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The Discoverability of Private Social Media Content: Are Pennsylvania Trial Courts Going Too Far by Granting Litigants Unfettered Access to Their Opponents' Social Media Accounts?

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The Discoverability of Private Social Media Content: Are Pennsylvania Trial Courts Going Too Far by Granting Litigants Unfettered Access to Their Opponents' Social Media Accounts?

*Timothy C. Quinn**

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I. INTRODUCTION

Patty Plaintiff was driving on a Pennsylvania road when Denny Defendant ran a red light and struck Plaintiff's vehicle, causing Patty to lose control of her car and strike a pole. Patty sustained injuries to her neck, back, and face. She subsequently sued Denny for damages, including lost wages, lost future earning capacity, pain and suffering, loss of ability to enjoy the pleasures of life, and scarring and embarrassment. In addition, Patty's husband filed a claim against Denny for loss of consortium. Denny's counsel conceded Denny's negligence, leaving only the amount and extent of damages at issue. In the discovery phase of litigation, Patty claimed that she could no longer participate in certain physical activities because of her injured neck and back and that her enjoyment of life had been impaired. In addition, Patty's husband claimed that he no longer takes pleasure in his wife's companionship and affection since the accident. While deposing Patty, Denny's counsel found out that Patty has a Facebook account and a Twitter account. However, certain content on Patty's Facebook account is available only to those people whom Patty designates as a "friend," while other information is available for anyone to see. The information on her Twitter account is private: only users whom Patty allows to "follow" her can view it.

A week after Patty's deposition, Denny's attorney found that the public portion of Patty's Facebook account featured a profile picture of Patty and her husband riding a brand new rollercoaster at the local amusement park. Unbeknownst to Denny's counsel, the private portion of Patty's Facebook account contains more pictures of Patty enjoying physical activities, and her private "status updates" and "tweets" indicate that she had recently participated in other physical activities and social events. Based on Patty's public profile picture, Denny's counsel sent Patty additional interrogatories, asking Patty to provide the usernames and passwords to all of her social media accounts. In addition, Denny's counsel sent authorizations for Patty to sign that would allow the custodian of records at the social networking companies to release all of the information contained on Patty's accounts. Patty's counsel refused, arguing that the requests were not reasonably calculated to lead to the discovery of admissible evidence; were unduly broad and burdensome; sought irrelevant information; and would cause an unreasonable annoyance, burden, and/or embarrassment. In

response, Defendant's counsel filed a motion to compel the private social media content, asking the court to order Plaintiff to turn over her usernames and passwords and to sign the authorizations.

How should a Pennsylvania Court of Common Pleas judge rule on these matters? Should the judge grant access to the non-public content, or is it subject to a privacy privilege? Should Denny's counsel only have access to information from the private accounts if the public portions share information inconsistent with statements made by Patty, or should Denny be allowed access to *all* of Patty's private content regardless of the public content? Who determines whether the information contained on the private portion of the social media accounts are relevant? What if Patty never shared information with the public, and Denny's counsel had no idea what information is contained on the private accounts and bases its requests on a mere suspicion that the accounts contain relevant information?

Surprisingly, these issues have not been widely litigated in Pennsylvania. In fact, only thirteen (known) Pennsylvania cases have addressed some of these issues.¹ Under the particular circumstances of each case, at least six trial court judges have ordered discovery of private social media content,² six others have ruled that the private content was not discoverable,³ and one has

1. With the popularity of social media, it is likely that there are many more trial courts that have decided these issues. This comment discusses the thirteen cases actually known to the author. For a running "scorecard" of the social media discovery cases, see Daniel E. Cummins, *Facebook Discovery Scorecard*, TORT TALK (last updated Dec. 4, 2012), <http://www.torttalk.com/2012/01/facebook-discovery-scorecard.html>. On his blog, Attorney Daniel Cummins provides copies of some of the trial courts' orders and opinions that have decided the issue and some motions/filings made by the litigants. The blog also provides a sample motion to compel a plaintiff to produce Facebook log-in information, a proposed order of court, and a sample brief in support of the motion to compel.

2. *Coy-Burt v. Hoskins*, No. 090901827 (Pa. Ct. Com. Pl. Phila. Apr. 28, 2010) (order granting defendant's motion for reconsideration of defendant's motion to compel); *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Ct. Com. Pl. Jefferson Sept. 9, 2010) (opinion and order granting defendant's motion to compel); *Zimmerman v. Weis Mkts., Inc.*, No. CV-09-1535, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Pa. Ct. Com. Pl. Northumberland May 19, 2011) (opinion and order granting defendant's motion to compel); *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (Pa. Ct. Com. Pl. Franklin Nov. 8, 2011) (opinion and order granting defendant's motion to compel); *Gallagher v. Urbanovich*, No. 2010-33418 (Pa. Ct. Com. Pl. Montgomery Feb. 27, 2012) (order granting plaintiff's motion to compel); *Mazzarella v. Mount Airy #1*, No. 1798 Civil 2009 (Pa. Ct. Com. Pl. Monroe Nov. 7, 2012) (order granting defendant's motion to compel).

3. *Kennedy v. Norfolk S. Corp.*, No. 100201473, 2011 WL 7110212 (Pa. Ct. Com. Pl. Phila. Jan. 4, 2011) (order denying defendant's motion to strike plaintiff's objections to supplemental interrogatories); *Piccolo v. Paterson*, No. 2009-04979, 2011 Pa. Dist. & Cnty. Dec. LEXIS 45 (Pa. Ct. Com. Pl. Bucks May 5, 2011) (order denying defendant's motion to compel); *Kalinowski v. Kirschenheiter*, No. 2010-06779 (Pa. Ct. Com. Pl. Luzerne Aug. 8,

ruled that the private content contained on one of the plaintiff's social media accounts was discoverable, while the private content contained on her other two other accounts were not.⁴ Seemingly, a heavyweight bout is taking place between personal injury attorneys and defense attorneys in Pennsylvania.⁵ To date, neither party has suffered a knockout blow, as Pennsylvania's appellate courts have yet to deliver a general rule on the scope of social media discovery.⁶ Eventually, a Pennsylvania appellate court will need to decide the scope of social media discovery because, to date, Pennsylvania trial courts that have decided the issue have circumvented *Pennsylvania Rules of Civil Procedure* and have not adhered to the typical way discovery is conducted. These trial courts have permitted litigants unfettered access to *all* of an opponent's social media content, including private information that might be completely irrelevant or embarrassing.

Should an appellate court decide to take on the issue, the outcome could have a far-reaching impact on litigation. As the use of social media continues to grow,⁷ social media accounts will become

2011) (order denying defendant's motion to compel but ordering plaintiff to preserve present Facebook or Myspace pages); *Arcq v. Fields*, No. 2008-2430 (Pa. Ct. Com. Pl. Franklin Dec. 7, 2011) (opinion and order denying defendant's motion to compel); *Martin v. Allstate Fire & Casualty Ins. Co.*, No. 110402438 (Pa. Ct. Com. Pl. Phila. Dec. 13, 2011) (order denying defendant's motion to compel); *Trail v. Lesko*, No. GD-10-017249, 2012 WL 2864004 (Pa. Ct. Com. Pl. Allegheny July 5, 2012) (order and opinion denying both plaintiff's and defendant's motions to compel).

4. *Simms v. Lewis*, No. 11961 CD 2011, 2012 WL 6755098 (Pa. Ct. Com. Pl. Indiana Oct. 10, 2012) (opinion and order granting in part and denying in part defendant's motion to compel).

5. See Ben Present, *Plaintiffs Score a Pair of Wins in Social Media Decisions*, THE LEGAL INTELLIGENCER (Dec. 20, 2011) (LEXIS, Legal Intelligencer); Ben Present, *Plaintiffs Win Round on Discovery of Facebook Pages*, THE LEGAL INTELLIGENCER (Jan. 3, 2012) (LEXIS, Legal Intelligencer).

6. One reason that an appellate court probably has not decided the issue yet is because "[g]enerally, a party can appeal only after entry of a final order, and an order compelling discovery is not a final order." *Gormley v. Edgar*, 995 A.2d 1197, 1200 (Pa. Super. Ct. 2010) (citing *Jones v. Faust*, 852 A.2d 1201, 1203 (Pa. Super. Ct. 2004)). Under certain situations, though, an interlocutory discovery order may be considered a collateral order and appealable under PA. R. APP. P. 313. *Id.*; see also *Feldman v. Ide*, 915 A.2d 1208, 1210-11 (Pa. Super. Ct. 2007) ("In order for an interlocutory order to be deemed collateral, there must be an order collateral to the main cause of action; the right involved must be too important for review to be denied; and the question presented must be such that if review is postponed until final judgment the claim will be irreparably lost." (quoting *Ben v. Schwartz*, 729 A.2d 547, 550 (Pa. 1999))).

7. Facebook's website indicates that it currently has over 901 million active monthly users.

Key	Facts-Facebook	Newsroom,
http://newsroom.fb.com/content/default.aspx?NewsAreaId=22 (last visited June 12, 2012).		

 Twitter currently has over 140 million users. *Twitter Turns Six*, TWITTER BLOG (Mar. 21, 2012, 10:18 AM), <http://blog.twitter.com/2012/03/twitter-turns-six.html>. Myspace current-

an increasing concern for practicing attorneys, as more will begin to acknowledge that accounts may contain very relevant information and request the non-public content in discovery. Moreover, attorneys need to be aware that clients use social media and should advise them that information contained on the social media sites can be used against them.⁸

This Comment begins by examining the Pennsylvania Court of Common Pleas' decisions on whether private social media content is discoverable. The Comment will then set forth the factors that Pennsylvania courts should consider when deciding the proper scope of private social media discovery and discuss the proper methods of discovering the private content.⁹

II. THE PENNSYLVANIA COURT OF COMMON PLEAS' LEGAL HISTORY ON THE DISCOVERY OF PRIVATE SOCIAL MEDIA CONTENT

Generally, in Pennsylvania, "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party"¹⁰ The discovery requests must appear to be "reasonably calculated to lead to the discovery of admissible evidence."¹¹ As such, it follows that, as long as the information sought may be considered relevant and is not privileged, it generally is discoverable. Thus, Pennsylvania has liberal discov-

ly has over 25 million users. Wikipedia, <http://en.wikipedia.org/wiki/Myspace> (last visited June 12, 2012).

8. Sashe D. Dimitroff, *Social Media and Discovery*, THE ROLE OF TECHNOLOGY IN EVIDENCE COLLECTION (2011), available at 2011 WL 2941026, 3 ("Social networks represent a potential treasure trove of information for a litigant. As such, attorneys should always consider seeking discovery of the social networks of opposing parties or third parties. By equal measure, attorneys should consider what potentially relevant or damaging information exists on their clients' social media sites.")

9. The use of content gained from an opponent's social media page as evidence and the authentication of this evidence is beyond the scope of this Comment. For an insightful article on this issue, see Heather L. Griffith, *Understanding and Authenticating Evidence from Social Networking*, 7 WASH. J. L. TECH. & ARTS 209 (2012).

10. PA. R. CIV. P. 4003.1(a).

11. PA. R. CIV. P. 4003.1(b). Under PA. R. CIV. P. 4011, [n]o discovery . . . shall be permitted which (a) is sought in bad faith; (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party; (c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6; (d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or (e) would require the making of an unreasonable investigation by the deponent or any party or witness.

Id.

ery rules.¹² Pennsylvania trial courts have debated whether requests for signed authorizations consenting to the release of private content and for a user's log-in information are reasonably calculated to lead to the discovery of admissible evidence, whether the information sought would be relevant, and whether the private content should be considered confidential and/or privileged.

To date, only a small number of trial courts have decided the issue, and the decisions have fallen on both sides of the discovery fence. To boot, only six Court of Common Pleas judges have issued opinions along with their orders granting or denying the discovery requests.¹³ Although the decisions have been mixed, one general rule seems to be emerging from the trial courts' written opinions. This approach, referred to as the "threshold rule,"¹⁴ requires that the party requesting the private content make a threshold showing that the public portions of the user's social media account contain relevant information or that another good faith basis for requesting the information exists.¹⁵ Otherwise, the

12. See *PECO Energy Co. v. Ins. Co. of N. Am.*, 852 A.2d 1230, 1233 (Pa. Super. Ct. 2004); *George v. Schirra*, 814 A.2d 202, 204 (Pa. Super. Ct. 2002).

13. Four of the unpublished court opinions are discussed in the text of this Comment. Judge Wettick of the Allegheny County Court of Common Pleas and Judge Bianco of the Indiana Court of Common Pleas issued their opinions and orders on this matter after a majority of this Comment was written; therefore, their opinions are only briefly discussed in footnotes at the end of this Comment. See *Trail v. Lesko*, No. GD-10-017249, 2012 WL 2864004 (Pa. Ct. Com. Pl. Allegheny July 5, 2012) (order and opinion denying both plaintiffs and defendant's motions to compel), discussed *infra* note 240; *Simms v. Lewis*, No. 11961 CD 2011, 2012 WL 6755098 (Pa. Ct. Com. Pl. Indiana Oct. 10, 2012), discussed *infra* note 240. The other cases in which a trial court only issued an order unaccompanied by an opinion are discussed in footnotes, as they are less persuasive. Judge Williamson of the Monroe County Court of Common Pleas issued an order granting a plaintiff's motion to compel discovery of private social media content after a majority of this Comment was completed; therefore, the facts of the case are not included in the footnotes. See *Mazzarella v. Mount Airy #1*, No. 1798 Civil 2009 (Pa. Ct. Com. Pl. Monroe Nov. 7, 2012) (order granting plaintiff's motion to compel stating, "Plaintiff's argument of an expectation of privacy regarding her use of social media is misplaced. Those who elect to use social media, and place things on the internet for viewing, sharing and use with others, waives an expectation of privacy").

14. James P. Goslee, *Litigants Need to Exercise Extreme Caution When Posting to Social Networking Sites*, JETLAW (Apr. 13, 2012), www.jetlaw.org/?p=11217.

