

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 18

WCC No. 2015-3535

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T. B.<sup>1</sup>

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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ORDER GRANTING RESPONDENT'S SECOND MOTION TO COMPEL DISCOVERY

**Summary:** Respondent moved to compel Petitioner to produce posts from her Facebook page, including posts she designated as "private." Petitioner objected on the grounds of privacy and on the basis that some of her posts might be privileged.

**Held:** Respondent's motion to compel is granted because its request for production is reasonably calculated to obtain evidence relevant to the issues in this case, including evidence tending to prove or disprove Petitioner's claim that her injury and occupational disease make it difficult for her to engage in physical activities, including typing and using a computer.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 26.** Under the broad rules of discovery, the requesting party need not meet any threshold before the opposing party has to produce relevant information she has deemed "private" on her Facebook page where the discovery request is reasonably calculated to lead to the discovery of admissible evidence. However, the requesting party does not get unfettered access to the opposing party's private Facebook posts, but rather the opposing party has the duty to review her pages and produce only those posts, photographs, and other

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<sup>1</sup> Petitioner's initials are used because this Court has, with consent of both parties, ordered that filings be made under seal pursuant to M.R.Civ.P. 5.2.

information which are responsive to the request for production and which are not privileged.

**Discovery: Requests for Production: Social Media.** Under the broad rules of discovery, the requesting party need not meet any threshold before the opposing party has to produce relevant information she has deemed “private” on her Facebook page where the discovery request is reasonably calculated to lead to the discovery of admissible evidence. However, the requesting party does not get unfettered access to the opposing party’s private Facebook posts, but rather the opposing party has the duty to review her pages and produce only those posts, photographs, and other information which are responsive to the request for production and which are not privileged.

**Discovery: Objections to Discovery.** The Court overruled Petitioner’s objection to Respondent’s request that she produce certain items she had posted on her Facebook page and designated “private.” Although Petitioner argued that the request was overly broad, burdensome, and an invasion of her constitutional right to privacy, the Court held that the discovery request was reasonably calculated to lead to the discovery of admissible evidence and ordered Petitioner to produce those posts, photographs, and other information which are responsive to the request for production and which are not privileged.

**Discovery: Relevancy and Materiality.** The Court held that Respondent’s request for production of certain posts, photographs, and other information which Petitioner had posted on her Facebook page and which related to Petitioner’s ability to use her hands, engage in physical activity, and work, was reasonably calculated to lead to the discovery of admissible evidence. The Court ordered Petitioner to produce these materials even though she had designated them as “private” on her Facebook page.

¶ 1 Petitioner suffered work-related injuries and/or occupational diseases in 2005 and 2006 arising out of the course and scope of her employment as a claims examiner with Montana State Fund (State Fund).<sup>2</sup> She alleges that she still suffers from problems with her neck, back, left shoulder, hands, forearms, and wrists.<sup>3</sup> She alleges that she is limited

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<sup>2</sup> Compare Petition for Trial at 1, Docket Item No. 1, with Response to Petition for Trial at 1, Docket Item No. 6.

<sup>3</sup> Petition for Trial at 1. See also Petitioner’s Responses to Respondent’s First Set of Discovery Requests to Petitioner, Petitioner’s Answer to Discovery Request No. 8, attached to [Respondent’s] Motion to Compel Discovery & Request for Sanctions, Docket Item No. 13.

in her ability to do many activities, including typing.<sup>4</sup> The issues in this case include whether Petitioner is at maximum medical improvement, whether she is entitled to additional medical benefits, and whether she is entitled to temporary total disability benefits, vocational rehabilitation benefits, and permanent total disability benefits.<sup>5</sup>

¶ 2 During its investigation, State Fund found Petitioner's Facebook page, which at that time was partly in the public domain. (State Fund maintains that Petitioner has since changed her settings so that her posts are no longer in the public domain.<sup>6</sup>) Petitioner posted several photos, including photographs that appear to be "selfies," among which are some that appear to have been taken while she was in the driver's seat of a car, along with short comments about her photos.<sup>7</sup> At her deposition, Petitioner testified that she has kept in touch with a few of her former coworkers at State Fund via short Facebook posts.<sup>8</sup> Petitioner also testified that she posts on Facebook "once in a while."<sup>9</sup>

¶ 3 State Fund has served a request for production upon Petitioner, stating:

For each Facebook account maintained by you, please produce your account data for the period of its inception through the present relating in any fashion to the use of your hands whether it be driving or any activity, your current and past employment, your physical activities, work, or any other manner likely to lead to the discovery of relevant information relating to your claim. You may download and print your Facebook data by logging onto your Facebook account selecting, "Settings" and then under "General Account Settings," clicking the link to "download a copy of your Facebook Data."<sup>10</sup>

¶ 4 Petitioner objected to the discovery request on the grounds that it is overly broad and burdensome, and that it invades her constitutional right to privacy.<sup>11</sup> Petitioner relies

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<sup>4</sup> See *generally* Petitioner's Responses to Respondent's First Set of Discovery Requests to Petitioner, attached to [Respondent's] Motion to Compel Discovery & Request for Sanctions.

