SOCIAL MEDIA DISCOVERY:
PLANTIFF & DEFENSE PERSPECTIVES
POST FORMAN V. HENKIN
30 NY3D 656 (2018)

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Social Media Discovery:

Perspectives Post *Forman v. Henkin*, 30 N.Y.3d 656 (2018)

By Maureen E. Maney, Esq., Kathleen Barclay, Esq. and Caroline Bertholf, J.D. Candidate, 2019

Every lawsuit, regardless of whether it concerns a car accident, a defective product, securities fraud, patent infringement, or sexual harassment, is about people. The beauty of social media is that it serves as a potentially powerful discovery tool that often yields treasures such as unguarded and uncoached e-mails, statements, or photos, before an attorney is involved, that can help us to understand the true nature of a given witness or claim.

Since the inception of Facebook, more than ten years ago, social media usage has increased significantly. (*See*, Aaron Smith et al, Social Media Use in 2018, PEW RESEARCH CENTER, Mar. 1, 2018, *available at* http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/. According to a recent Pew Research Center Study, in 2018 more than 73 percent of adults use YouTube, 68 percent of adults use Facebook, 35 percent of adults use Instagram, 29 percent of adults use Pinterest, 27 percent of adults use Snapchat, 25 percent of adults use LinkedIn, 24 percent of adults use Twitter, and 22 percent of adults use WhatsApp. Of the 68 percent of adults who use Facebook, approximately three-quarters of users log into Facebook on a daily basis. *Id*. Individuals provide personal information on these platforms in both private and public settings. The majority of individuals use social platforms such as Facebook, Twitter, and Instagram to provide a window into thoughts, feelings, and emotions. Because these outlets can provide personal and real-time documentation of events, it has become an increasingly popular and arguably necessary source of information in personal injury cases. This means that there is a

substantial likelihood that the litigants and witnesses in your cases are using Facebook, and are posting statements, pictures, and other content that could be directly relevant to the issues in your lawsuit or shed light on that person's mood and activities, which is likely relevant to the plaintiff's damages.

The initial starting point in social media discovery is to utilize a traditional search engine such as Google. Inserting the name, employer, city, etc. of an individual can yield potentially useful information and even potential social media accounts. Other social media information such as blogs, product reviews, and personal webpages can often be located as a result of a basic search. In addition to Facebook, other potential sources include Instagram, YouTube, LinkedIn, Twitter, Google+, and MySpace, among others.

It should be noted that obtaining this information through discovery is paramount as it is unlikely to be retrieved through other methods. Service of a subpoena on a social network has virtually no chance of success. The same can be said for a signed authorization. A typical response generally directs an individual to have the opposing litigant download their information and share it with you.

"Traditional" Discovery of Social Media

Discovery, as guided by CPLR Section 3101 provides that: "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Over the years, however, New York courts have implemented a special standard in determining the discoverability of information on social media platforms by using publicly accessible information to open the door for the disclosure of private information. In 2013, the First Department held, in *Tapp v. New York State Urban Dev. Corp.*, 958 N.Y.S.2d 392, 393 (1st Dept.

2013), that a "factual predicate" must be established by the person seeking the information, to warrant discovery of additional materials. The factual predicate may only be established by first identifying "relevant information" on the public portion of the social medial platform. *Id*. at 393. This "relevant information" must be information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims," (quoting *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (1st Dept. 2011) or is "reasonably calculated to lead to the discovery of information bearing on the claims." *Abrams v. Pecile*, 922 N.Y.S.2d 16, 17 (1st Dept. 2011) (denying defendant's request for access to plaintiff's social media after no showing was made that discovery would reveal "disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims").

Anything from photographs, to statements, to frequency of use may be discoverable if a factual predicate is established. For example, in a plaintiff's personal injury case, *Jennings v. TD Bank*, 2013 NY Slip Op 32783(U) the plaintiff claimed to have sustained injuries due to the defendant's negligence. The factual predicate was established when an internet search of a plaintiff revealed public Facebook photographs of her apparently in front of a cruise ship, on vacation, pictures relevant to her injury claim. In another plaintiff's personal injury case, *Melissa "G" v. North Bablyon Union Free Sch. Dist.*, 48 Misc. 3d 389, 391 (Sup. Ct., Suffolk County 2006), where the plaintiff claimed loss of enjoyment of life, a factual predicate was established when a search of public Facebook photographs revealed the plaintiff engaging in a variety of recreational activities such as rock climbing, drinking with friends, and being at work because those activities were relevant to the plaintiff's claim.

This "factual predicate" standard is a higher burden to meet from traditional discovery methods not involving social media, because it clearly distinguishes publicly available information

from private information and then engages in a relevancy determination of the private information based on the publicly available information. This process shifted much of the burden to the defendant: first having to prove that the information they found was a "factual predicate" of the claim and second, that disclosure was "material and necessary." These showings, difficult to navigate, typically called for more lengthy discovery and an *in camera* review of the records by courts. *See Richards v. Hertz Corp*, 953 N.Y.S.2d 654, 656-657 (2d Dept. 2012); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311.

Forman v. Henkin

Rather than adopting this special standard for social media discovery, the New York State Court of Appeals, recently jettisoned the showing of a "factual predicate," as developed by lower courts. In February of this year, the Court of Appeals decided *Forman v. Henkin*, 30 N.Y.3d 656 (2018), in which they entertained the standard used in the discovery of social media in personal injury cases.