15. See, e.g., *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Ct. Com. Pl. Jefferson Sept. 9, 2010) (opinion and order granting defendant's motion to compel); *Zimmerman v. Weis Mkts., Inc.*, No. CV-09-1535, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Pa. Ct. Com. Pl. Northumberland May 19, 2011) (opinion and order granting defendant's motion to compel); *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (Pa. Ct. Com. Pl. Franklin Nov. 7, 2011) (opinion and order granting defendant's motion to compel); *Simms v. Lewis*, No. 11961 CD 2011, 2012 WL 6755098 (Pa. Ct. Com. Pl. Indiana Oct. 10, 2012) (opinion and order granting in part and denying in part defendant's motion to compel).

user's private social media content is not discoverable.¹⁶ However, at least two trial courts have apparently taken a less restrictive approach and allowed discovery of private content without requiring any threshold showing of relevance in the user's publicly viewable information.¹⁷ In addition, at least two trial courts have declined to order the discovery of private social media content, even though the public content may arguably have been considered relevant.¹⁸

McMillen v. Hummingbird Speedway, Inc. marked the first case in which a Pennsylvania Court of Common Pleas judge issued an opinion accompanying an order that granted a defendant's motion to compel discovery of a plaintiff's social media user names and passwords.¹⁹ In *McMillen*, the plaintiff allegedly sustained inju-

16. *Arcq v. Fields*, No. 2008-2430 (Pa. Ct. Com. Pl. Franklin Dec. 7, 2011) (opinion and order denying defendant's motion to compel).

17. *See, e.g., Goslee, supra* note 14 (discussing *Gallagher v. Urbanovich*, No. 2010-33418 (Pa. Ct. Com. Pl. Montgomery Feb. 27, 2012) (order granting plaintiff's motion to compel); *see also Coy-Burt v. Hoskins*, No. 090901827 (Pa. Ct. Com. Pl. Phila. Apr. 28, 2010) (order granting defendant's motion for reconsideration of defendant's motion to compel), discussed *infra*, note 19.

18. *But see, e.g., Kennedy v. Norfolk S. Corp.*, No. 100201473, 2011 WL 7110212 (Pa. Ct. Com. Pl. Phila. Jan. 4, 2011) (order denying defendant's motion to strike plaintiff's objections to supplemental interrogatories), discussed *infra* note 38; *Kalinowski v. Kirschenheiter*, No. 2010-06779 (Pa. Ct. Com. Pl. Luzerne Aug. 8, 2011) (order denying defendant's motion to compel but ordering plaintiff to preserve present Facebook or Myspace pages), discussed *infra* note 86.

19. No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Ct. Com. Pl. Jefferson Sept. 9, 2010) (opinion and order granting defendant's motion to compel). Before *McMillen* was decided, at least one other Pennsylvania trial court considered the discoverability of private social media content. *See Coy-Burt*, at No. 090901827.

In *Coy-Burt*, Judge Allen of the Philadelphia County Court of Common Pleas ordered the plaintiff to execute an authorization to release private Facebook information to Facebook's custodian of records. *Id.* However, Judge Allen's order was not accompanied with a written opinion. The judge initially denied the motion to compel, *Coy-Burt*, No. 090901827 (Pa. Ct. Com. Pl. Phila. Mar. 17, 2010), but then granted the defendant's motion for reconsideration after the proposed order added a provision that required the private Facebook content be subject to a confidentiality agreement between the parties. *Coy-Burt*, No. 090901827 (Pa. Ct. Com. Pl. Phila. Apr. 28, 2010) (order granting defendant's motion for reconsideration of defendant's motion to compel). This author is unaware of the oral arguments made at motion's court, but copies of defense counsel's motion for reconsideration and memorandum of law in support of its motion for reconsideration indicate that the defendant never made an initial showing of relevant information contained on the plaintiff's publically viewable Facebook page. *See Defendant's Motion for Reconsideration, Coy-Burt*, No. 090901827; *Defendant's Memorandum of Law in Support of Motion for Reconsideration, Coy-Burt*, No. 090901827. Defense counsel's motion simply indicated that, because the plaintiff put her physical and mental conditions at issue, the Facebook content was discoverable under Pennsylvania law because the request was reasonably calculated to lead to the discovery of admissible evidence relevant to the plaintiff's claims of liability and damages. *Motion for Reconsideration* ¶ 10, *Coy-Burt*, No. 090901827 (citing *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-cv-01958-WYD-MJW, 2009 WL 1067018 (D. Colo. Apr. 21,

ries after the car he drove in a stock car race was struck from behind during a cool-down lap.²⁰ The plaintiff filed suit against the racetrack, the driver of the vehicle that struck him, and two others, alleging “substantial injuries, including possible permanent impairment, loss and impairment of general health, strength, and vitality, and inability to enjoy certain pleasures of life.”²¹ In its interrogatories, the racetrack defendant asked the plaintiff whether he belonged to any social media sites and, if so, to provide the names of the sites, his usernames, and his passwords.²² The plaintiff responded that he uses Facebook and Myspace, but that he would not provide his log-in names or passwords, claiming that information is confidential.²³ After the racetrack defendant viewed the public portion of the plaintiff’s Facebook page and discovered comments the plaintiff made about going on a fishing trip and attending the Daytona 500, three of the defendants filed a motion to compel the plaintiff to produce his usernames, log-in names, and passwords.²⁴ Defendants’ counsel argued that the private portions of the plaintiff’s social media pages might contain further relevant content that could shed light on plaintiff’s claims of damages and injury and possibly impeach and contradict the plaintiff’s claims.²⁵ In response, without filing a written brief in opposition to the motion,²⁶ the plaintiff essentially asked the court to find that the private content on the sites comprised of privileged communications, which are confidential and protected against disclosure.²⁷

The court began its discussion by laying out Pennsylvania’s broad discovery rules and stating that nearly anything relevant is discoverable because Pennsylvania only recognizes a limited number of privileges.²⁸ The court stated that the legislature has never

2009). Even without the initial showing of relevant public Facebook information in the motion, the court granted the defendant’s motion for reconsideration. *Id.*

20. 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *1.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at *1-2.

25. *Id.* at *2.

26. *Id.*

27. *Id.* at *3. The plaintiff actually only wanted the court to recognize the plaintiff’s social media content as confidential and protected against disclosure. *Id.* Instead, the court stated that because the only information not discoverable under PA. R. CIV. P. 4003.1 is privileged information, the plaintiff was essentially asking the court to recognize a privilege for the private social media content. *Id.*

28. *Id.* at *2.

created a privilege for private social media content and that, “[a]s a general matter . . . the law disapproves privileges.”²⁹ The court also pointed out that Pennsylvania courts have routinely declined to grant new privileges.³⁰ Here, the plaintiff was unable to establish the elements necessary to establish a new privilege.³¹ The court reasoned that the Terms and Privacy Policy of Facebook puts its users “on notice that regardless of their subjective intentions when sharing information, their communications could nonetheless be disseminated by the friends with whom they share it, or even by Facebook at its discretion.”³² Likewise, the court explained that Myspace’s Terms and Conditions indicate that Myspace employees have “unfettered access to a member’s communications, and may, with his or her implied consent, scrutinize those communications at any time and for any reason.”³³ For these reasons, the court determined Facebook and Myspace operators’ complete access to a user’s social media content negated the plaintiff’s argument that his communications were confidential.³⁴

Ultimately, the court held

Where there is an indication that a person’s social network sites contain information relevant to the prosecution or defense of a lawsuit . . . and given [that Pennsylvania courts] should allow litigants to utilize “all rational means for ascertaining the truth,” and the law’s general dispreference for the

29. *Id.* at *3 (citing *Joe v. Prison Health Servs.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001)).

30. *Id.* at *4. “[O]ur courts have routinely declined to extend the scope of existing privileges beyond their historical purpose and application or the strictures of the statutory language creating them.” *Id.*

31. *Id.* at *5. The court indicated:

[A] new privilege ought not be recognized unless the claimant can establish four things: 1) that his communications originated in the confidence that they would not be disclosed; 2) that the element of confidentiality is essential to fully and satisfactorily maintain the relationship between the affected parties; 3) community agreement that the relationship must be sedulously fostered; and 4) that the injury potentially sustained to the relationship because of the disclosure of the communication outweighs the benefit of correctly disposing of litigation.

Id. (citing *Matter of Adoption of Embick*, 506 A.2d 455, 461 (Pa. Super. Ct. 1986), *appeal denied*, 520 A.2d 1385 (Pa. 1987)). The court determined that the plaintiff was not able to establish any of the four elements and that any harm that might be realized by the social network users is “undoubtedly outweighed by the benefit of correctly disposing of litigation.” *Id.* at *5, *11.

32. *Id.* at *7.

33. *Id.* at *8.

34. *Id.* at *8-9. The court stated, “it is clear that no person choosing Myspace or Facebook as a communications forum could reasonably expect that his communications would remain confidential . . .” *Id.* at *9-10.

allowance of privileges, access to those sites should be freely granted.³⁵

Here, a defendant viewed content on the plaintiff's public Facebook page that might have shown that the plaintiff exaggerated his injuries. The court indicated that any lack of injury is clearly relevant to the plaintiff's claim of damages, and that it is reasonable to assume that the plaintiff's private social media pages may also contain relevant information regarding the veracity of his injuries.³⁶ Therefore, the court granted the defendants' motion to compel and ordered the plaintiff to provide his Facebook and Myspace usernames and passwords to counsel for the defendants.³⁷

Relying on *McMillen*, the next case in which a Pennsylvania Court of Common Pleas judge issued a comprehensive opinion along with an order granting a motion to compel discovery of private social media content was *Zimmerman v. Weis Markets, Inc.*³⁸

35. *Id.* at *12 (quoting *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1027 (Pa. Commw. Ct. 2006)).

36. *Id.* at *11-12.

37. *Id.* at *13. The defendants' attorneys were ordered to not divulge the usernames and passwords to the defendants themselves. *Id.* The court also ordered the plaintiff to not delete or alter the existing information contained on his accounts. *Id.*

38. No. CV-09-1535, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Pa. Ct. Com. Pl. Northumberland May 19, 2011) (opinion and order granting defendant's motion to compel). Before *Zimmerman* and after *McMillen*, at least two other trial court judges issued orders denying the discoverability of private social media content. See *Kennedy v. Norfolk S. Corp.*, No. 100201473, 2011 WL 7110212 (Pa. Ct. Com. Pl. Phila. Jan. 4, 2011) (order denying defendant's motion to strike plaintiff's objections to supplemental interrogatories); *Piccolo v. Paterson*, No. 2009-04979, 2011 Pa. Dist. & Cnty. Dec. LEXIS 45 (Ct. Com. Pl. Bucks May 5, 2011) (order denying defendant's motion to compel). However, neither order came with a written opinion. In any event, information regarding these cases can be gleaned from the parties' briefs and/or news articles.

In *Kennedy*, the first (known) Pennsylvania trial court to deny discovery of social media content, the plaintiff brought suit for injuries and economic loss and also made a claim for loss of life's pleasures after he was involved in an accident. See Defendant's Memorandum of Law in Support of Its Motion to Strike Objections to Supplemental Interrogatories at 1, *Kennedy*, No. 100201473, 2010 WL 8357534 (Feb. 2010). In a deposition, the plaintiff claimed he could no longer go "skeet-shooting" due to the accident; however, the public portion of his Facebook page allegedly listed "shooting as one of his 'activities.'" *Id.* With this information, defense counsel issued supplemental interrogatories requesting the plaintiff to provide his username, log-in name, and password for all the social networking sites that he used. *Id.* at 2. The plaintiff objected on the grounds that the request was made in bad faith and for the purpose of harassing the plaintiff and that the information requested was outside the scope of discovery. *Id.* Citing *McMillen*, defense counsel argued that "where the publically accessible page of a Plaintiff's Facebook page contains information which is relevant to the subject matter of the litigation, the plaintiffs [sic] Facebook user/log-in name and password are discoverable." *Id.* (emphasis omitted). The defendant argued that the Facebook content is relevant to the veracity of the plaintiff's claimed limi-

In *Zimmerman*, the plaintiff brought suit against the defendant for injuries he sustained while operating a forklift at the defendant's warehouse.³⁹ After reviewing the public portion of the plaintiff's Facebook page, the defendant discovered that the plaintiff's "interests" included "ridin" [sic] and "bike stunts."⁴⁰ The public portion of the plaintiff's Myspace page contained photographs of the plaintiff wearing shorts in public with his scar from the accident plainly visible (even though the defendant claimed he did not wear shorts in public because he was embarrassed by the scar), photographs of the plaintiff with a black eye before and after the incident, and photographs of the plaintiff with his motorcycle before and after the incident.⁴¹ Based on this information, the defendant filed a Motion to Compel Disclosure and Preservation of Plaintiff's Facebook and Myspace Information, claiming that the private portions of the plaintiff's social media pages may contain other relevant information pertinent to the plaintiff's damage claims.⁴² In response, the plaintiff argued that his privacy interests outweighed any need to obtain the private content.⁴³

tation. *Id.* The court apparently disagreed and issued an order denying the defendant's motion to strike the plaintiff's objections. *Kennedy*, No. 100201473, 2011 WL 7110212.

