PRESS RELEASES

At The Crossroads Of Privacy Interests In Social Media and What Is Discoverable Under Florida Law

Social Media posts by the Plaintiff ARE Discoverable.

Nicolette John and Tom Paradise (Vernis & Bowling of Broward) represented Target Corporation and successfully defended against an appeal (Writ of Certiorari) filed by a Plaintiff who was represented by the law firm of Greenspoon Marder P.A., in a case where a personal injury Plaintiff objected to providing photographs which she had posted to Facebook. The Plaintiff, who was making a claim for personal injuries, mental anguish, and pain and suffering, was allegedly involved in a slip and fall incident that occurred at a Target store. We sought to compel the production of the photographs posted to the Plaintiff's Facebook account and provided the trial court with evidence from video surveillance showing the Plaintiff participating in activities which called into question the true extent of the injury the Plaintiff was claiming. The Plaintiff objected but the trial court overruled the Plaintiff's objections and ordered the production of any photographs which depict the Plaintiff posted on her social media accounts as well as on her cell phone.

The Plaintiff immediately appealed and filed the Writ to the Fourth District Court of Appeals with regard to her social media postings only, and did not address the ruling as it related to her cell phone. In the Writ, the Plaintiff claimed that her Facebook settings were set to private and that therefore the trial court's order unconstitutionally invaded her right to privacy and violated the Federal Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2712.

In its 11 page detailed opinion the appellate court ruled that the photographs being sought were reasonably calculated to lead to the discovery of admissible evidence as they are "powerfully relevant to the damage issues in the lawsuit" and further stated that "there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media."

The appellate court agreed with our position that the Plaintiff's privacy interest in such posted photographs was minimal, if any. The court stated that "before the right

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to privacy attaches, there must exist a legitimate expectation of privacy" and that they "agree with those cases concluding that, generally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established." The court held that the expectation that such information shared through social networking websites is private is not a reasonable one. As the Court aptly stated "Facebook itself does not guarantee privacy. By creating a Facebook account, a user acknowledges that her personal information would be shared with others. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist."

As to Plaintiff claim regarding the Stored Communications Act (S.C.A.), 18 U.S.C. §§ 2701-2712, the Court ruled that the S.C.A. had no application to this case. The Court stated that "generally, the SCA prevents 'providers' of communication services from divulging private communications to certain entities and/or individuals". "The act does not apply to individuals who use the communications services provided" and "does not preclude civil discovery of a party's electronically stored communications which remain within the party's control even if they are maintained by a non-party service provider."

This is a case of first impression in Florida State court. Not only is our law firm pleased with the favorable, and what we believe to be the correct result of this appeal, we are also very happy that the courts in Florida now have a definitive rule to follow with regard to what is discoverable in terms of the newly emerging issue of social media in the context of personal injury cases. Before this ruling, the trial courts throughout the State of Florida varied significantly in terms of what was discoverable. There is now a brighter line for the courts to follow.

The case is Maria F. Leon Nucci and Henry Leon v. Target Corp. et al., Fourth District Court of Appeal of the State of Florida; Case Number: 4D14-138. .