In *Forman*, the plaintiff, Kelly Forman alleged she was injured after falling from a horse owned by the defendant. The plaintiff claimed to have suffered "serious, severe and permanent personal injuries…prevent[ing her] from attending her usual activities and duties…"[1] Her injuries included: spinal and brain injuries such as cognitive deficits, memory loss, and complications with oral and written communications.[2] Furthermore, the plaintiff claimed social isolation and difficulty using a computer and composing coherent messages, as a result of her injuries.[3] At her deposition

[1] Br. on behalf of the Defense Association of New York, Inc. as *Amicius Curiae*, March 27, 2017, 6, *available at* http://defenseassociationofnewyork.org/resources/Pictures/Forman%20v%20Henkin.pdf.

[2] *Id.*

[3] *Forman v. Henkin*, 30 N.Y.3d 659.

the plaintiff stated that she had photographs showing her engaging in an active (pre-accident lifestyle), on her Facebook account.[4] But approximately six months after her accident she deleted her Facebook and "could not recall" whether she had posted any post-injury photographs on Facebook.[5] The defendant sought unlimited authorization to the plaintiff's private Facebook account, arguing that any photographs and written content would be both material and necessary under CPLR §3101(a) going to the materiality of plaintiff's ability to reason, write, and communicate effectively.[6]

When the plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel, asserting that the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. In support of the motion, defendant specifically cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing that the defendants failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account,

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[4] *Forman*, at 659.

[5] *Id.*

[6] *Id.*

nor allege that any specific material located therein was privileged or should be shielded from disclosure on privacy grounds. At oral argument, the defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there was a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

The Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, and all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters. The trial court also recognized that by accessing private Facebook messaging, the frequency, speed, and volume of the plaintiff's writing could be established.[7] Therefore, the trial court directed the plaintiff to provide the defendant with authorization to obtain records from Facebook, indicating each time a private message was posted after the accident and the number of characters or words in each message.[8] The court did not order disclosure of any of plaintiff's written Facebook posts, whether authored before or after the accident.

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[7] *Forman v. Henkin*, 2014 N.Y. Slip Op. 30679(U) (Sup. Ct., N.Y. County 2014) (Billings, J.)).

[8] *Forman*, 2014 N.Y. Slip Op. 30679(U).

On appeal, the Appellate Division, First Department, held that the defendant failed to establish the threshold showing of a "factual predicate," as they could not establish such information existed that was publicly available.[9] Therefore the plaintiff was only required to provide copies of photographs taken that related to the claim and that the plaintiff intended to use in trial.[10] In a dissent[11] by Justice Saxe and joined by Justice Acosta, the justices criticize the heightened scrutiny given to discovery of social media platforms, stating that it is unnecessary to have a higher and more complex level of review to obtain information, when in traditional personal injury cases "[t]here is not usually a need for the trial court to sift through the contents of the plaintiff's filing cabinets to determine which documents are relevant to the issues raised in the litigation."[12] The dissenting judges hold the position that the traditional discovery process would yield the same result, when disclosing digital information, arguing:

> "[u]pon receipt of an appropriately tailored demand, a plaintiff's obligation would be no different than if the demand concerned hard copies of documents in filing cabinets. A search would be conducted through those documents for responsive relevant documents, and, barring legitimate privilege issues, such responsive relevant documents would be turned over; and if they could not be accessed, an authorization for them would be provided."[13]

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[9] *Id.*

[10] *Forman v. Henkin*, 22 N.Y.S.3d 178, 180-182 (N.Y. App. Div. 1st Dept. 2015).

[11] *Forman*, 22 N.Y.S.3d 183.

[12] *Id.* at 187.

[13] *Id.* at 188.

On appeal, the Court of Appeals, closely aligns with the dissent from the Appellate Division, and establishes clear guidance for the discovery of social media.[14] The Court of Appeals found that the lower court erred in using the heightened threshold to establish discoverable social media information, based on whether or not the information was private or public.[15] The *Forman* court directs our attention back to the traditional discovery methods, requiring relevant information to be discoverable under CPLR Section 3101.[16] The court's threshold is determining not whether the information that is sought is private or public, but only whether or not the information sought is "reasonably calculated to yield information that is "material and necessary" or relevant information.[17] The Court of Appeals noted that before discovery has occurred – and unless the parties are already Facebook "friends" – the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account. The Court noted that under such an approach, disclosure turns on the extent to which some of the information sought is readily accessible – and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action" (*see* CPLR 3101 (a)).

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[14] *Forman v. Henkin*, 30 N.Y.3d 656 (N.Y. 2018).

[15] *Forman*, 30 N.Y.3d 656.

[16] *Id.* at 661.

[17] *Id.*

However, the right to disclosure is not unlimited.[18] The *Forman* court still recognizes that there are three categories of relevant information that remain immune from discovery under CPLR § 3101. This protected information includes: privileged matter; attorney work product; and trial preparation materials (with the exceptions of a showing of "substantial need and undue hardship").

Subsequent Court Treatment of *Forman*

Given the recentness of the *Forman* Decision, there has been limited treatment of it by the lower Courts. In *Doe v. Bronx Preparatory Charter School*, 160 AD 3d 591 (1st Dept., 2018), the First Department Appellate Division, citing *Forman*, ruled that the defendants' demands for access to social media accounts for five (5) years prior to the incident, and to cell phone records for two (2) years prior to the incident, were over broad and not reasonably tailored to obtain discovery relevant to the issues in the case.

