# Social Media Discovery

## Case Law Update & Strategies

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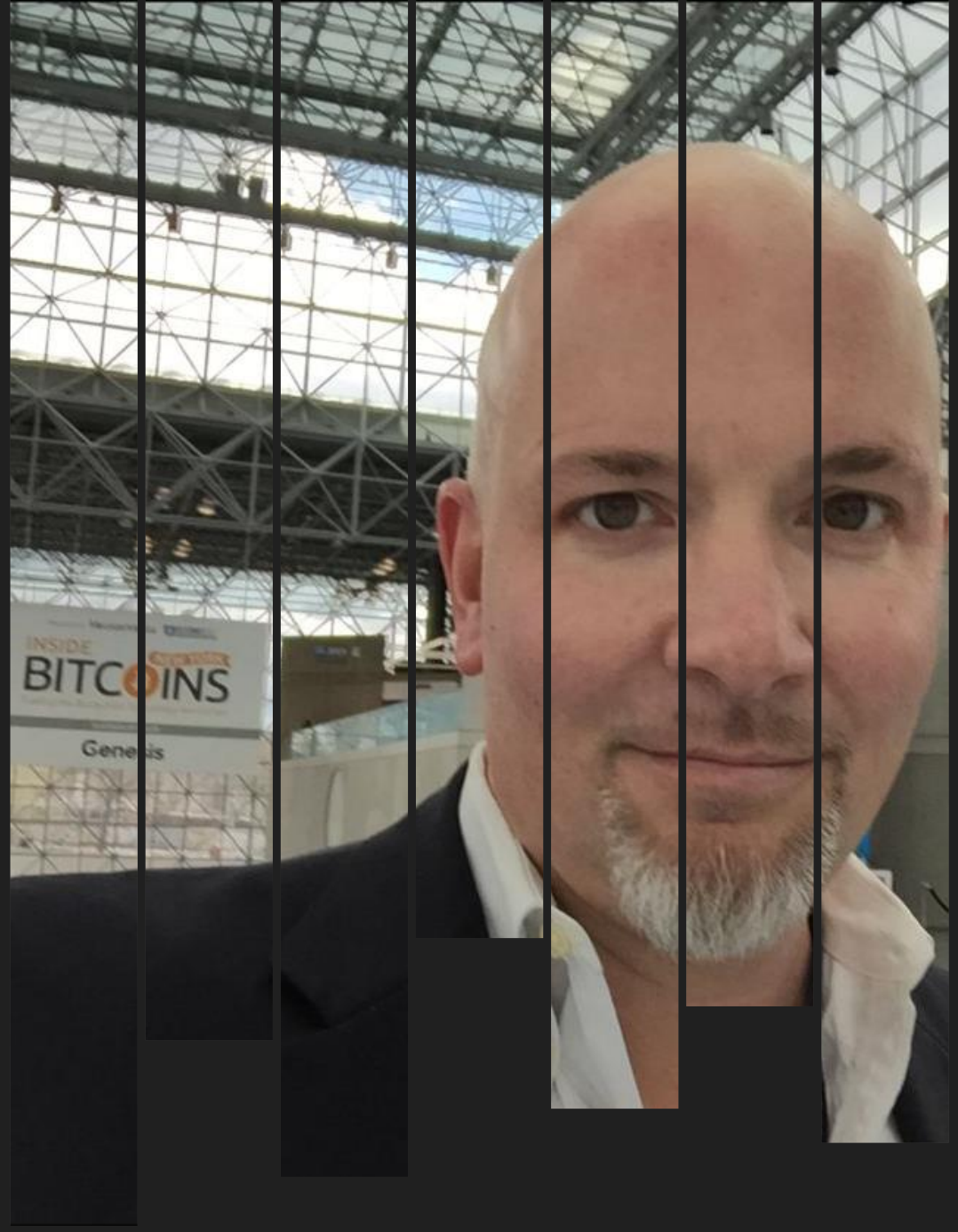
# Christopher Hopkins

McDonald Hopkins LLC – West Palm Beach

*Trial and appellate counsel with emphasis on emerging technologies: blockchain, data breach, defamation, drones, e-discovery, EULAs, internet crimes, privacy, & social media.*



# TOPICS:

- Essential Cases
- 10 Steps to Obtain FB Discovery
- Other Social Media Discovery Cases
- Social Media Interrogatory (2018)

# Social Media Discovery

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1. Please identify any internet social media web sites which Plaintiff has used or on which Plaintiff has maintained an account during the one year prior to the incident that is the basis for the subject lawsuit to the present. "Internet social media web sites" includes but is not limited to Facebook, Twitter, LinkedIn, XboxLive, Foursquare, Gowalla, Myspace, and Windows Live Spaces.

# Social Media Discovery

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***Sounded cool… maybe a few years ago***

## Facebook Has Acquired Gowalla

**Jason Kincaid** @jasonkincaid / Dec 2, 2011

Comment


**Facebook** has acquired location-based startup Gowalla, according to a report this evening by Laurie Segall on CNN Money. The terms of the deal haven't been reported, and Gowalla declined to comment. Facebook says it doesn't comment on rumor and speculation. **Update:** We've heard from an independent

# Social Media Discovery

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***Hip… maybe a few years ago***

## Windows Live Spaces

From Wikipedia, the free encyclopedia

**Windows Live Spaces** was Microsoft's blogging and social networking platform. The site was originally released in early 2004 as **MSN Spaces** to compete with other social of a shifting of community services away from the MSN brand. Windows Live Spaces received an estimated 27 million (27,000,000) unique visitors per month as of August 20 and communication tool, Windows Live Spaces has been criticized as not being as powerful as some of its alternatives.[2] It was shut down in 2011 due to low viewership.[3]

# Social Media Discovery

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***Thanks for the reference but… you're 6 years too late***

The constant expansion of social networking websites means that defense practitioners will increasingly have

