

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: John E. Leduc and Zeana Myerscough-Leduc, Joey Myerscough and Ronald Myerscough, represented by their litigation guardian John E. Leduc v. Janice L. Roman

BEFORE: Justice D. M. Brown

COUNSEL: J. Strype, for the Plaintiffs/Respondents

B. Marta, for the Defendant/Appellant

DATE HEARD: February 2, 2009

ENDORSEMENT

I. Overview

[1] Over the past few years Canadian popular culture has embraced www.facebook.com ("Facebook"), a social networking website, as a means by which to reveal one's personal life to other members of the community – one's "Facebook friends". In this motor vehicle action the defendant, Janice Roman, appeals from the decision of Master Dash made August 14, 2008, dismissing her motion to compel production from the plaintiff, John Leduc, of all pages on his Facebook webpage (also called a Facebook profile).

II. Background facts

[2] John Leduc was involved in a car accident on February 7, 2004, in Lindsay, Ontario. In this action he claims that as a result of the defendant's negligent driving his enjoyment of life has been lessened and the accident caused limitations to his personal life (Statement of Claim, paras. 9 and 11).

[3] Mr. Leduc was examined for discovery in November, 2006; no questions were asked whether he maintained an active Facebook profile. Mr. Leduc underwent several medical examinations. During an examination in May, 2006, he advised the psychologist that he was not able to engage in the sporting activities he had enjoyed before the accident. In September, 2007, Dr. Bruun-Meyer conducted a defence psychiatric evaluation of Mr. Leduc. The resulting

medical report recorded that Mr. Leduc had told Dr. Bruun-Meyer that he did not have friends in his current area, although he had “a lot on Facebook”.

[4] Mr. Leduc served an unsworn affidavit of documents in August, 2006. On May 28, 2008, defence counsel wrote Mr. Leduc’s lawyer requesting a sworn up-to-date Affidavit of Documents.

[5] At the same time defence counsel’s office conducted a search of Facebook profiles and discovered that Mr. Leduc kept a Facebook account. Mr. Leduc’s publicly available Facebook profile showed only his name and picture. Because Mr. Leduc had restricted access to his site only to his “Facebook friends”, defence counsel’s office was not able to view the content of his site.

[6] Early in June, 2008, the defence moved for several production-related orders, including orders for (i) the interim preservation of all information contained on Mr. Leduc’s Facebook profile, (ii) production of all information on the Facebook profile,¹ and, (iii) the production of a sworn Supplementary Affidavit of Documents.

III. Decision of the Master

[7] On the initial return of the motion Master Dash ordered Mr. Leduc to copy and preserve every page from his Facebook profile until the main hearing of the motion.

[8] On the further return of the motion on August 14, 2008, the plaintiff consented to an order to produce a supplementary affidavit of documents. As to the request that Mr. Leduc produce his Facebook pages, Master Dash held that (i) the Facebook profile pages were “documents” and (ii) they lay within the control of the plaintiff. The master also concluded that the Facebook profile could contain information that “might have some relevance to demonstrating the Plaintiff’s physical and social activities, enjoyment of life and psychological well being”.

[9] Master Dash, however, refused to order Mr. Leduc to produce the pages from his Facebook profile. He held that the defendant bore the onus “to demonstrate that this Plaintiff has relevant materials on this Plaintiff’s website.” He continued:

I agree with the sentiments expressed in paragraph 30 of the Plaintiff’s factum with respect to the precedent that would be created by allowing a Defendant to gain access to any Plaintiff’s Facebook merely by proving its existence. Same would be true of a photo album or a diary. The Defendant had an opportunity to ask at discovery whether the Plaintiff had photos – either a hard album or electronically that are demonstrative of his lifestyle but I have no evidence such questions were asked.

¹ In its Notice of Motion the defendant sought an order for production to her counsel “of copies of all pages, photographs, profiles, groups, applications, friend lists, wall and funwall postings and video and inspection by [defendant’s counsel] of all information contained in the Facebook webpage of the Plaintiff John E. Leduc on or before June 9, 2008”.

In my view speculation of what may be on the Plaintiff's site or what is on a 'typical' site is insufficient. Surely the one head shot produced on the one public page is neither relevant nor indicative of what may be on the site. I am also concerned about the Plaintiff's privacy interests; however I am bound by the decision of Rady J. in *Murphy v. Preger* (October 3, 2007, Court File 45623/04, unreported). I do however agree that that decision may be distinguished as set out in paragraphs 27 to 29 of the Plaintiff's factum. In my view, unlike in *Murphy*, the request by the Defendant herein is clearly a fishing expedition. Even if I were to consider a production order, the Defendant's request for the entire site is far too broad and has not been restricted to specified relevant items. The motion will be dismissed.

