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78 A.D.3d 1524, 910 N.Y.S.2d 614, 2010 N.Y. Slip Op. 08181
(Cite as: 78 A.D.3d 1524, 910 N.Y.S.2d 614)

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Supreme Court, Appellate Division, Fourth Department, New York.
Kara R. McCANN, Plaintiff–Respondent,
v.
HARLEYSVILLE INSURANCE COMPANY OF NEW YORK, Defendant–Appellant. (Appeal No. 1.).

Nov. 12, 2010.

Background: Motorist commenced personal injury action against other driver's insurer, seeking damages for injuries she sustained. The Supreme Court, Erie County, [James H. Dillon, J.](#), denied defendant's motions to compel plaintiff to disclose photographs and authorization for plaintiff's online social network account information and granted plaintiff's cross-motion for protective order. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) lower court properly denied first motion as overly broad, without prejudice to service of new, proper discovery demands;
- (2) denial of defendant's subsequent motion to compel disclosure was also proper; and
- (3) lower court abused its discretion in prohibiting defendant from seeking disclosure of plaintiff's online social network account at future date.

Affirmed as modified.

West Headnotes

[\[1\] Pretrial Procedure 307A](#) 383

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and Things and Entry on Land
[307AII\(E\)3](#) Particular Documents or Things
[307AK383](#) k. Photographs; X rays; sound recordings. [Most Cited Cases](#)

In personal injury action, lower court properly denied as overly broad, without prejudice to service of new, proper discovery demands, defendant insurer's motion to compel disclosure of photographs and seeking authorization for plaintiff motorist's online social network account; insurer claimed that information sought was relevant with respect to issue of whether plaintiff sustained a serious injury in accident with its insured.

[\[2\] Pretrial Procedure 307A](#) 28

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(A\)](#) Discovery in General
[307AK27](#) Scope of Discovery
[307AK28](#) k. Grounds of claim or defense; “fishing expedition”. [Most Cited Cases](#)

In personal injury action, denial of defendant insurer's motion to compel plaintiff to produce photographs and authorization for plaintiff's online social network account information was proper; although defendant specified type of evidence sought, it failed to establish factual predicate with respect to relevancy of evidence, and indeed essentially sought permission to conduct “fishing expedition” into plaintiff's online social network account based on mere hope of finding relevant evidence.

[\[3\] Pretrial Procedure 307A](#) 413.1

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and Things and Entry on Land
[307AII\(E\)4](#) Proceedings
[307AK413](#) Protective Orders
[307AK413.1](#) k. In general. [Most Cited Cases](#)

In personal injury action in which it properly denied defendant insurer's motions to compel plaintiff to produce photographs and authorization for her online social network account information, lower court abused its discretion in granting plaintiff's

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cross-motion for protective order, thereby prohibiting defendant from seeking disclosure of plaintiff's online social network account at future date.

****615** Chelus, Herdzik, Speyer & Monte, P.C., Buffalo ([Christopher R. Poole](#) of Counsel), for Defendant–Appellant.

Anspach Meeks Ellenberger LLP, Buffalo ([David M. Stillwell](#) of Counsel), for Plaintiff–Respondent.

PRESENT: [MARTOCHE](#), J.P., [LINDLEY](#), [SCONIERS](#), [PINE](#), AND GORSKI, JJ.

MEMORANDUM:

[1] ***1524** Plaintiff commenced an action seeking damages for injuries she sustained when the vehicle she was operating collided with a vehicle driven by defendant's insured. Plaintiff thereafter settled that action and commenced the instant action against defendant seeking “supplementary uninsured/underinsured motorist coverage.” In appeal No. 1, defendant appeals from an order denying its motion to compel disclosure of photographs and seeking “an authorization for plaintiff's Facebook account.” According to defendant, the information sought was relevant with respect to the issue whether plaintiff sustained a serious injury in the accident. We conclude in appeal No. 1 that Supreme Court properly denied defendant's motion “as overly broad,” without prejudice “to service of new, proper discovery demands” (see generally [Slate v. State of New York](#), 267 A.D.2d 839, 841, 699 N.Y.S.2d 824).

[2][3] ***1525** In appeal No. 2, defendant appeals from an order denying its subsequent motion seeking to compel plaintiff to produce photographs and an authorization for plaintiff's Facebook account information and granting plaintiff's cross motion for a protective order. Although defendant specified the type of evidence sought, it failed to establish a factual predicate with respect to the relevancy of the evidence (see [Crazytown Furniture v. Brooklyn Union Gas Co.](#), 150 A.D.2d 420, 421, 541 N.Y.S.2d 30). Indeed, defendant essentially sought permission to conduct “a fishing expedition” into plaintiff's Facebook account based on the mere hope of finding relevant evidence ([Auerbach v. Klein](#), 30 A.D.3d 451, 452, 816 N.Y.S.2d 376). Nevertheless, although we conclude that the court properly denied defendant's motion in appeal No. 2, we agree with defendant that the court

erred in granting plaintiff's cross motion for a protective order. Under the circumstances presented here, the court abused its discretion in prohibiting defendant from seeking disclosure of plaintiff's Facebook account at a future date. We therefore modify the order in appeal No. 2 accordingly.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

N.Y.A.D. 4 Dept.,2010.
McCann v. Harleysville Ins. Co. of New York
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