## Discovery of Facebook Content in Florida Cases

*By Christopher B. Hopkins and Tracy T. Segal*

"Facebook helps you connect and share with the people in your life," proclaims the Facebook homepage. As of December 2011, 152.5 million people in the United States were posting monthly on their Facebook accounts.[1] Based

and wearing shorts.[4] Similarly, a plaintiff who alleged she was in constant physical pain and needed a cane to walk posted photographs that showed her enjoying life with her family and wrote a status update about visiting the gym.[5] Another plaintiff, who claimed to be largely confined to

# Social Media Discovery

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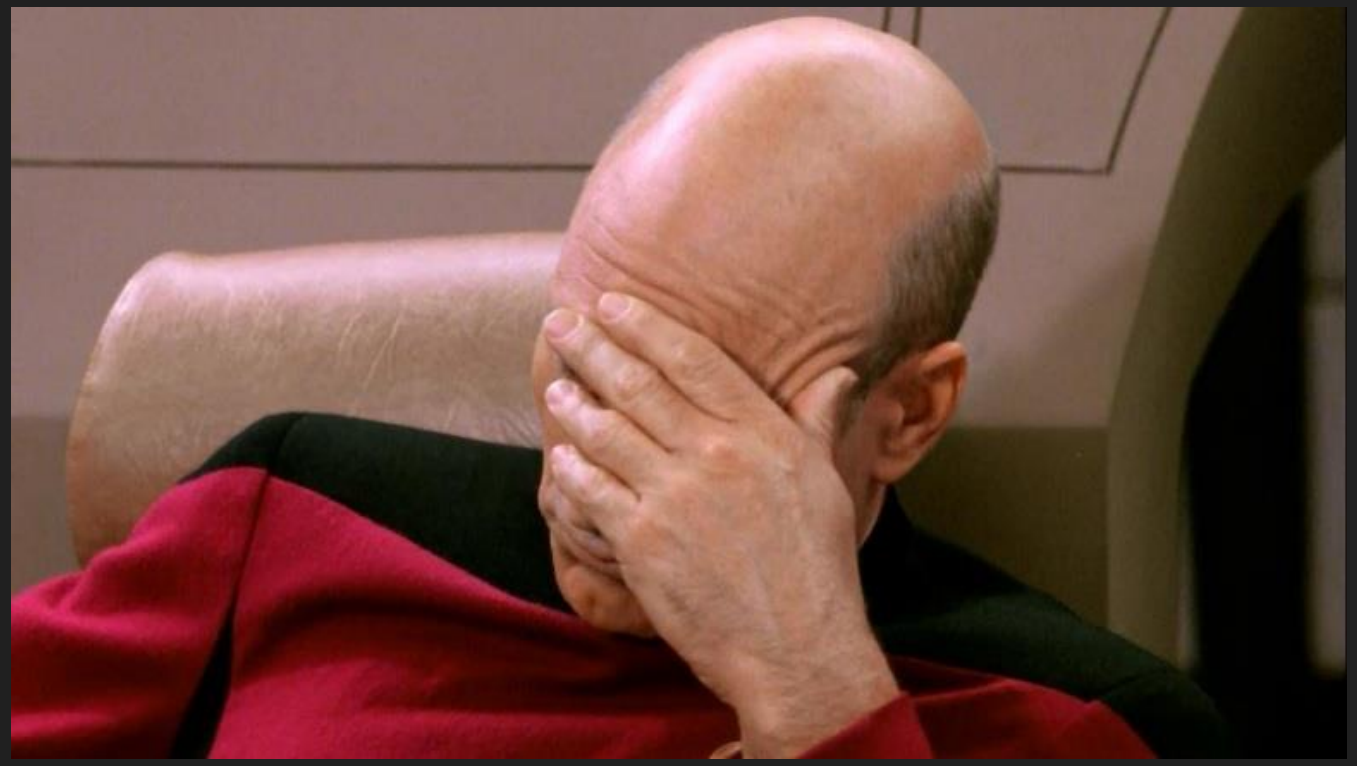
complex. The authors of this article have successfully used the following interrogatories:[8]

* Please identify any internet social media websites which Plaintiff has used and/or maintained an account in the last five (5) years. "Internet social media websites" includes but is not limited to Facebook, Twitter, LinkedIn, XboxLive, Foursquare, Gowalla, MySpace, and Windows Live Spaces.

* If Plaintiff has Internet social media website account(s), please provide her username and password or, alternatively, under Florida Rules of Civil Procedure Rule 1.340(c), please provide a copy of all non-privileged content/data shared on the account in the last five (5) years.



# Social Media Discovery

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## Discovery of Facebook Content in Florida Cases

*By Christopher B. Hopkins and Tracy T. Segal*

The constant expansion of social networking websites means that defense practitioners will increasingly have to confront issues of how and when

"Facebook helps you connect and share with the people in your life," proclaims the Facebook homepage. As of December 2011, 152.5 million people in the United States were posting monthly on their Facebook accounts.[1] Based on these figures, it is likely that a personal injury plaintiff may have an

and wearing shorts.[4] Similarly, a plaintiff who alleged she was in constant physical pain and needed a cane to walk posted photographs that showed her enjoying life with her family and wrote a status update about visiting the gym.[5] Another plaintiff, who claimed to be largely confined to her home and bed, posted pictures on Facebook and MySpace which revealed

DO NOT USE - OUTDATED

# Social Media & e-Discovery

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***And this one… likely not to work until you set the stage…***

2. With respect to each internet social; media web site which Plaintiff has used or maintained an account during the one year prior to the incident that is the basis for the subject lawsuit to the present, please provide Plaintiff's users name and password. Alternatively,

Social Media Discovery

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# ESI and Social Media Discovery Are Not Forms Use Can Use Forever

# Essential Cases

# Social Media Discovery

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Westlaw.

75 So.3d 789, 36 Fla. L. Weekly D2610
**(Cite as: 75 So.3d 789)**

**H**

District Court of Appeal of Florida,
Fourth District.
Mario A. ALVAREZ, Appellant,
v.
COOPER TIRE & RUBBER COMPANY,
Appellee.

No. 4D08–3498.
Nov. 30, 2011.

