IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DAVID HARKEY and RUBY HARKEY, Plaintiffs, vs.	: No. CV-19-1295 : :
	: Civil Action – Law
DAVID M. STOJAKOVICH and A. DUIE PYLE, INC., Defendants.	: : : *Motion to Compel*

ORDER

AND NOW, following argument held October 6, 2020 on Defendants David M. Stojakovich and A. Duie Pyle, Inc.'s Motion to Compel Plaintiff David Harkey's Complete Discovery Responses, the Court hereby issues the following ORDER.

Background

On September 17, 2019, Plaintiffs David Harkey and Ruby Harkey (collectively "Plaintiffs") filed a Complaint alleging that on August 15, 2017, Defendant David M. Stojakovich, while driving a Tractor Trailer Truck owned by Defendant A. Duie Pyle, Inc. east on Allegheny Street in Jersey Shore, Pennsylvania, made a left-hand turn off Allegheny Street onto Harris Street. While turning, Mr. Stojakovich crossed directly in front of Mr. Harkey, who was driving his motorcycle west on Allegheny Street, causing a collision and various injuries to Mr. Harkey.

The Complaint asserted four claims. Under Count I, Mr. Harkey raised a count of Negligence against Mr. Stojakovich. Under Count II, Mr. Harkey raised a count of Negligence *Per Se* against Mr. Stojakovich, alleging that in making the left-hand turn, Mr. Stojakovich violated 75 Pa.C.S.A. § 3322.[1] Under Count III, Mr. Harkey raised a count of Vicarious Liability against A. Duie Pyle, Inc., alleging that the accident occurred while Mr. Stojakovich, an employee of A. Duie Pyle, Inc., was acting within the scope of his employment. Under Count IV, Mrs. Harkey raised a Loss of Consortium claim against both Mr. Stojakovich and A. Duie Pyle, Inc. (collectively "Defendants").

Defendants filed Preliminary Objections on October 1, 2019, objecting that

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[1] 75 Pa.C.S.A. § 3322 ("The driver of a vehicle intending to turn left within an intersection or into an alley, private road or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute a hazard."),

certain paragraphs within the Complaint included scandalous or impertinent materials. Plaintiffs filed an Amended Complaint on October 8, 2019, which deleted these paragraphs. Defendants then filed an Answer and New Matter to the Complaint on October 23, 2019. Plaintiffs filed an Answer to New Matter on October 24, 2019. The parties then filed a Stipulation as to Negligence on October 28, 2019, which stipulated that Mr. Stojakovich was 100% negligently responsible for the August 15, 2017 collision and that A. Duie Pyle, Inc. was vicariously liable for Mr. Stojakovich's negligence. Under the Stipulation, the Defendants did not admit damages, and Plaintiffs agreed not to assert a claim for punitive damages. The Court issued a Scheduling Order on December 2, 2019, setting the close of discovery for August 24, 2020.

On August 13, 2020, Defendants filed a Motion to Compel Plaintiff David Harkey's Complete Discovery Responses ("Motion to Compel" or "Motion"). Pursuant to the facts alleged in this Motion, Defendants served Requests for Production of Documents upon Plaintiffs on August 28, 2019. On September 27, 2019, Plaintiffs sent Defendants their Responses. Plaintiffs raised an objection and refused to answer Request for Production No. 22, which requested that Mr. Harkey submit a signed release allowing Defendants to access his records on the Pennsylvania Prescription Drug Monitoring Program ("PDMP"). On June 2, 2020, Defendants' counsel sent Plaintiffs' counsel an email that again requested that Mr. Harkey sign the PDMP release, and further requested downloaded copies of Mr. Harkey's personal and business social medial postings. Defendants' counsel sent a follow-up email reiterating these requests on July 21, 2020. Plaintiffs' counsel did not comply with either of these requests, prompting Defendants to file the foregoing Motion to Compel.

Defendants seek to compel Mr. Harkey to execute a release enabling them to access the PDMP records. Defendants further seek the production of downloaded copies of all Mr. Harkey's social media postings.

Analysis

<u>Release Authorizing Access to PDMP Records</u>

Defendants assert within their Motion to Compel and Brief in Support that the PDMP records are relevant and discoverable because Mr. Harkey is claiming that

because of the August 15, 2017 collision, he is disabled from being a commercial truck driver, resulting in a loss in wages of $39,000.00 per year. However, Mr. Harkey testified at deposition that he has been prescribed 180 10mg tablets of oxycodone per month since September of 2014 to treat back pain.[2] He stated that prior to the August 15, 2017 collision, he would only take the medication at morning and at night, and not while driving, as it would be "against the law to take pain medication and drive a tractor-trailer."[3] Mr. Harkey also testified that, when questioned at a 2016 DOT inspection, he had denied taking any narcotics or habit-forming drugs, explaining at deposition that he believed the question was meant to apply only to illegal narcotics and not to prescribed medications.[4] Defendants argue that in light of this deposition testimony, the PDMP records would be relevant to demonstrate, *inter alia*, that Mr. Harkey was taking prescription drugs prior to the August 15, 2017 collision that would have disqualified him from working as a commercial truck driver.

