

38 Misc.3d 1022
Supreme Court, Richmond County, New York.

Gina L. FAWCETT, as Parent and Natural Guardian of John Fawcett, Jr., an Infant, and Gina L. Fawcett,
Individually, Plaintiffs

v.

Nicholas ALTIERI, Gerard L. Altieri, as Parent and Natural Guardian of Nicholas Altieri, an Infant, Laura M.
Altieri, as Parent and Natural Guardian of Nicholas Altieri, an Infant, and [St. Joseph by the Sea High School](#),
Defendants.

Jan. 11, 2013.

Synopsis

Background: Mother, on behalf of herself and her son, sued high school and parents of another student, seeking to recover damages for son's personal injuries sustained in altercation with other student, and asserting causes of action for assault, battery, negligence, and loss of services. School and parents moved to compel production of son's social media **accounts**, and mother moved for protective order.

[Holding:] The Supreme Court, Richmond County, [Joseph J. Maltese, J.](#), held that sufficient factual basis was lacking to either compel or preclude discovery of social media **accounts**.

Motions denied.

West Headnotes (14)

[1]	Pretrial Procedure Discovering truth, narrowing issues, and eliminating surprise Pretrial Procedure Relevancy and materiality
	Under the scope of discovery rule, requiring full disclosure of all matter material and necessary in the prosecution or defense of an action, the liberal interpretation of the words “material and necessary” requires disclosure , upon request, of any facts bearing on the controversy that will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. McKinney’s CPLR 3101(a) . Cases that cite this headnote

[2]	Pretrial Procedure Objections and protective orders
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	A party's right to discovery is not unlimited and may be curtailed when it becomes an unreasonable annoyance and tends to harass and overburden the other party. McKinney's CPLR 3101(a). Cases that cite this headnote
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[3]	Pretrial Procedure Examination of Person
	Plaintiffs who place their physical condition in controversy may not shield from disclosure material which is necessary for the defense of the action. McKinney's CPLR 3101(a). Cases that cite this headnote

[4]	Pretrial Procedure Particular Subjects of Disclosure
	Discovery is permitted with respect to not only materials having to do with liability, but also to damages as well. McKinney's CPLR 3101(a). Cases that cite this headnote

[5]	Criminal Law Particular documents or tangible objects Pretrial Procedure Documents, papers, and books in general
	In both the criminal and civil contexts, a two-pronged analysis is conducted before trial courts compel the production of the contents of social media accounts on the Internet, first requiring a determination by the court as to whether the content contained on/in the account is material and necessary, and then a balancing test as to whether the production of this content would result in a violation of the account holder's privacy rights. McKinney's CPLR 3101(a). 1 Cases that cite this headnote

[6]	Pretrial Procedure Particular Subjects of Disclosure
	Broad discovery on the issue of damages is allowed where a plaintiff states a general loss of the enjoyment of life due to injuries sustained as a result of an accident. McKinney's CPLR 3101(a). Cases that cite this headnote

[7]	Evidence Facts relating to human life, health, habits, and acts
	Judicial notice would be taken that subscribers to social media websites share their political views, vacation pictures, and various other thoughts and concerns that subscribers deem fit to broadcast to those viewing on Internet, and whether these broadcasts take form of "tweets," or postings to subscriber's "wall," subscriber's intent is to disseminate this information. Cases that cite this headnote

[8]	Pretrial Procedure Other remedy, availability or prior use of
	In pretrial phase of personal injury lawsuit, high school and parents of student involved in altercation that resulted in another student sustaining personal injuries lacked sufficient factual basis to determine whether records of injured student's social media accounts on Internet were material and necessary to defense of school and parents, and thus, depositions were required to be taken before determining whether to either compel discovery of records or to issue protective order. McKinney's CPLR 3101(a). Cases that cite this headnote

[9]	Pretrial Procedure Documents, papers, and books in general
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	Social media website materials may be subject to production just as material from a personal diary may be discoverable. McKinney's CPLR 3101(a). Cases that cite this headnote
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[10]	Pretrial Procedure Documents, papers, and books in general
	Information posted in open on social media accounts are freely discoverable and do not require court orders to disclose such information. McKinney's CPLR 3101(a). 3 Cases that cite this headnote

[11]	Pretrial Procedure Documents, papers, and books in general
	In order to obtain discovery of a closed or private social media account on the Internet, by a court order for the subscriber to execute an authorization for their release, the adversary must show with some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand. McKinney's CPLR 3101(a). 1 Cases that cite this headnote

[12]	Pretrial Procedure Documents, papers, and books in general
	Trial courts should not accommodate blanket searches on a subscriber's social media accounts on the Internet to discover any kind of information or photos to impeach a person's character, which may be embarrassing, but are irrelevant to the facts of the case at hand. McKinney's CPLR 3101(a). 2 Cases that cite this headnote