**Background:** Estate of pick-up truck passenger, who was killed in accident that allegedly resulted from separation of tire tread on truck's rear wheel, filed suit against tire manufacturer, alleging claims for strict liability and negligence. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Edward H. Fine and Catherine Brunson, JJ., issued order restricting estate's discovery, and following a jury trial, rendered judgment in favor of manufacturer. Estate appealed.

**Holding:** On rehearing en banc, the District Court of Appeal, Warner, J., held that trial court acted within its discretion in limiting discovery from manufacturer to subject tire and those tires with the same or similar specifications.

*Mario Alvarez v. Cooper Tire & Rubber Co.*
75 So.3d 789 (Fla 4th DCA 2011)

Dec 2010 opinion vs. Nov 2011 opinion:

- 2010: Florida has “a strong policy to allow parties to do some fishing to learn what possible trial evidence may actually be out there.”
- 2011: [no reference to “fishing”] “…the cost and burden of civil litigation will imperil its very existence.”

# Social Media Discovery

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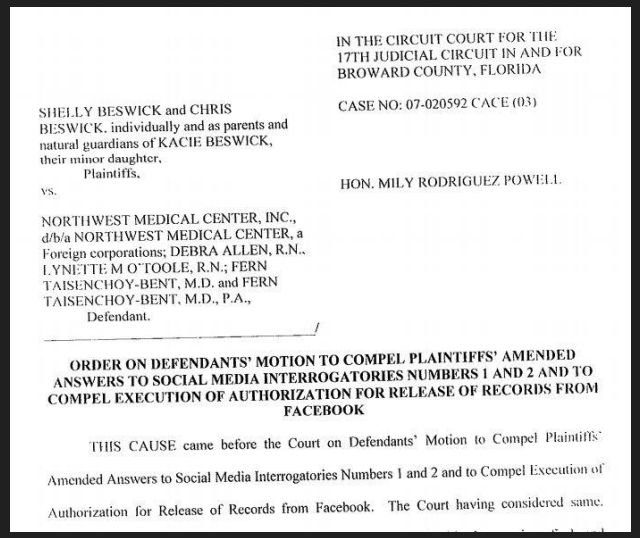

IN THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 07-020592 CACE (03)

SHELLY BESWICK and CHRIS BESWICK, individually and as parents and natural guardians of KACIE BESWICK, their minor daughter,
Plaintiffs,
vs.

HON. MILY RODRIGUEZ POWELL

NORTHWEST MEDICAL CENTER, INC., d/b/a NORTHWEST MEDICAL CENTER, a Foreign corporations; DEBRA ALLEN, R.N., LYNETTE M O'TOOLE, R.N.; FERN TAISENCHOY-BENT, M.D. and FERN TAISENCHOY-BENT, M.D., P.A.,
Defendant.

**ORDER ON DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' AMENDED ANSWERS TO SOCIAL MEDIA INTERROGATORIES NUMBERS 1 AND 2 AND TO COMPEL EXECUTION OF AUTHORIZATION FOR RELEASE OF RECORDS FROM FACEBOOK**

THIS CAUSE came before the Court on Defendants' Motion to Compel Plaintiffs' Amended Answers to Social Media Interrogatories Numbers 1 and 2 and to Compel Execution of Authorization for Release of Records from Facebook. The Court having considered same,

*Beswick v. Northwest Medical Center, Inc.*
2011 WL 70005038 (Fla. 17th Cir. Ct. Nov. 3, 2011)

- All FB content: "clearly relevant" and "narrow in scope as they include a time limitation of five years."
- Note – issued three weeks before *Alvarez*

# Social Media Discovery

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*Davenport v. State Farm Mutual*
*2012 WL 555759 (M.D. Fla. Feb 21, 2012)*

**Request for Production**

All photographs posted, uploaded, or otherwise added to any social networking sites or blogs, including but not limited to Facebook.com, Myspace.com, Twitter.com, or any similar websites posted since the date of the accident alleged in the Complaint. This includes photographs posted by others in which Chelsea Davenport has been tagged or otherwise identified therein.

# Social Media Discovery

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*Davenport v. State Farm Mutual*
*2012 WL 555759 (M.D. Fla. Feb 21, 2012)*

**Ordered to Produce:**

"produce any photographs depicting [plaintiff], taken since the date of the subject accident, and posted to [social media], regardless of who posted them."

# Social Media Discovery

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION "AI"
CASE No. 50-2011-CA-010339-XXXXMB

ERICA LEVINE

Plaintiff,

vs.

CULLIGAN OF FLORIDA, INC.,
a Florida corporation,

Defendant/Third Party Plaintiff,

vs.

THE LAW OFFICES OF CHAD R. LAING,
P.A. d/b/a LAING LAW GROUP, a Florida
corporation,

Third Party Defendant.

*Levine v Culligan of Florida, Inc.*
2013 WL 1100404 (Fla. 15th Cir. Ct. Jan. 29, 2013)

- D sought full access since evidence "may" exist on her social media accounts.
- D had not come forward with evidence to show "*some* reason to believe that the private portion of a profile contains information relevant to the case."

# Social Media Discovery

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2013 WL 2712206
Only the Westlaw citation is currently available.
United States District Court,
M.D. Florida.

Vincent SALVATO, as Personal Representative of the Estate of Joshua Salvato, for the benefit of Vincent Salvato, surviving parent Ana Rodriquez, surviving parent, Plaintiff,
v.
Lauren MILEY, Norman Brown and Chris Blair, Defendants.

No. 5:12–CV–635–Oc–10PRL. | June 11, 2013.

**Attorneys and Law Firms**

Adam John Langino, Diana L. Martin, Leslie M. Kroeger, Theodore J. Leopold, Leopold Law, PA, Palm Beach Gardens, FL, Antonio M. Romanucci, Romanucci & Blandin, LLC, Chicago, IL, Brian W. Warwick, Janet R. Varnell, Steven Thomas Simmons, Jr., Varnell & Warwick, PA, The Villages, FL, for Plaintiff.

Jeanelle G. Bronson, Walter A. Ketcham, Jr., Philip J. Wallace, Grower, Ketcham, Rutherford, Bronson, Eide & Telan, PA, Bruce R. Bogan, Melissa Jean Sydow, Hilyard, Bogan & Palmer, PA, Orlando, FL, for Defendants.

