

A. Defendants' Request for Plaintiffs' Entire Social Media Posts and Communications Should be Denied

Defendants' claim that simply because Plaintiffs' have asserted claims for non-economic damages, the entirety of their social media profiles are relevant and subject to discovery in this case. As discussed below, Defendants' request should be denied because they are overly broad, unduly burdensome, and Defendants have not made met the required threshold to show how Plaintiffs' accounts are relevant. Defendants cite no support for their proposition that the entirety of Plaintiffs' social media accounts for the past 20 years should be produced. To the contrary, a complete reading of the *Keller* case cited by Defendants demonstrates that the law requires a threshold showing that the content of Plaintiffs' public postings is inconsistent with their claims in this case. *Keller v. Nat'l Farmers Union Prop. & Cas.*, No. CV 12-72-M-DLC-JCL, 2013 U.S. Dist. LEXIS 452, at *7-8 (D. Mont. 2013)¹. Because Defendants have not made this requisite threshold showing, their motion should be denied.

¹ "But other courts, like the court in *Romano*, have charged a course that allows discovery of a plaintiff's social networking site content where the defendant makes a threshold showing that publicly available information on those sites undermines the plaintiff's claims. See e.g., *Thompson v. Autoliv ASP, Inc.*, 2012 U.S. Dist. LEXIS 85143, 2012 WL 2342928 *4 (D. Nev. June 20, 2012) (allowing discovery where material obtained by defendant from plaintiff's public Facebook account negated her allegations that her social networking site accounts were irrelevant); *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388-89 (E.D. Mich. 2012) (denying discovery as overly broad where publicly available information was not inconsistent with the plaintiff's claims); *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, 2010 WL 4403285 (Pa. Com. Pl. Sept. 9, 2010); *Zimmerman v. Weis Markets, Inc.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187, 2011 WL 2065410 (Pa. Com. Pl. May 19, 2011). Courts requiring such a showing do so, at least in part, to guard against the "proverbial fishing expedition." *Tompkins*, 278 F.R.D. at 388. As the *Tompkins* court explained it, a "[d]efendant does not have a generalized right to rummage at will through information that [p]laintiff has limited from public view." *Tompkins*, 278 F.R.D. at 388. Absent some "threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence," a "[d]efendant would be allowed to engage in the proverbial fishing expedition, in the hope that

Indeed, *Keller* is directly on point. In *Keller*, Defendants sought the entire content of Plaintiffs' social networking profiles. *Id.* In its motion to compel, Defendant argued only that because plaintiff "alleges a host of physical and emotional injuries," information found on her social networking websites "may very well undermine or contradict" those allegations." *Id.* The court denied Defendant's motion to compel holding that Defendant had not made the requisite showing that publicly available information was inconsistent with Plaintiff's claims and that "[a]bsent such a showing, [Defendant] is not entitled to delve carte blanche into the nonpublic sections of Plaintiffs' social networking accounts. *Id.*

The same reasoning applies here. Defendants have not shown that they have any legitimate basis for demanding Plaintiffs' *entire* social media accounts. Instead, Defendants simply want to dig through 20 years of social media posts to try and find something that *might* be relevant.² For these reasons, Defendants' motion is improper and should be denied.

a. Defendants' Request for Facebook Messages to Marco Should be Denied

Defendants' Request No. 9 seeks Facebook communications between Plaintiff Nunez and her father Marco Nunez. However, these very limited communications are not relevant to this case.³ Indeed, Plaintiffs have filed a motion to strike Defendants' Third-Party Complaint against Marco. For the reasons described in that motion, Defendants' claims against Marco are not relevant

there *might* be something of relevance in [p]laintiff's Facebook account." *Tompkins*, 278 F.R.D. at 388. The Court agrees with this circumspect approach to the discovery of social networking site content."

² Plaintiffs have produced an entire Facebook Messenger conversation between Plaintiff McGowan, Plaintiff Nunez, and third-party Plaintiff Ivy Castleberry because it contained information relevant to the allegations in this lawsuit.

³ Plaintiff Alexis Nunez testified that Marco Nunez sends her friend requests or messages on Facebook, but that she "respond[s] and tell him to leave me alone and then I block him." *See*, Exhibit "A" - Alexis Nunez January 11, 2018 deposition at 10:22-11:23.

to this case. *See* Plaintiffs' Motion to Strike Defendants' Third-Party Complaint. Thus, Defendants' Request No. 9 should be denied.