In *Piccolo*, the plaintiff was injured in an automobile accident, and the defendant conceded negligence; the only issue to be decided was damages. Gina Passarella, *Facebook Postings Barred from Discovery in Accident Case*, THE LEGAL INTELLIGENCER (May 17, 2011) (LEXIS, Legal Intelligencer). Defense counsel wanted the plaintiff to accept a friend request in order to gain access to the plaintiff's Facebook postings and pictures. *Id.* The plaintiff denied the request citing PA. R. CIV. P. 4011(b) and arguing that the materiality and importance of the evidence sought was outweighed by the annoyance, embarrassment, oppression and burden to which it exposed the plaintiff. *Id.* The plaintiff argued that defense counsel only inquired about pictures the plaintiff posted on Facebook at the plaintiff's deposition and not about any textual postings. *Id.* According to the plaintiff, the defendant had already been provided with a complete photographic record of plaintiff's pre- and post-accident condition as reasonably could be expected, and any additional photos gleaned from her Facebook account were unnecessary. *Id.* Accordingly, the plaintiff argued that the defendant did not make a prima facie showing of the need for access to the non-public pages, nor did the plaintiff assert any likelihood that the request would lead to the discovery of any material evidence. *Id.* Seemingly, the trial court judge agreed, and denied the motion to compel—unfortunately, without a written opinion supporting the order. *Id.*

39. 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 at *1. The plaintiff sought damages for injuries to his leg, lost wages, lost earning capacity, pain and suffering, scarring and embarrassment. *Id.* The plaintiff claimed that his health was seriously and permanently impaired and that he "sustained a permanent diminution in the ability to enjoy life and life's pleasures." *Id.*

40. *Id.* at *1-2.

41. *Id.* at *2.

42. *Id.* at *2.

43. *Id.* The plaintiff also argued that the court should conduct its own *in camera* inspection of the private pages and decide itself what information is discoverable. *Id.* at n.2. The court rejected this argument, stating that any *in camera* review would be too time consuming and a waste of the court's resources. *Id.*

The court adopted the rationale and opinion of *McMillen* and granted the defendant's Motion to Compel.⁴⁴ However, unlike *McMillen*, the *Zimmerman* court addressed the plaintiff's contention that ordering him to produce his private social media content would violate his privacy interests and outweigh any need the defendant may have for the information.⁴⁵ In response, the court noted that the Fourth Amendment's right to privacy protects people, not places, and that the reasonableness standard of the right to privacy is applied in that manner.⁴⁶ The court indicated that, when the litigant chooses to disclose the information with others, privacy concerns are not as great as they would be otherwise.⁴⁷ The court then pointed out that both Facebook's and Myspace's policies do not guarantee complete privacy and that any content a user posts on these sites could become viewable by the public.⁴⁸

Like *McMillen*, the court determined that, because the content on the public portions of his Facebook and Myspace pages contained relevant information about his condition, "there is a reasonable likelihood of additional relevant and material information" being discovered on the private portions of his social media sites.⁴⁹ Because the plaintiff placed his physical condition at issue, voluntarily posted the pictures and information on the sites, and knew that his information could become publicly available, the court reasoned that he could not now claim he had a reasonable expectation of privacy.⁵⁰ The court then stated, "any relevant,

44. *Id.* at *4. The court agreed with *McMillen*, stating that "no privilege exists in Pennsylvania for information posted in the non-public sections of social media websites, liberal discovery is generally allowable, and the pursuit of truth as to alleged claims is a paramount ideal." *Id.* The court also adopted the holding and rationale of *Romano v. Steelcase, Inc.*, 907 N.Y.2d 650 (N.Y. Sup. Ct. Suffolk Cnty. 2010), and aptly compared *Romano* to the plaintiff's case. *Id.* at *4-9.

45. *Id.* at *7-12. The court noted that *McMillen* did not address the right to privacy issue, and only focused on whether a privilege for non-disclosure existed in Pennsylvania. *Id.* at *7 n.5.

46. *Id.* at *7-8 (citing *Romano*, 907 N.Y.2d at 655). In *Romano*, the court stated that [i]n determining whether a right to privacy exists via the Fourth Amendment, courts apply the reasonableness standard set forth in the concurring opinion of Justice Harlan in *Katz*: "first that a person have [sic] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."

Romano, 907 N.Y.2d at 655-56 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

47. See *Zimmerman*, 2011 Pa. Dist. & Cnty. Dec. LEXIS at *8 (citing *Romano*, 907 N.Y.2d at 656).

48. *Id.*

49. *Id.* at *10.

50. *Id.* at *9-10 (adopting the approach taken by *Romano*, 907 N.Y.2d at 656-57). The court reasoned that, "[b]y definition, a social networking site is the interactive sharing of

non-privileged information about one's life that is shared with others and can be gleaned by defendants from the internet is fair game in today's society.⁵¹ The court granted the defendant's Motion to Compel, and ordered the plaintiff to furnish the defendant with the usernames and passwords for his Facebook and Myspace accounts and to not delete or alter the information currently contained on the accounts.⁵²

Continuing the trend set forth in *McMillen* and *Zimmerman*, in probably the most comprehensive and expansive opinion dealing with the discoverability of private social media content in Pennsylvania, the next case in which a Pennsylvania Court of Common Pleas judge issued an opinion granting the discovery of private social media content was *Largent v. Reed*.⁵³ In *Largent*, the plaintiffs, a driver and passenger of a motorcycle, allegedly sustained injuries in a chain-reaction motor vehicle accident and brought suit against the drivers of the other two vehicles involved in the accident.⁵⁴ At the deposition of one of the plaintiffs, defense counsel discovered that the plaintiff had a Facebook account.⁵⁵ The plaintiff refused to voluntarily disclose her log-in information when defense counsel asked for it, which in turn prompted the defendant to file a motion to compel.⁵⁶ In the defendant's motion to compel, the defendant indicated that she was able to view photographs that the plaintiff posted on a Harley Davidson Member Forum and argued that she had a good faith belief that the private portion of the plaintiff's Facebook account may also contain relevant information necessary to the defendant's defense of the law-

your personal life with others; the recipients are not limited in what they do with such knowledge." *Id.* at *10.

51. *Id.* at *10. In a footnote, the court noted that litigants would not have access to an opponent's Facebook and Myspace information in every type of personal injury case where damages are sought. *Id.* n.8. The court stated that relief would only be granted in situations where the party seeking discovery has made "some threshold showing that the publicly accessible portions of any social networking site contain information that would suggest that further relevant postings are likely to be found by access to the non-public portions." *Id.* (citing *McCann v. Harleysville Ins. Co.*, 78 A.D.3d 1524 (N.Y. App. Div. 2010)). The court noted that "fishing expeditions" would not be allowed. *Id.*

52. *Id.* at *12.

53. No. 2009-1823, 2011 WL 5632688 (Pa. Ct. Com. Pl. Franklin Nov. 7, 2011) (opinion and order granting defendant's motion to compel).

54. *Largent*, No. 2009-1823, slip op. at 2 (Pa. Ct. Com. Pl. Franklin Nov. 7, 2011). Plaintiffs alleged "serious and permanent physical and mental injuries, pain, and suffering." *Id.*

55. *Id.*

56. *Id.* at 2-3.

suit.⁵⁷ Specifically, the defendant claimed that the plaintiff's former public (now private) Facebook account included several photographs that showed the plaintiff enjoying life with her family and a "status update" about going to the gym.⁵⁸ In response, the plaintiff argued the requests were overly broad and sought irrelevant information, did not meet the standards set forth in Rule 4003.1(a) of the *Pennsylvania Rules of Civil Procedure*, violated the Stored Communications Act, and created unreasonable annoyance and embarrassment.⁵⁹

The court began its analysis with a discussion about the purpose of Facebook, how it is used, and its "ever-changing privacy policy."⁶⁰ The court pointed out that Facebook makes users aware that their information may be shared by default and that Facebook may reveal any private content in response to certain legal requests.⁶¹

Next, the court pointed out that "Pennsylvania[']s discovery rules are broad, and the relevancy threshold is slight."⁶² The court found that the information sought by the defendant in this case was clearly relevant and satisfied the relevancy requirement of Rule 4003.1(a), as the information could undermine the plaintiff's claims of damages.⁶³

After determining that the information sought was relevant, the court discussed the privilege and privacy concerns regarding discovery of private social media content.⁶⁴ The court indicated that, "[i]f either Pennsylvania's law of privilege or statutory law, such as the Stored Communications Act, prohibits disclosure, the rele-

57. Defendant Jessica Rosko's (incorrectly identified as Jessica Reed) Motion to Compel Plaintiff Jennifer Largent's Facebook Log-In Info. ¶22, *Largent*, No. 2009-1823, 2011 WL 5632688 (No. 2009-1823), 2011 WL 6432493, at *1. Defense counsel argued that the discovery of the private information would be relevant to the plaintiff's damage claims including her claim that her life's activities have been limited. *Id.* ¶21.

58. *Largent*, No. 2009-1823, slip op. at 6, 8.

59. *See id.* at 6.

60. *Id.* at 3-5. The court gives an in-depth and thorough explanation of how Facebook's privacy policy works, the different privacy settings available to users, and how the networking/sharing works on Facebook. *Id.* at 4-5.

61. *Id.* at 5.

62. *Id.* at 6 (citing *George v. Schirra*, 814 A.2d 202, 204 (Pa. Super. Ct. 2002)). The court went on to cite several other trial court cases from Pennsylvania and other jurisdictions that have allowed social media discovery, and then noted, "[a]s far as the threshold relevancy inquiry is concerned, it is clear that material on social networking websites is discoverable in a civil case." *Id.* 7-8.

63. *Id.* at 8.

64. *Id.* at 8-12.

vant information [sought] is not discoverable.⁶⁵ Like *McMillen*, the court noted that Pennsylvania law does not favor privileges, and that Pennsylvania has no confidential social networking privilege.⁶⁶ Also like *McMillen*, the court noted that Facebook users have no reasonable expectation of privacy because most of the information posted on Facebook is shared with other people and may also be shared with strangers.⁶⁷ The court explained that, even if a Facebook user adjusted his or her privacy setting to “private,” it would not protect the information contained on his or her site from being discovered.⁶⁸ As such, the court refused to create a privilege for private social media content.⁶⁹

Unlike the Pennsylvania trial courts discussed above, the *Largent* court was the first to discuss the Stored Communications Act (SCA)⁷⁰ and whether it prohibits disclosure of private social media content.⁷¹ The court noted that the SCA limits the government’s ability to compel Internet Service Providers (ISPs) from disclosing its users’ information, and limits the ISPs’ ability to disclose its customers’ and subscribers’ information.⁷² According to the court, *Crispin v. Christian Audigier, Inc.* was the only other court to address whether Facebook is an entity covered by the SCA.⁷³ The court then discussed *Crispin*, a case in which the trial judge granted a motion to quash a defendant’s subpoenas upon the plaintiff’s social networking sites and held that civil subpoenas seeking to gain private communications posted on a user’s Facebook and other social networking sites are never permissible under the SCA.⁷⁴ The court distinguished *Crispin* from the current case because *Crispin* dealt with private information sought directly from the social media company via a subpoena whereas the defendant in this case sought information directly from the plain-

65. *Id.* at 9.

66. *Id.*

67. *Id.* The court indicated that, like undelivered email messages, undelivered Facebook messages may have a reasonable expectation of privacy attached to them. *Id.* n.10. However, the court noted that “the expectation of privacy vanishes once the email reaches the intended recipient. *Id.* (citing *Commonwealth v. Proetto*, 771 A.2d 823, 828 (Pa. Super. Ct. 2001)).

68. *Id.* (citing *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 434 (S.D. Ind. 2010)).

69. *Id.*

70. 18 U.S.C. §§2701–2712 (2012).

71. *Largent*, No. 2009-1823, slip op. at 10-12.

72. *Id.* at 10 (citing 18 U.S.C. §§ 2702-03).

73. *Id.* at 11; see *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010).

74. *Id.* (citing *Crispin*, 717 F. Supp. 2d at 975-76) (citations omitted).

tiff.⁷⁵ The court noted that the SCA does not apply in this situation because the plaintiff was not an entity regulated by the SCA and therefore, cannot claim the protections of the SCA.⁷⁶

Finally, the judge discussed the breadth of the discovery requests and determined that the requests were not in violation of Rule 4011 of the *Pennsylvania Rules of Civil Procedure*.⁷⁷ The court noted that the “mere existence of some annoyance or embarrassment is insufficient to bar discovery” and that “[u]nreasonableness is determined on a case-by-case basis.”⁷⁸ Here, the plaintiff argued that the defendant’s motion to compel was comparable to “asking [the plaintiff] to turn over all of her private photo albums and requesting to view her personal mail.”⁷⁹ In response, the court found the analogy misplaced, stating that Facebook posts are not private or comparable to personal mail.⁸⁰ In addition, the court explained that the plaintiff did not give any reason why the discovery would cause any unreasonable embarrassment.⁸¹ Lastly, the court noted that granting defense counsel access to the Facebook account did not cause an unreasonable annoyance because the plaintiff would still have access to her account and the defendant would cover the cost of investigating the account.⁸²

For the above reasons, the court granted the defendant’s motion to compel and ordered the plaintiff to turn over her Facebook login information so that defense counsel could access the private content.⁸³ In a footnote, the court recognized that discovery of private social media content is not discoverable in every case; the requesting party must first have a “good faith basis that discovery request will lead to relevant information.”⁸⁴ According to the

75. *Id.*

76. *Id.*

77. *Id.* at 12-13. As stated *supra* note 11, PA. R. CIV. P. 4011 prohibits discovery if the request is made in bad faith, or if the discovery would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party.

78. *Id.* at 12 (citing CHRISTINE M. GIMENO ET AL., 9A GOODRICH AMRAM 2d § 4011(b):1 (2d ed.)).

79. *Id.* (citing Plaintiff’s Answer to Defendant’s Motion to Compel ¶ 23).

80. *Id.* at 12-13.

81. *Id.* at 13.

82. *Id.*

83. *Id.* The court indicated that the defendant’s counsel would only have twenty-one days to inspect the Facebook page, at which time the Plaintiff could change her password, thus preventing further access to her account. *Id.* at 13-14.