[13]	Pretrial Procedure Documents, papers, and books in general
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	The party requesting the discovery of an adversary's restricted social media accounts on the Internet should first demonstrate a good faith basis to make the request. McKinney's CPLR 3101(a). Cases that cite this headnote
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[14]	Pretrial Procedure Documents, papers, and books in general
	Absent some facts that the person disclosed some information about the subject matter of the pending law suit, granting carte blanche discovery of every litigant's social media records on the Internet is tantamount to a costly, time consuming "fishing expedition," which the trial courts ought not condone. McKinney's CPLR 3101(a). 2 Cases that cite this headnote

Attorneys and Law Firms

****594** Russo, Scamardella & D'Amato, for Plaintiffs.

Peisner Gerard Girsh & Schaefer, for Defendants Altieri.

Connors & Connors, P.C., for Defendant Saint Joseph by the Sea High School.

Opinion

[JOSEPH J. MALTESE](#), J.

***1023** The defendants move and cross-move to compel the production of the social media files of the plaintiff, John Fawcett, Jr. The plaintiff cross-moves for a protective order preventing the production of his social media files. The motion and cross-motion made by the defendants to compel the production of John Fawcett, Jr.'s social media files is denied. The plaintiff's cross-motion for a protective order is also denied.

Facts

This is an action to recover for personal injuries allegedly sustained by the plaintiff, John Fawcett, Jr., a high school student during an altercation with the defendant, Nicholas Altieri, another high school student, at a tennis match at St. Joseph By the Sea High School, in Staten Island, New York. The plaintiff sets forth causes of action against the defendants for assault, battery, negligence and loss of services. The plaintiff's bill of particulars states that he sustained an injury to his right eye.

During the course of the litigation the defendants demanded:

... authorizations to permit the defendants to obtain full access to and copies of Plaintiff's current and historical records and/or information and photographs on Plaintiff's social media website pages, including but not limited to **Facebook**, MySpace, Friendster, Flickr, and any other social media

websites.

Defendants contend that the plaintiff's social media **accounts** are not publically viewable and they have been made private with no information available for public consumption. It is unclear when the plaintiff made his social media **accounts** private.

Discussion

[1] [2] This court must evaluate the relevance of social media **accounts** in the pre-trial discovery phase of a civil action alleging *1024 personal injuries. While social media web sites may be a relatively new phenomenon, the liberal interpretation of the words "material and necessary" in CPLR § 3101(a) remains applicable. The liberal interpretation of the words "material and necessary" require **disclosure**, upon request, of any facts bearing on the controversy that will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. A party's right to discovery is not unlimited, however, and may be curtailed when it becomes an unreasonable annoyance and tends to harass and overburden the other party.¹

595 [3] [4] It is without dispute that plaintiffs, who place their physical condition in controversy may not shield from **disclosure material, which is necessary for the defense of the action.² It is equally well accepted that discovery is permitted with respect to not only materials having to do with liability, but also to damages as well.³

[5] A survey of cases dealing with the production of social media **accounts**, in both the criminal and civil contexts, reveal a two prong analysis before courts compel the production of the contents of social media **accounts**. This inquiry requires a determination by the court as to whether the content contained on/in a social media **account** is "material and necessary;" and then a balancing test as to whether the production of this content would result in a violation of the **account** holder's privacy rights.⁴

"Material and Necessary"

Setting aside the fact that John Fawcett, Jr. turned eighteen years old, the plaintiff submits the affidavit of his mother Gina Fawcett to support his cross-motion. In her affidavit she states that her son, "... stated to [her] that he has no specific memory of using, discussing this attack, or his injury using social media." Furthermore, plaintiff's counsel argues that access to the plaintiff's social media **accounts** sought by the defendants are not relevant to mount a defense against an allegation of civil assault battery or negligence. However, to accept such an argument would ignore the defendants' right to seek discovery relating to the damages John Fawcett, Jr. sustained as a result of this altercation. Plaintiff's bill of particulars states that the *1025 injuries he sustained as a result of this incident will continue to effect him socially, educationally, economically, and in the way he pursues recreation into the future.

[6] The Appellate Division, Second Department allows for broad discovery on the issue of damages where a plaintiff states a general loss of the enjoyment of life due to injuries sustained as a result of an accident. In *Abdalla v. Mazl Taxi Inc.*, the Appellate Division, Second Department compelled a plaintiff to disclose his medical records pertaining to his **diabetes** based on his broad allegations contained in his bill of particulars, including the "... claimed loss of enjoyment of life due to his current injuries."⁵ However, at this early stage in litigation it is unclear as to whether this information will yield "material and necessary" information, or whether it is merely a fishing expedition as the plaintiff suggests.