*Est of Salvato v. Miley*
2013 WL 2712206 (M.D. Fla. June 11, 2013)

- Requests outside the scope of discovery absent a "threshold showing that the information is reasonably calculated to lead to the discovery of admissible evidence."
- Order lists a number of the discovery requests; alone, some version of these requests might be OK.

# Social Media Discovery

McDonald Hopkins

2013 WL 2712206
Only the Westlaw citation is currently available.
United States District Court,
M.D. Florida.

Vincent SALVATO, as Personal Representative of the Estate of Joshua Salvato, for the benefit of Vincent Salvato, surviving parent Ana Rodriquez, surviving parent, Plaintiff,
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Lauren MILEY, Norman Brown and Chris Blair, Defendants.

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*Est of Salvato v. Miley*
2013 WL 2712206 (M.D. Fla. June 11, 2013)

## Interrogatory 12

Please identify whether you had any social media accounts and/or profiles including, but not limited to, Facebook, Twitter, MySpace, you have had at any time from July 5, 2012–February 1, 2013.

For each account, please provide the name and/or username associated with the profile and/or social media account, the type of social media account (e.g.—Facebook, Twitter, etc.), the email address associated with the social media account, the dates you've maintained the account, and/or whether the account is still active.

# Social Media Discovery

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

TONIA ROOT, individually and on behalf of GAGE ROOT, a minor,

Petitioner,

v. Case No. 2D13-3205

BALFOUR BEATTY CONSTRUCTION LLC, a Delaware limited liability corporation; ZEP CONSTRUCTION, INC.; C.W. ROBERTS CONTRACTING, INC. f/k/a COUGAR CONTRACTING SPECIALITIES, INC., a wholly owned subsidiary of CONSTRUCTION PARTNER INC.; DRMP, INC.; ROADSAFE TRAFFIC SYSTEMS, INC. f/k/a NES TRAFFIC SAFETY/ ROADSAFE TRAFFIC, L.P. f/k/a NES TRAFFIC SAFETY, L.P.; ALLIED ENGINEERING AND TESTING, INC.; and CITY OF CAPE CORAL,

Respondents.

Opinion filed February 5, 2014.

*Root v. Balfour Beatty Const. LLC*
132 So.2d 867 (Fla. 2d DCA 2014)

- Sought full access to Facebook account
- Distinguishable:
  - "mother/next friend" was not a witness
  - scope of requests did not relate to counts / defenses.
- Plaintiffs will cite language; Defendants emphasize outlying nature of facts

# Social Media Discovery

McDonald Hopkins

148 So.3d 163
District Court of Appeal of Florida,
First District.

**Tammy Lee ANTICO**, Personal Representative of the Estate of Tabitha Frances Guyton **Antico**, Deceased, Petitioner,
v.
**SINDT TRUCKING**, INC., and James Paul Williams, Respondents.

No. 1D14–277. | Oct. 13, 2014.

**Synopsis**
**Background:** Estate of driver, who was killed in vehicular collision with **truck**, brought wrongful death action against **trucking** company, which operated **truck**. Company moved for an order from the trial court permitting an expert to inspect data from driver's cellphone on day of the accident. The trial court granted motion. Driver's estate filed petition for writ of certiorari.

**[Holding:]** The District Court of Appeal, Osterhaus, J., held that trial court did not err by allowing company's expert to retrieve data from driver's cellphone under limited and controlled conditions.

*Est of Antico v. Sindt Trucking, Inc.*
148 So.3d 163 (Fla. 1st DCA 2014)

- Defendant sought phone and FB content
- NOT IN OPINION = FB implicated because relatives later posted, “don’t text and drive.”
- Arguably not a “social media” case but same analysis. See also *Restrepo v. Carrera*, 3d DCA (April 13, 2016).

# Social Media Discovery

McDonald Hopkins

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

**MARIA F. LEON NUCCI** and **HENRY LEON,** her husband,
Petitioners,

v.

**TARGET CORPORATION, AMERICAN CLEANING CONTRACTING, INC.,** and **FIRST CHOICE BUILDING MAINTENANCE, INC.,**
Respondents.

No. 4D14-138

[January 7, 2015]

Petition for writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy, III, Judge; L.T. Case No. 10-45572 (21).

John H. Pelzer of Greenspoon Marder, P.A., Fort Lauderdale, and Victor Kline of Greenspoon Marder, P.A., Orlando, for petitioners.

Nicolette N. John and Thomas W. Paradise of Vernis & Bowling of Broward, P.A., Hollywood, for respondent, Target Corporation.

GROSS, J.

*Nucci v. Target Corp.*
162 So.3d 146 (Fla. 4th DCA 2015)

- Defendant sought phone and FB content
- NOT IN OPINION = FB implicated because relatives later posted, “don’t text and drive.”
- Arguably not a “social media” case but same analysis

# Social Media Discovery

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

VICKI HOGWOOD and
JAMES HOGWOOD,
Plaintiffs,

Case No. 2011CA013010
Civil Division: AI

v.

HCA HOLDINGS, INC.; PALMS WEST HOSPITAL LIMITED PARTNERSHIP, d/b/a PALMS WEST HOSPITAL; MICHAEL WING, M.D.; PALMS WEST RADIATION THERAPY, L.L.C.; and 21ST CENTURY ONCOLOGY, L.L.C.;
Defendants.
_____/

**ORDER OVERRULING IN PART AND SUSTAINING IN PART PLAINTIFFS' OBJECTIONS TO DEFENDANTS' INTERNET SOCIAL MEDIA REQUEST TO PRODUCE AND INTERROGATORIES**

*Hogwood v. Palms West*
(Fla. 15th Cir. Ct. Aug 12, 2015)

- Judge Sasser (*Levine*) applies *Nucci* & *Root*
- Granted in part, denied in part

# Social Media Discovery

McDonald Hopkins

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VICKI HOGWOOD and
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Defendants.
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**ORDER OVERRULING IN PART AND SUSTAINING IN PART PLAINTIFFS' OBJECTIONS TO DEFENDANTS' INTERNET SOCIAL MEDIA REQUEST TO PRODUCE AND INTERROGATORIES**

*Hogwood v. Palms West*
(Fla. 15th Cir. Ct. Aug 12, 2015)

**Request for Production**

Please provide the content of each and every social media website, utilized by the Plaintiff, Vicki Hogwood, for the one year period prior to the incident which is the subject matter of this litigation to the present. For clarification, this would include, but not be limited to, Facebook, Twitter, Instagram, LinkedIn, XboxLive, Foursquare, Gowalia, Myspace, and Windows Live Spaces, and dating websites.