84. *Id.* at 13 n.13.

court, the defendants had a good faith basis because the plaintiff's profile was previously public.⁸⁵

On the other side of the discovery fence, *Arcq v. Fields* was the first case in which a Pennsylvania Court of Common Pleas judge issued an opinion that accompanied an order *denying* a motion to compel discovery of private social media content.⁸⁶ In *Arcq*, the plaintiff was involved in an automobile accident and brought a negligence action against the driver of the other vehicle and an action against the driver's employer, claiming that it was vicariously liable.⁸⁷ The court noted that the plaintiff testified in his deposition that he was incapable of performing certain physical

85. *Id.* The court cautioned, "[i]n other cases, it might be advisable to submit interrogatories and requests for production of documents to find out if any relevant information exists on a person's online social networking profiles." *Id.*

86. No. 2008-2430 (Pa. Ct. Com. Pl. Franklin Dec. 7, 2011) (opinion and order denying defendant's motion to compel). Prior to the opinion issued in *Arcq*, another Pennsylvania trial court, in addition to the two discussed *supra* note 38, denied a defendant's motion to compel discovery of private social media content without an opinion. See *Kalinowski v. Kirschenheiter*, No. 2010-06779 (Pa. Ct. Com. Pl. Luzerne Aug. 8, 2011) (order denying defendant's motion to compel but ordering plaintiff to preserve present Facebook or Myspace pages), available at Cummins, *supra* note 1.

In *Kalinowski*, another personal injury case stemming from an automobile accident, the defendant sought the Facebook and Myspace log-in information for the plaintiff's personal account, and for the accounts of bars owned by the plaintiff, as well as signed authorizations from the plaintiff allowing the social media companies to release the private content contained on these accounts. Defendant's Motion to Compel at 1, *Kalinowski*, No. 2010-06779. See also Present, *Plaintiff's Score a Pair of Wins in Social Media Decisions*, *supra* note 5. The defendant argued that the public portions of the bar's Facebook account and the plaintiff's personal Myspace account contained pictures and posts that were inconsistent with the extent of the plaintiff's injuries, and as such, it argued that its requests for the private information were reasonably calculated to lead to the discovery of admissible evidence. Defendant's Motion to Compel ¶¶ 30-34, *Kalinowski*, No. 2010-06779. In response, the plaintiff was able to successfully argue that there was no direct impeachment evidence contained on any of the publicly viewable pages, which, he argued, was the requirement "under the ripening body of case law in this state." See Present, *Plaintiff's Score a Pair of Wins in Social Media Decisions*, *supra* note 5. The plaintiff argued that any follow-up questions that the defendant thought necessary based on what the defendant saw on the publicly viewable pages could have been handled by additional interrogatories. Plaintiff's Brief in Opposition to Defendant's Motion to Compel at 4-6, *Kalinowski*, No. 2010-06779. The plaintiff further argued that the purpose of the defendant's motion to compel was to embarrass the plaintiff or harm his character, and that the requests were not reasonably calculated to lead to the discovery of admissible evidence. *Id.* at 5. Although the trial court seemingly agreed with the plaintiff by denying the motion to compel, another trial court in Pennsylvania could have easily considered the public posts relevant, and ordered the plaintiff to provide the defendant with access to his private Facebook and Myspace pages since the requests could have been considered reasonably calculated to lead to other relevant information. The order signed by the court, the defendant's motion to compel, and the plaintiff's brief in opposition to the defendant's motion to compel can be accessed at Cummins, *supra* note 1.

87. *Arcq*, No. 2008-2430, slip op. at 1.

activities due to the accident.⁸⁸ Because the plaintiff put his physical, emotional and social conditions at issue, the defendant sought to obtain the usernames and passwords for all of the plaintiff's social networking sites and copies of any and all information contained on the sites that may be relevant to the case.⁸⁹ In response, the plaintiff argued that the defendant's requests were not reasonably calculated to lead to the discovery of admissible evidence and that the plaintiff had a reasonable expectation of privacy in regards to this information.⁹⁰

In responding to the defendant's motion, the court distinguished these facts from those in *McMillen*, *Zimmerman*, and *Romano*.⁹¹ The court noted that those cases involved plaintiffs who posted information on their social media accounts that were publicly viewable, and that the information contradicted the plaintiffs' claims of damages.⁹² Therefore, the parties seeking non-public information in those cases had reason to believe that the private portions of the accounts would also contain relevant information.⁹³ Here, however, the court did not follow *McMillen*, *Zimmerman*, and *Romano* because the defendant's request did not arise from viewing relevant information on the plaintiff's publicly viewable pages.⁹⁴ In the cases permitting discovery, the trial courts granted the motions to compel because "the party seeking information had a basis for their request" and the requests "were reasonably calculated to yield information that would lead to admissible evidence."⁹⁵ In the case at hand, however, the defendant did not establish any basis for believing that the plaintiff's private social media content would contain any relevant information nor that the plaintiff's content was ever publicly viewable.⁹⁶ Therefore, the court denied the defendant's motion to compel, holding that "the defendant [must] have *some* good faith belief that the private profile may contain information."⁹⁷ It explained that trial courts could not simply assume that private portions of a plaintiff's social

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2.

92. *Id.* at 2.

93. *Id.* at 3.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

media account will contain relevant information.⁹⁸ “In essence,” the court added, “viewing relevant information on the public profile acts as a gateway to the private profile.”⁹⁹

As the above cases indicate,¹⁰⁰ the general rule emerging in the trial courts’ decisions is that in order for private social media content to be discoverable, the party requesting it must first show that the public portion of the site includes relevant information or have another good faith reason for requesting it. If the requesting party meets this threshold requirement, it will be able to obtain unfettered access to the litigant’s social media account. However, these non-precedential decisions do not prevent other trial judges from granting access to private information without a threshold showing of relevance on the publicly viewable pages. In fact, one

98. *Id.* at 4.

99. *Id.* (distinguishing *Arcq* from *Largent*).

100. Two other (known) cases in which a Pennsylvania trial court judge issued an order regarding discovery of private social media were *Martin v. Allstate Fire & Casualty Ins. Co.*, No. 110402438 (Pa. Ct. Com. Pl. Phila. Dec. 13, 2011) (order denying defendant’s motion to compel) and *Gallagher v. Urbanovich*, No. 2010-33418 (Pa. Ct. Com. Pl. Montgomery Feb. 27, 2012) (order granting plaintiff’s motion to compel). Again, the judges in these cases did not provide opinions with their orders.

In *Martin*, another personal injury case, the trial court judge refused to grant an insurance company’s request to access the plaintiff’s Facebook information after the plaintiff successfully argued that the defendant was unable to point to any specific posts, relevant or not, on the public portion of the plaintiff’s Facebook account. Present, *Plaintiffs Win Round on Discovery of Facebook Pages*, *supra* note 5. The plaintiff argued that the defendant did not ask the plaintiff what she used Facebook for or whether she posted any updates or photographs about her injury. *Id.* Therefore, the plaintiff argued that the private portion of her Facebook account was undiscoverable because the defendant offered no evidence that it contained anything relevant to her claims. *Id.* Apparently, the court agreed with the plaintiff and denied the motion to compel. *Martin*, No. 110402438 (order denying defendant’s motion to compel).

In *Gallagher*, the tide was turned when a Pennsylvania Common Pleas Court judge ordered a defendant, and not a plaintiff, to provide Facebook log-in information and not to delete or erase any of the information contained on his page. *Gallagher*, No. 2010-33418 (order granting plaintiff’s motion to compel). The plaintiff sued the defendant for allegedly striking the plaintiff in the face and breaking his nose during an intramural soccer game. Plaintiff’s Motion to Compel ¶ 1, *Gallagher*, No. 2010-06779. In Plaintiff’s discovery requests, which were attached as Exhibit B to the plaintiff’s motion to compel, the plaintiff asked the defendant to identify and provide the social media accounts he belonged to, and to identify and provide all the information contained or posted on the accounts for the past three years. *Id.* ¶12. This author is unaware of the oral arguments made to the judge at motion’s court, but the plaintiff’s motion to compel did not provide any indication that the defendant’s public portion of Facebook contained relevant information. *See id.* The defendant objected to the requests on the grounds that they were “overly broad and/or seek irrelevant information and are not reasonably calculated to lead to the discovery of relevant evidence that would be admissible at trial.” Defendant’s Response to Plaintiff’s Motion to Compel ¶ 16, *Gallagher*, No. 2010-06779. Nevertheless, the court granted the plaintiff’s motion to compel and ordered the plaintiff to provide his Facebook username, email and password, and to not delete the information contained therein. *Gallagher*, No. 2010-33418 (order granting plaintiff’s motion to compel).

could argue that most private social media accounts likely would contain some relevant information regarding a litigant's life and well-being, events the litigant participates in, or information pertaining to how he or she spends his or her time.

Pennsylvania trial courts are not bound by the emerging "threshold rule" and could easily determine that discovery requests seeking information on the private accounts are reasonably calculated to lead to admissible evidence relevant to a plaintiff's damage claims. Would this granting of unfettered access to private social media content be going too far? The issue that needs to be (and should be) decided by a Pennsylvania appellate court is whether private content contained on social media sites is discoverable without a threshold showing of relevance on the public portion of a user's social media page. The appellate court should also provide guidance on the proper scope of discovery of private social media when a user's public account contains relevant information, and determine if ordering a litigant to produce his or her usernames and passwords or to sign an authorization releasing *all* of his or her private social media content is proper under the *Pennsylvania Rules of Civil Procedure*.

III. THE PROPER METHOD AND SCOPE OF PRIVATE SOCIAL MEDIA DISCOVERY

Discovery of private social media content is and should be discoverable in Pennsylvania. After all, a great deal of relevant information might appear on a user's social media page. However, the private content should be discoverable only to a certain extent and under certain circumstances. Access to such information should not be freely granted in every case and, at the very least, a litigant's discovery requests should be narrowly tailored to seek only relevant information. Courts should not allow methods of obtaining private social media content that are unlimited in scope and time. The Pennsylvania trial courts that have granted complete access to a litigant's private social media account—by ordering a user to furnish his or her usernames and passwords or to sign authorizations that release all of a user's private social media content—have circumvented the *Pennsylvania Rules of Civil Procedure* and have not adhered to the typical way discovery is conducted. By granting unrestricted access to *all* of a user's social media content, trial judges are permitting litigants access to an abundance of irrelevant and potentially embarrassing information. Moreover, social media users may have at least some rea-

sonable expectation of privacy when posting non-public information to their accounts or messaging other users. Courts should consider several factors before enabling litigants to access relevant private social media content.

First, to begin the analysis of how discovery of private social media should be conducted, one must first understand how Facebook and Twitter work before delving into the *Pennsylvania Rules of Civil Procedure* pertaining to discovery and the judicial opinions construing these rules. Then, a brief discussion on the methods litigants have used in an attempt to obtain an opponent's private social media content will be proper. Finally, the two necessary factors that Pennsylvania trial courts should consider when determining the proper scope of private social media discovery requests will be proposed.

A. *Functions of Facebook and Twitter*

For purposes of this Comment, a brief explanation of how Facebook and Twitter work is necessary.¹⁰¹ The following explanation is by no means a representation of all the features available on Facebook and Twitter. Rather, this explanation is a “crash course” for readers with limited to no Facebook or Twitter knowledge. For simplicity's sake, the name Patty will represent the Facebook and Twitter user in the following two sub-sections.

1. *Facebook*

According to the social networking website,

Facebook's mission is to give people the power to share and make the world more open and connected Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet.¹⁰²

A user can share information on Facebook in many ways. For example, Patty can share information with other Facebook users

101. There are a number of other popular social media websites, including, Myspace, LinkedIn, Flickr, Friendster, FourSquare, YouTube and Okrut. In an effort to keep this Comment concise, only Facebook and Twitter will be explained in detail, as the number of people that use each site is immense. For the number of users on each site, see Facebook, *supra*, note 7.

102. FACEBOOK, *About*, <http://www.facebook.com/facebook/info> (last visited July 7, 2012).

(usually “friends”) in the form of a “status update.”¹⁰³ In a status update, Patty can post short blocks of text indicating what she is doing, how she is feeling, or what she is thinking.¹⁰⁴ In addition, as a Facebook user, Patty creates a “profile” that includes certain information about herself.¹⁰⁵ Depending on other users’ privacy settings, Patty can post content on another user’s wall (called “wall posts”), send messages directly to another user, or have a conversation with another user through Facebook’s instant message feature.¹⁰⁶ When Patty “posts” a text or picture on another user’s wall, the information will be viewable by whomever the other user designates, depending on the other user’s privacy settings.¹⁰⁷ Patty can also post and share pictures or videos on her own wall, which, again, can be viewed by whomever Patty designates.¹⁰⁸ Patty can also “tag” other users in a status update or photo.¹⁰⁹ Tagging links the photo or status update to the tagged user’s profile.¹¹⁰ When another user tags her, Patty has the option to remove the tag so that the post no longer creates a link to Pat-

103. See Andrew C. Payne, *Twitigation: Old Rules in a New World*, 49 WASHBURN L. J. 841, 846 (2010). On Facebook, Patty can add “friends,” which are other Facebook members with whom Patty can share information. See FACEBOOK, *Glossary*, <http://www.facebook.com/help/glossary> (last visited July 7, 2012). Patty is also able to control who can see the information she posts every time she posts with the “audience selector” feature. *Id.*

104. See Payne, *supra* note 103, at n.47 (citing Susan Whelan, *An Introduction to Facebook for Beginners: An Overview of the Facebook Network*, SUITE101.COM (Jan. 15, 2008), http://social-networking-tagging.suite101.com/article.cfm/facebook_for_beginners).

105. See *id.* at n.49 (citing James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149 (2009) (“identifying the possible information on a user’s profile as ‘name; birthday; political and religious views; online and offline contact information; gender, sexual preference, and relationship status; favorite books, movies, and so on; educational and employment history; and, of course, picture.”)). Certain profile information is viewable to the whole public no matter what: “[a]nyone can see your public information, which includes your name, profile picture, gender, username, user ID (account number), and networks.” FACEBOOK, *Basic Privacy Controls*, <http://www.facebook.com/help/?page=132569486817869> (last visited July 7, 2012).

106. Payne, *supra* note 103, at 846. The direct message feature is similar to an email and messages can be sent to one member, or a number of members in a “thread.” See FACEBOOK, *Help*, <http://www.facebook.com/help/messages/basics> (last visited July 7, 2012).