[10] Master Dash went on to note that if Mr. Leduc had posted photographs or other information on his Facebook profile depicting his activities or other enjoyment of life, those documents should be listed in his supplementary affidavit of documents. The master commented that if the production of Facebook profiles should become the new standard in personal injury actions, the decision in *Murphy v. Preger* should be reviewed at an appellate level.

IV. Standard of review

[11] An appellate court should only interfere with a decision of a master if he made an error of law, exercised his discretion on the wrong principles, or misapprehended the evidence such that there was a palpable and overriding error. Where the master has erred in law, the standard of review is one of correctness: *Zeitoun v. Economical Insurance Group* (2008), 292 D.L.R. (4th) 313 (Ont. Div. Ct.), paras. 40 and 41.

V. Analysis

A. The obligation to identify and produce relevant documents

[12] Our *Rules of Civil Procedure* impose on each party a positive obligation to disclose "every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party" and to produce each such document unless privilege is claimed over it: Rules 30.02(1) and (2). Proper compliance with this obligation is so critical to the functioning of our civil system of justice that each party must produce a sworn affidavit identifying relevant documents. This obligation to disclose continues throughout the course of the action: Rule 30.07.

[13] One mechanism established by the Rules to monitor compliance with this disclosure duty consists of permitting an opposite party to move for relief before the courts where it has reason to believe that the other party has not complied with his disclosure obligations. On its motion to secure the production of Mr. Leduc's Facebook profile the appellant relied on Rule 30.06 which provides:

Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents...the court may

- (a) order cross-examination on the affidavit of documents;
- (b) order service of a further and better affidavit of documents;
- (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged...

[14] Rule 30.06 does not detract from the governing principle that the onus for reviewing documents to determine their relevance rests, in the first instance, with the party bearing the obligation to produce. Nonetheless, a motion under Rule 30.06 requires evidence, as opposed to mere speculation, that potentially relevant undisclosed documents exist. However, the level of proof required should take into account the fact that one party has access to the documents and the other does not: *RCP Inc. v. Wilding*, [2002] O.J. No. 2752 (Master), para. 12. When dealing with categories of documents it may not be possible to determine the extent or depth of required production until preliminary questions have been asked, or a preliminary level of production of a category of documents has been made: *RCP Inc.*, *supra*.

[15] Master Dash did not err in his articulation of the law regarding motions under Rule 30.06. He acknowledged that Mr. Leduc had an obligation to produce all relevant documents in his possession, including any information posted on his private Facebook profile demonstrating activities and enjoyment of life, “even if it is contrary to his interests in this action”. Master Dash also correctly noted that where, on a Rule 30.06 motion, the defendant contends that the plaintiff has not met his obligation to produce relevant documents, then the defendant must provide some evidence that the plaintiff has relevant materials in his possession or control.

B. The existence of relevant information on Mr. Leduc’s Facebook profile

[16] Master Dash had before him two kinds of evidence: general evidence about Facebook, and specific evidence concerning Mr. Leduc’s profile on it.

B.1 General evidence about Facebook

[17] The general evidence described Facebook as a “social website” or, as put by its Terms of Use, “a social utility that connects you with the people around you”. As of June, 2008, Facebook had more than 70 million active users. Although originally designed for use by American college students, more than half of Facebook’s users now are outside of college, and users over 25 years of age make up its fastest growing demographic.

[18] The site is available for the personal, non-commercial use of its users. Content which users may post on Facebook includes photos, profiles (name, image, likeness), messages, notes, text, information, music, video, advertisements, listing and other content. The sites’ “Facebook Principles” indicates that a user may “set up your personal profile, form relationships, send messages, perform searches and queries, form groups, set up events, add applications, and transmit information through various channels.”

[19] When a person registers with Facebook, he creates his own profile and privacy settings. Profile information is displayed to people in the networks specified by the user in his privacy settings – e.g. a user may choose to make his private profile information available to others within his school, geographic area, employment network, or to “friends” of “friends”. A user can set privacy options that limit access to his profile only to those to whom he grants permission – the so-called “friends” of the user.

[20] Facebook contains several applications. A user can post basic personal information – age, contact information, address, employment, personal facts, relationship status, etc. A user can post Photo Albums; Facebook is the largest photo-sharing application on the Web, with more than 14 million photos uploaded daily. A user can create a “wall”, or chat board, where friends can post messages to each other. These postings can be viewed by all friends looking at the webpage, unlike emails which only the recipient can read. A user also can join a Facebook “group”, essentially a community based on common interests.