[7] Social media web sites, such as **Facebook**⁶ and Twitter⁷, exist to allow individuals to interact with "real world" **596 friends, relatives and those individuals sharing common interests that may be as close as your own town, or as far away as a distant continent. The court takes judicial notice that subscribers to these sites share their political views, their vacation pictures, and various other thoughts and concerns that subscribers deem fit to broadcast to those viewing on the internet. Whether these broadcasts take the form of "tweets," or postings to a user's "wall," the intent of the users is to disseminate this information. Judge Matthew Sciarrino pointed out in his decision concerning an "Occupy Wall Street" protestor charged in the Criminal Court of New York County that, "[i]f you post a tweet, just like you scream it out the window, there is no reasonable expectation of privacy."⁸

At the end of 2009 **Facebook** reset user privacy settings to default all profiles to public from private. In early 2010 after this setting change, **Facebook's** president and founder Mark Zuckerberg, in an interview with TechCrunch responded to the question "where is privacy on the web going?" as follows:

*1026 When I got started in my dorm room at Harvard, the question a lot of people asked was why

would I want to put any information on the Internet at all? Why would I want to have a website? And then in the last 5 or 6 years, blogging has taken off in a huge way and all these different services that have people sharing all this information. People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that has evolved over time. We view it as our role in the system to constantly be innovating and be updating what our system is to reflect what the current social norms are. A lot of companies would be trapped by the conventions and their legacies of what they've built, doing a privacy change—doing a privacy change for 350 million users is not the kind of thing that a lot of companies would do. But we viewed that as a real important thing, to always keep a beginner's mind and what would we do if we were starting the company now and we decided that these would be the social norms now and we just went for it.⁹

Mark Zuckerberg and Sheryl Sandberg extolled the benefits of these multilayered “privacy” settings in a November 7, 2011 television interview with Charlie Rose.¹⁰ However, these privacy settings did not prevent the president of the Queer Chorus at the University of Texas to add these two students to a **Facebook** discussion group which “outed” them to all of their **Facebook** friends, regardless of the pre-set privacy settings.¹¹

[8] [9] The Appellate Division, First Department held in *Patterson v. Turner Construction Company*, that the materials posted on a **Facebook** page would not be shielded from discovery in a civil matter “... merely because plaintiff used the service’s **597 privacy settings to restrict *1027 access ...” if the material is relevant to the litigation.¹² These materials may be subject to production just as material from a personal diary may be discoverable.¹³ While the ultimate privacy and subsequent **disclosure** of social media postings are disputable, the facts in this case are not developed to either compel or preclude their discovery. There must be a clear factual predicate in order to compel the production of social media records from the defendants or authorizations for the production of that material from certain social media providers.¹⁴ Consequently, on the facts before this court depositions must be conducted before one can properly determine whether the plaintiff should be compelled to produce social media records; and conversely, whether the defendants should be precluded from accessing this information.

Conclusion

[10] [11] [12] Electronic discovery issues were once nearly the exclusive province of commercial litigation involving corporate players. However, with the expansion of the use of mobile phones that are connected to the Internet, and the overall ease of access to broadband Internet connections at home, electronic discovery will quickly enter into actions where it was once thought irrelevant. **Facebook**’s Mark Zuckerberg is correct that members of society continue to share more of their thoughts, secrets, mundane musings, photos and videos of their personal lives on social media sites. Perhaps this phenomenon is driven by feelings of anonymity in the online environment, where social media giants perpetuate the mantra that “your privacy is important.”¹⁵ But, as courts have previously determined this privacy is not absolute. Information posted in open on social media **accounts** are freely discoverable and do not require court orders to disclose them. However, this court will not go so far as to hold that all social media records are material and necessary based solely on the fact that many people avail themselves to these social media sites. In order to obtain a closed or private social media **account** by a court order for the subscriber to execute an authorization for their release, the adversary must show with *1028 some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand. The courts should not accommodate blanket searches for any kind of information or photos to impeach a person’s character, which may be embarrassing, but are irrelevant to the facts of the case at hand.

[13] [14] The party requesting the discovery of an adversary’s restricted social media **accounts** should first demonstrate a good faith basis to make the request. Absent some facts that the person disclosed some information about the subject matter of the pending law suit, granting carte blanche discovery of every litigant’s social media records is tantamount to a costly, time consuming “fishing expedition,” which the courts ought not condone. Moreover, asking courts to review hundreds of transmissions “in camera” should not be the all **598 purpose solution to protect the rights of litigants. Courts do not have the time or resources to be the researchers for advocates seeking some tidbit of information that *may* be relevant in a tort claim. While several courts have frequently assigned the “in camera” review to “special masters,” the fees to be paid those special masters should be paid by the party seeking such discovery in a tort case, but which may be shared by the parties in a commercial or matrimonial matter.