The *Forman* Decision was examined by NY County Supreme Court Judge Kathryn E. Freed in the *Christian v. 846 6th Avenue Property Owner, LLC, et al.*, Trial Order, 2018 WL 2282883 (NY County Sup. Ct. May 18, 2018). The *Christian* case was a personal injury action under the Labor Law, where the defendants moved for access to private portions of the plaintiff's Facebook account. The thirty-two (32) year-old plaintiff claimed in the Bill of Particulars that he sustained injuries to his cervical, thoracic, and lumbar spine, as well as both shoulders, and was incapacitated from his employment from the date of the accident to the present and was partially disabled. The defendants submitted several photographs of the plaintiff recovered from his public Facebook account showing, among other things, the plaintiff standing upright with a hard hat in his hand and tying a strap around a stack of objects, and a photo of him hanging from the edge of a basketball hoop. Judge Freed found that while the defendants did not have to make a predicate showing with respect to public portions of the account, they nevertheless had done so. Judge

[18] *Id*. at 661-62.

Freed found that contrary to the plaintiff's opposition, nothing in *Forman* indicates that a party must wait until after a deposition before demanding disclosure of the private portions of an individual's social medial account. Furthermore, since defendants had provided the Court with examples of plaintiff's Facebook posts showing that he uses it to share information about his activities with friends and family, there was already a basis to determine that additional relevant information may be found in the private section.

Justice Freed ordered that the plaintiff was directed to turn over printouts of Facebook posts, as well as the original photographs or videos, for six (6) months prior to the date of the accident that showed him engaged in any work or social activities that he claimed he is now unable to perform, as well as posts from the date of the accident to the present that tend to contradict his claim that he is presently unable to work, and that he is partially disabled, excluding any images showing nudity or romantic encounters.

Likewise, in *Paul v. The Witkoff Group, et al.*, 2018 WL 1697285 (NY County Sup. Ct. April 3, 2018) NY County Supreme Court Judge Manuel J. Mendez cited the *Forman* case, stating, "There is nothing so novel about [social media] materials that precludes application of New York's longstanding disclosure rules," but the party moving to compel production needs to include scope and temporal limitations and carefully drafted demands to seek specific information material that is necessary to the prosecution or defense of the action. In the *Paul* case, the plaintiff was injured when he slipped and fell on a ramp covered with ice and snow, and commenced the action to recover for damages due to his alleged injuries. In plaintiff's Bill of Particulars, he claimed severe depression, anxiety, stress, anxiousness, and suicidal thoughts. The plaintiff allegedly posted suicidal comments on his Facebook page, and thus the Court found that responding to the defendants' social media discovery demands would result in the disclosure of relevant evidence bearing on the plaintiff's claim. However, portions of the demand were found to be overly broad and not sufficiently tailored with scope and temporal limitations, and plaintiff was not ordered to respond to those demands. Further, the defendants showed the necessity for a temporary restraining order and preliminary injunction restraining plaintiff from directly, or

indirectly through other persons, modifying, changing, or deleting any information from his social networking accounts relating to the action.

Implications Following *Forman*

It is clear from the Court of Appeals' decision that discovery of social media should be governed by the same principles and procedures as those governing traditional discovery. However, as with any other discovery request, a demand for private Facebook materials should be narrowly tailored to the facts and issues in the case. It is no longer necessary for a defendant to lay a specific kind of foundation from the public portions of a Facebook page to obtain discovery. Yet this does not mean that the defendant will receive unfettered access. A boilerplate demand for a plaintiff's full social medial account is not likely to survive under *Forman*.

An unintended consequence of the *Forman* decision will be the increased use by plaintiff's counsel of a motion for a protective order to prevent or limit social media discovery. Pursuant to CPLR 3103 (a), the court is authorized:

> "[T]he court may at any time on its own initiative, or on motion of any part or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

CPLR 3103 (a).

Anyone who has ever received an individual's complete historic Facebook page knows just how truly voluminous that information can be. In reconciling a plaintiff's motion for protective order against the defendant's motion to compel, it is anticipated that more courts will begin the

practice of directing the information to be submitted for an *in camera* review. Given the sheer volume of information to be reviewed, it is also anticipated that courts will appoint a Judicial Hearing Officer to wade through that information. This will result in an additional expense to the parties that should be factored into when requests are made to also ensure that they are reasonably and narrowly tailored to the facts of the specific case.

Ethical Obligations of Digital Discovery

According to a New York County Lawyers Association Opinion Ethics Opinion,[19] when advising clients about social media platforms in civil litigation, it is important that they understand that even if the social media site is not currently activated, they may need to disclose that they have or had a social media site, if asked about it.[20]

Additionally, any piece of information of potential relevance removed from the platform should be preserved in order to comply with any obligations to produce information, and any information should be left unaltered.[21] According to NYCLA Ethics Opinion 745, while an attorney may advise a client to remove information from social media platforms they cannot advise the client to destroy the information.[22] In fact, at the moment a party reasonably anticipates litigation, precautions must be taken to preserve potential evidence.[23]

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[19] NYCLA Ethics Opinion 745 (2013).