B.2 Specific evidence about Mr. Leduc’s Facebook profile

[21] Turning to the specific evidence that was before Master Dash about Mr. Leduc’s Facebook profile, the defence filed a copy of the plaintiff’s publicly available Facebook profile which showed his name, photo, and city of residence, Toronto. Mr. Leduc set his privacy options to limit access to his posted material to “friends”, so the defence was not able to view any content posted by Mr. Leduc on his profile. According to Mr. Leduc’s statement to Dr. Bruun-Meyer, he had “a lot” of friends on Facebook.

[22] Master Dash concluded that it would be speculative to infer from the various applications available to a Facebook user what content might exist on a specific Facebook site. He was not prepared to conclude that the one head shot of Mr. Leduc was indicative of what else might be on his site.

C. The approach of other courts to Facebook postings

[23] That a person’s Facebook profile may contain documents relevant to the issues in an action is beyond controversy. Photographs of parties posted to their Facebook profiles have been admitted as evidence relevant to demonstrating a party’s ability to engage in sports and other recreational activities where the plaintiff has put his enjoyment of life or ability to work in issue: *Cikojevic v. Timm*, 2008 BCSC 74 (Master), para. 47; *R. (C.M.) v. R. (O.D.)*, 2008 NBQB 253, paras. 54 and 61; *Kourtesis v. Joris*, [2007] O.J. No. 2677 (Sup. Ct.), paras. 72 to 75; *Goodridge (Litigation Guardian of) v. King*, 161 A.C.W.S. (3d) 984 (Ont. Sup.Ct.), para. 128. In one case the discovery of photographs of a party posted on a MySpace webpage formed the basis for a request to produce additional photographs not posted on the site: *Weber v. Dyck*, [2007] O.J. No. 2384 (Sup. Ct., Master).

[24] The only case, however, to which counsel referred me on the question of the production of the access-limited contents of a Facebook profile was that of Rady, J. in *Murphy v. Perger*, [2007] O.J. No. 5511 (S.C.J.). That case also involved a claim for damages resulting from injuries suffered in a car accident, including a claim regarding loss of enjoyment of life. The

plaintiff had posted photographs on her publicly-accessible Facebook profile showing her engaged in various social activities. The defendant moved for production of any photographs maintained on the private Facebook profile over which the plaintiff had control. In considering whether the defendant's request represented a mere fishing expedition or whether relevant photographs likely were posted on the private site, Rady J. stated:

17 It seems reasonable to conclude that there are likely to be relevant photographs on the site for two reasons. First, www.facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.

18 On the issue of relevancy, in this case, clearly the plaintiff must consider that some photographs are relevant to her claim because she has served photographs of her prior to the accident, notwithstanding that they are only "snapshots in time".

[25] Rady J. discounted that any significant privacy concerns arose in the circumstances before her:

20 Having considered these competing interests, I have concluded that any invasion of privacy is minimal and is outweighed by the defendant's need to have the photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.

Rady J. ordered the plaintiff to produce copies of the web pages posted on her private site, subject to the ability of plaintiff's counsel to make future submissions in the event that any of the photographs personally embarrassed the plaintiff.

[26] Master Dash was not prepared to follow the principle articulated by Rady J. in *Murphy v. Preger* that one could infer from the nature of the Facebook service the likely existence of photographs on the plaintiff's private profile. Master Dash characterized as "speculation" the drawing of any inferences from a "typical" Facebook profile about what content likely would be found on a specific Facebook profile. Master Dash also distinguished the *Murphy* decision on the basis that in that case the plaintiff had posted photographs on her public Facebook profile, had given the defence photographs as part of her productions, and evidence existed that 366 people had access to her site.

D. Review of Master Dash's decision

[27] Although web-based social networking sites such as Facebook and MySpace are recent phenomena, their posted content constitutes "data and information in electronic form" producible as "documents" under the *Rules of Civil Procedure*. Facebook's Terms of Use and Principles make it clear that a person's postings fall under that party's control or power since the account user may post or remove content. If a party to an action posts on Facebook content that "relates

to any matter in issue in an action”, that party must identify such content in his affidavit of documents. Master Dash re-iterated this obligation in his reasons.

[28] The *Rules of Civil Procedure* also impose an obligation on a party’s counsel to certify that he has explained to the deponent of an affidavit of documents “what kinds of documents are likely to be relevant to the allegations in the pleadings”: Rule 30.03(4). Given the pervasive use of Facebook and the large volume of photographs typically posted on Facebook sites, it is now incumbent on a party’s counsel to explain to the client, in appropriate cases, that documents posted on the party’s Facebook profile may be relevant to allegations made in the pleadings.