With the volume of cases pending before our courts, simply requesting authorizations for all social media from all or most of the litigants will create an unmanageable volume of documents to be reviewed in the hope that some information directly relevant to the case will be uncovered. More likely, the information obtained would be irrelevant to the actual facts of the

case, but may be used in an attempt to discredit the adversary with collateral matters. As a matter of judicial policy, such a fishing expedition is not a sufficient basis to open the flood gates of meandering thoughts or silly postings to be used to impeach a party in a simple assault or negligence action without any good cause to believe that any incriminating statement was ever made and publicized in the social media. These are not matters of national security or part of a criminal investigation. This is a civil tort matter of a minor assault that should have a good faith basis other than supposition, hope or speculation that some comment was made that may be relevant to the case at hand.

Therefore, the parties should proceed to discover the facts of the case by way of depositions or other investigatory or surveillance means.

*1029 Accordingly, it is hereby:

ORDERED, that the motion made by the defendants: St. Joseph by the Sea High School and the cross-motion made by Nicholas Altieri, Gerard L. Altieri and Laura Altieri to compel the production of social media **accounts** of John Fawcett, Jr. is denied with leave to renew after the completion of depositions; and it is further

ORDERED, that the cross-motion made by the plaintiffs is denied with leave to renew upon the completion of depositions; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on Wednesday, January 30, 2013 at 9:30 a.m. for a compliance conference.

All Citations

38 Misc.3d 1022, 960 N.Y.S.2d 592, 290 Ed. Law Rep. 227, 2013 N.Y. Slip Op. 23010

Footnotes	
1	<i>See, Harrison v. Bayley Seton Hosp., Inc.</i> , 219 A.D.2d 584, 631 N.Y.S.2d 182 [2d Dep't 1995].
2	<i>Hoening v. Westphal</i> , 52 N.Y.2d 605, 439 N.Y.S.2d 831, 422 N.E.2d 491 [1981].
3	<i>Walker v. City of New York</i> , 205 A.D.2d 755, 614 N.Y.S.2d 31 [2d Dep't 1994].
4	<i>See, People v. Harris</i> , 36 Misc.3d 613, 945 N.Y.S.2d 505 [Crim. Ct. New York County 2012]; <i>See, People v. Harris</i> , 36 Misc.3d 868, 949 N.Y.S.2d 590 [Crim. Ct. New York County 2012]; <i>See, United States v. Meregildo</i> , 883 F.Supp.2d 523 [S.D.N.Y.2012].
5	<i>Abdalla v. Mazl Taxi Inc.</i> , 66 A.D.3d 803, 887 N.Y.S.2d 250 [2d Dep't 2009].
6	Facebook is a social media site designed to allow users to post messages on a "wall," play interactive games, share pictures and join multiple groups.
7	Twitter is a social media site that allows users to "tweet" messages to their followers in 140 characters or less. Twitter is also used not just by individuals but also as an outlet for news sources, and different governmental and non-governmental entities.
8	<i>People v. Harris</i> , 36 Misc.3d 868, 874, 949 N.Y.S.2d 590 [Crim. Ct., New York County 2012].
9	Huffington Post, <i>Facebook's Zuckerberg Says Privacy No Longer A Social Norm</i> ' (VIDEO), http://www.huffingtonpost.com/2010/01/11/facebook-zuckerbergthe_n_417969.html?view=print & comm_ref=false [Accessed Oct. 25, 2012].

10	Charlie Rose, http://www.charlierose.com/view/interview/11981 [Accessed Oct. 25, 2012].
11	Geoffrey A. Fowler, <i>When Deepest Secrets Gets Outed on Facebook</i> , Wall Street Journal, wsj.com [Accessed Oct. 23, 2012].
12	<i>Patterson v. Turner Construction Company</i> , 88 A.D.3d 617, 931 N.Y.S.2d 311 [1st Dep't 2011].
13	<i>Id.</i> , see also, <i>Faragiano v. Town of Concord</i> , 294 A.D.2d 893, 741 N.Y.S.2d 369 [4th Dep't 2002].
14	<i>McCann v. Harleysville Ins. Co. of N.Y.</i> , 78 A.D.3d 1524, 910 N.Y.S.2d 614 [4th Dep't 2010].
15	See generally, Charlie Rose, http://www.charlierose.com/view/interview/11981 [Accessed Oct. 25, 2012].

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