[20] *See* New York Rules of Professional Conduct R. 3.3(a)(1) "A lawyer shall not: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."; *See generally Forman v. Henkin*, 30 N.Y.3d 656 (N.Y. 2018).

[21] *See* New York Rules of Professional Conduct R. 3.4(a)(3) "A lawyer shall not: conceal or knowingly fail to disclose that which the lawyer is required to by law to reveal."; R. 3.4(a)(3) "A lawyer shall not: knowingly use perjured testimony or false evidence."

[22] NYCLA Ethics Opinion 745 (2013).

[23] *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 939 N.Y.S.2d 321, 331 (1st Dept. 2012) ("Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data.").

Additional Considerations and Points of Emphasis

It is ethically permissible to advise your client on social media privacy settings. An attorney can explain how the various settings permit different types of information to be accessed by third parties including friends. It should be recommended that a client use the strongest privacy settings. It should also be noted that just because an account is deactivated, this does not mean that the information is no longer available. By way of example, in *Forman*, the plaintiff's account was deactivated. However, the information was still present and easily recoverable. Potentially discoverable information can also extend to text messages, instant messages, and email as well as public reviews on social media sites.

Multiple state bar opinions agree that simply reviewing the public-facing social media page of an adverse party does not violate ethics rules, providing that no "friending" takes place. (See, e.g., New York State Bar Association, Committee on Professional Ethics, Opinion No. 843 (2010)). However, sending a friend request to an opposing party represented by counsel or using a third party to send the request is not permissible.

Conclusion

While there is no longer a requirement for a "factual predicate" to support discovery of social media, the best practice would be to craft reasonably tailored discovery demands and then build a case supporting a motion to compel disclosure by eliciting information from a plaintiff during deposition. Part of the reason defendant was ultimately successful in Forman is that it was able to establish specific claims of limitation of injuries in relationship to the accident in question. A blanket demand without more would have been unlikely to yield the same results.

State of New York
Court of Appeals

OPINION

No. 1
Kelly Forman,
Respondent,
v.
Mark Henkin,
Appellant.

Michael A. Bono, for appellant.
Kenneth J. Gorman, for respondent.
Defense Association of New York, Inc., amicus curiae.

DIFIORE, Chief Judge:

In this personal injury action, we are asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook account.

Plaintiff alleges that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss,

difficulties with written and oral communication, and social isolation. At her deposition, plaintiff stated that she previously had a Facebook account on which she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages. In that regard, plaintiff produced a document she wrote that contained misspelled words and faulty grammar in which she represented that she could no longer express herself the way she did before the accident. She contended, in particular, that a simple email could take hours to write because she had to go over written material several times to make sure it made sense.

Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account, contending the photographs and written postings would be material and necessary to his defense of the action under CPLR 3101(a). When plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel, asserting that the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on

Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing, as relevant here, that defendant failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account, nor allege that any specific material located therein, although potentially relevant, was privileged or should be shielded from disclosure on privacy grounds. At oral argument on the motion, defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there is a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Supreme Court

did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident.

Although defendant was denied much of the disclosure sought in the motion to compel, only plaintiff appealed to the Appellate Division.[1] On that appeal, the court modified by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed. Two Justices dissented, concluding defendant was entitled to broader access to plaintiff's Facebook account and calling for reconsideration of that court's recent precedent addressing disclosure of social media information as unduly restrictive and inconsistent with New York's policy of open discovery. The Appellate Division granted defendant leave to appeal to this Court, asking whether its order was properly made. We reverse, reinstate Supreme Court's order and answer that question in the negative.

Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: "[t]here shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof." We have emphasized that "[t]he words 'material and necessary,' . . . are to be interpreted liberally to require disclosure,

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[1] Defendant's failure to appeal Supreme Court's order impacts the scope of his appeal in this Court. "Our review of [an] Appellate Division order is 'limited to those parts of the [order] that have been appealed and that aggrieve the appealing party'" (Hain v Jamison, 28 NY3d 524, 534 [2016], quoting Hecht v City of New York, 60 NY2d 57 [1983]). Because defendant did not cross-appeal and, thus, sought no affirmative relief from the Appellate Division, he is aggrieved by the Appellate Division order only to the extent it further limited Supreme Court's disclosure order.

upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; see also Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 746 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary" – i.e., relevant – regardless of whether discovery is sought from another party (see CPLR 3101[a][1]) or a nonparty (CPLR 3101[a][4]; see e.g. Matter of Kapon v Koch, 23 NY3d 32 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (Spectrum Systems Intern. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991]).

The right to disclosure, although broad, is not unlimited. CPLR 3101 itself "establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship" (Spectrum, supra, at 377). The burden of establishing a right to protection under these provisions is with the party asserting it – "the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (id.).

In addition to these restrictions, this Court has recognized that "litigants are not without protection against unnecessarily onerous application of the disclosure statutes.

Under our discovery statutes and case law competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (Kavanaugh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954 [1998] [citations and internal quotation marks omitted]; see CPLR 3103[a]). Thus, when courts are called upon to resolve a dispute,[2] discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure . . . Absent an [error of law or an] abuse of discretion, this Court will not disturb such a determination (Andon, supra, 94 NY2d at 747; see Kavanaugh, supra, 92 NY2d at 954).[3]

Here, we apply these general principles in the context of a dispute over disclosure of social media materials. Facebook is a social networking website "where people can share information about their personal lives, including posting photographs and sharing

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[2] While courts have the authority to oversee disclosure, by design the process often can be managed by the parties without judicial intervention. If the party seeking disclosure makes a targeted demand for relevant, non-privileged materials (see CPLR 3120[1][i], [2] [permitting a demand for items within the other party's "possession, custody or control," which "shall describe each item and category with reasonable particularity"]), counsel for the responding party – after examining any potentially responsive materials – should be able to identify and turn over items complying with the demand. Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process. When the process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.