[29] Where a party makes extensive postings of personal information on his publicly-accessible Facebook profile, few production issues arise. Any relevant public postings by a party are producible. An opposite party who discovers and downloads postings from another’s public profile also operates subject to the disclosure and production obligations imposed by the Rules.

[30] Where, in addition to a publicly-accessible profile, a party maintains a private Facebook profile viewable only by the party’s “friends”, I agree with Rady J. that it is reasonable to infer from the presence of content on the party’s public profile that similar content likely exists on the private profile. A court then can order the production of relevant postings on the private profile.

[31] Where, as in the present case, a party maintains only a private Facebook profile and his public page posts nothing other than information about the user’s identity, I also agree with Rady J. that a court can infer from the social networking purpose of Facebook, and the applications it offers to users such as the posting of photographs, that users intend to take advantage of Facebook’s applications to make personal information available to others. From the general evidence about Facebook filed on this motion it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of “friends” with whom they can share information about themselves, and on which “friends” can post information about the user.

[32] A party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action. Master Dash characterized the defendant’s request for content from Mr. Leduc’s private profile as “a fishing expedition”, and he was not prepared to grant production merely by proving the existence of the plaintiff’s Facebook page. With respect, I do not regard the defendant’s request as a fishing expedition. Mr. Leduc exercised control over a social networking and information site to which he allowed designated “friends” access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident.

[33] I do agree with Master Dash that mere proof of the existence of a Facebook profile does not entitle a party to gain access to all material placed on that site. Some material may relate to

matters in issue; some may not. Rule 30.06 requires the presentation of some evidence that a party possesses a relevant document before a court can order production. Most often such evidence will emerge from questions asked on a party's examination for discovery about the existence and content of the person's Facebook profile. Where the party's answers reveal that his Facebook profile contains content that may relate to issues in an action, production can be ordered of the relevant content.

[34] Here, the defendant did not ask Mr. Leduc any questions about his Facebook profile on his November, 2006 discovery; the defence only learned about the existence of the profile following a medical examination of the plaintiff. Simplified Rules cases do not permit discovery as of right, so other circumstances may arise where a party learns of the existence of another's Facebook profile, but cannot examine the person on the site's content. In such cases trial fairness dictates that the party who discovers the Facebook profile should enjoy some opportunity to ascertain and test whether the Facebook profile contains content relevant to any matter in issue in an action. One way to ensure this opportunity is to require the Facebook user to preserve and print-out the posted material, swear a supplementary affidavit of documents identifying any relevant Facebook documents and, where few or no documents are disclosed, permit the opposite party to cross-examine on the affidavit of documents in order to ascertain what content is posted on the site. Where the parties do not consent to following this process, recourse to the courts may be made.

[35] Master Dash adopted the first two steps: he ordered Mr. Leduc to preserve his Facebook postings and to deliver a supplementary affidavit of documents. However, he dismissed the defendant's motion for production of all site materials as overly broad. While I share the Master's concern about the breadth of the defendant's request, I think the court should have permitted the defendant to cross-examine on the supplementary affidavit of documents to learn what relevant content, if any, was posted on Mr. Leduc's Facebook profile. To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

[36] To summarize, Master Dash correctly stated the law that postings on Facebook profiles are documents within the meaning of the *Rules of Civil Procedure* and a party must produce any of his Facebook postings that relate to any matter in issue in an action. Although the Master correctly interpreted Rule 30.06 as requiring some evidence from a moving party pointing to the omission of a relevant document in the other's affidavit of documents, in my view the learned Master erred in exercising his discretion under that rule without applying the principle articulated by Rady J. in *Murphy v. Preger* that a court can infer, from the nature of the Facebook service, the likely existence of relevant documents on a limited-access Facebook profile. Further, having granted a consent order that Mr. Leduc serve a supplementary affidavit of documents, in my view the Master erred in dismissing the motion to produce without affording the defendant an opportunity to cross-examine Mr. Leduc on that affidavit regarding the kind of content posted on his Facebook profile.

[37] I therefore allow the appeal to the extent of setting aside paragraph 3 of the order of Master Dash made August 14, 2008. Pursuant to section 134(1) of the *Courts of Justice Act*, I grant leave to the defendant to cross-examine Mr. Leduc on his supplementary of affidavit of documents about the nature of the content he posted on his Facebook profile.

V. Costs

[38] As Master Dash observed in his endorsement, only in very recent times have courts turned to considering production requests involving Facebook profiles. In those circumstances, my inclination would be to order costs of this appeal and the motion before Master Dash payable in the cause. However, if the parties wish to make submissions on costs, the defendant may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, February 27, 2009. The plaintiff may serve and file with my office responding written cost submissions by Friday, March 6, 2009. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D. M. Brown J.

DATE: February 20, 2009