107. Payne, *supra* note 103, at n.50 (citations omitted). The information may be viewable to the entire Facebook community, friends, or friends of a friend. *Id.*

108. *Id.* at 846-47.

109. FACEBOOK, *Tagging*, <http://www.facebook.com/help/tagging> (last visited July 7, 2012). The picture or post on which Patty tags another member also shows up on the other member’s wall. *Id.* “For example, you can tag a photo to show who’s in the photo or post a status update and say who you’re with. If you tag a friend in your status update, anyone who sees that update can click on your friend’s name and go to their [profile]. Your status update will also show up on that friend’s [wall].” *Id.* When another member adds a tag of Patty, friends of Patty may be able to see the tagged post. *Id.*

110. *Id.*

ty's profile or shows up on her wall.¹¹¹ Patty can also "comment" on another user's posts if the user allows her to do so, and those to whom Patty grants permission can "comment" on her posts. Depending on Patty's adjustable settings, Patty's "timeline"¹¹² may contain all of her "photos, stories, and experiences" including, but not limited to, her past status updates, posts, and any other content that other users have posted to Patty's wall or tagged Patty in.¹¹³ Finally, Patty has the option to designate exactly who can view the information contained on her timeline or in her photo album with Facebook's privacy settings.¹¹⁴

2. Twitter

"Twitter is a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting."¹¹⁵ According to Payne, "Twitter is a much simpler social-networking device" than Facebook.¹¹⁶ In short, Twitter allows Patty to share short messages known as "tweets" with other users.¹¹⁷ Patty also may share photos in her tweets. If Patty chooses to make her tweets available to the public, anybody can view them.¹¹⁸ However, if Patty chooses to make her tweets private, only those users whom Patty allows to "follow" her will be able to view her tweets.¹¹⁹ Likewise, Patty can choose the users she wants to follow.¹²⁰ Tweets from the users Patty follows will show up on her Twitter homepage for her to read.¹²¹ In addition,

111. *Id.*

112. On Facebook's site, Facebook uses the words "wall," "profile," and "timeline" interchangeably. See generally FACEBOOK, *Learn About Facebook*, <http://www.facebook.com/help/basics/learn-about-facebook> (last visited July 7, 2012).

113. See FACEBOOK *Glossary*, *supra*, note 103.

114. FACEBOOK, *Help Center, Learn About Your Privacy Options*, <http://www.facebook.com/help/timeline/privacy> (last visited July 7, 2012). The member can choose to share a status update or post that shows up on their Timeline with the entire Facebook community, "friends," nobody, or a custom group of people with whom the user chooses. FACEBOOK, *Help Center, When I share something, how do I choose who can see it?*, <http://www.facebook.com/help/?faq=120939471321735> (last visited July 7, 2012).

115. TWITTER, *About*, <https://twitter.com/about> (last visited July 10, 2012).

116. See Payne, *supra* note 103, at 847.

117. TWITTER, *Help Center*, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/215585-twitter-101-how-should-i-get-started-using-twitter> (last visited July 7, 2012). Each tweet contains 140 characters or less. Payne, *supra* note 103, at 847.

118. TWITTER, *Help Center*, <https://support.twitter.com/articles/14016-about-public-and-protected-tweets> (last visited July 7, 2012).

119. *Id.*

120. TWITTER, *Help Center*, *supra* note 117.

121. *Id.*

public tweets can be “re-tweeted” by any Twitter user, which disseminates the tweet to whoever “follows” the re-tweeter.¹²²

Obviously, Facebook and Twitter offer many different ways of sharing and communicating with other members, as well as many types of privacy settings that allow a user to designate who can see what information. When determining the proper method and scope of discovering private social media content, and before granting unfettered access to *all* of the content contained on a litigant’s social media page, courts must consider the different attributes of social media and understand how information is shared (and not shared).¹²³

B. *The Pennsylvania Discovery Rules*

Pennsylvania Rules of Civil Procedure 4001 through 4025 govern the rules of discovery. Pennsylvania Rule of Civil Procedure 4003.1 provides for the “Scope of Discovery Generally.”¹²⁴ In pertinent part, Rule 4003.1(a) states that “a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”¹²⁵ Rule 4003.1(b) liberalizes discovery: “It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”¹²⁶ Rules 4011 and 4012 place limitations on discovery. Rule 4011 states

No discovery, including discovery of electronically stored information, shall be permitted which (a) is sought in bad faith; (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party; (c) is beyond the scope of discovery as set forth in

122. TWITTER, *Help Center, How to Retweet a Tweet*, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/20169873-how-to-retweet-a-tweet> (last visited July 7, 2012).

123. See Payne, *supra* note 103, at 846 (“To understand fully the details, it is important to understand how users create information, how users are able to place privacy restrictions on the information they create through internal controls, how information is stored, and how popular the use of these sites is becoming.”).

124. PA. R. CIV. P. 4003.1. This rule is “taken almost verbatim from FED. R. CIV. P. 26(b).” *Id.* (1978 Explanatory Comment).

125. PA. R. CIV. P. 4003.1(a).

126. PA. R. CIV. P. 4003.1(b).

Rules 4003.1 through 4003.6; (d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or (e) would require the making of an unreasonable investigation by the deponent or any party or witness.¹²⁷

Rule 4012 allows a trial court to enter a protective order.¹²⁸ Specifically, Rule 4012 states that “[u]pon motion by a party . . . from whom discovery . . . is sought, and for good cause shown, the court may make any order which justice requires to protect a party . . . from unreasonable annoyance, embarrassment, oppression, burden or expense.”¹²⁹ Despite the limits set forth in Rule 4011 and 4012, the discovery rules generally allow for liberal discovery.¹³⁰ Nonetheless, when considering whether to allow a litigant to obtain private social media content, courts need to strike a balance between the liberalness of the discovery rules and the abundance of irrelevant and/or potentially embarrassing content that the litigant would receive if unfettered access to a user’s social media account were granted.

C. The Discovery Methods that Litigant’s Have Used in an Effort to Obtain Private Social Media Content

In general, litigants have used four methods in an effort to obtain an opponent’s private social media content: (1) subpoenaing the content directly from the social media company;¹³¹ (2) requesting the opponent sign an authorization to release the private so-

127. PA. R. CIV. P. 4011 (amended in August 2012 to include the phrase “including discovery of electronically stored information”).

128. PA. R. CIV. P. 4012. This rule is similar to FED. R. CIV. P. 26(c).

129. *Id.* The court’s protective order may state:

(1) that the discovery . . . shall be prohibited; (2) that the discovery . . . shall be only on specified terms and conditions, including a designation of the time and place; (3) that the discovery . . . shall be only by a method of discovery . . . other than that selected by the party seeking discovery . . . ; (4) that certain matters shall not be inquired into; (5) that the scope of discovery . . . shall be limited; (6) that discovery or deposition shall be conducted with no one present except persons designated by the court; . . . (8) that the parties simultaneously shall file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Id. This follows FED. R. CIV. P. 26(c).

130. *See, e.g.,* PECO Energy Co. v. Ins. Co. of N. Am., 852 A.2d 1230, 1233 (Pa. Super. Ct. 2004); George v. Schirra, 814 A.2d 202, 204 (Pa. Super. Ct. 2002).

131. *See, e.g.,* Crispin v. Audigier, Inc., 717 F. Supp. 2d 965, 968 (C.D. Cal. 2010); Ledbetter v. Wal-Mart Stores, Inc., No. 06-cv-01958-WYD-MJW, 2009 U.S. Dist. LEXIS 126859, at *2 (D. Colo. Apr. 21, 2009); Mackelprang v. Fidelity Nat’l Title Agency of Nev., No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *2 (D. Nev. Jan. 9, 2007).

cial media content;¹³² (3) requesting the opponent's usernames and passwords;¹³³ and/or (4) requesting production of private social media content directly from the opponent.¹³⁴ Because of the Stored Communications Act,¹³⁵ social media companies are unlikely to respond to civil subpoenas that seek a user's private content without a user's consent.¹³⁶ Therefore, litigants can only obtain access to an opponent's private social media content through methods (2), (3), and (4).

This Comment argues that, in most situations, requesting *relevant* private content directly from the opponent via requests for production of documents is the proper way of conducting social media discovery under the *Pennsylvania Rules of Civil Procedure* and is in line with how discovery is typically conducted. Nonetheless, option (2), requesting a signed authorization for the release of information, should also be available for litigants, but only under limited circumstances and only when the authorization is limited

132. See, e.g., *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 387 (E.D. Mich. 2012); *Mackelprang*, 2007 WL 119149, at *2; *McCann v. Harleysville Ins. Co.*, 910 N.Y.S.2d 614, 614 (N.Y. App. Div. 2010); *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010); *Coy-Burt v. Hoskins*, No. 090901827 (Pa. Ct. Com. Pl. Phila. Apr. 28, 2010); *Kalinowski v. Kirschenheiter*, No. 2010-06779 (Pa. Ct. Com. Pl. Luzerne Aug. 8, 2011).

133. See, e.g., *Gallagher v. Urbanovich*, No. 2010-33418 (Pa. Ct. Com. Pl. Montgomery Feb. 27, 2012); *Arcq v. Fields*, No. 2008-2430 (Pa. Ct. Com. Pl. Franklin Dec. 7, 2011); *Largent v. Reed*, No. 2009-1823, slip op. at 5, (Pa. Ct. Com. Pl. Franklin Nov. 7, 2011); *Kalinowski*, No. 2010-06779; *Zimmerman v. Weis Mkts., Inc.*, No. CV-09-1535, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Pa. Ct. Com. Pl. Northumberland May 19, 2011); *Kennedy v. Norfolk S. Corp.*, No. 100201473, 2011 WL 7110212 (Pa. Ct. Com. Pl. Phila. Jan. 4, 2011); *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *1 (Pa. Ct. Com. Pl. Jefferson Sept. 9, 2010).

134. See, e.g., *Held v. Ferrellgas, Inc.*, No. 10-2393-EFM, 2011 WL 3896513, at *1 (D. Kan. Aug. 31, 2011); *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 432 (S.D. Ind. 2010); *Bass v. Miss Porter's Sch.*, Civil No. 3:08cv1807, 2009 WL 3724968, at *1 (D. Conn. Oct. 27 2009); *McCann*, 910 N.Y.S.2d at 614; *Arcq*, No. 2008-2430. Additionally, in some instances, litigants have requested that the opposing party accept a friend request so that they could view the information. See *Passarella, supra*, note 38, discussing *Piccolo v. Paterson*, No. 2009-04979, 2011 Pa. Dist. & Cnty. Dec. LEXIS 45 (Ct. Com. Pl. Bucks May 5, 2011).

135. 18 U.S.C. §§2701-2712 (2011). For a comprehensive discussion of the Stored Communications Act and how it applies to social media discovery, see Ryan A. Ward, Comment, *Discovering Facebook: Social Network Subpoenas and the Stored Communications Act*, 24 HARV. J.L. & TECH. 563 (2011).

136. Kristen L. Mix, *Discovery of Social Media*, 5 FED. CTS. L. REV. 119, 122 (2010) (quoting Evan E. North, Comment, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1306 (2010)); see also *Bower v. Bower*, 808 F. Supp. 2d 348, 349 (D. Mass. 2011) (indicating that the SCA prevents Yahoo! and Google from responding to a civil subpoena requesting production of emails without the user's consent); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010) (quashing subpoenas to Myspace and Facebook on the grounds that the private information sought was protected by the SCA); *Mackelprang*, 2007 WL 119149, at *2 (indicating that Myspace refused to produce private email messages on plaintiff's account in the absence of a search warrant or plaintiff's consent to the production).

in time and scope. Option (3), requesting a party's usernames and passwords, should never be granted because such a request is overly broad and unlimited in time and scope. In reviewing relevant case law, there are no other cases in which any other jurisdiction has ordered a litigant to furnish his or her usernames and passwords to an opponent like the aforementioned Pennsylvania trial courts.

D. Factors to Consider when Determining the Proper Scope of Private Social Media Discovery

Requests for an opponent to sign an authorization consenting to release all his or her private social media content or to furnish his or her login information usually will be met by strong objections. Specifically, the user will likely argue that the requests are overly broad and seek irrelevant information, are not reasonably calculated to lead to admissible evidence, invade the user's privacy, and seek embarrassing information. This refusal will then lead the requesting party to file a motion to compel.¹³⁷ In deciding whether to grant a motion to compel, trial courts should consider the following two factors, in addition to those already mentioned above: (1) the user's expectation of privacy, including whether the user will be unreasonably forced to divulge embarrassing and/or private information; and (2) the reasonableness and breadth of the particular discovery request and the likelihood that it will lead to relevant information. These two factors overlap a great deal, and one factor can be dispositive of the issue without considering the other. After looking at these two factors, courts should conclude that granting unrestricted access to a litigant's social media page is not proper. Ultimately, the scope of discovery of social media content "requires the application of basic discovery principles in a novel context."¹³⁸ For courts, "the challenge is to define appropriately broad limits—but *limits nevertheless*—on the discoverability of social communications."¹³⁹

137. In the alternative, before a motion to compel is filed, the responding party may seek a protective order under Pennsylvania's Rule of Civil Procedure 4012 asking the court to limit the request with a protective order. PA. R. CIV. P. 4012.

138. *EEOC*, 270 F.R.D. at 434.

139. *Id.* (emphasis added).

1. *The User's Expectation of Privacy, Including Whether the User Will Be Unreasonably Forced to Divulge Embarrassing and/or Private Information*

Privacy is probably the most argued issue regarding discovery of private social media.¹⁴⁰ Most courts that have discussed the discoverability of private social media have determined that a user does not have a reasonable expectation of privacy in the content contained on his or her social media site because others can view and disseminate the content.¹⁴¹ These courts have discounted the fact that privacy settings allow social media users to control who, if anyone, can see content they post. It is these privacy controls that may actually (or do) create a reasonable expectation of privacy in the user, especially in today's society where users are willing to post so many "intimate details of their lives on the Internet."¹⁴² Many conversations a user has through Facebook's direct messaging or instant messaging system, as well as photographs posted on the social media site, may be extremely embarrassing and not viewable by the entire public. A user may feel comfortable having intimate conversations and/or posting embarrassing photographs because he or she does not expect a stranger to view this private information due to the privacy settings. Nonetheless, most courts have been unwilling to recognize a privacy interest in the information people post on the Internet. In light of the arguments to follow, these courts should reconsider their stance.