[3] Further, the Appellate Division has the power to exercise independent discretion – to substitute its discretion for that of Supreme Court, even when it concludes Supreme Court's order was merely improvident and not an abuse of discretion – and when it does so applying the proper legal principles, this Court will review the resulting Appellate Division order under the deferential "abuse of discretion" standard (see e.g. Andon, supra; Kavanaugh, supra; see generally Kapon, supra).

information about what they are doing or thinking" (Romano v Steelcase, Inc., 30 Misc 3d 426 [Sup Ct Suffolk County 2010]). Users create unique personal profiles, make connections with new and old "friends" and may "set privacy levels to control with whom they share their information" (id.). Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder – in fact, the viewer need not even be a fellow Facebook account holder (see Facebook Help: What audiences can I choose from when I share? https://www.facebook.com/help/211513702214269?helpref=faq_content [last accessed January 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (id.). While Facebook – and sites like it – offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

On appeal in this Court, invoking New York's history of liberal discovery, defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. Although it is unclear precisely what standard the Appellate Division applied, it cited its prior decision in Tapp v New York State Urban Dev. Corp. (102 AD3d 620 [1st Dept 2013]), which stated: "To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account – that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims'"

(id. at 620 [emphasis added]). Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (see e.g. Spearin v Linmar, 129 AD3d 528 [1st Dept 2015]; Nieves v 30 Ellwood Realty LLC, 39 Misc 3d 63 [App Term 2013]; Pereira v City of New York, 40 Misc 3d 1210[A] [Sup Ct Queens County 2013]; Romano, supra, 30 Misc 3d 426). Plaintiff invoked this precedent when arguing, in opposition to the motion to compel, that defendant failed to meet the minimum threshold permitting discovery of any Facebook materials.

Before discovery has occurred – and unless the parties are already Facebook "friends" – the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account.[4] Under such an approach, disclosure turns

[4] This rule has been appropriately criticized by other courts. As one federal court explained, "[t]his approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section . . . Furthermore, this approach shields from discovery the information of Facebook users who do not share any information publicly" (Giacchetto v Patchogue-Medford Union Free School Dist., 293 FRD 112, 114 [ED NY 2013]).

on the extent to which some of the information sought is already accessible – and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action" (see CPLR 3101[a]).

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable (see e.g. Kregg v Maldonado, 98 AD3d 1289, 1290 [4th Dept 2012] [rejecting motion to compel disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; Giacchetto, supra, 293 FRD 112, 115; Kennedy v Contract Pharmacal Corp., 2013 WL 1966219, *2 [ED NY 2013]). Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation – such an order would be likely to yield far more nonrelevant than relevant information. Even

under our broad disclosure paradigm, litigants are protected from "unnecessarily onerous application of the discovery statutes" (Kavanaugh, supra, 92 NY2d at 954).

Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules – there is no need for a specialized or heightened factual predicate to avoid improper "fishing expeditions." In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate – for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (see CPLR 3103[a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. We assume for purposes of resolving the narrow issue before us that some materials on a Facebook account may fairly be characterized as private.[5] But even private materials may be subject to discovery if they are relevant. For example, medical records enjoy protection in many contexts under the physician-patient privilege (see CPLR 4504). But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records – including the physician-patient privilege – are waived (see Arons v Jutkowitz, 9 NY3d 393, 409 [2007]; Dillenbeck v Hess, 73 NY2d 278, 287 [1989]). For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.

Applying these principles here, the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial.[6] With respect

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[5] There is significant controversy on that question. Views range from the position taken by plaintiff that anything shielded by privacy settings is private, to the position taken by one commentator that "anything contained in a social media website is not 'private' . . . [S]ocial media exists to facilitate social behavior and is not intended to serve as a personal journal shielded from others or a database for storing thoughts and photos" (McPeak, The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery or Social Media Data, 48 Wake Forest L Rev 887, 929 [2013]).

[6] Because plaintiff would be unlikely to offer at trial any photographs tending to contradict her claimed injuries or her version of the facts surrounding the accident, by limiting disclosure in this fashion the Appellate Division effectively denied disclosure of any evidence potentially relevant to the defense. To the extent the order may also contravene CPLR 3101(i), we note that neither party cited that provision in Supreme

to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.

In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. Because Supreme Court provided defendant no access to the content of any messages on the Facebook account (an aspect of the order we cannot review given defendant's failure to

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Court and we therefore have no occasion to further address its applicability, if any, to this dispute.

appeal to the Appellate Division), we have no occasion to further address whether defendant made a showing sufficient to obtain disclosure of such content and, if so, how the order could have been tailored, in light of the facts and circumstances of this case, to avoid discovery of nonrelevant materials.[7]

In sum, the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence "material and necessary" to the litigation. A remittal is not necessary here because, in opposition to the motion, plaintiff neither made a claim of statutory privilege, nor offered any other specific reason – beyond the general assertion that defendant did not meet his threshold burden – why any of those materials should be shielded from disclosure.