# Social Media Discovery

McDonald Hopkins

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

VICKI HOGWOOD and
JAMES HOGWOOD,
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*Hogwood v. Palms West*
(Fla. 15th Cir. Ct. Aug 12, 2015)

## Interrogatory

With respect to each social media website which Plaintiff has used or maintained an account from one year prior to the incident that is the basis for the subject lawsuit to the present, please provide Plaintiff's user name and password.

Alternatively, pursuant to Rule 1.340(c), Fla. R. Civ. P., please provide a copy of all content/data shared on each account during the one year prior to the incident that is the basis for the subject lawsuit to the present.

# Social Media Discovery

McDonald Hopkins

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

VICKI HOGWOOD and
JAMES HOGWOOD,
Plaintiffs,

Case No. 2011CA013010
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v.

HCA HOLDINGS, INC.; PALMS WEST HOSPITAL LIMITED PARTNERSHIP, d/b/a PALMS WEST HOSPITAL; MICHAEL WING, M.D.; PALMS WEST RADIATION THERAPY, L.L.C.; and 21ST CENTURY ONCOLOGY, L.L.C.;
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**ORDER OVERRULING IN PART AND SUSTAINING IN PART PLAINTIFFS' OBJECTIONS TO DEFENDANTS' INTERNET SOCIAL MEDIA REQUEST TO PRODUCE AND INTERROGATORIES**

*Hogwood v. Palms West*
(Fla. 15th Cir. Ct. Aug 12, 2015)

**Application of Nucci:**

"Patient's objections must be overruled to the extent they seek to prevent disclosure of photographs from her Facebook page. As in *Nucci*, Patient has placed her long-term health at issue in this action. Therefore, photographs of her daily life before and after the incident leading to this litigation are exceedingly relevant."

# Social Media Discovery

McDonald Hopkins

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

VICKI HOGWOOD and
JAMES HOGWOOD,
Plaintiffs,

Case No. 2011CA013010
Civil Division: AI

v.

HCA HOLDINGS, INC.; PALMS WEST HOSPITAL LIMITED PARTNERSHIP, d/b/a PALMS WEST HOSPITAL; MICHAEL WING, M.D.; PALMS WEST RADIATION THERAPY, L.L.C.; and 21ST CENTURY ONCOLOGY, L.L.C.;
Defendants.
_____/

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*Hogwood v. Palms West*
(Fla. 15th Cir. Ct. Aug 12, 2015)

**Application of Root:**

"Defendants here seek discovery of "all content/data shared" on Patient's Facebook account. Such a request implicates the concerns raised in *Root* and would be the equivalent of the proverbial impermissible "fishing expedition".

# Take-Away Standards?

P

## Photographs

*Nucci* distinguishes still images from other content and appears to confirm broad discovery powers. This is helpful since social media is moving away from written content and towards posted images (see, e.g, Instagram, Pinterest, and SnapChat).

T

## Threshold to Get Social Media Access

Levine, Salvato, Hogwood

O

## Other Objections Typically Fail

Privacy – Beswick, Davenport, Levine, Nucci

SCA – Levine and Nucci

Production Method – Antico and Nucci

Not “tagged” photos – Nucci, see also EEOC v Simply Storage

# 10 Steps
# Facebook Discovery

# Social Media Discovery

McDonald Hopkins

## Ten Steps to Obtain Facebook Discovery In Florida

By Christopher B. Hopkins

The number of appellate decisions setting out standards for litigants pursuing discovery of information posted on social media websites is small, but growing. In this article Christopher Hopkins identifies trends in the decisional law and suggests ten steps that will improve the chances of obtaining social media discovery. The article focuses on Facebook, but the principles described here can be applied to other social and professional networking sites.

In the past year, three Florida appellate courts have articulated standards in civil cases for the discovery of content from a party's Facebook account. Before 2014, Florida's scant precedent for social media discovery was composed of two federal and two state trial court orders. While this budding authority of three opinions and four orders is not fully harmonized, defense practitioners will detect trends and strategies for obtaining Facebook content (*e.g.*, posts, comments, still images, video, or other information) and, potentially, full access to a plaintiff's Facebook account.

Rather than serving a standard set of "social media discovery" requests, the lesson from these Florida cases is that defense counsel should take discrete steps — early in the case, followed by narrow social media discovery in stages— to maximize production of the plaintiff's Facebook content. This article provides an overview of the recent social media discovery rulings in Florida; explains the grounds to overcome frequent plaintiff objections; and describes ten steps to obtain court-approved access to the plaintiff's Facebook content.

A primer on Facebook and other forms of social media is likely not necessary for most Florida lawyers.[1] This article will focus exclusively on Facebook because of that site's popularity, but the principles and steps articulated here likely will apply to other social media. We begin with a chronological discussion of the four trial court orders from 2011 through 2013 and the more recent 2014 through 2015 appellate opinions.

### *"Facebook Discovery" Trial Court Orders 2011–2013*

There are four reported Florida trial court orders regarding Facebook discovery, decided by the Broward and Palm Beach County circuit courts and the Middle District of Florida. The two South Florida trial court orders — *Beswick v. Northwest Medical Center, Inc.* and *Levine v. Culligan* — are the most significant.

