N.Y.S.2d 650, 656-7 (N.Y. Sup. Ct. 2010)).

The right to privacy in the Florida Constitution "ensures that individuals are able 'to determine for themselves when, how and to what extent information about them is communicated to others.'" *Shaktman v. State*, 553 So. 2d 148, 150 (Fla. 1989) (quoting A. Westin, *Privacy and Freedom* 7 (1967)). Before the right to privacy attaches, there must exist a legitimate expectation of privacy. *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

Additionally, it is unlikely for this issue to become a double-edged sword which would then open the door to allow a plaintiff to demand an individual-defendant's social media materials. The photographs, videos, and written materials posted on a social media account would show a plaintiff's prior life and lifestyle, as compared to his or her post-accident life—which plaintiffs put at issue as soon as they allege "pain and suffering" and/or an "inability to enjoy life." An individual-defendant, however, has not put those matters at issue, so an individual-defendant should maintain an objection to the same request.

A request for social media materials only needs to otherwise comply with the general rules of discovery (i.e., reasonably calculated to lead to the discovery of admissible evidence, narrowly tailored in time and scope, etc.).

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