Accordingly, the Appellate Division order insofar as appealed from should be reversed, with costs, the Supreme Court order reinstated and the certified question answered in the negative.

[7] At oral argument, Supreme Court indicated that, depending on what the data ordered to be disclosed revealed concerning the frequency of plaintiff's post-accident messages, defendant could possibly pursue a follow-up request for disclosure of the content. We express no views with respect to any such future application.

* *

Order insofar as appealed from reversed, with costs, order of Supreme Court, New York County, reinstated and certified question answered in the negative. Opinion by Chief Judge DiFiore. Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided February 13, 2018

STATE OF NEW YORK
SUPREME COURT COUNTY OF

Plaintiffs,

-against-

COMBINED DISCOVERY DEMAND

Defendants.

PLEASE TAKE NOTICE, that pursuant to CPLR Article 31 and the specific sections contained within that Article and Section 4545, the answering defendants, , by and through their attorneys, ,request that you produce for inspection and copying and that you serve upon them the following:

1. Pursuant to CPLR Section 306-a and 306-b: ***[TO THE PLAINTIFFS ONLY]***

   (a) The date the summons and complaint were filed.
   (b) The address of the clerk where the summons and complaint were filed.
   (c) Copies of the affidavit(s) of service.
   (d) Name and address of assigned judge.
   (e) Copies of the Letters Testamentary for the estate of H.L.B.

RECORDS AND REPORTS *[TO THE PLAINTIFFS ONLY]*

2. With respect to medical reports and records, the answering defendants demand:

   (a) Copies of the written reports, medical records and films, including, but not limited to x-rays, CT scans, MRIs and ultrasounds, of any and all physicians and medical care providers who treated or provided medical care to the plaintiffs' decedent, relating to the diagnosis, etiology, treatment and prognosis of the plaintiffs' decedent.

AUTHORIZATIONS *[TO THE PLAINTIFFS ONLY]*

3. With respect to authorizations, the answering defendants demand:

   (a) Using the authorization annexed hereto, or copies thereof, duly executed and acknowledged written authorizations valid under HIPAA permitting _____ to obtain and make copies of treating and attending physicians'

records and reports and the records and reports of other medical care providers (hospitals, etc.) concerning the diagnosis, etiology, treatment and prognosis of the plaintiffs' decedent, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(b) Using the authorization annexed hereto, or copies thereof, duly executed and acknowledged written authorizations valid under HIPAA permitting _____ to obtain and make copies of such other records as may be referred to and identified in any physicians' statements, including, *inter alia,* x-rays, and pathology specimens, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(c) Using the authorization annexed hereto, or copies thereof, duly executed and acknowledged written authorizations valid under HIPAA permitting _____ to contact and speak with plaintiffs' decedent's treating physicians regarding the medical condition at issue in this litigation, pursuant to the Court of Appeals decision in Arons v. Jutkowitz (9 N.Y.3d 889 (2007), valid until the end of litigation.

Please provide the full names and addresses of the above-named physicians and institutions, and any other identifying information necessary to retrieve these records including, but not limited to, identification numbers, subscriber numbers and hospital/patient numbers.

(d) Duly executed and acknowledged written authorizations permitting _____ to obtain and make copies of the plaintiffs' decedent's employment records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(e) If applicable, duly executed and acknowledged written authorizations permitting _____ to obtain and make copies of the plaintiffs' decedent's education records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(f) If applicable, duly executed and acknowledged written authorizations permitting _____ to obtain and make copies of the plaintiffs' Social Security Disability records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(g) If applicable, duly executed and acknowledged written authorizations permitting _____ to obtain and make copies of the plaintiffs' decedent's Worker's Compensation records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(h) If applicable, duly executed and acknowledged written authorizations permitting _____ to obtain and make copies of the plaintiffs' decedent's No-Fault records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(i) At or before the time the Note of Issue is filed, duly executed and acknowledged HIPAA compliance authorizations for all providers previously demanded and identified, permitting the undersigned to serve subpoenas for the original or certified copies of records. Said authorizations are to contain full and proper names and addresses, together with any necessary identifying information, such as Social Security Number, and are to be HIPAA compliant to obtain the requisite records, films and billing records.

SPECIAL DAMAGES ***[TO PLAINTIFFS ONLY]***

4. The answering defendants demand that the plaintiffs provide the undersigned with a verified statement with respect to the following questions:

(a) If the plaintiffs claim monetary damage by reason of physicians' expenses, state the name and address of each physician who rendered medical care and treatment to plaintiffs' decedent, the amount of each such physician's expense, and the amount received or the amount which the plaintiffs are entitled to receive under any collateral source, including Blue Cross/Blue Shield or major medical insurance coverage, or other disability insurance plan, for each such physician's expense. State the name and address of the collateral source applicable for each of the physicians listed in response to the above.

(b) If the plaintiffs claim monetary damage by reason of hospital expenses, state the name and address of each hospital in which care and treatment was rendered to the plaintiffs' decedent, the amount of each such hospital expense and the amount received or the amount which the plaintiffs are entitled to receive under any collateral source, including Blue Cross/Blue Shield or major medical insurance coverage, or other disability insurance plan for each such hospital expense. State the name and address of the collateral source applicable for each of the hospitals listed in response to the above.

