Arkansas Association of Defense Counsel

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THE STATUS OF OBTAINING SOCIAL MEDIA EVIDENCE WHILE DEFENDING A PERSONAL INJURY LAWSUIT

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Social media is one of the fastest growing and most influential areas of technology in the country. Every year there seems to be a new program or platform developed that changes the way people communicate with each other. These programs, from Facebook to Twitter to Instagram, permeate into every aspect of life and influence various industries such as advertising, entertainment, and now, the practice of law.

While there is a general dearth of Arkansas case law regarding the discoverability of social media evidence, this is beginning to change, and will change as Arkansas Courts become acclimated to these contemporary issues, with the first and threshold issue being whether social media is discoverable?

Ark. R. Civ. P. 26(b) authorizes a broad scope for discoverable evidence. Specifically, "parties may obtain discovery regarding any matter, not privileged, *which is relevant to the issues in the pending actions*, whether it relates to the claim or defense of the party seeking discovery . . ." Ark. R. Civ. P. 26(b) (emphasis added). The key determination, and likeliest contention from a Plaintiff, is that her social media is irrelevant, thus not discoverable. However, there is a strong argument to be made under Ark. R. Evid. 401 that a Plaintiff's social media account is relevant as information obtained from the account in the form of statements, pictures, or videos would tend to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401.

For example, in a typical personal injury negligence claim Plaintiff must prove: (1) she sustained injury; (2) Defendant was negligent; and (3) such negligence was the proximate cause of Plaintiff's injury. By voluntarily filing a lawsuit to seek compensation for her injury, Plaintiff puts her physical and medical condition at issue. Therefore, a Defendant has a Constitutional Right and is entitled to examine and scrutinize *all evidence* related Plaintiff's claim, including any material obtained from her social media account, which could contain conflicting pictures of Plaintiff's injury following her accident or contradictory statements regarding the extent of her injuries. As information regarding Plaintiff's social media account is always relevant, the next issue is how to obtain and gain access to this evidence. The easiest and least litigious method of accessing Plaintiff's social media account is to receive a signed Authorization and Consent for Release of Information in compliance with the Stored Communications Act, 18 U.S.C. §§ 2701 *et seq,* which prohibits an entity, such as Facebook or Twitter, from disclosing information without the consent of the owner of the account. However, as the practice of law is an inherently adversarial profession, obtaining access to Plaintiff's social media account is rarely this easy. Should Plaintiff fail to comply with an Authorization request, the next step would be to file a Motion compelling such. Beforehand, it is prudent to send a good faith letter to Plaintiff's counsel requesting he/she return the signed Authorization in order to avert court interference. Attaching this correspondence to the Motion, bolsters and likely increases the probability of the Court granting said Motion. However, as previously mentioned, there is very little Arkansas authority to include in the Motion, and as such, two persuasive decisions may be useful.

In *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, the Supreme Court of New York granted defendant's Motion for access to Plaintiff's current

and historical social networking pages and accounts. *Id.* at 651. Plaintiff argued, unsuccessfully, that production of her social media account would violate her right to privacy which outweighed Defendant's need for the information. *Id.* at 655. However, the Court held, "Plaintiff's who place their physical condition in controversy *may not shield from disclosure* material which is *necessary to the defense of the action*. Accordingly, in an action seeking damages for personal injuries, discovery is generally permitted with respect to materials that may be relevant both to the issues of damages and the extent of a plaintiff's injury." *Id.* at 652 (emphasis added). Similarly in *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, a Pennsylvania Court granted Defendant's Motion to Compel Plaintiff's Facebook and MySpace usernames and passwords. *Id*. at *13. The Court explained the countervailing benefits of allowing Defendant access to Plaintiff's social media account in a personal injury claim "cannot be overstated," as a "lack of injury or inability is relevant to [Defendant's] defense, and it is reasonable to assume [Plaintiff] may have made additional observations about his travels and activities in private posts not currently available to the defendants." *Id*. at *11. Finally, the Court stated a Plaintiff's social media account is relevant, and therefore discoverable, because "the search for truth should prevail to bring to light relevant information that may not otherwise have been known." *Id.* at *12. In conclusion, Plaintiff's social media accounts can be useful tools in defending a personal injury lawsuit, while gaining access to this information should become easier thanks to the liberal scope of Discovery in the Arkansas Rules of Civil Procedure.

Whether Plaintiff post a contradictory picture of herself following an alleged "horrific" accident or she shares a video of her daily exercise routine while claiming disability, typically useful and damaging evidence can be found on various social media platforms, which is a status all defense attorneys should like.

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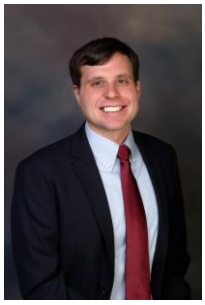

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