

## **New York's Highest Court Expands Discoverability Of Social Media Content**

In Forman v. Henkin, 2018 NY Slip Op 01015, the New York Court of Appeals established a framework for lower courts to follow when determining the discoverability of social media records and postings.

At issue in Forman was the discoverability of the “private” contents of the injured plaintiff’s Facebook account. The plaintiff alleged traumatic brain injuries, difficulty communicating, and social isolation after she fell off a horse owned by the defendant. The defendant sought an unlimited authorization to obtain plaintiff’s entire “private” Facebook account after plaintiff testified she used Facebook often before the accident to post photographs of her activities, and had difficulty with written communication post-accident. The trial court granted defendant access to a limited portion of plaintiff’s Facebook account, and the Appellate Division further restricted defendant’s access. The Appellate Division limited disclosure because it determined defendant had to establish a factual predicate for “private” materials by identifying relevant “public” materials in the plaintiff’s Facebook account.

The issue, of course, is that a defendant will never be able to establish a factual predicate if the entirety of a plaintiff’s posts and photographs are kept “private”. In other words, a plaintiff can limit discovery of its Facebook account by utilizing Facebook’s privacy settings. In reversing the Appellate Division’s order, the Court of Appeals reiterated that discovery requests must be evaluated with due regard for the strong policy supporting open disclosure. Instead of establishing a heightened factual predicate for social media records, a defendant merely has to set forth its request for social media records is reasonably calculated to yield material and necessary information.

The Court of Appeals advised that lower courts should consider the nature of the event giving rise to the litigation, and the injuries claimed, to assess whether relevant material is likely to be found on the social media account and then issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of non-relevant materials. Applying the framework to the injuries claimed by Forman, the Court concluded defendant was entitled to plaintiff’s “private” photographs posted before and after the accident, as well as records revealing each time plaintiff posted a private message after the accident, and the number of characters or words in the messages.

This decision should be viewed as a victory for the defense bar because it establishes a plaintiff in a bodily injury action cannot restrict from disclosure those materials kept “private” on social media accounts. Conducting social media searches and demanding social media records is a vital aspect of each bodily injury action.