

# New Jersey Law Journal

STATEWIDE LEGAL AUTHORITY SINCE 1878

VOL. CLXXXVIII NO. 11

MONDAY, JUNE 11, 2007

ALM



**LIMITED ACCESS:** Anyone browsing the Internet can reach subscribers' sites on MySpace, but surfers cannot see the private portions without being designated as a 'friend' of the subscriber.

## MySpace, Facebook Privacy Limits Tested in Emotional Distress Suit

By Henry Gottlieb

The operators of MySpace and Facebook social networking sites assure their millions of subscribers that only designated "friends" can read registrants' private postings.

But do the postings stay private if the registrant becomes the plaintiff in an emotional distress case? Can the defendant get the texts of MySpace and Facebook messages to support a defense that the distress claim is bogus?

And is the expectation of privacy by users of such sites higher than it is for customers of common e-mail

Continued on page 17

## MySpace, Facebook Privacy Limits Tested in Emotional Distress Suit

Continued from page 1

providers like Microsoft and Comcast?

A New Jersey judge weighed those questions Friday and gave a preliminary answer: Without a particularized showing that the texts are relevant, the plaintiff's privacy interests prevail.

But Union County Superior Court Judge Kathryn Brock did not rule out changing her mind as discovery unfolds in the case, *T.V. v. Union Township Board of Education*, UNN-L-4479-04.

The plaintiff is a teenager sexually assaulted in 2003 by a fellow middle schooler, who was convicted. The victim claims that the school's failures to supervise made the attack possible and contributed to emotional distress that has been documented by her psychiatrists.

Such cases pose difficulties for defense lawyers, because the people who know the plaintiff best and can testify about her emotional state are friends who wish her case well. That leaves the defense burden on psychiatric experts, who often do not resonate with juries.

In this case, defense lawyer George Campion of Weiner Lesniak in Parsippany began seeking more after seeing the two-page public portion of the plaintiff's MySpace and Facebook sites.

He argues there is reason to believe that messages on the private portions of the sites will help defense psychiatric experts get at the truth of whether T.V. really suffered emotional distress, and perhaps raise credibility issues. He asked Brock for an order that would allow him to see those private texts.

The issue for the judge was whether the privacy features of MySpace and

Facebook make communications there different from e-mails routed through Internet providers — e-mails often routinely discoverable in civil matters.

The question has special meaning in emotional distress cases because the two social networking sites are popular vehicles for people — usually the young and unguarded — to vent on a regular basis about how they feel about their lives.

They are sharing secrets they want to keep from parents and teachers and certainly from an adversary in a lawsuit.

Facebook, of Palo Alto, Calif., started as a site for college students and now has 8 million subscribers of all ages, the company says. MySpace, a Beverly Hills, Calif.-based subsidiary of media giant News Corp., claims 100 million accounts.

Anyone browsing the Internet can reach subscribers' sites, but surfers cannot see the private portions without being designated as a "friend" of the subscriber.

"At Facebook, we believe you should have control over your information and who sees it," the 8-million-member site says on its signup page. "Only your friends and people in your networks can see your profile."

Both sites' privacy statements say they do much to ensure that third parties do not obtain information that is posted, but they also say the information may be divulged under court order.

Campion argues that when T.V. sued for emotional distress she waived her privacy rights about things that can provide evidence of her mental state. Asking for MySpace and Facebook messages is no different from requests, routinely granted, for e-mails in civil cases, he says.

"There is no real difference between

communicating by e-mail on AOL or Microsoft Outlook and communicating on a social networking site," Campion said in a brief.

In emotional distress cases, Campion said, "testing the credibility of a plaintiff can be a difficult task, because a defendant cannot rewind a film of the plaintiff's life to learn whether the plaintiff was really suffering or exaggerating complaints for secondary gain in litigation or even inventing complaints solely to bring a lawsuit."

"In this case, there is a way to shed light on the plaintiff's credibility by finding out what she wrote on social networking sites in unguarded moments," he added.

Under California law, Campion needs a commission from Brock to depose MySpace and Facebook representatives to obtain the plaintiff's writings on the sites.

Rather than decide whether privacy rights automatically trump such discovery requests, Brock ruled that the defense had not undertaken enough discovery to show it needed the Web site messages to defend the school board adequately.

Before he can find out what T.V. said to Internet "friends," Campion must use traditional discovery to find out who might testify on the plaintiff's behalf and perhaps interview those people to see what they know about her mental state, the judge said.

"If you talk to the kids, you'll find out a lot of things," she said.

Without doing that first, "it seems like a big step" to get the plaintiff's private messages, the judge said. She declined to grant the commission and issued a protective order against release of the data. She gave Campion the right to renew the

request if he can show a need.

The plaintiff's lawyer, Adam Slater of Mazie Slater Katz & Freeman in Roseland, argued in a brief that the discovery request should be rejected on broad principles.

A general proposition that social networking site postings are discoverable in emotional distress cases would prompt defense motions for such material in almost every case in which the plaintiff had a MySpace or Facebook site, he says.

"This court needs to say to this defendant and every defendant in New Jersey that if they have these private conversations they are not going to be discoverable in emotional distress matters," he said at the hearing.

He argued that the messages are like texts of telephone conversations and are covered by the New Jersey Wiretapping and Electronic Surveillance Control Act, which limits wiretapping to law enforcement agencies.

He said the need for a protective order was particularly necessary in a case involving a minor.

"In our society, minors now communicate by computer far more often than they do by telephone, and the minor plaintiff has relied on the ability to communicate confidentially with her friends, via the Internet, just as she would have by telephone prior to the advent of the Internet," Slater said in his brief.