Within their Brief in Opposition to the Motion to Compel, Plaintiffs assert that Mr. Harkey should not be compelled to provide a signed release as the Defendants have already subpoenaed and received copies of Mr. Harkey's pharmacy records from July 24, 2010 through January 6, 2020. Indeed, Plaintiffs maintain that Defendants have copies of Mr. Harkey's records dating back prior to the creation of the PDMP, which only went into effect on August 25, 2016. Plaintiffs further argue that the purposes of the PDMP are limited, and that information on the PDMP is confidential, subject to limited exceptions not applicable to this case.

The PDMP, which was created as part of the Achieving Better Care by Monitoring All Prescriptions Program ("ABC-MAP") Act, is an electronic database that collects information on all filled prescriptions for controlled substances.[5] The express purpose of the PDMP is, "to increase the quality of patient care by giving prescribers and dispensers access to a patient's prescription medication history through an electronic system that will alert medical professionals to potential dangers for purposes

[2] Defendants David M. Stojakovich and A. Duie Pyle, Inc.'s Motion to Compel Plaintiff David Harkey's Complete Discovery Responses (Ex. B – Videotaped Videoconference Deposition of David Harkey at 65) (Aug. 13, 2020) ("Motion to Compel").
[3] Motion to Compel (Ex. B at 59).
[4] Motion to Compel (Ex. B at 68).
[5] Achieving Better Care by Monitoring All Prescriptions Program (ABC-MAP) Act, P.L. 2911, No. 191, § 1, 35 P.S. § 872.1 (2014).

of making treatment determinations."[6] The PDMP is also intended to provide patients, "thorough and easily obtainable record of their prescriptions for purposes of making educated and thoughtful health care decisions" and further, "seeks to aid regulatory and law enforcement agencies in the detection and prevention of fraud, drug abuse and the criminal diversion of controlled substances."[7] Access to the PDMP is strictly limited to patients obtaining their own information, prescribers, dispensers, the Office of the Attorney General, authorized law enforcement personnel, guardians of individuals under 18 or an individual's health care power of attorney, municipal coroners, and certain other State employees and medical personnel.[8] It is a misdemeanor in the first degree to knowingly or intentionally obtain information from the PDMP for purposes other than those specified under statute.[9]

Having reviewed the express purposes of the PDMP, the Court agrees with the position asserted by Plaintiffs that Mr. Harkey's PDMP records are not subject to discovery. Even if, as Defendants' counsel asserted at argument, Mr. Harkey could legally sign a release allowing Defendants access to the records, such access would contravene the limited purposes of the PDMP. The PDMP is intended to educate patients about their own health information, to enable prescribers and dispensers to ensure that patients are receiving proper care, and to empower law enforcement to investigate criminal substance abuse. The PDMP is not intended to help parties bolster their claims within a civil lawsuit. Further, as Plaintiffs have noted, Defendants already have access to Mr. Harkey's pharmacy records dating back to 2010, so Mr. Harkey's PDMP records would be merely duplicative. There is no evidence beyond mere supposition that the provided pharmacy records are incomplete. Therefore, Defendants' request that the Court compel Mr. Harkey to sign a release allowing Defendants to access to his PDMP records is DENIED.

<u>Copies of All Social Media Postings</u>

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[6] 35 P.S. § 872.2.
[7] *Id.*
[8] 35 P.S. § 872.9.
[9] 35 P.S. § 872.10.

Defendants assert that Mr. Harkey's social media postings are relevant and discoverable because Mr. Harkey claims that as a result of the August 15, 2017 collision he has suffered physical disability, loss of life's pleasures, loss of earnings, and difficulty walking and ambulating. However, Defendants note that Mr. Harkey's social media postings show him taking multiple trips after the accident, taking motorcycle rides after the accident, and engaging in work at a restaurant and bar owned by Plaintiffs, even though Plaintiffs are seeking damages for having to hire replacement employees. Defendants cite *Kelter v. Flanagan*, an opinion from the Monroe County Court of Common Pleas, for the proposition that a party's social media accounts may be discoverable, "if it appears likely that they contain information that could be relevant."[10]

