CARLTON FIELDS

Facebook Fishing Expeditions Prohibited

February 11, 2014

In *Root v. Balfour Beatty Const., LLC*, 2014 WL 444005 (Fla. 2d DCA February 5, 2014), Florida joined a growing list of courts around the country that expressly prohibit "fishing expeditions" in social media discovery. *Root* was a personal injury action brought by the mother of a three-year-old boy, who was in the care of his seventeen-year-old aunt at the time he was injured. The mother also brought a derivative claim for loss of parental consortium. Defendants raised several affirmative defenses including the mother's negligent entrustment and the aunt's failure to supervise the boy. Defendants requested the mother to produce copies of "any and all postings, statuses, photos, 'likes' or videos" on her Facebook page before or after the accident related to her relationships with her son, other family members, boyfriends, husbands, and/or significant others as well as related to her mental health, stress complaints, alcohol use or other substance abuse. *Id.* at *1. The discovery also sought postings relating to any lawsuits the mother filed after the accident. The trial court ordered the discovery to proceed, but the 2nd DCA granted certiorari and quashed the order. The Court began its analysis noting that courts around the country have repeatedly determined that social media evidence is discoverable and that the Florida Rules of Civil Procedure were amended in 2012 to provide guidelines for the discovery of electronically stored information. The Court remarked that social network discovery simply requires applying "basic discovery principles in a novel context." *Id.* at *2 (quoting *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F. R. D. 430, 434 (S.D. Ind. 2010)). Applying those basic principles, the Court held that Defendants had failed to meet their burden that this discovery was reasonably calculated to lead to admissible evidence regarding the claims or defenses at issue in the case. The Court also held that the discovery was overbroad. As the Court observed, none of the discovery related to the accident or the boy's injuries. Likewise, regarding the mother's loss of consortium claim, the Court noted that the discovery was not limited to the relevant inquiry: the impact of the boy's injuries on his mother. In sum, the Court agreed with the mother that Defendants were engaged in an impermissible fishing expedition of her personal information on Facebook. The discovery at issue in *Root* was arguably more specific than the social media discovery rejected by several federal district courts in recent opinions. *See e.g., Ford v. United States*, 2013 WL 3877756 (D. Md. July 25, 2013)(in medical malpractice case, discovery from plaintiff's social media accounts relating to any factual allegation in plaintiffs' depositions was not narrowly tailored to complaint and failed to identify specific categories of information sought); *Jewell v. Aaron's, Inc.*,

2013 WL 3770837 (N.D. Ga. July 19, 2013)(in Fair Labor Standards Act class action, discovery seeking class members' posts on Facebook during working hours was a fishing expedition); *Salvato v. Miley*, 2013 WL 2712206 (M.D. Fla. June 11, 2013) (in wrongful death action, discovery seeking communications from defendants cell phone, email, and social media accounts that related in any way to complaint was overbroad); *Kennedy v. Contract Pharmacal Corp.*, 2013 WL 1966219 (E.D. NY May 13, 2013)(in Title VII hostile work environment case, discovery of plaintiff's social networking usage including all media related to plaintiff's emotional state was overbroad and not limited to content in some way relating to acts alleged in complaint). The Court's decision in *Root* was likely influenced by the concession of Defendants' counsel to a special master, quoted in the opinion, that the discovery was an attempt to "look under the hood, so to speak, and figure out whether that's even a theory worth exploring." 2014 WL 444005 at *3. In fact, the special master was quoted as saying that 99% of the discovery might be irrelevant. *Id.* The Court may have also been swayed by the fact that the mother's deposition had already been taken, but Defendants were unable to point to anything in her testimony to support the relevance of the discovery. *Id*, at *2. Importantly, the Court left the door open for Defendants to pursue the discovery should further developments in the litigation suggest that the requested information may be discoverable but cautioned that "the trial court may have to review the material in camera and fashion appropriate limits and protections regarding the discovery." *Id.* Experienced litigators should know by now that almost any attempt to cast a wide net around a party's social media accounts will draw numerous objections. The *Root* opinion certainly reinforces the merit of such objections and will undoubtedly be cited as establishing a "no Facebook fishing expeditions" rule in Florida. The more important takeaway from *Root* is that the proponent of social media discovery must be able to articulate how the discovery is narrowly and carefully tailored to specific issues in the case.

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