<sup>5</sup> Compare Petition for Trial at 1-2, with Response to Petition for Trial at 1-2.

<sup>6</sup> Respondent's Reply Brief in Support of Second Motion to Compel Discovery at 1, Docket Item No. 57.

<sup>7</sup> *Id.*, Exhibit 1.

<sup>8</sup> Petitioner Dep. 28:17-24.

<sup>9</sup> Petitioner Dep. 86:17-22.

<sup>10</sup> Petitioner's Responses to Respondent's Second Set of Discovery Requests to Petitioner, attached to Respondent's Second Motion to Compel Discovery, Docket Item No. 33.

<sup>11</sup> *Id.*

on *State v. Windham*<sup>12</sup> and argues that she has a right to privacy in her private Facebook posts under Montana Constitution Article II, § 10.<sup>13</sup> She also argues that State Fund should not get “unfettered” access to her Facebook page because it may contain privileged communications.<sup>14</sup>

¶ 5 State Fund argues that Petitioner’s Facebook posts, include posts she designated as “private,” are neither privileged nor otherwise protected from discovery.<sup>15</sup> Relying on *Giacchetto v. Patchogue-Medford Union Free School District*,<sup>16</sup> State Fund urges this Court to adopt the standard that a person must produce all relevant social media posts.<sup>17</sup> Alternatively, State Fund asks this Court to adopt the standard set forth in *Keller v. National Farmers Union Property and Casualty Co.*, which requires the party requesting “private” content from social networking sites to first make a threshold showing that “publicly available information on those sites undermines the plaintiff’s claims.”<sup>18</sup>

### Law and Analysis

¶ 6 Montana Rule of Civil Procedure 26(b)(1) provides in relevant part:

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Thus, the Montana Supreme Court has explained, “The rules of civil procedure are premised on a policy of liberal and broad discovery.”<sup>19</sup> Likewise, this Court has explained

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<sup>12</sup> Montana 18th Jud. Dist. Ct., Gallatin Cnty., Cause No. DC-13-118C (2015).

<sup>13</sup> Petitioner’s Brief Re: Discovery Motions at 4-5, Docket Item No. 48.

<sup>14</sup> *Id.*

<sup>15</sup> Respondent’s Brief Regarding Discovery Motions at 4, Docket Item No. 35.

<sup>16</sup> 293 F.R.D. 112 (E.D.N.Y. 2013).

<sup>17</sup> Respondent’s Brief Regarding Discovery Motions at 4.

<sup>18</sup> No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at \*4 (D. Mont. January 2, 2013) (citation omitted).

<sup>19</sup> *Patterson v. State*, 2002 MT 97, ¶ 15, 309 Mont. 381, 46 P.3d 642 (citation omitted).

that “discovery is very broad” and “there is a difference between discoverability and admissibility.”<sup>20</sup>

¶ 7 The Montana Supreme Court has not yet had the opportunity to rule on the parameters of discovery into social networking. Having reviewed *Giacchetto*, *Keller*, several other cases involving discovery into social networking, and secondary sources,<sup>21</sup> this Court is persuaded that the approach taken in *Giacchetto* is correct: i.e., in response to a request for production asking for parts of a Facebook page, a party must produce all materials from her Facebook page(s) that are relevant to the case and not privileged. This Court agrees that no “social media privilege” exists and that private Facebook posts are discoverable. As stated by a commentator:

Accordingly, courts have consistently and correctly rejected claims that information located behind privacy settings on Facebook or other social-media services is rendered non-discoverable. A person who uses privacy settings on Facebook is no different than a person who shares letters only with his or her closest friends. If the information in those letters is relevant, it must be produced. The person with custody of the letters cannot refuse to provide them on the grounds that they were meant to be a secret.<sup>22</sup>

¶ 8 This Court agrees with the explanation in *Giacchetto* that the requesting party need not meet any threshold before the opposing party has to produce relevant information she has deemed “private” on her Facebook page:

Some courts have held that the private section of a Facebook account is only discoverable if the party seeking information can make a threshold evidentiary showing that the plaintiff’s public Facebook profile contains information that undermines the plaintiff’s claims. This 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. The Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it.