*Beswick v. Northwest Medical Center, Inc.*[2]

The earliest reported authority in Florida articulating standards for the discovery of a plaintiff's Facebook account is the November 2011 Broward County circuit court order in *Beswick v. Northwest Medical Center, Inc. Beswick* is also noteworthy because it was relied upon by two of the six subsequent Florida cases.[3]

The *Beswick* defendant sent discovery requests asking one of the plaintiffs to identify her social media accounts and to divulge a copy of all shared content for the preceding five years.[4] The *Beswick* plaintiff objected on the grounds that these requests were overbroad, burdensome, not reasonably related to the discovery of admissible evidence, and violative of privacy rights.[5] This mantra of objections, as illustrated below, appears to be the prevailing grounds that plaintiffs use to avoid production of Facebook content.

**ABOUT THE AUTHOR...**

CHRISTOPHER B. HOPKINS is a member of McDonald Hopkins LLC (West Palm Beach). He received the *Trial Advocate Quarterly* Award in 2012 and has been on the TAQ editorial board since 2004. His litigation and appellate practice frequently focuses on emerging technologies. His email is chopkins@mcdonaldhopkins.com.

# Social Media Discovery

McDonald Hopkins

Technology Corner

## Social Media Discovery in Florida After Nucci v. Target

***by Christopher B. Hopkins***

Despite the widespread use of internet social networking, there has been little recent case law clarifying social media discovery. This article discusses the few current decisions and trends nationwide, focusing on Florida and Facebook, so that practitioners can better frame requests or sharpen objections. [Due to space constraints, materials below are at www.hopkins.law]

Facebook remains ground zero for most social media discovery battles. In 2015, I wrote *Ten Steps to Obtain Facebook Discovery in Florida* which discussed the development of Florida's social media discovery precedent between 2011-2015. As discussed in that article, the 2015 case of *Nucci v. Target Corp.* was the most recent Florida appellate decision on social media discovery. Therein, the defendant selectively propounded a request for photographs which the plaintiff posted to Facebook. The *Nucci* court approved that limited request, agreeing that "there is no better portrayal of what an individual's life was

burden are historically overruled and should be avoided (see *Nucci and Hogwood*).

First, as for relevance, it is frequently argued that the defendant failed to establish that the request is reasonably calculated to lead to discovery of admissible evidence (see *Hogwood, Root v. Balfour*, and *Smith v. Hillshire*). Plaintiff's counsel should rely on *Nucci* to argue that non-photographic content on Facebook is not relevant absent certain circumstances.

Second, in the May 2017 case of *Gordon v. TGR Logistics*, a Wyoming court applied "proportionality" to a broad request for complete access to the plaintiff's two Facebook accounts. Following Federal Rule 26(b)(1), the *Gordon* court considered the amount in controversy, resources, and importance to the case. Similarly, following Rule 26(c)(1), the court stated "discovery can be burdensome even if it is inexpensive" due to annoyance, embarrassment, or oppression. Plaintiff lawyers should be mindful that *Nucci* held that blanket objections along

# Social Media Discovery

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1. **Preserve Plaintiff's Public Profile (early)**

Print or save public portion of the plaintiff's Facebook account, including number of friends, photos, and other openly-available information.

This snapshot may reveal what is subsequently altered, removed, or deleted.

## 2. Serve a Single Interrogatory

Seek identification of plaintiff's social media accounts.

(Skip this step if plaintiff's social media profiles are public)

Don't rely on Google or Facebook search

Use interrogatory from *Beswick* or *Nucci*

Distinguish from *Davenport* and *Root*

Aim for *Davenport, Nucci*, and *Hogwood* order

## 2. Serve a Single Interrogatory

Please identify (a) any social media site(s) which you have used from [date] to the present and (b) your user name or profile name for each social media site listed. "Social media sites" refer to Internet-based social networking websites and/or services including but not limited to Facebook, Twitter, Linked In, Instagram, Pinterest, and SnapChat. You are not being asked to produce content or a password – this Interrogatory simply asks you to identify internet-based social media sites which you have used or continue to use and your user (or profile) name.

## 3. Re-Check Public Profile

Re-examine plaintiff's public profile before deposition.

If content is removed or altered, that could develop grounds for further discovery and/or spoliation claim (*new ethics rule could cause two harms*)

## 4. Develop Case-Specific Reasons for Disclosure

What type of content is going to be most relevant and valuable to your case?

Looking ahead, what is the narrowest initial discovery request which will yield results? (time period or type of content)

## 5. Consider Facebook Questions in Deposition

Likely tailor to your case or style. You may chose not to question.

For examples, see article, *Ten Steps to Obtain Facebook Discovery in Florida.*

# 6. Post-Deposition Review

Public photos/content in conflict with evidence or depo testimony?

Content been altered or missing?

Plaintiff reveal something about private content in deposition?

See analysis in *Levine* and *Root*. See also discovery test(s) in non-Florida *EEOC v. Simply Storage*.

# 7. Serve a Narrow Request for Production

Still images (photographs) or moving images (video, GIFs) depicting the Plaintiff (posted by Plaintiff or in which Plaintiff is tagged) from [time] to present.

*Nucci* and *Davenport* have examples; avoid *Root* and *Levine*.

Must relate to a count or defense (relevant).

If content has changed, interrogatory asking for a description of content changed, not RFP (this helps avoid Root/Levine situations).

## 8. Set a Hearing if Other Side Objects

See Rule 1.280(b)(1) [reasonably calculated to lead to admissible evidence]

And Rule 1.350(a) [contemplates e-discovery]

# 9. Re-Check Public Portion of Profile Again

# 10. Consider Supplemental (Incremental) Discovery

If images are helpful, ask for any captions or comments

*EEOC v Simply Storage*: “social media communications and photographs that reveal, refer, or relate to any emotion, feeling, or mental state… and that reveal, refer, or relate to events that could reasonably be expected to produce emotion, feeling, or mental state.”

# Social Media Discovery

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## *Start with this SM Interrogatory (2018)*

**12.** Did [PARTY] have use social media internet accounts from [DATE] – present? If so, please provide the (a) name of the social media platform and (b) [PARTY]'s account name(s). This interrogatory includes but is not limited to her account name(s) on Facebook, Twitter, Instagram, Snapchat, and LinkedIn. This further includes social media accounts which [PARTY] used even if the account does not reflect his real name / true identity (including but not limited to attempted anonymous accounts). *This request does not seek content, access, nor passwords. To the extent a definition of "social media" is required, see definition here: http://bit.ly/2ovZQU8.*

**ANSWER:**

# Social Media Discovery Materials

# Social Media Discovery

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## *Forman v. Henkin (Feb 2018)*

…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… 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' ".

