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Judge: Privacy on Social Networking Sites is "Wishful Thinking"

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Many a "sick" employee, job seeker or college applicant has discovered that what happens on Facebook or Twitter often doesn't stay on Facebook or Twitter. Now parties to lawsuits are finding the same thing.

A Suffolk County, New York trial judge recently ruled that the private areas of a plaintiff's Facebook and MySpace profiles could be discovered by the defendants in her personal injury suit to prove she wasn't injured as badly as she claimed.

In Romano v. Steelcase , Kathleen Romano fell off a desk chair at the college where she was employed. She sued the manufacturer and distributor for making a defective product, claiming permanent neck and back injuries that largely confined her to home or bed, and reduced her quality of life. Yet, the public pages of her Facebook and MySpace pages showed her happily traveling to Florida and Pennsylvania during times she claimed she was incapacitated.

The defendant then requested consent from Ms. Romano to access the private sections of her social networking sites to disprove the extent of her injuries. She refused, and the defendant filed a motion to show cause why this information should not be turned over.

Ms. Romano's attorneys argued that she had a reasonable expectation of privacy in her home computer and that the request was merely intended to intimidate and harass her.

Facebook also opposed the request, saying that if it provided a subscriber's account information without consent, it would be violating the federal Stored Communications Act. This Act prohibits a social networking site from "producing a non-consenting subscriber's communications even when those communications are sought pursuant to a court order or subpoena," Facebook argued in court papers.

The judge found that this discovery request was reasonably related to plaintiff's own claim of injuries (i.e., she put her physical condition at issue in the court case), and that she had no expectation of privacy:

Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy. In this regard, MySpace warns users not to forget that their profiles and MySpace forums are public spaces, and Facebook's privacy policy set forth, *inter alia*, that:

You post User Content . . . on the Site at your own risk. Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable.

Further that:

When you use Facebook, certain information you post or share with third parties (e.g., a friend or someone in your network), such as personal information, comments, messages, photos, videos . . . may be shared with others in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if you disclose personal information in you profile or when posting comments, messages, photos, videos, Marketplace listing or other items, this information may become publicly available.

Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, "[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."

Further, Defendant's need for access to the information outweighs any privacy concerns that may be voiced by Plaintiff. Defendant has attempted to obtain the sought after information via other means e.g., via deposition and notice for discovery, however, these have proven to be inadequate since counsel has thwarted Defendant's attempt to question Plaintiff in this regard or to obtain authorizations from Plaintiff for the release of this information. The materials including photographs contained on these sites may be relevant to the issue of damages and may disprove Plaintiff's claims. Without access to these sites, Defendant will be at a distinct disadvantage in defending this action.

In another recent decision, McMillen v. Hummingbird Speedway, Inc., a Pennsylvania judge ordered another personal injury plaintiff who was alleging significant impairment to disclose his social media user names and passwords. As in the *Romano* case, the public portions of this plaintiff's social networking sites revealed activities that contradicted the plaintiff's claimed injuries. The defendants were then allowed access to the private areas of the plaintiff's accounts and the plaintiff was ordered not to delete or change content.