Under section 4011(b) of the *Pennsylvania Rules of Civil Procedure*, discovery requests that cause unreasonable embarrassment are not permitted.¹⁴³ Pennsylvania courts "have been given wide discretion to preclude or appropriately limit the use of any particular disclosure device where it determines that the use of that device would cause unreasonable annoyance, embarrassment, openness, burden or expense."¹⁴⁴ The objecting party bears the burden of showing that a request would cause unreasonable embarrassment.¹⁴⁵ The mere existence of some embarrassment is not

140. Mix, *supra* note 136, at 127.

141. See *id.* (quoting Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 21 (2009-10)).

142. Kelly Ann Bub, *Privacy's Role in the Discovery of Social Networking Site Information*, 64 SMU L. REV. 1433, 1434 (2011).

143. PA. R. CIV. P. 4011(b).

144. Shank v. Newman, 69 Pa. D. & C. 4th 48, 53 (Pa. Ct. Com. Pl. Lancaster 2004).

145. Golato v. Gillespie, 70 Pa. D. & C.2d 15, 19 (Pa. Ct. Com Pl. Phila. 1973) (citations omitted).

enough to sustain an objection.¹⁴⁶ The key to disallowing a request is to show its unreasonableness,¹⁴⁷ and “the objecting party must specifically show the effect of the proposed discovery request before the court may make a finding of unreasonableness.”¹⁴⁸ Generally, a discovery request will be found to be unreasonable “where it is stated too broadly, is without proper specification, and, in effect, amounts to a ‘fishing expedition.’”¹⁴⁹ As I will explain in greater detail below, requests that ask a user to furnish his or her social media usernames and passwords or to sign an authorization that would release *all* of his or her social media content are overly broad and amount to a fishing expedition.¹⁵⁰ Accordingly, if a litigant is able to specifically point to content that would embarrass him or her, the request should be impermissible under Rule 4011. At the very least, a court should enter a protective order over content falling within the ambit of Rule 4012.

Largent v. Reed was the only Pennsylvania trial court case to address an argument that requesting access to all of a plaintiff’s private social media content would cause the plaintiff unreasonable embarrassment.¹⁵¹ The court correctly noted that the “mere existence of some annoyance or embarrassment is insufficient to bar discovery.”¹⁵² It stated that the “[u]nreasonableness is determined on a case-by-case basis.”¹⁵³ However, the plaintiff pointed to nothing specific on the web site that would have caused unreasonable embarrassment, and the court noted that “bald assertions of embarrassment” were not enough to sustain an objection.¹⁵⁴ The court stated that Facebook posts are not truly private and that there is little harm in disclosing that information in discovery.¹⁵⁵ Despite the fact that the court was aware of Facebook’s many attributes,¹⁵⁶ it nevertheless required the plaintiff to turn

146. GIMENO ET AL., *supra* note 78.

147. *Id.*

148. *Id.* (citing *Azen v. Lampenfield*, 18 Pa. D. & C.3d 574, 580 (Pa. Ct. Com. Pl. Allegheny 1981)).

149. GIMENO ET AL., *supra* note 78, at § 4011(b):2 (citing *In re Townsend’s Estate*, 241 A.2d 534 (Pa. 1968) (decided under similar provision of prior rule)); *see also* *Kintzer v. Petrone*, 39 Pa. D. & C.3d 486, 490 (Pa. Ct. Com. Pl. Berks 1985).

150. *See infra*, Section III(D)(2).

151. No. 2009-1823, slip op. at 12 (Pa. Ct. Com. Pl. Franklin Nov. 7, 2011).

152. *Id.* (citing GIMENO ET AL., *supra* note 78).

153. *Id.*

154. *Id.* at 13.

155. *Id.*

156. *See id.* at 3-5.

over her usernames and passwords to defense counsel.¹⁵⁷ The court never considered that by granting unrestricted access to the plaintiff's *entire* Facebook account, the defendant's counsel had access to every single picture, post and direct message that the plaintiff had ever uploaded, posted, or sent. It never considered that much of the content contained on the plaintiff's account was likely irrelevant and/or potentially embarrassing.¹⁵⁸ Further, the court apparently did not consider whether this content might have been shared only with the plaintiff's closest and/or intimate friends.¹⁵⁹

A court must also anticipate a similar and related consideration under this factor: whether the user has a right to privacy in his or her private social media content. The Pennsylvania Supreme Court has stated that Rule 4011(b) is "merely a codification of this Court's analysis of the constitutional right to privacy and as such provides no more protection than the constitutional right provides."¹⁶⁰ Pennsylvania's Supreme Court has recognized that the right to privacy is a well-settled principle that "avoid[s] unjustified intrusions into the private zone of our citizens' lives."¹⁶¹ However, the right is not unqualified and "must be balanced against weighty competing private and state interests."¹⁶² Under the Fourth Amendment, courts have recognized at least two distinct types of privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."¹⁶³ The Pennsylvania Supreme Court has recognized the same two

157. *Id.* at 13.

158. As one scholar has indicated,

There's all sorts of irrelevant and embarrassing information that might be social networking sites. An individual might have sent flirting messages to someone. Satirical political posts might be misinterpreted out of context. Drunken party pictures or photos of one's children might have no relevance to the case. Granting the opposing party access to the account means that they will see everything you've ever done with the account, no matter how irrelevant to the facts of the case.

Bruce E. Boyden, *Can You Be Forced to Turn Over Your Social Network Passwords in a Civil Case?*, MARQUETTE UNIV. L. SCH. FAC. BLOG (Sept. 28 2010), <http://law.marquette.edu/facultyblog/2010/09/28/can-you-be-forced-to-turn-over-your-social-network-passwords-in-a-civil-case/>.

159. To the court's credit, it did state that the plaintiff never pointed to any embarrassing content contained on her Facebook page. *Largent*, slip op. at 13. I am curious as to how the court would have ruled if the plaintiff did point to intimate conversations or embarrassing photos and status updates entirely irrelevant to the plaintiff's claims.

160. *Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796, 803 (Pa. 1992).

161. *Id.* at 800.

162. *Id.* (citing *Fabio v. Civil Serv. Comm'n of City of Phila.*, 414 A.2d 82 (Pa. 1980)).

163. *Id.* (citing *Whalen v. Roe*, 429 U.S. 589 (1977)) (footnote omitted).

interests under the Pennsylvania Constitution.¹⁶⁴ The privacy interest at stake here, should a court determine that one exists, revolves around an individual's interest in avoiding disclosure of personal matters. "This interest finds explicit protection in Article I, [S]ection 1, of the Pennsylvania Constitution, which provides that '[a]ll men . . . have certain inherent and inalienable rights, among which are those . . . of acquiring, possessing and protecting property and reputation . . .'"¹⁶⁵ Before determining whether intrusions into a social media user's privacy interests are justified,¹⁶⁶ the court must first determine whether a social media user actually has a privacy interest in his or her private communications and other content contained on a social media site.

As set forth in *Commonwealth v. Proetto*,¹⁶⁷ a person must have a legitimate expectation of privacy to invoke the protections of the Pennsylvania Constitution.¹⁶⁸ The Pennsylvania Supreme Court has indicated that when a person exhibits an actual expectation of privacy that society would recognize as reasonable, the person has a legitimate expectation of privacy.¹⁶⁹ Under the United States Constitution, the Fourth Amendment's right to privacy "does not depend on a property right in the invaded place but does depend on whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."¹⁷⁰ The United States Supreme Court has also stated that a legitimate expectation of privacy exists when a person exhibits a subjective expectation of privacy that "society is prepared to recognize as reasonable."¹⁷¹ This expectation of privacy must be "reasonable in light of all the surrounding circumstances."¹⁷²

When determining a social media user's expectation of privacy, courts should consider the fact that, although Facebook's and other social media sites' privacy policies provide that the information

164. *Id.* (citing *In re June 1979 Allegheny Cnty. Investigating Grand Jury*, 415 A.2d 73 (Pa. 1980); *In re "B"*, 394 A.2d 419 (Pa. 1979)).

165. *Kintzer v. Petrone*, 490 (Ct. Com. Pl. Berks 1985) (emphasis added in original) (citing Pa. CONST. amend. I, § 1).

166. *See Stenger*, 609 A.2d at 801 (setting forth the balancing test that is used to determine whether an intrusion into a privacy interest is justified).

167. *Commonwealth v. Proetto*, 771 A.2d 823 (Pa. Super. 2001).

168. *Proetto*, 771 A.2d at 830 (citing *Commonwealth v. Ardestani*, 736 A.2d 552, 556 (Pa. 1999)).

169. *Id.* (citing *Ardestani*, 736 A.2d at 556).

170. *Id.* (citing *Commonwealth v. Brundidge*, 620 A.2d 1115, 1117 (Pa. 1993)).

171. *Id.* (citing *Brundidge*, 620 A.2d at 1117) (quoting *Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

172. *Proetto*, 771 A.2d at 830-31 (citing *Brundidge*, 620 A.2d 1115, 1117 (Pa. 1993)).

posted on the sites *may* be viewed or shared by others, many users have at least a subjective expectation of privacy.¹⁷³ If users did not have this expectation of privacy, they probably would not post “intimate details of their lives.”¹⁷⁴ One possible reason that users feel so comfortable posting details about their lives on Facebook is because the site creates an “intimate, confidential, and safe setting.”¹⁷⁵ Most likely, the “intricate privacy controls” give users this subjective expectation of privacy:¹⁷⁶ “Because of the availability of detailed privacy controls, users may feel they are effectively blocking any unwanted viewers from accessing their information, and therefore, they maintain at least some expectation of privacy.”¹⁷⁷ The difficult question a court will have to consider, if it has not already disposed of the request under Rule 4011, is whether the subjective expectation of privacy is reasonable.

Some Pennsylvania trial courts have held that a user has no reasonable expectation of privacy or confidentiality in his or her private social media site because in their policies, the social media companies put users on notice that their information may be shared or viewed by others.¹⁷⁸ The court in *McMillen* stated, “it is clear that no person choosing Myspace or Facebook as a communications forum could reasonably expect that his communications would remain confidential”¹⁷⁹ However, in *McMillen*, the court never accounted for the fact that the only relevant public information the plaintiff posted on his accounts were comments about going on a fishing trip and attending the Daytona 500.¹⁸⁰ The court failed to consider how many people were able to view all of the other content contained on the plaintiff’s site, content to which the court permitted the defendant unrestricted access. Likewise, the court in *Largent* indicated that Facebook users have no reasonable expectation of privacy because most of the infor-

173. Bub, *supra* note 142, at 1434.

174. *See id.*

175. *See id.* at 1435 (quoting James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1159-60 (2009)).

176. *See id.* (citing JOHN G. BROWNING, THE LAWYER’S GUIDE TO SOCIAL NETWORKING 17-19 (2010)).

177. *Id.* (citing Payne, *supra* note 103, at 864).

178. *McMillen v. Hummingbird*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, *8-11 (Ct. Com. Pl. Jefferson Sept. 9, 2010); *Largent v. Reed*, No. 2009-1823, slip. op. at 9 (Pa. Ct. Com. Pl. Franklin Nov. 7, 2011); *Zimmerman v. Weis Mkts., Inc.*, No. CV-09-1535, 2010 Pa. Dist. & Cnty. Dec. LEXIS 187, *8-11 (Ct. Com. Pl. Northumberland May 19, 2011).

179. *McMillen*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *9-10.

180. *Id.* at *2.

mation posted on an account is shared with other people and may also be shared with strangers.¹⁸¹ However, this is a very broad statement, considering some content on social media sites might only be shared with one other person or nobody at all. The judges in *McMillen*, *Zimmerman*, and *Largent* all ordered the plaintiffs to turn over their usernames and passwords, which would allow defense counsel to access *all* of the plaintiffs' non-public pictures, direct messages, and status updates dating back to when the plaintiffs' Facebook pages were created.

Like the judges in the three aforementioned cases, another commentator also argues that a user's subjective expectation of privacy is unreasonable because "other users can disseminate the content without obtaining consent from the user who posted it."¹⁸² The commentator likened social media users' expectation of privacy in their private social media content to the expectation of privacy contained in an individual's sent email or mailed letters.¹⁸³ Once the email or letter has been delivered to the recipient, the expectation of privacy terminates.¹⁸⁴

On the other hand, another commentator has suggested that, "[a] blanket judicial interpretation that users have no expectation of privacy in social-networking information threatens the social benefits of the websites."¹⁸⁵ This commentator argues that information contained on social media "implicates privacy because it involves the communication of personal information based on individual expression, relationship building, and a sense of community."¹⁸⁶ The commentator suggests that "courts should apply a nuanced approach in analyzing social network privacy under [Federal Rule of Civil Procedure 26(c)¹⁸⁷]" because "different types of social-networking information may have different levels of privacy implications."¹⁸⁸ It follows that not everything contained on a social media page should be discoverable after a threshold show-

181. *Largent*, No. 2009-1823, slip. op. at *9.

182. North, *supra* note 136, at 1296.

183. *Id.* (citing *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001)); *see also Largent*, No. 2009-1823, slip. op. at *9 n. 10.

184. North, *supra* note 136, at 1296 (citing *Guest*, 255 F.3d at 333); *see also Commonwealth v. Proetto*, 771 A.2d 823, 831 (Pa. Super. 2001) (discussing how the expectation of privacy is terminated once the email reaches its intended recipient).

185. Payne, *supra* note 103, at 869.

186. *Id.* at 864.

