Defendant in New York Personal Injury Action Gets Expanded Access to Plaintiff's Social Media Accounts

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In defending a personal injury action, whether it is grounded on claims of product liability or general negligence, social media evidence can be a powerful tool to impeach the plaintiff's credibility. The plaintiff may have posted photographs and comments on social media that cast doubt upon or directly contradict, plaintiff's damages claims or alleged version of the accident. Recognizing the critical nature of this evidence, New York courts have been gradually expanding a defendant's ability to obtain relevant, non-public information in plaintiff's social media and electronic accounts. This is evident in the First Department's recent decision *Vasquez-Santos v. Mathew*, 2019 NY Slip Op 00541 (1st Dep't 2019) (decided on January 24, 2019).

In *Vasquez-Santos*, plaintiff claimed to have sustained injuries in a motor vehicle accident that rendered him disabled and incapable of performing activities he had enjoyed doing before the accident. During discovery, the defendant obtained photographs of plaintiff playing basketball posted to Facebook after the accident. When plaintiff contended the photographs pre-dated the accident, defendant sought the "raw data" for those photographs, but could not obtain it directly from Facebook. Defendant ultimately moved to allow its data mining expert to access plaintiff's social media accounts, email accounts, and electronic devices "to obtain [post-accident] photographs and other evidence of plaintiff engaging in physical activities." The trial court denied defendant's motion.

The First Department reversed, however, and granted the third-party data mining company access to plaintiff's devices and accounts. The Court determined that because plaintiff had made various claims about his newfound physical limitations, the defendant could investigate and rebut those claims, even if it meant providing a third-party professional with access to plaintiff's private social media information. The Court stressed that "[p]rivate social media information can be discoverable to the extent it 'contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims.'" *Id*. (quoting Patterson v. Turner Const. Co., 88 A.D.3d 617, 618 [1st Dep't 2011)]. The Court did not allow unfettered access, but rather, limited it to the time frame (i.e., items posted or sent post-accident) and subject matter (i.e., relevant to plaintiff's physical limitation claims).

The First Department's ruling reinforces the importance of taking an early look at plaintiff's social media accounts and demanding the production of non-public information that could weigh on plaintiff's credibility. If it comes to light that the plaintiff has deleted or hidden certain photographs and posts, it is worthwhile to request that a third-party data mining professional be given access to plaintiff's accounts. A trove of impeachment material may be waiting to be uncovered.