Unresolved at Friday's hearing was how MySpace and Facebook — despite their disclaimers to subscribers about legal proceedings — would respond to an order to produce the private Web pages. Spokesmen for both companies did not return requests for comment on the case. ■

# New Jersey Law Journal

STATEWIDE LEGAL AUTHORITY SINCE 1878

VOL. CLXXXVIII NO. 11

MONDAY, JUNE 11, 2007

ALM

188 N.J.L.J. 861

NEW JERSEY LAW JOURNAL, JUNE 11, 2007

17

## MySpace, Facebook Privacy Limits Tested in Emotional Distress Suit

Continued from page 1

providers like Microsoft and Comcast?

A New Jersey judge weighed those questions Friday and gave a preliminary answer: Without a particularized showing that the texts are relevant, the plaintiff's privacy interests prevail.

But Union County Superior Court Judge Kathryn Brock did not rule out changing her mind as discovery unfolds in the case, *T.V. v. Union Township Board of Education*, UNN-L-4479-04.

The plaintiff is a teenager sexually assaulted in 2003 by a fellow middle schooler, who was convicted. The victim claims that the school's failures to supervise made the attack possible and contributed to emotional distress that has been documented by her psychiatrists.

Such cases pose difficulties for defense lawyers, because the people who know the plaintiff best and can testify about her emotional state are friends who wish her case well. That leaves the defense burden on psychiatric experts, who often do not resonate with juries.

In this case, defense lawyer George Campion of Weiner Lesniak in Parsippany began seeking more after seeing the two-page public portion of the plaintiff's MySpace and Facebook sites.

He argues there is reason to believe that messages on the private portions of the sites will help defense psychiatric experts get at the truth of whether T.V. really suffered emotional distress, and perhaps raise credibility issues. He asked Brock for an order that would allow him to see those private texts.

The issue for the judge was whether the privacy features of MySpace and

Facebook make communications there different from e-mails routed through Internet providers — e-mails often routinely discoverable in civil matters.

The question has special meaning in emotional distress cases because the two social networking sites are popular vehicles for people — usually the young and unguarded — to vent on a regular basis about how they feel about their lives.

They are sharing secrets they want to keep from parents and teachers and certainly from an adversary in a lawsuit.

Facebook, of Palo Alto, Calif., started as a site for college students and now has 8 million subscribers of all ages, the company says. MySpace, a Beverly Hills, Calif.-based subsidiary of media giant News Corp., claims 100 million accounts.

Anyone browsing the Internet can reach subscribers' sites, but surfers cannot see the private portions without being designated as a "friend" of the subscriber.

"At Facebook, we believe you should have control over your information and who sees it," the 8-million-member site says on its signup page. "Only your friends and people in your networks can see your profile."

Both sites' privacy statements say they do much to ensure that third parties do not obtain information that is posted, but they also say the information may be divulged under court order.

Campion argues that when T.V. sued for emotional distress she waived her privacy rights about things that can provide evidence of her mental state. Asking for MySpace and Facebook messages is no different from requests, routinely granted, for e-mails in civil cases, he says.

"There is no real difference between

communicating by e-mail on AOL or Microsoft Outlook and communicating on a social networking site," Campion said in a brief.

In emotional distress cases, Campion said, "testing the credibility of a plaintiff can be a difficult task, because a defendant cannot rewind a film of the plaintiff's life to learn whether the plaintiff was really suffering or exaggerating complaints for secondary gain in litigation or even inventing complaints solely to bring a lawsuit."

"In this case, there is a way to shed light on the plaintiff's credibility by finding out what she wrote on social networking sites in unguarded moments," he added.

Under California law, Campion needs a commission from Brock to depose MySpace and Facebook representatives to obtain the plaintiff's writings on the sites.

Rather than decide whether privacy rights automatically trump such discovery requests, Brock ruled that the defense had not undertaken enough discovery to show it needed the Web site messages to defend the school board adequately.

Before he can find out what T.V. said to Internet "friends," Campion must use traditional discovery to find out who might testify on the plaintiff's behalf and perhaps interview those people to see what they know about her mental state, the judge said.

"If you talk to the kids, you'll find out a lot of things," she said.

Without doing that first, "it seems like a big step" to get the plaintiff's private messages, the judge said. She declined to grant the commission and issued a protective order against release of the data. She gave Campion the right to renew the

request if he can show a need.

The plaintiff's lawyer, Adam Slater of Mazie Slater Katz & Freeman in Roseland, argued in a brief that the discovery request should be rejected on broad principles.

A general proposition that social networking site postings are discoverable in emotional distress cases would prompt defense motions for such material in almost every case in which the plaintiff had a MySpace or Facebook site, he says.

"This court needs to say to this defendant and every defendant in New Jersey that if they have these private conversations they are not going to be discoverable in emotional distress matters," he said at the hearing.

He argued that the messages are like texts of telephone conversations and are covered by the New Jersey Wiretapping and Electronic Surveillance Control Act, which limits wiretapping to law enforcement agencies.

He said the need for a protective order was particularly necessary in a case involving a minor.

"In our society, minors now communicate by computer far more often than they do by telephone, and the minor plaintiff has relied on the ability to communicate confidentially with her friends, via the Internet, just as she would have by telephone prior to the advent of the Internet," Slater said in his brief.

Unresolved at Friday's hearing was how MySpace and Facebook — despite their disclaimers to subscribers about legal proceedings — would respond to an order to produce the private Web pages. Spokesmen for both companies did not return requests for comment on the case. ■