187. FED. R. CIV. P. 26(c) is the equivalent of PA. R. CIV. P. 4012, which provides that judges may issue protective orders limiting or preventing discovery when certain requirements are met.

188. Payne, *supra* note 103, at 867.

ing of relevance.¹⁸⁹ As the commentator suggests, “[c]ourts should consider determining whether a social-network user has an expectation of privacy by looking at the type of information and whether it is reasonable to expect that information to remain private.”¹⁹⁰ When doing so, “[t]he relevant factors that courts should consider are where the information exists, what types of people have access to the information, and whether any social dynamics exist that constrain or facilitate dissemination.”¹⁹¹ In particular, when determining whether the specific type of content deserves privacy protection, the commentator suggests that “courts should look at the nuts and bolts of the social-networking website: where the information was located, who is the receiver of the information, how the information was stored, and whether any internal policy or norm created an expectation that other users would not disseminate the information.”¹⁹²

If a court determines that a user does not have a reasonable expectation of privacy for the private content, the court should consider an order that requires the parties to enter into a confidentiality agreement regarding the private social media content.¹⁹³ Such agreements may alleviate the privacy concerns discussed above. Also, in order to limit the privacy concerns, the court may enter a protective order under Rule 4012.

Ultimately, if requests to obtain an opponent’s username and password or an authorization to release *all* of his or her private social media content are not stricken under Rule 4011 or for privacy reasons, a court should reject the requests because they are overly broad and unreasonably calculated to lead to the discovery of admissible evidence.

189. For example, irrelevant and private direct messages with close friends or family should not be discoverable.

190. Payne, *supra* note 103, at 867.

191. *Id.* at 870 (citing Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 970-71 (2005)).

192. *Id.*

193. See *Coy-Burt v. Hoskins*, No. 09090182700046 (Pa. Ct. Com. Pl. Phila. Apr. 28, 2010) (order granting defendant’s motion for reconsideration of defendant’s motion to compel), discussed *supra*, note 19.

2. *The Reasonableness and Breadth of the Particular Discovery Request and the Likelihood that It Will Lead to Relevant Information*

When looking at this factor, in accordance with Rule 4003.1(b), the court should ask whether the information sought (the private content) appears “*reasonably* calculated” to lead to relevant evidence. Obviously, a request that asks an opponent to produce his or her social media usernames and passwords or to sign an authorization to release *all* of the information contained on the social media page *may* lead to admissible evidence. This is because the term relevant is construed broadly under Rule 4003.1¹⁹⁴ and a user’s social media page may contain content regarding the physical activities that he or she participates in or his or her state of mind that might contradict his or her claims of damages. However, discovery requests that cast too wide of a net and seek too much irrelevant information along with the potentially relevant information should be disallowed as being *unreasonably* calculated.¹⁹⁵

As one commentator has argued, “[j]ust like any other kind of evidence, a discovery request for information on a social network page should be rejected as overly broad if it is unlimited in scope, or not related to an alleged injury or claim for recovery. The relevant inquiry is whether the discovery is so broad that it amounts to a fishing expedition.”¹⁹⁶ In recent amendments to the Rules of Civil Procedure on discovery, an explanatory note was added to Rule 4009.11, which states: “A request seeking electronically stored information should be as specific as possible. Limitations as to time and scope are favored”¹⁹⁷ Thus, a reasonable discovery request must be narrowly tailored in order to produce the relevant content with the least amount of irrelevant (and poten-

194. See, e.g., *George v. Schirra*, 814 A.2d 202, 205 (Pa. Super. Ct. 2002) (“the relevancy standard during discovery is necessarily broader than it is for admission at trial”); *Schwab v. Milks*, 8 Pa. D. & C.4th 557, 559 (Ct. Com. Pl. Lackawanna 1990) (indicating that the term “relevant” under Pa. R. Civ. P. 4003.1 has a greater breadth and scope and carries a more flexible standard than “relevant” for purposes of admissibility of evidence at trial).

195. See *In re Thompson’s Estate*, 206 A.2d 21, 28 (Pa. 1965) (“[F]ishing expeditions’ are not to be countenanced under the guise of discovery.”).

196. Ward, *supra* note 135, at 582-83.

197. PA. R. CIV. P. 4009.11 (amendment, effective August 1, 2012). The recently adopted amendments to the *Pennsylvania Rules of Civil Procedure* govern e-discovery practice and specifically affect Rules 4009 and 4011. See Michael Broadbent, *Pennsylvania Announces E-Discovery Amendments to Rules of Civil Procedure*, E-DISCOVERY L. REV. (June 11, 2012), at <http://www.ediscoverylawreview.com/2012/06/articles/pennsylvania-announces-ediscovery-amendments-to-rules-of-civil-procedure/>.

tially embarrassing) content along with it. Requests for usernames, passwords, and signed authorizations that consent to the release of *all* of the user's private content are neither narrowly tailored nor "reasonably" calculated to produce only the relevant content.¹⁹⁸ Rather, these types of requests are overly broad, unlimited in time and scope and amount to nothing but a fishing expedition.

In *McMillen*, the court disregarded the fact that the scope of discovery should be limited to relevant information and not to just "any information."¹⁹⁹ Likewise, in *Romano v. Steelcase Inc.*,²⁰⁰ a New York trial court case that Pennsylvania judges have relied on when deciding the issue,²⁰¹ the judge also overlooked rules of civil procedure in an overly zealous effort to obtain information that might have contradicted the plaintiff's claims.²⁰² As one commentator correctly opined, the judges in *Romano* and *McMillen* "demonstrated profound neglect of the very sensitive nature of much of the content stored on a user's [social networking site] as well as abandonment of the routine discovery procedures that have been followed by attorneys for years" by ordering the plaintiffs to turn over their entire social media accounts thereby giving their opponents unfettered access.²⁰³

198. It is true that the party objecting to discovery bears the burden of establishing that the requested information or documents are not relevant. *See* *Walsh v. Generations Mgmt. Servs., LLC*, No. 09 CV 5715, 2011 WL 1131485 (Pa. Ct. Com. Pl. Lackawanna Mar. 7, 2011) (internal citations omitted). A social media user can easily point to the unreasonableness of the request by pointing to all of the posts, pictures, and direct messages with friends that are not remotely relevant to a fact at issue.

199. Bub, *supra* note 142, at 1455.

200. 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010).

201. *See* *Zimmerman v. Weis Mkts., Inc.*, No. CV-09-1535, 2011 Pa. D. & C. LEXIS 187, at *4-9 (Ct. Com. Pl. Northumberland May 19, 2011); *Largent v. Reed*, No. 2009-1823, slip. op. at 8 (Pa. Ct. Com. Pl. Franklin Nov. 7, 2011).

202. *Romano*, 907 N.Y.S.2d at 653. In *Romano*, plaintiff brought a personal injury suit for damages, claiming that she had a loss of enjoyment of life and could no longer participate in certain activities due to the accident. *Id.* The defendant reviewed the plaintiff's public information on the plaintiff's Facebook and Myspace accounts and found that the plaintiff traveled to Florida and Pennsylvania and actually had an active lifestyle. *Id.* After the plaintiff refused to sign an authorization consenting to the release of her social media content, the defendant filed a motion to compel. *Id.* The court indicated that it was reasonable to infer from the limited public postings that her private postings may also contain material and information that were relevant to her claims or that may lead to other admissible evidence. *Id.* at 432. The court indicated that the defendant's need for the information outweighed the plaintiff's privacy concerns. *Id.* The court ultimately granted the motion to compel and ordered the plaintiff to sign an authorization. *Id.* at 435. The court disregarded the fact that, by ordering the plaintiff to sign an authorization releasing all of the content, an abundance of irrelevant and potentially embarrassing information and content would also be released. *Id.*

203. Bub, *supra* note 142, at 1455.

These judges are traveling down a dangerous and slippery slope. If a defendant discovers just one relevant email between friends in a response to requests for production, what is next? Are trial judges now going to order litigants to turn over the usernames and passwords to their private email accounts? After all, access to the entire email account may lead to relevant information regarding a plaintiff's claimed injuries and damages.²⁰⁴ Such a request, however, would be unreasonable, atypical, and highly intrusive. A typical discovery request is one that "requires the information-seeking litigant to issue a production request so that the producing party can gather the evidence, cull it for relevance and privilege, and then produce the relevant non-privileged materials."²⁰⁵ One scholar summed it up best: "It would be a highly intrusive system if the normal procedure was, instead of a party producing its own documents, the other party's attorneys enter[ed] your house or business, look[ed] through all your papers and effects, and [took] away the material that in their judgment was relevant and non-privileged."²⁰⁶

This comment does not suggest an all out ban on the discovery of private social media content. After all, social media sites may contain a great amount of relevant information, and the purpose of discovery is to ascertain the truth in order to have a fair trial on the merits.²⁰⁷ This comment instead suggests that more reasonable and conventional methods are available to obtain private social media content.

Under certain circumstances, requests for authorizations allowing a social media company to release private content may not be unreasonable. If a party uses this method of discovery, the court should ensure the authorization is as specific as possible and limited in time and scope.²⁰⁸ First, the authorization should cover only the relevant time period and not date back to the inception of the social media account. Moreover, the authorization should be

204. This is not to suggest that there are not some situations in which all email communications actually would be relevant and required to be turned over to the opponent.

205. Bub, *supra* note 142, at 1455 (citing Boyden, *supra* note 158).

206. *Id.* (quoting Boyden, *supra* note 158).

207. See *McGovern v. Hosp. Serv. Ass'n of Northeastern Pa.*, 785 A.2d 1012, 1015 (Pa. Super. Ct. 2001) ("the purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits" (citing *Dominick v. Hanson*, 753 A.2d 824, 826 (Pa. Super. Ct. 2000))).

208. See explanatory note amended to PA. R. CIV. P. 4009.11 (effective Aug. 1, 2012) ("A request seeking electronically stored information should be as specific as possible. Limitations as to time and scope are favored . . .").

limited in scope, only requesting certain types of social media content. This is where the “threshold rule” that has been emerging in the Pennsylvania trial courts and other jurisdictions may have some merit.²⁰⁹ It would not be unreasonable under the *Pennsylvania Rules of Civil Procedure* for a party that has viewed relevant photographs on the publicly viewable page to request an authorization to release *only* the private photographs *for the relevant time period*. Direct messages, instant messages, status updates, comments, and other content should not be included in the authorization.²¹⁰ This would reduce the chance that the authorization would carry too much irrelevant or potentially embarrassing information with it. Although this type of discovery method may be reasonable under some circumstances, a more reasonable way to obtain private social media content exists and should be the method preferred by courts.

The most reasonable way a party can obtain private social media content is by requesting relevant content directly from the opponent. A number of courts have agreed with this premise. For example, in *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*,²¹¹ after denying the defendant’s request for a signed authorization that would allow the defendant to access plaintiff’s private Myspace messages, the court indicated that the “proper method” for obtaining relevant information is to serve “properly limited requests for production of relevant [Myspace] communications.”²¹² Similarly, in *Held v. Ferrellgas, Inc.*,²¹³ the court indicated that the defendant mitigated the plaintiff’s privacy concerns by allowing the plaintiff “to download and produce the information

209. Other jurisdictions that have recognized the “threshold rule” but declined to order the plaintiff to sign an authorization include: *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387 (E.D. Mich. 2012) (refusing to order defendant to sign an authorization finding that the requests sought irrelevant information and were overly broad); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525 (N.Y. Sup. Ct. 2012) (indicating that the defendant failed to establish a factual predicate with respect to relevancy and denied the motion to compel signed authorizations).

210. Likewise, if the page contains a relevant publicly viewable status update, then only the user’s status updates for the relevant time period should be released and not private pictures, direct messages, or any other information on the account.

211. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *2 (D. Nev. Jan 9, 2007).

212. *Mackelprang*, 2007 WL 119149 at *8. The court stated that “[n]othing in this Order prevents Defendants from serving such discovery requests on Plaintiff to produce her Myspace.com private messages that contain information regarding her sexual harassment allegations in this lawsuit or which discuss her alleged emotional distress and the cause(s) thereof.” *Id.*

213. *Held v. Ferrellgas, Inc.*, 10 2393 EFM, 2011 WL 3896513 (D. Kan. Aug. 31, 2011).

himself, rather than providing login information.”²¹⁴ In *Held*, the court granted the motion to compel because the defendant was not “seeking unfettered or unlimited access” to the plaintiff’s Facebook account.²¹⁵

In *Offenback v. L.M. Bowman, Inc.*,²¹⁶ the court conducted its own *in camera* review to determine which of the plaintiff’s photographs and posts were relevant to his claims of damages and injuries.²¹⁷ In a footnote, the court indicated that it was perplexed as to why it was asked to complete an *in camera* review and pointed out that the defense should have narrowed the discovery requests if it wanted to discover the potentially relevant information.²¹⁸ The court indicated that it would have been both possible and proper for the plaintiff to review his own Facebook account to determine the relevant information.²¹⁹

In *EEOC v. Simply Storage Management*,²²⁰ the defense, in its requests for production of documents, asked the claimants to produce copies of *all* the content contained on their Facebook and Myspace pages, including *all* of the photographs and videos posted by the claimants and *all* “status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blubs, comments and applications” for the relevant time period.²²¹ In deciding on the motion to compel, the court determined that discovery of private social media discovery is, in fact,

214. *Held*, 2011 WL 3896513 at *1.

215. *Id.*

216. 1:10 CV 1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011).

217. *Offenback*, 2011 WL 2491371 at *2-3. After conducting the *in camera* inspection, the court indicated that, with the exceptions of a few photographs, the plaintiff’s Facebook account revealed little information “beyond routine communications with family and friends, an interest in bluegrass and country music, a photography hobby, sporadic observations about current events, and a passion for the Philadelphia Phillies.” *Id.* at *3.

218. *Id.* at *3 n.3.