B. Defendants' Request For Plaintiff McGowan's Criminal History Should be Denied

Defendants contend that Holly McGowan's criminal records are relevant to her alleged damages and her credibility. Motion at 8. A. Defendants motion should be denied for two reasons.

First, as to Plaintiff's credibility, Montana Rule of Evidence 609 expressly prohibits *exactly* what Defendants are asking. "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible." Mont. R. Evid. 609.

Second, with respect to damages, this case is about childhood sexual abuse. Plaintiff's criminal history is not relevant to damages for those claims. Defendants' request is simply an attempt to circumvent Rule 609 and embarrass and oppress Plaintiff.

Nevertheless, if the court were to find Plaintiff's criminal history relevant to the limited issue of *emotional health damages*, Defendants are in possession of that information and have questioned Plaintiff about it extensively. Defendants have Plaintiff's medical records that discuss her mental health problems and diagnoses. Any relevance that Plaintiff's criminal history has as to her claims for emotional health damages in this case are fully disclosed in those documents. Further, Defendants' psychological expert Dr. Newman examined Plaintiff without any objection as to her criminal history—as did Defendants at her deposition. Finally, as Defendants point out, much of the information they seek is publicly available. Indeed, Defendants are already in possession of many documents. Thus, to the extent Defendants contend that Plaintiff's criminal history is relevant to her claims for damages in this case, Defendants have all the information needed to support those claims. Defendants demands for additional documents is unduly

burdensome and meant to harass, embarrass, and oppress Plaintiff McGowan. As such, Defendants' request should be denied.

C. Defendants' Request For All Photographs of Plaintiff Nunez should be denied

Defendants request for photographs of Plaintiff Nunez is overbroad and unduly burdensome on its face. Defendants seek all photos of Plaintiff Nunez taken over an 8-year timespan. On the meet-and-confer, Defendants were unwilling to narrow their request. Nevertheless, Plaintiff has since produced 9 photos of Plaintiff Nunez to Defendants covering 1999-2007. Plaintiff Nunez will continue to search for reasonably responsive pictures in good faith but cannot agree to comply with Defendants overbroad and unreasonable request.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all attorneys of record via Email on this the 17th day of May, 2018.

A handwritten signature in black ink, appearing to read "Ross Leonoudakis". The signature is written in a cursive style with a large "R" and "L".

Ross Leonoudakis

EXHIBIT "A"

Alexis Nunez

1 listed in the answer to this interrogatory, are
2 there any changes, or is this information
3 accurate?

4 A. This information is accurate. I would
5 just like to add that there was a six-month period
6 in Gillette, Wyoming where I kind of couch-surfed
7 and didn't have a really --

8 Q. Okay.

9 A. -- single address.

10 Q. Okay. And would that have been that
11 third bullet point, perhaps, or --

12 A. Yes, in between -- in between living in
13 Gillette and moving to Missoula.

14 Q. Okay. All right. Thank you for that.
15 Can you identify who your parents are, natural
16 birth parents?

17 A. My mother is Ivy McGowan-Castleberry, and
18 my father is Marco Nunez.

19 Q. Okay. And do you know where Marco Nunez
20 resides today?

21 A. I don't.

22 Q. Well, when was the last time you had any
23 contact with Marco Nunez?

24 A. He attempted to contact me about a month
25 ago.

Alexis Nunez

1 Q. And how did he attempt to contact you?

2 A. Facebook.

3 Q. You have a Facebook account?

4 A. Correct.

5 Q. Okay. Does the -- do you know his
6 Facebook account? Are you able to identify his
7 Facebook address?

8 A. I'm not sure.

9 Q. Okay. Did he send you an invite or --

10 A. Yeah.

11 Q. -- friend request?

12 A. A Message request.

13 Q. Do you still have that message?

14 A. I think so.

15 Q. Okay.

16 MR. TAYLOR: And so, counsel, we've asked
17 for that message request from Marco.

18 MR. LEONOUDAKIS: Okay.

19 Q. (BY MR. TAYLOR) And when you received
20 the message request, did you respond or just
21 ignore it?

22 A. I respond and tell him to leave me alone,
23 and then I block him.

24 Q. Okay.

25 MR. TAYLOR: And we -- counsel, I'd like 11