UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CAROLINE DAVENPORT,

Plaintiff, CASE NO.: 3:11-cv-632-J-JBT

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Defendant.
_____/

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCOVERY

I. Introduction and Summary of the Argument

Defendant seeks production of every single photograph on the Plaintiff's entire Facebook account since the date of this crash. Plaintiff objects on the grounds that this request is not reasonably calculated to lead to the discovery of admissible evidence when the request is overly broad and improperly invades the Plaintiff's privacy, regardless of the fact that she has put her physical condition at issue.[1] The Defendant is on a fishing expedition in regard to Plaintiff's Facebook page, seeking everything in her personal life. This lawsuit involves a first-party insurance claim submitted by the Plaintiff, Caroline Davenport, for underinsured motorist benefits from Defendant, State Farm Mutual Automobile Insurance Company, as a result of Caroline Davenport sustaining injuries caused by an underinsured negligent driver on April 9, 2009.[2] The only information that could arguably be relevant would be photographs posted by the Plaintiff in which

[1] *See* Defendant's Motion to Compel Discovery (Attached as Exhibit "B" to Defendant's Motion) (Doc. 22).

[2] *See* Complaint (Doc. 2).

she is depicted. Accordingly, the Plaintiff proposed this production to narrowly tailor the Defendant's overbroad request in an effort to resolve the discovery request without judicial intervention. The Defendant rejected such a proposal, and in fact, requested an alternative which was even broader than its initial request for production - the Plaintiff's private log-in information, giving the Defendant *carte blanche* access to the Plaintiff's entire Facebook account.[3]

The second paragraph in the Defendant's Second Request for Production asks for production of the Plaintiff's actual "computers, cell phones, laptops, smart phones, or similar electronic devices used by, owned by, or in any way accessible by Chelsea Davenport to gain access or post any material on any social networking sites or blogs, including but not limited Facebook.com, Myspace.com, Twitter.com, or any similar websites."[4] Again, this request for production is clearly overbroad and redundant of the previous production request, not likely to lead to admissible evidence and would encompass any and all private communications made by the Plaintiff which have no bearing on this action.

The Defendant bears the burden to providing this Court with a threshold showing ***that all*** the requested information is reasonably calculated to lead to the discovery of admissible evidence. The Defendant has failed to meet that burden. The Defendant has only demonstrated that the Plaintiff has a Facebook account and that she has posted photographs on her Facebook account.[5] The Defendant has failed to plead any facts which enables this Court to determine whether ***all*** the photographs Ms. Davenport has posted would lead to the discovery of admissible evidence. The

---

[3]*See* Defendant's Motion to Compel Discovery (Doc. 22).

[4]*See* Defendant's Motion to Compel Discovery, (Attached as Exhibit "A" to Defendant's Motion) (Doc. 22).

[5]*See* Defendant's Motion to Compel Discovery (Doc. 22, ¶4).

Plaintiff has requested the Defendant to limit its request to only photographs in which the Plaintiff has posted in which she is actually depicted, but the Defendant has rejected this compromise.

Accordingly, the Plaintiff respectfully requests this Court to deny the Defendant's Motion and discovery production requests as framed.

II. **Balancing Discovery Requests to Account for Potential Relevancy**

Recently, due to evolving public policy concerns, courts have been struggling to find a balanced approach to discovery that takes into account the potential relevancy of social networking posts and the individual privacy issues at stake. See Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. Kan. L. Rev. 1279, 1290-95 (2010).

In *McCann v. Harleysville Ins. Co. of New York*, 78 AD3d 1524, 910 N.Y.S.2d 614 (N.Y. App.Div. 2010), the court upheld the denial of a motion to compel Facebook information not on grounds of privacy or privilege, but because the defendant "failed to establish a factual predicate with respect to the relevancy of the evidence," finding that "defendant essentially sought permission to conduct 'a fishing expedition' into plaintiff's Facebook account based on the mere hope of finding relevant evidence." *Id.* at 1525. at 1525.

