

PROTHONOTARY  
FRANKLIN COUNTY PA

2011 DEC -8 P 1:05

LINDA L. BEARD  
PROTHONOTARY

DEPUTY \_\_\_\_\_ *Sj*

**THE COURT OF COMMON PLEAS OF THE 39<sup>th</sup> JUDICIAL DISTRICT  
OF PENNSYLVANIA – FRANKLIN COUNTY BRANCH**

James A. Arcq, Sr.,  
Plaintiff

Civil

v.

No. 2008-2430

Robert R. Fields III, Grove US LLC,  
And The Manitowoc Co., Inc.,  
Defendants

Judge Douglas W. Herman

**ORDER**

NOW THIS 7<sup>th</sup> day of December 2011, upon review and consideration of the Defendants', *Motion to Compel* regarding information contained in social networking profiles and the Plaintiff's response thereto:

**THE COURT HEREBY ORDERS** that Defendant's motion is DENIED for reasons stated in the attached opinion.

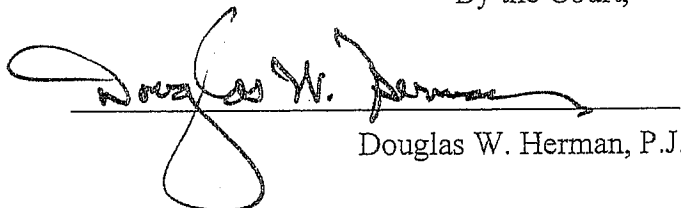
*Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2), (b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Opinion and*

**ATTEST A TRUE COPY**

*Shelley R. Perkins*  
LINDA L. BEARD, PROTHONOTARY

*Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.*

By the Court,

A handwritten signature in black ink, appearing to read "Douglas W. Herman", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Douglas W. Herman, P.J.

*The Prothonotary shall give notice to:*  
Matthew Crosby, Esq., Attorney for Plaintiff  
James DeCinti, Esq., Attorney for Defendant

## Procedural History

This action arose from an automobile collision that occurred on June 26, 2006. The Plaintiff, James A. Arcq, Sr., has alleged that Defendant, Robert R. Fields, the driver of the other vehicle was negligent and that Defendant, Groves US, LLC, is vicariously liable as Mr. Fields' employer. Plaintiff seeks damages for personal injuries which include continuing medical care, disfigurement, and infertility, among others.

## Discussion

Defendant's motion seeks an Order of Court granting Defendant access to Plaintiff's social networking website profiles. Defendant's motion alleges that "Plaintiff has put his medical, physical, mental, and social conditions at issue in this case." (Def. Motion to Compel, ¶ 9). At a deposition, Plaintiff testified that he is incapable of participating in certain activities as a result of the accident. (Id. at ¶ 10). Defendant "believe[s] and therefore aver[s] that Plaintiff" is a member of social networking websites such as MySpace, FaceBook, LinkedIn, Twitter, and the like. (Id. at ¶ 12 and 13). Defendant has sought information contained on Plaintiff's social networking profiles by interrogatories.<sup>1</sup> Plaintiff objected to the request, responding that the request is not reasonably calculated to lead to discoverable evidence and because the Plaintiff has a reasonable expectation of privacy in this information. (See Motion to Compel at Exhibit B).

As a general rule on discovery, Pa. R. Civ. P. 4003.1(a) dictates that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Further, Pa. R. Civ. P. 4003.1(b) provides that the information sought must be "reasonably calculated to lead to the discovery of admissible evidence."

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<sup>1</sup> Interrogatory 1 asked for the username and password to any social networking website to which Plaintiff belongs. Interrogatory 2 requested a copy of "any and all online messages, photographs, videos and online communications" relevant to the pending matter. (See Motion to Compel at Exhibit A).

We note the void of not only binding authority on this emerging area of discovery, but also persuasive authority. We are not without some guidance, however.

Defendant has cited two Pennsylvania Court of Common Pleas cases in which similar requests for information were granted. McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD, 2010 WL 4403285 (Pa. C.P. Jefferson, Sept. 9, 2010) and Zimmerman v. Weis Markets, No. CV-09-1535, 2011 WL 2065410 (Pa. C.P. Northumberland May 19, 2011). Defendant has also cited a New York case, Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (Sup. Ct. Suffolk 2011), upon which the Zimmerman Court relied. In all of these cases, a plaintiff was suspected of exaggerating his or her injuries because they had posted certain comments or photos on the public portion of their social networking website profiles. Defendant viewed these postings and sought access to the private portion of the profile believing that there would be additional information via communications with friends of the plaintiff or postings that took place on the website that would be relevant. The plaintiffs argued that these communications were confidential and therefore privileged. The courts found that no social networking privilege or expectation of privacy could exist as the Terms of Service of FaceBook and MySpace warn users that information may be shared with third parties, disclosed by the website operators in criminal or civil litigation, or monitored to prevent fraud or illegality. See McMillen, No. 113-2010 CD, at 2-5.

Defendant now seeks that this Court compel Plaintiff to grant Defendant access to his social networking profiles in light of the reasoning contained in these foregoing cases. We find that there lies one glaring, distinguishing factor that prevents us from doing so: Defendant's request is not the result of viewing the public portion of Plaintiff's profile.

In analyzing the reasoning in the cases discussed above, it has become apparent that the courts granted the Motions to Compel because the party seeking information had a basis for their request. The parties had viewed the *public portion* of opposing parties' social networking profile which contained relevant information and therefore had some reason to believe the private portion might contain information as well. Their requests were reasonably calculated to yield information that would lead to admissible evidence.

Here, Defendant has not alleged any basis for believing that Plaintiff's profiles contain any information relevant to the pending matter. Defendant has not alleged that information was seen on the public portion of any of Plaintiff's profiles. In fact, Defendant does not even seem sure if Plaintiff is a member of any social networking websites.<sup>2</sup> Though there have been instances where a defendant has been granted access to such information, those defendants have had a basis for their request. It appears here that Defendant does not have such a basis and the request is not reasonably calculated to lead to the discovery of evidence. While it is not an absolute necessity that a plaintiff have a public profile before a defendant can be given access to the private portion, it is necessary that the defendant have *some* good faith belief that the private profile may contain information. Here, Defendant had no reason to believe so, therefore the Motion to Compel will be denied.

In further support of our denial, we note this Court's recent Opinion in Largent v. Reed, No. 2009-1823 (Pa. C.P. Franklin Nov. 8, 2011) written by Judge Richard Walsh. In that Opinion, the Court held that no privilege exists to protect information on a social networking profile since users are notified that their information may be shared with third parties and that the information sought is relevant. We distinguish our case from Largent because Judge Walsh

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<sup>2</sup> Defendant's Motion to Compel states at paragraph 12, "It is believed and therefore averred that Plaintiff, James Arcq is a subscriber to and participates in the social media site known as MySpace." Defendant 'believes' the same to be true for Facebook, LinkedIn, and Twitter.

reasoned that since the defendant had viewed a public portion of the profile, then a good faith basis existed for the request to access the private portion. In essence, viewing relevant information on the public profile acts as a gateway to the private profile. As previously stated, Defendant has not viewed a public profile and the Court cannot simply assume that Plaintiff has posted relevant information on his private profile.

#### **Conclusion**

Defendant's Motion to Compel will be DENIED as Defendant has failed to show any reasonable basis to believe that access to Plaintiff's social networking profiles would yield any relevant information.