(c) If the plaintiffs claim monetary damages by reason of any other medical costs, including nursing service, home care, medication or medical apparatus, state the amount of each of these expenses, the name and address of each payee, the amount received or the amount which the plaintiffs are entitled to receive under any collateral source including Blue Cross/Blue Shield or major medical insurance coverage, or other disability insurance plan, for each of these expenses.

State the name and address of the collateral source applicable for each of the payees listed in response to the above.

(d) If the plaintiffs claim monetary damages in the nature of lost earnings, state the alleged amount of the lost earnings; the alleged gross wage immediately prior to the accident; the name and address of the employer; the amount of remuneration received for wages and the source of said remuneration after the accident, including Workers' Compensation, union benefits, employees' benefit plans, or other collateral source.

(e) State the monetary amount of any other alleged special damage, and the amounts received from any collateral source, including insurance, Social Security (except those benefits provided under Title XVIII of the Social Security Act), Workers' Compensation, or employees' benefits programs, except such collateral sources entitled by law to liens against any recovery of the plaintiffs.

5. Pursuant to Section 3017(c) of the CPLR, the answering defendants hereby request that plaintiffs set forth the total damages to which the plaintiffs deem themselves entitled.

NOTE OF ISSUE NOTIFICATION ***[TO THE PLAINTIFFS ONLY]***

6. The answering defendants demand that at least forty-five (45) days prior to the date on which you plan to file the note of issue, that you advise the answering defendants of the anticipated note of issue filing date so that the answering defendants can be in conformity with any expert disclosure rules under the CPLR or under applicable expert disclosure rules of the Third Department, pertinent judicial districts or rules of individual trial judges pertaining thereto.

WITNESSES ***[TO ALL PARTIES]***

7. With respect to witnesses, the answering defendants demand the names and addresses of the following:

(a) Witnesses claimed or known by the plaintiffs or answering defendants to have either witnessed the occurrence or to have first hand knowledge of same;
(b) Witnesses claimed or known by the plaintiffs and/or answering defendants to have first hand knowledge of facts and circumstances surrounding the occurrence;
(c) Witnesses present at the scene prior to or subsequent to the occurrence;
(d) Witnesses with regard to notice of any fact where notice is an element of the plaintiffs' claims, whether obtained by any of the parties and/or their attorneys and/or representatives;
(e) Witnesses to any alleged statements of any defendants or any representative of a defendants;

(f) Witnesses claimed or known to have witnessed or to have first hand knowledge of the economic damage, pain and suffering, or any other losses alleged by the plaintiffs or plaintiffs' decedent.

If no such persons are known to the plaintiffs, answering defendants and/or their attorneys and representatives, so state in reply to this demand;

If plaintiffs, answering defendants and/or their attorneys and/or representatives obtain the names and addresses of any persons described above subsequent to the service of this notice, such information is to be furnished to the undersigned whenever so obtained.

At the time of trial, the answering defendants will object to the testimony of any witnesses not identified pursuant to this notice.

Please note that this shall be deemed to be a continuing demand up to, and including, the time of trial of this matter.

STATEMENTS ***[TO ALL PARTIES]***

8. Copies of any statement, oral, written, transcribed or otherwise recorded, signed or unsigned, or any summary of any information provided by the parties, their employees, representatives, and/or agents, represented by the undersigned attorneys concerning the issues involved in this action. If it will be claimed that the answering defendant(s) or anyone acting on behalf of the defendant(s), made any admissions or statements against interest which are relevant to the issues in this litigation, please provide:

(a) The names and addresses of any person(s) making such admission or statements;

(b) The names and address of any person(s) who were present when such admissions or statements were made;

(c) The dates upon which said admissions or statements were made;

(d) The location or forum where any such admission or statement was made, kept or recorded, including whether the statement or admission was made on social media or any other type of electronic forum; and

(e) If in writing, a copy of such statement. If such statement was oral, please set forth exact transcriptions of the statements or admissions. If an exact transcription of the statement is not possible, please set forth a detailed summary of the substance of each, including, but not limited to, an approximation of the language used in each statement and/or admission and the above demanded information.

9. Any printed material, written material, diagrams, instructions, prescriptions, or other information obtained by the plaintiffs or the plaintiffs' agent from the defendant(s) or from the office(s) of the defendant(s).

10. Any photos, films, or video/audio, or other recordings of any statements obtained by the plaintiffs or the plaintiffs' agent from the defendant(s) or from the office(s) of the defendant(s).

11. Printed copies of any statements made by the plaintiffs or plaintiffs' decedent in any social media or electronic forum, including, but not limited to, Facebook, Twitter, blogs, texts, or e-mails, relevant to the alleged incidents and injuries that are the subject of this action.

PLEASE TAKE NOTICE, that the plaintiffs are directed to preserve and to refrain from deleting or destroying, or otherwise causing the loss of, any statements set forth above for the duration of this litigation.

PLEASE TAKE FURTHER NOTICE, that failure to produce said statement will result in the plaintiffs being precluded from its use at the trial of this matter. In the event it will be contended that the defendants or an agent, servant or employee of the defendants, made an oral statement please set forth the date, time and place of the statement, to whom the statement was made and fully disclose the substance of the statement

WRITTEN MATERIALS ***[TO PLAINTIFFS ONLY]***

12. Copies of diaries, notes, journals, calendars, computer disks, or other written materials prepared, authored, maintained or recorded by plaintiffs, plaintiffs' decedent or plaintiffs' agent related to the subject matter of this litigation.