Plaintiffs counter that Mr. Harkey's two social medial accounts, a work Facebook account and a personal Facebook account, are set to "Public" and so all information requested would be equally available to Defendants. Plaintiffs further assert that *Kelter*, another personal injury case, is distinguishable from this case on the facts. In *Kelter*, the plaintiff at first claimed at deposition that she had no social media account, and after she was confronted by opposing counsel with incriminating evidence from her Instagram account, changed the settings on that account from "Public" to "Private." Plaintiffs cite the decision of the Lackawanna County Court of Common Pleas in *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, for the proposition that discovery requests of private social media information must be tailored "with reasonable particularity" to avoid unreasonable burden and embarrassment.[11]

This Court has not addressed discoverability of social media postings, nor is there binding precedent on the issue from the Pennsylvania appellate courts. Other Pennsylvania trial courts that have addressed the issue have generally held that there is no privacy right to non-public information posted on social media sites such as Facebook, because users should realize that third parties, such as site operators, could access this information at any time.[12] Therefore, information posted on social media accounts may be discoverable when such information is not subject to privilege and is

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[10] Kelter v. Flanagan, No. 286 CIVIL 2017, 2018 WL 1439793, at *1 (Monroe Cty. Feb. 14, 2018).
[11] *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, 28 Pa. D & C. 5th 553, 575-76 (Lack. Cty. 2013).
[12] *See* Allen v. Sands Bethworks Gaming, LLC, No. C-0048-CV-2017-2279, 2018 WL 4278941, at *3 (North. Cty. Aug. 06, 2018) (providing a summation of these cases).

relevant to the case, or may potentially lead to the discovery of relevant material.[13] However, the limitations on discovery under Pa.R.C.P. 4011, and particularly the limitation on discovery requests that "would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party[,]" will apply to discovery of non-public information on a social media account.[14]

Generally, a party seeking discovery of the non-public information on a social media account has been required to show a "factual predicate" that the sought information could be relevant by demonstrating that relevant information has been posted on the publically available portions of the account.[15] However, the courts have held that even when this factual predicate has been demonstrated, discovery requests must be tailored "with reasonable particularity" to avoid unreasonable embarrassment and burden.[16] While these decisions of our fellow trial courts are not precedential, the Court finds this reasoning persuasive.

In the instant case, the Court finds that Defendants have made a threshold showing that Mr. Harkey's private social media account information could be relevant by citing information on the publically accessible side of his accounts that implicates his claims for future damages. However, Defendants' request for all account postings lacks the requisite particularity necessary to avoid undue embarrassment and burden not only to Mr. Harkey, but also to any third parties potentially involved in private messaging or other non-public communications with Mr. Harkey on these accounts. Further, Defendants could themselves easily screenshot and download information that is *publically* posted on Mr. Harkey's accounts, and so this publically posted information will

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[13] Pa.R.C.P. No. 4003.1(a).

[14] *See* Allen, 2018 WL 4278941, at *3 ("Neither privacy nor privilege being at issue in the realm of social media discovery, decisions regarding social media discovery disputes turn on the general principle that that which may lead to the discovery of relevant evidence is discoverable, tempered only by issues of unreasonable annoyance, embarrassment, oppression, burden, or expense.").

[15] *See* Allen, 2018 WL 4278941, at *4; Trail v. Lesko, No. GD-10-017249, 2012 WL 2864004, at *7 (Alleg. Cty. July 05, 2012) ("The [trial] courts recognize the need for a threshold showing of relevance prior to discovery of any kind, and have nearly all required a party seeking discovery in these cases to articulate some facts that suggest relevant information may be contained within the non-public portions of the profile. To this end, the courts have relied on information contained in the publicly available portions of a user's profile to form a basis for further discovery.").

[16] *See* Allen, 2018 WL 4278941, at *7 (quoting *Brownstein v. Philadelphia Transp. Co.*, 46 Pa. D. & C. 2d 463, 464 (Phila. Cty. 1969)) (quotations omitted) ("While a limited degree of fishing is to be expected with certain discovery requests, parties are not permitted to fish with a net rather than with a hook or a harpoon.").

likewise not be subject to discovery.[17] Therefore, Defendants' request that the Court compel the production of downloads of Mr. Harkey's social media postings is DENIED.

Conclusion

In summary, Defendants' Motion to Compel is DENIED.

IT IS SO ORDERED this 26th day of October 2020**.**

By The Court,

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Eric R. Linhardt, Judge

ERL/cp
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[17] *See Boyle v. Steiman*, 631 A.2d 1025, 1031 (Pa. Super. 1993) (citations omitted) ("It is not a purpose of discovery for a party to supply, at its own expense, information already under the control or readily available to the opposing party.").