

Client Alert **Product Liability Law**

New Jersey's Appellate Division Permits Discovery of Private Social Media Posts

Social media is a mainstay in our daily lives. It is common for individuals to “post” messages, photographs, video, etc. to their “friends” and “followers” on a variety of social media platforms. Information posted to an individual's Facebook or Instagram account is often publicly available and can be accessed and searched by litigants as part of informal discovery. But what happens when an individual sets his/her social media settings to “private,” shielding the posts from the public? Are private social media posts discoverable in that scenario? In the first published opinion in New Jersey, Norma Davis v. Disability Rights New Jersey, et al., A-0270-22, 2023 N.J. Super. LEXIS 28 (App. Div. Mar. 16, 2023), the New Jersey Appellate Division answered that question with a resounding “yes”¹. While recognizing that a plaintiff has a privacy interest in private social media posts, the Court found that the privacy interest must yield to New Jersey's liberal discovery and evidentiary rules when the posts are relevant to a plaintiff's claims.

In Davis, plaintiff claimed that the defendants wrongfully terminated her employment as a senior staff attorney with Disability Rights New Jersey in violation of New Jersey's Law Against Discrimination. She alleged defendants terminated her because she requested disability accommodations relating to various medical conditions, and that the termination caused her to suffer emotional distress.

During discovery, defendants requested production of plaintiff's private social media posts. Plaintiff objected, and defendants moved to compel. In her opposition, plaintiff certified that she never posted any content on her social media relating to any of the parties in the case or to her claims. She also argued that she had a legally protectable

¹ The opinion also addressed the trial court's order to compel the production of cell phone records. That ruling is beyond the scope of this Client Alert.

J u l y
2023

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privacy interest in her private social media accounts that barred production of social media posts. Nevertheless, the trial court found that private social media posts were discoverable, because they were relevant to plaintiff's emotional distress claim. The trial court granted defendants' motion, but narrowed the discovery requests as follows:

- Date range narrowed from January 1, 2020 to the present;
- Documents sufficient to demonstrate the social media sites on which plaintiff maintained a profile between January 1, 2020 and the present;
- Postings, profiles or comments regarding the defendants, the lawsuit, plaintiff's emotional state (happy or sad);
- Postings that discuss or mention vacation, trips, parties or celebrations;
- Posts that discuss or mention illness or worry about illness;
- Posts that mention work; and
- All pictures of plaintiff.

The trial court directed plaintiff to review her social media posts and to redact non-relevant content. Plaintiff claimed that this task was arduous as she posted to her social media accounts on a daily basis.

Plaintiff appealed. She argued that she had a legally protected privacy interest in her private social media posts that could not be subject to civil discovery without demonstrating a compelling need. Plaintiff relied on the Social Media Privacy Law, N.J.S.A. 34:6B-5 to -10, which prohibits an employer from requiring a current or prospective employee to disclose any user name or password to a social media account as well as the Stored Communications Act, 18 U.S.C. Section 2701-2713, which recognizes a privacy interest in social media postings.

While the Court agreed that plaintiff had a privacy interest in her private social media posts, it disagreed that these state and federal statutes precluded discovery. Rather, it found that those statutes "only protected a person's private social media posts from unauthorized access by employers and others. Nowhere did either statute state or otherwise suggest that social media posts are not subject to civil discovery." The Court ultimately found that New Jersey's liberal discovery rules (Rule 4:10-2) covered private social media posts, and that the rules did not "extend a privilege to private social media account information."

Applying the relevancy standard of Rule 4:10-2, the Court found that the requested private social media posts were relevant to her emotional distress claims. The Court embraced the reasoning outlined in E.E.O.C. v. Simply Storage Mgmt., 270 F.R.D. 430, 435 (S.D. Ind. 2010), stating that it is reasonable to expect severe emotional or mental injury to manifest itself in some social media content.

The Court also analyzed whether the scope of the trial court's order was consistent with New Jersey's discovery rules. Plaintiff argued that the order was vague and overbroad because it gave defendants "too broad an access to her social media." She analogized her social media posts to financial records, claiming that like discovery of financial information, discovery of private social media posts should be denied when there are less intrusive means of obtaining the same information. She claimed that discovery related to her emotional distress claim should be limited to her medical records and deposition testimony.

Defendants disagreed, asserting that there is a lesser privacy concern in private social media posts than personal financial information because "the posts are voluntarily generated and intentionally shared with people allowed to 'follow' the poster's account", which is different from financial information. Defendants also argued that the trial court's order minimized the degree of intrusion because it did not give them unfettered access to her social media accounts, but rather, allowed her to review the posts and redact non-relevant content.

The Court agreed with the defense position, rejecting the argument that private social media posts are akin to personal financial and tax records that require a compelling reason for disclosure. The Court found that there is no confidentiality or legal authority preventing an approved private recipient (such as a litigant's Facebook friend) from sharing a litigant's private posts. It also recognized that individuals who post on social media understand that intended recipients may share the information with others. Finally, the Court rejected plaintiff's argument that private social media posts are not discoverable because the posts may not be a realistic portrayal of someone's life; instead, the ultimate reliability of accessing a person's emotional distress is decided by a trial judge pursuant to New Jersey's evidentiary rules.

While the Court found that the trial court's social media order was appropriately limited in time and scope, it nevertheless remanded the matter to the trial judge to "put into place an in camera review process to ensure plaintiff has recourse to allow the judge to assess posts that she believes are not discoverable." Specifically, the Court directed the trial judge to amend the order to require plaintiff to produce to defendants and the judge a redacted list of her discoverable posts and to also produce to the judge an unredacted copy of the posts with a Vaughn² index (identifying log).

² The "Vaughn index must consist of one comprehensive document, adequately describe each withheld document or redaction, state the exemption claimed and explain why each exemption applies." Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp 2d 749, 765 (E.D. Pa. 2008).

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Prior to Davis, trial court rulings on the discoverability of private social media posts were unpublished and often inconsistent with one another. This opinion provides much needed guidance to New Jersey trial courts, clarifying that there is no private social media privilege and that private social media posts are discoverable in accordance with New Jersey's discovery rules.

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