INSURANCE COVERAGE ***[TO ALL PARTIES]***

13. The existence and contents of any insurance or other agreement, under which any person, insurance company, or other entity, may be liable to satisfy part or all of any judgment which may be entered in this action against the answering defendants; this information is to include the name of the insurer; the policy number; the coverage limits of said policy or agreement and the amount of said coverage limits presently available to satisfy all or part of any judgment which may be entered against the answering defendants in this action.

PHOTOGRAPHS ***[TO ALL PARTIES]***

14. With respect to photograph(s), audio(s) and video(s), the answering defendants demand:

(a) Photographs depicting the scene of the incident/accident which is the subject of the plaintiffs' complaint.
(b) Photographs depicting the bodily injuries claimed in this matter.
(c) Photographs depicting any of the instrumentalities involved in this matter.
(d) All videotapes and other photographic film which concern the injuries, damages or instrumentalities involved in this matter.
(e) Photographs, video or other film intended to be introduced into evidence at time of trial.
(f) A complete duplicate recording of any and all audio tapes or other recordings of any conversations that the plaintiffs, plaintiffs' decedent or any representatives and/or family member of the plaintiffs and/or plaintiffs' decedent had with any defendants or any representative of a defendant.
(g) A complete duplicate recording of any and all audio tapes or other recordings of any conversations that the plaintiffs, plaintiffs' decedent or any representatives and/or family member of the plaintiffs and/or plaintiffs' decedent had with any defendants or any representative of a defendant intended to be introduced into evidence at time of trial.

The undersigned would prefer color copies of the photographs, rather than photocopies.

The undersigned is willing to reimburse the plaintiff(s) for the reasonable costs incurred in the production of these color copies.

DEMONSTRATIVE EXHIBITS AND EVIDENCE ***[TO ALL PARTIES]***

15. With respect to demonstrative exhibits and evidence, we herein demand that all parties provide, as soon as practical, but not less than 30 days before trial, copies of and/or access for discovery and inspection of all demonstrative exhibits and evidence which the parties intend to use at trial including, but not limited to:

(a) Unenhanced, un-highlighted or altered enlargements of medical records;
(b) Enhanced, altered, colored, interactive, animated, illustrated, copies of medical records and/or imaging studies of any kind;
(c) Medical illustrations, whether still, interactive, animated, enhanced, and/or whether each such illustration is purported to show "normal" anatomy or is particular to the facts of this case;
(d) Injury summaries;
(e) Color diagnostics;
(f) Illustrations, animations, graphics, pictures, and/or videos, purporting to show any mechanism of injury;
(g) Forensic animations, graphics, illustrations or pictures/videos, custom graphics, media, static illustrations and/or other demonstrative evidence the party intends to use at trial;
(h) Colorized, enhanced, and/or illustrative imaging studies including, but not limited

to: x-rays, CT scans, MRI, ultrasound, echocardiography, PET scans

(i) Any/all images, videos, animation, presentations, pictures and/or illustrations purporting to portray a reconstruction of the accident and/or incident, which forms the basis of plaintiffs' claims or which plaintiffs intend to show to the trier of fact;

(j) Any Power-Point or other presentation or summary the party intends to use at trial;

(k) Provide the identity of any artist, engineer, company, firm, visual/media consultant, physician, strategist, animator, graphic artist, medical illustrator, designer creating and/or assisting in the creation of any/all demonstrative exhibits the party intends to use at trial, including the names and contact information for each person/entity.

ACCIDENT OR INCIDENT REPORTS OR RECONSTRUCTION *[TO ALL PARTIES]*

16. Copies of any accident or incident reports relating to the accident or incident in question.

17. Copies of any computer generated accident or incident reconstruction relating to the accident or incident in question.

SOCIAL NETWORKING STATEMENTS/PHOTOGRAPHS *[TO PLAINTIFFS ONLY]*

18. Printed copies of any statements journals and/or photographs posted or made by the plaintiffs or plaintiffs' decedent in any social, medical, fundraising or electronic forum, including, but not limited to: Facebook, My Space, Twitter, Instagram, CaringBridge.org, blogs, texts or emails relative to the alleged incident and/or injuries that are the subject of this action.

19. Defendants further demand that plaintiffs preserve any such statements and/or photographs and that same not be altered or deleted during the pendency of this litigation.

PLEASE TAKE FURTHER NOTICE that copies of the items demanded above may be sent to the offices of the attorneys listed below in lieu of physical production of the originals within thirty (30) days of the date of this notice.

PLEASE TAKE FURTHER NOTICE that copies of the items demanded above may be sent to the offices of the attorneys listed below in lieu of physical production of the originals within thirty (30) days of the date of this notice.

PLEASE TAKE FURTHER NOTICE that this shall be deemed a continuing demand up to, and including, the time of trial of this matter. The answering defendants will object to the attempt to introduce into evidence any of the information requested above which has not been furnished to the answering defendants in response to this demand and the answering defendants will object to the testimony of any witnesses not identified pursuant to this notice.

PLEASE TAKE FURTHER NOTICE that in the event any party fails or refuses to comply with this demand, the answering defendants shall seek to preclude any testimony with regard to any of the demands to which a party has not complied.