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.

Social Media Discovery

McDonald Hopkins

# *Forman v. Henkin (Feb 2018)*

**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.

Under such an approach, **disclosure turns 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 in the prosecution or defense of an action."**

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.

# *Example: Warrant in Las Vegas Shooter Case*

Litigants can / should learn from law enforcement how to phrase their e-discovery requests

**ATTACHMENT "A1"**

**ONLINE ACCOUNT TO BE SEARCHED**

1. This warrant applies to information associated with the Microsoft email account centralpark1@live.com (the "Target Accounts") from their inception to present, which is stored at premises owned, maintained, controlled, or operated by Microsoft Corporation, headquartered at 1 Microsoft Way, Redmond, Washington, 98052.

# Warrant in Las Vegas Shooter Case

**ESI**

which the Government sought from Microsoft (email account provider)

a. The contents of all emails associated with the account, including copies of emails sent to and from the account, draft emails, the source and destination addresses associated with each email, the date and time at which each email was sent, and the size and length of each email;

b. All records or other information regarding the identification of the account, to include full name, physical address, telephone numbers and other identifiers, records of session times and durations, the date on which the account was created, the length of service, the types of service utilized, the IP address used to register the account, log-in IP addresses associated with session times and dates, account status, alternative email addresses provided during registration, methods of connecting, log files, and means and source of payment (including any credit or bank account number);

c. All records or other information stored in the Online Accounts, including address books, contact and buddy lists, calendar data, pictures, applications, documents, and other files;

d. All records pertaining to communications between Service Provider and any person regarding the account, including contacts with support services and records of actions taken.

e. All third-party application data and content associated with the Target Account through any Android operating system and/or any Microsoft-related facility.

# *Warrant in Las Vegas Shooter Case*

**Metadata** which the Government sought from Microsoft (email account provider)

a. The contents of all emails associated with the account, including copies of emails sent to and from the account, draft emails, the source and destination addresses associated with each email, the date and time at which each email was sent, and the size and length of each email;

b. All records or other information regarding the identification of the account, to include full name, physical address, telephone numbers and other identifiers, records of session times and durations, the date on which the account was created, the length of service, the types of service utilized, the IP address used to register the account, log-in IP addresses associated with session times and dates, account status, alternative email addresses provided during registration, methods of connecting, log files, and means and source of payment (including any credit or bank account number);

c. All records or other information stored in the Online Accounts, including address books, contact and buddy lists, calendar data, pictures, applications, documents, and other files;

d. All records pertaining to communications between Service Provider and any person regarding the account, including contacts with support services and records of actions taken.

e. All third-party application data and content associated with the Target Account through any Android operating system and/or any Microsoft-related facility.

# Other Cases / Sources

www.Internetlawcommentary.com

State of Connecticut v. Teri Buhl (June 21, 2016)
U.S. v. Elonis (3rd Cir. Oct. 28, 2016)(post SCOTUS)
Jones, Alexandra, "Forman v. Henkin: Conflict Between Social Media Discovery & User Privacy"
Smith v Hillshire Brands, (USDC Kansas 6/20/14)
Thurmond v Bowman, (USDC WD NY 3/31/16)
Giacchetto v. Free School Dist., 2013 Lexis 83341

# Social Media Discovery

McDonald Hopkins

## Ten Steps to Obtain Facebook Discovery In Florida

By Christopher B. Hopkins

The number of appellate decisions setting out standards for litigants pursuing discovery of information posted on social media websites is small, but growing. In this article Christopher Hopkins identifies trends in the decisional law and suggests ten steps that will improve the chances of obtaining social media discovery. The article focuses on Facebook, but the principles described here can be applied to other social and professional networking sites.

In the past year, three Florida appellate courts have articulated standards in civil cases for the discovery of content from a party's Facebook account. Before 2014, Florida's scant precedent for social media discovery was composed of two federal and two state trial court orders. While this budding authority of three opinions and four orders is not fully harmonized, defense practitioners will detect trends and strategies for obtaining Facebook content (*e.g.*, posts, comments, still images, video, or other information) and, potentially, full access to a plaintiff's Facebook account.

Rather than serving a standard set of "social media discovery" requests, the lesson from these Florida cases is that defense counsel should take discrete steps — early in the case, followed by narrow social media discovery in stages— to maximize production of the plaintiff's Facebook content. This article provides an overview of the recent social media discovery rulings in Florida; explains the grounds to overcome frequent plaintiff objections; and describes ten steps to obtain court-approved access to the plaintiff's Facebook content.

A primer on Facebook and other forms of social media is likely not necessary for most Florida lawyers.[1] This article will focus exclusively on Facebook because of that site's popularity, but the principles and steps articulated here likely will apply to other social media. We begin with a chronological discussion of the four trial court orders from 2011 through 2013 and the more recent 2014 through 2015 appellate opinions.

### *"Facebook Discovery" Trial Court Orders 2011–2013*

There are four reported Florida trial court orders regarding Facebook discovery, decided by the Broward and Palm Beach County circuit courts and the Middle District of Florida. The two South Florida trial court orders — *Beswick v. Northwest Medical Center, Inc.* and *Levine v. Culligan* — are the most significant.

*Beswick v. Northwest Medical Center, Inc.*[2]

The earliest reported authority in Florida articulating standards for the discovery of a plaintiff's Facebook account is the November 2011 Broward County circuit court order in *Beswick v. Northwest Medical Center, Inc. Beswick* is also noteworthy because it was relied upon by two of the six subsequent Florida cases.[3]

The *Beswick* defendant sent discovery requests asking one of the plaintiffs to identify her social media accounts and to divulge a copy of all shared content for the preceding five years.[4] The *Beswick* plaintiff objected on the grounds that these requests were overbroad, burdensome, not reasonably related to the discovery of admissible evidence, and violative of privacy rights.[5] This mantra of objections, as illustrated below, appears to be the prevailing grounds that plaintiffs use to avoid production of Facebook content.