In *Simply Storage*, the case the Defendant cites in its Motion to Compel, the plaintiff alleged mental and emotional harm. *See E.E.O.C. v. Simply Storage Mgmt. LLC*, 270 F.R.D. 430, 434 (S.D. Ind. May 11, 2010). The district court recognized that Facebook's "privacy" settings do not, on their own, always shield communications from discovery. *Id*. However, the *Simply Storage* court points out that "the simple fact that a claimant has had social communications is not necessarily probative[.]" *Id*. at 435 (emphasis original). "Although . . .the contours of social communications relevant to a claimant's mental and emotional health are difficult to define, that does not mean that everything must be disclosed." *Id*. at 434.

The Plaintiff concedes that she has put her physical condition at issue, but she does not claim that she is bedridden, or that she is incapable of leaving her house or participating in modest social activities. Nevertheless, the Defendant does not have a generalized right to rummage at will through information that the Plaintiff has limited from public view. *Tompkins v. Detroit Metro. Airport*, 2012 U.S. Dist. LEXIS 5749, 4-5 (E.D. Mich. Jan. 18, 2012). "The simple fact that a claimant has had social communications is not necessarily probative of the particular mental and emotional health matters at issue in the case. Rather, it must be the substance of the communication that determines relevance." *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 435 (S.D. Ind. 2010) quoting *Rozell v. Ross-Holst*, 2006 U.S. Dist. LEXIS 2277, 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006).

As the *Rozell* court put it,

> To be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of every thought she may have reduced to writing or, indeed, the deposition of everyone she may have talked to.

2006 U.S. Dist. LEXIS 2277, [WL] at *3-4.

III. <u>The Defendant Has Failed to Make a Threshold Showing</u>

Consistent with Rule 26(b) and with the cases cited by both Plaintiff and Defendant, there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence. Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in Plaintiff's Facebook account. Accordingly, the Plaintiff is agreeable to producing photographs which she has uploaded to her Facebook account in which she is depicted.

The Defendant has also requested production of any photographs in which the Plaintiff has

been tagged.[6]

The same test set forth above can be used to determine whether particular pictures should be produced. For example, at stated by the court in *Simply Storage*, pictures of the Plaintiff taken during the relevant time period and posted on a Plaintiff's profile will generally be discoverable because the context of the picture and the claimant's appearance may reveal the claimant's emotional or mental status. *Supra*, at 436. On the other hand, a picture posted on a third party's profile in which a claimant is merely "tagged," is less likely to be relevant. *EEOC v. Simply Storage Mgmt*., 270 F.R.D. 430, 436 (S.D. Ind. 2010). Accordingly, requiring the Plaintiff to produce photographs in which she has merely been "tagged" is overly broad and not narrowly tailored to likely lead to admissible evidence.

IV. Conclusion

The Defendant's Motion asks the Court to compel Ms. Davenport to produce every and all photograph she has ever posted on her Facebook account since this crash. The Defendant has further requested all of Ms. Davenport's computers, cell phones, laptops, smart phones, or similar electronic devices used to post any material of any kind to her Facebook account. The Defendant's overly broad and blanket requests are not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the Plaintiff respectfully requests this Court to deny the Defendant's Motion and discovery production requests as framed.

---

[6]"Tagging" is the process by which a third party posts a picture and links people in the picture to their profiles so that the picture will appear in the profiles of the person who "tagged" the people in the picture, as well as on the profiles of the people who were identified in the picture.

Respectfully submitted this 14th day of February, 2012.

BLOCK & IRACKI, P.A.

s/ Daniel A. Iracki
ERIC S. BLOCK
Florida Bar No.: 0915531
DANIEL A. IRACKI
Florida Bar No.: 0041212
6817 Southpoint Parkway, Ste. 2502
Jacksonville, Florida 32216
TEL.: (904) 475-9400
FAX: (904) 475-9411
Attorneys for Plaintiff
eblock@ericblocklaw.com
diracki@ericblocklaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail to Jeffrey Humphries, Esq., Tiffany Jones, Esq., O'Hara Law Firm, 4811 Beach Blvd., Ste. 303, Jacksonville, FL 32207, this 14th day of February, 2012.

s/ Daniel A. Iracki
Attorney