219. *Id.* The court also indicated that the defense “backed away from their initial position that they should be entitled to a general release of all information and data from Plaintiff’s social networking sites, and that instead of engaging in a broad fishing expedition, were attempting to discover [the] potentially relevant information such as that described in their . . . letter to the Court.” *Id.* The court went on to state that

If the Defendants had, in fact, narrowed their discovery requests in this fashion, we believe it would have been both possible and proper for Plaintiff to have undertaken the initial review of his Facebook account to determine whether it contained potentially relevant and responsive information, and thereafter to solicit the Court’s assistance if a dispute remained as to whether he should be required to produce the information identified.

Id.

220. 270 F.R.D. 430 (S.D. Ind. 2010).

221. *EEOC*, 270 F.R.D. at 432.

allowed, but the scope has to be limited in some way.²²² Although the defendant's requests were limited in time, the court essentially rewrote them to include the word "relevant" after the word "all" so that the requests had a proper scope.²²³ The court determined that the proper scope under the particular facts comprised any content that "reveal[ed], refer[ed], or relate[d] to any emotion feeling or mental state, as well as communications that that reveal[ed], refer[ed], or relate[d] to events that could reasonably be expected to produce a significant emotion, feeling or mental state" for the relevant time period.²²⁴ It then gave the parties guidance on what it would consider relevant under the circumstances of the case and told the plaintiff/claimant to err in favor of production when determining what is relevant.²²⁵

The above cases indicate that the proper way to conduct social media discovery is with requests that are narrowly tailored to produce relevant information directly from the opponent and which are reasonably calculated to lead to relevant evidence. The requests should be specific and related to a fact at issue. As one commentator suggests, "[i]n terms of discovery requests, refrain from being excessively global (*i.e.*, 'all contents of any and all social media profiles of John Doe') . . . Instead, be specific in what is sought, and tie it to the claims of defenses in the case."²²⁶

It should be noted that Facebook actually makes it easy for a user to provide relevant private content in response to an opponent's request for production of documents. Facebook has a feature that allows the user to download a copy of the information that he or she has shared on the site.²²⁷ Specifically, the user is able to download a file that includes the user's profile information; wall/timeline posts and content that the user and user's friends have posted to the user's wall/timeline; photos and videos that the user has uploaded to his or her account; the user's friend list;

222. *Id.* at 434.

223. *See id.* at 436.

224. *Id.*

225. *Id.* at 436.

226. John G. Browning, Articles, *Digging for the Digital Dirt: Discovery and Use of Evidence From Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 473-74 (2011) (citations omitted) ("For example, instead of just a blanket request for all content, seek 'all online profiles, postings, messages (including, but not limited to, tweets, replies, re-tweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), photographs, videos and online communication' relating to particular claims, allegations of mental anguish or emotional distress, defenses, et cetera.")

227. FACEBOOK, *Download Your Information*, <http://www.facebook.com/help/?page=116481065103985> (last visited July 11, 2012).

“notes” that the user has created; “events” to which the user RSVP’d; the user’s sent and received messages; and any other comments that the user or his or her friends have made on the user’s posts, photos, and other profile/timeline content.²²⁸ This feature makes the private content easily accessible and obtainable to litigants. Accordingly, it makes it easy for the user to comb over his or her own social media content to determine what is relevant and to respond to the opponent’s specific requests appropriately.

A concern with this method is whether the requesting parties will actually receive all of the relevant private content from the opponent in response to their discovery requests. Any argument of this type should fail. As with all discovery requests, litigants have to rely on the other side to produce requested documents or answers to interrogatories in good faith. In *any* type of discovery request, the opposing party could potentially withhold requested information. That is how discovery works. If the responding party fails to respond properly to a discovery request, he or she could face sanctions or penalties of perjury, because all responses must be “verified” by the responding party under penalties of perjury.²²⁹ In *Simply Storage*, in response to this type of argument, the court stated, “[l]awyers are frequently called upon to make judgment calls—in good faith and consistent with their obligations as officers of the court—about what information is responsive to another party’s discovery requests.”²³⁰ The court stated that parties have certain options if they believe that the other side’s production falls short, which include questioning the opponent and his or her counsel further in depositions about what was and was not produced.²³¹ As indicated in *Mackelprang*, a refusal by a plaintiff to produce relevant and discoverable content could be grounds for imposing sanctions.²³² In *Rozell v. Ross Holst*,²³³ a case dealing with private email communications, the court stated:

228. *Id.*

229. See PA. R. CIV. P. 4006(a)(1) (“Answers to interrogatories shall be in writing and verified.”); PA. R. CIV. P. 4009.12(c) (“The [response] shall be signed and verified by the party making it”); PA. R. CIV. P. 76 (“‘verified,’ when used in reference to a written statement of fact by the signer, means supported by oath or affirmation or made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities”); PA. R. CIV. P. 4019 (a party may face sanctions when it fails to properly answer or respond to discovery requests).

230. *EEOC*, 270 F.R.D. at 436.

231. *Id.*

232. *Mackelprang v. Fidelity Nat’l Title Agency of Nev.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *8 (D. Nev. Jan. 9, 2007).

The defendants are correct that an interested party cannot be the ‘final arbiter’ of relevance. But counsel for the producing party is the judge of relevance in the first interest. Discovery in our adversarial system is based on a good faith response to demands for production by an attorney constrained by the Federal Rules and by ethical obligations. Where the parties disagree as to the contours of relevance in connection with particular discovery demands, they present their dispute to the court, as the parties have done here. When a party can demonstrate that an adversary may be wrongfully withholding relevant information, it can seek relief²³⁴

Another way a party can address this issue is to ask the court to conduct its own *in camera* inspection to determine what information is relevant on the user’s social media page.²³⁵ If a court has the time and resources to conduct an *in camera* review for relevant information or to assure a party has responded appropriately, this method would not be unreasonable, for it would alleviate the privacy concerns associated with the private content. In one case, in an effort to expedite the discovery, a judge went so far as to offer to “friend” the witnesses who were friends with the plaintiff, find the relevant content, and thereafter disseminate the relevant information contained on their sites to both sides.²³⁶ It is unlikely, however, that these approaches will be used by many courts. In *Zimmerman*, a request by the plaintiff for an *in camera* approach was “flatly rejected as an unfair burden” on the court.²³⁷ Courts simply do not have the time or resources necessary to complete a thorough review of a party’s social media account.²³⁸

In sum, when a court considers how social media websites work, along with the rules and factors discussed above, the court should determine that the most proper and reasonable way for a party to conduct discovery of private social media is by requesting relevant information directly from the opponent in properly drafted re-

233. 05 Civ. 2936(JGK)JCF, 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006).

234. *Rozell*, 2006 WL 163143 at *4.

235. *See, e.g.*, *Offenback v. L.M. Bowman, Inc.*, 1:10 CV 1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011); *Bass v. Miss Porter’s Sch.*, No. 3:08cv1807 (JBA), 2009 WL 3724968 (Oct. 27, 2009).

236. *See Barnes v. CUS Nashville, LLC*, No. 3:09 cv 00764, 2010 WL 2265668 (M.D. Tenn. June 3, 2010).

237. *Zimmerman v. Weis Mkts., Inc.* No. CV-09-1535, 2011 Pa. D. & C. LEXIS 187, at *2 n.2 (Ct. Com. Pl. Northumberland May 19, 2011).

238. *See id.*

quests for production of documents. For example, a proper discovery request for the fact scenario laid out in the Introduction of this Comment would have been a request that sought printouts of “any pictures, status updates, comments, messages, or profile information contained on Plaintiffs’ Facebook and Twitter accounts that relates to, depicts, characterizes, details or illustrates Patty Plaintiff partaking in any physical activity or social event since the date of the accident.”²³⁹ In response, Patty Plaintiff would have been obligated to send the pictures and status updates that indicated that she recently partook in physical activities and social events. As indicated above, Facebook actually has a tool that makes it easy for social media users to provide this requested content. Nevertheless, in some situations, authorizations that are limited in time and scope and seek only specific content that is potentially relevant may also be reasonable. On the other hand, discovery requests that seek opponents’ usernames and passwords are never reasonable and should never be allowed.

IV. CONCLUSION

The discoverability of private social media has not been widely litigated in Pennsylvania. There have only been six Court of Common Pleas’ judges that have issued an opinion regarding the matter and an appellate court has yet to address the issue.²⁴⁰ The

239. For another example of a properly drafted discovery request, see *Browning*, *supra* note 226.

240. As indicated in note 13, *supra*, Judge Wettick of the Allegheny County Court of Common Pleas and Judge Bianco of the Indiana County Court of Common Pleas issued their opinions and orders after a majority of this Comment was completed; therefore, their opinions and orders were not discussed in the body of this Comment. See *Trail v. Lesko*, No. GD-10-017249, 2012 WL 2864004 (Pa. Ct. Com. Pl. Allegheny July 5, 2012) (order and opinion denying both plaintiffs and defendant’s motions to compel); *Simms v. Lewis*, No. 11961 CD 2011, 2012 WL 6755098 (Pa. Ct. Com. Pl. Indiana Oct. 10, 2012) (opinion and order granting in part and denying in part defendant’s motion to compel).

In *Trail*, Judge Wettick’s opinion denied both a plaintiff’s and a defendant’s motion to compel access to the other’s Facebook account. *Trail*, 2012 WL 2864004, at Part I. The plaintiff’s motion to compel sought information that was not relevant to the only issue that remained in the case, damages, and therefore, was held to be an unreasonable intrusion under PA. R. CIV. P. 4011(b). *Id.* at Part V, A. Likewise, the defendant’s motion was denied because the public photographs he gleaned from the plaintiff’s public profile were not inconsistent with the plaintiff’s alleged injuries. *Id.* at Part V, B. Judge Wettick based both rulings on PA. R. CIV. P. 4011(b) and indicated that allowing a litigant full access to his or her opponent’s Facebook account is intrusive “because the opposing party is likely to gain access to a great deal of information that has nothing to do with the litigation and may cause embarrassment if viewed by persons who are not ‘Friends.’” *Id.* at Summary. He indicated that private Facebook content is protected by Rule 4011 when the opposing party “has not shown a sufficient likelihood that such discovery will provide relevant evidence,

four opinions discussed in this Comment that have ruled on the matter have determined that there must be a threshold showing of relevant material contained on the litigant's public page before the opponent can have access to the private content. Inexplicably, when this threshold showing is made, some Pennsylvania trial judges have been setting dangerous precedent by ordering the party to furnish his or her usernames and passwords or signed authorizations, which allows the opposing party unfettered access to a user's entire social media account.²⁴¹

Private social media evidence is unlike any other evidence, and courts need to consider the different attributes of the social media sites. Although private social media content should be discoverable, the Pennsylvania trial courts that have granted opponents unfettered access have not been adhering to the *Pennsylvania Rules of Civil Procedure* or to the way discovery is typically con-

not otherwise available, that will support the case of the party seeking discovery." *Id.* Here, both discovery requests were denied because the intrusions were not offset by "any showing the discovery would assist the requesting party in presenting its case." *Id.*

In *Simms*, the plaintiff was injured in an automobile accident and claimed that she suffered "mental and physical anguish, inconvenience, and deprivation of the ordinary pleasures of life" as well as bodily injuries. *Simms*, 2012 WL 6755098. The defendant discovered that the plaintiff had Facebook, myYearbook, and MySpace accounts. *Id.* On the plaintiff's myYearbook account, she posted: "Chillin with my girl tonight. were gonna do some Zumba Fitness :) so exited!!! HTC :p." *Id.* Because of this post, the defendant requested the plaintiff's usernames and passwords for all three accounts in order to view the private content. *Id.* Once the plaintiff declined to provide her log-in information, the defendant filed a motion to compel. *Id.* Relying on *Zimmerman*, and applying the threshold rule, the court found that the information contained on the plaintiff's myYearbook account was discoverable. *Id.* However, since the defendant was unable to point to any relevant public postings on the plaintiff's Facebook and MySpace accounts, the judge denied the defendant access to those two sites. *Id.* Deviating from what the other Pennsylvania trial courts have done (i.e. ordering a litigant to turn over his or her log-in information), Judge Bianco somewhat limited his holding. *Id.* The plaintiff was only required to "coordinate an agreed upon date, time, and location where Plaintiff will access her myYearbook account in the presence of counsel for [the defendant]" and to not delete any of the information on that account until after that time. *Id.*

241. Since the completion of this Comment, at least two more Pennsylvania trial courts have decided the issue with written opinions denying discovery of private social media. See *Hoy v. Holmes*, No. S-57-12 (Pa. Ct. Com. Pl. Schuylkill Jan. 31, 2013) (opinion and order denying defendant's motion to compel); *Brogan v. Rosenn, Jenkins & Greenwald, LLP.*, No. 08 CV 6048, 2013 WL 1742689 (Pa. Ct. Com. Pl. Lackawanna Apr. 22, 2013) (memorandum and order denying plaintiff's motion to compel). In the recent and comprehensive opinion by Judge Nealon of the Lackawanna County Court of Common Pleas, the trial court correctly denied the plaintiffs' request to compel discovery of an opponent's Facebook username and password in part by considering the factors set forth in this Comment, stating: "A discovery request seeking carte blanche access to private social networking information is overly intrusive, would cause unreasonable embarrassment and burden in contravention of PA. R. CIV. P. 4011(b), and is not properly tailored 'with reasonable particularity' as required by the Pennsylvania Rules of Civil Procedure." *Brogan*, 2013 WL 1742689, at Part II(B)(2).

ducted. Moreover, courts must consider privacy concerns when deciding this issue. The most reasonable and appropriate method of discovering private social media content is to request the relevant content directly from the opponent. The opponent has a duty to furnish this relevant information to the other side or face sanctions. In some situations, authorizations limited in time and scope may also be reasonable.

Ultimately, the scope of private social media content discovery needs to be resolved by an appellate court. The court will need to consider a user's privacy concerns as well as the reasonableness and scope of the particular discovery request. Until an appellate court decides the proper scope of social media discovery, litigants need to be aware that if they post relevant information on their public pages, they may be forced to provide an opponent full access to their private account.