**ABOUT THE AUTHOR...**

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# Social Media Discovery

McDonald Hopkins

Technology Corner

## Defendants Want Social Media, Plaintiffs Want E-Discovery

***By Christopher B. Hopkins***

In the advent of social media and e-discovery, plaintiff and defense lawyers have specific questions to pose to their clients about social media and email. On the plaintiff-side, the lawyer needs to know what the client has put on the internet – with the suggestion that the client reduce his or her Facebook presence while the case is pending. On the other hand, defense lawyers, upon receiving a new matter, inquire of their corporate client, "Do you have an e-discovery preservation policy?"

The roles of social media discovery and e-discovery often create distinctly one-sided burdens in litigation. Social media and e-discovery are completely different – any lawyer who rattles off both phrases in the same breath likely has experience with neither. In injury or employment cases where a person sues a company, it is often the defendant who seeks out the plaintiff's social media content. On the other hand, rarely is the defendant-business' social media content of value. This is a powerful, one-sided discovery tool for the defendant since a plaintiff's social media is somewhat personal; enlightening as to the plaintiff's personality and activities; and it may lead to new witnesses and further evidence.

During the early stage of social media discovery, emerging trial orders and appellate decisions seemed to favor the defendants. Even to today, most courts which have considered production of social media content agree that it is neither private nor privileged. Defendants, it appeared, were obtaining orders permitting social media discovery as long as requests were reasonable in scope. More recently, however, a few opinions suggest that there needs to be some basis before the court will order production of a party's social media posts (like an admission by the plaintiff or some indication of relevance in the public portion of the plaintiff's profile). In some instances, there appears to be a heightened standard for social media discovery compared to the long reach of e-discovery which is now baked into the procedural rules.

In a recent case before Judge Sasser, she concluded that, "it is apparent that the critical factor in determining when to permit discovery of social media is whether the requesting party has a basis for the request" (http://bit.ly/YwJAKT). In short, the court opted for requiring the requesting party to make a threshold showing of relevance rather than permit "fishing." In those instances, defense counsel need to refine their deposition questioning of plaintiffs, family members, and witnesses about

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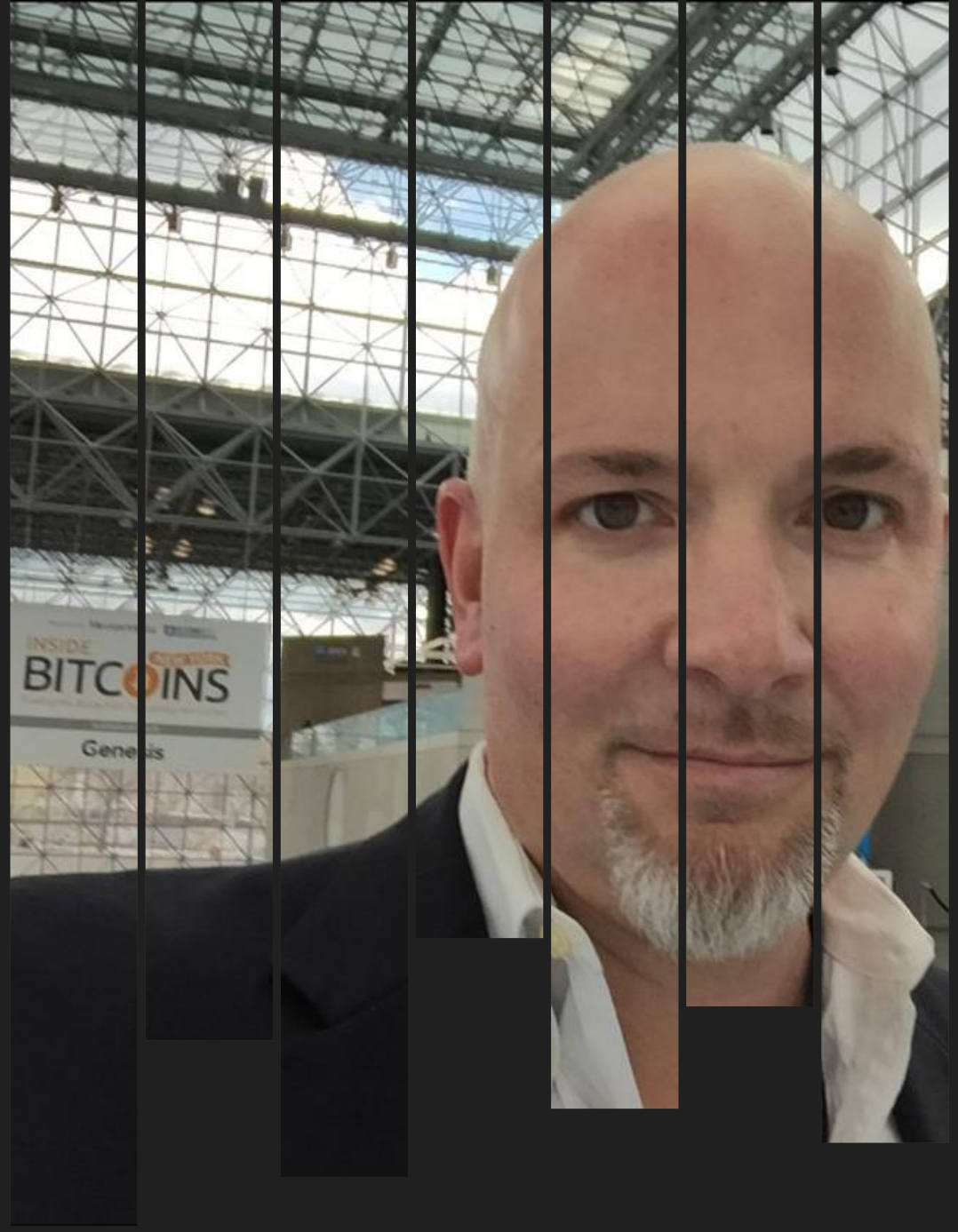


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