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<sup>20</sup> *Overholt v. Liberty Northwest Ins.*, 2013 MTWCC 5, ¶¶ 5 & 6.

<sup>21</sup> See, e.g., Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 Ark. L. Rev. 7 (2012).

<sup>22</sup> *Id.* at 21-22 (citations omitted).

Furthermore, this approach improperly shields from discovery the information of Facebook users who do not share any information publicly.<sup>23</sup>

¶ 9 In this case, State Fund's discovery request is reasonably calculated to lead to the discovery of admissible evidence. State Fund has asked Petitioner to produce any Facebook posts relevant to the issues of whether she can use her hands, engage in physical activity, and work, which are questions of fact in this case. The information Petitioner posted on Facebook might be relevant to these questions. While this Court agrees with Petitioner that State Fund's general, catch-all request for any information that is likely to lead to the discovery of relevant information is overly broad, the other parts of the discovery request are sufficiently detailed for Petitioner to answer. In addition, this Court agrees with State Fund that the very fact that Petitioner maintains a presence on Facebook might undermine her claim regarding her ability to type and use a computer, depending upon the extent of her presence.

¶ 10 Contrary to Petitioner's argument, State Fund will not get "unfettered" access to her private Facebook posts. State Fund has *not* asked Petitioner for direct access to her entire account. Petitioner has a duty to review her Facebook page(s) and produce only those posts, photographs, and other information that are responsive to State Fund's request for production that are not privileged. If Petitioner's private Facebook posts contain privileged information, she can claim the privilege and produce a privilege log.

¶ 11 Petitioner's reliance upon *Windham* is misplaced. In *Windham*, a detective posed as a 16-year-old girl via a fictitious Facebook account to investigate sexual crimes involving children.<sup>24</sup> The defendant, who had set his Facebook account to the highest privacy setting, became Facebook "friends" with the "girl," which gave the detective access to his Facebook page, and began communicating with the "girl" via private chatting.<sup>25</sup> The communications became sexual in nature, culminating in the defendant attempting to meet the "girl" in person.<sup>26</sup> Instead, the defendant was met by law enforcement officers and charged with attempted sexual abuse of children, pursuant to § 45-5-625, MCA.<sup>27</sup> *Windham* then moved to suppress evidence and dismiss his case, arguing that he was the subject of an illegal search.<sup>28</sup> The court ruled that *Windham* was

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<sup>23</sup> *Giacchetto*, 293 F.R.D. at 114, n.1 (internal citations omitted).

<sup>24</sup> *Windham*, Findings of Fact Nos. 1-2.

<sup>25</sup> *Windham*, Findings of Fact Nos. 4, 14, 25, & 26; see *Windham*, Finding of Fact No. 5.

<sup>26</sup> *Windham*, Findings of Fact Nos. 36-38.

<sup>27</sup> *Windham*, Finding of Fact No. 39.

<sup>28</sup> *Windham* at 1.

subjected to an illegal search because he had a subjective expectation of privacy in his private Facebook page and chats which society recognizes as reasonable, and the government neither obtained a warrant supported by probable cause nor provided adequate justification for its failure to do so. As a result, the court suppressed all evidence from the defendant's Facebook account and, since that was all of the evidence, the court dismissed the case.<sup>29</sup>

¶ 12 While this Court agrees that a person has a reasonable expectation of privacy in a private Facebook page, *Windham* is inapplicable because the standard for law enforcement to search through a person's private affairs is different than the standard applied to discovery in civil cases. Litigants in cases before this Court, and other cases governed by rules similar to M.R.Civ.P. 26, are often required to produce documents, photographs, and data that are private and which law enforcement would need a warrant to search. As stated by the United States Supreme Court:

The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.<sup>30</sup>

#### ORDER

¶ 13 State Fund's Second Motion to Compel Discovery is **granted**.

¶ 14 Petitioner shall provide State Fund with the portions of her Facebook page(s) that are responsive to its discovery requests within 20 days of the date of this Order.

DATED this 29<sup>th</sup> day of September, 2015.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Eric Rasmusson  
Charles G. Adams  
Submitted: August 10, 2015

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<sup>29</sup> *Windham*, Conclusion of Law No. 78.

<sup>30</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30, 104 S.Ct. 2199, 2206 (1984) (referring to the state of Washington's discovery rules, which are modeled on the federal rules).