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PDMP and Social Media Discovery

(10/28/20)

In *Harkey v. Stojakovich*, No. CV-19-1295 (C.P. Lycoming October 26, 2020) Linhardt, J., the court aptly described the factual scenario: On September 17, 2019, Plaintiffs David Harkey and Ruby Harkey (collectively "Plaintiffs") filed a Complaint alleging that on August 15, 2017, Defendant David M. Stojakovich, while driving a Tractor Trailer Truck owned by Defendant A. Duie Pyle, Inc. east on Allegheny Street in Jersey Shore, Pennsylvania, made a left-hand turn off Allegheny Street onto Harris Street. While turning, Mr. Stojakovich crossed directly in front of Mr. Harkey, who was driving his motorcycle west on Allegheny Street, causing a collision and various injuries to Mr. Harkey.

In the course of discovery, Defendants proposed that Plaintiff David Harkey sign a release permitting Defendants to access his records on the Pennsylvania Prescription Drug Monitoring Program (PDMP). Defendant further sought the production of downloaded copies of Mr. Harkey's social media postings.

Harkey claimed that he was disabled from functioning as a commercial truck driver, resulting in a substantial loss of yearly income. Harkey had testified at his deposition that he had been prescribed 180 of 10 mg tablets of Oxycodone for month of September 2014 to treat his back pain. He claimed that prior to the August 15, 2017 collision, he would take the medication in the morning and at night, but not while driving. He recognized that it would be "against the law to take pain medication and drive a tractor trailer." Mr. Harkey testified that when questioned during a 2016 PennDOT inspection, he denied taking any narcotics or habit-forming drugs. He explained the seeming inconsistency by noting that he believed the question to apply only to illegal narcotics and not to prescribed medications. Defendants argued that the PDMP would be relevant to demonstrate that Mr. Harkey was in fact taking the prescription drugs prior to the collision, which would have disqualified him in any event from working as a commercial truck driver.

Defendants had copies of Mr. Harkey's records dating back to the creation of the PDMP, which organization went into effect August 25, 2016.

The court stated as follows:

> The PDMP, which was created as part of the Achieving Better Care by Monitoring All Prescriptions Programs ("ABC-MAP") Act, is an electronic database that collects information on all filled prescriptions for controlled substances.[1] The express purpose of the PDMP is "to increase the quality of patient care by giving prescribers and dispensers access to a patients

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[1] Achieving Better Care by Monitoring All Prescriptions Program (ABC-MAP) Act, P.L. 2911, No. 191, § 1, 35 P.S. §872.1 (2014).

> prescription medication history through an electronic system that will alert medical professionals to potential dangers for purposes of making treatment determinations."[2] The PDMP is also intended to provide patients, "thorough and easily obtainable record of their prescriptions for purposes of making educated and thoughtful health care decisions" and further, "seeks to aid regulatory and law enforcement agencies in the detection and prevention of fraud, drug abuse and the criminal diversion of controlled substances."[3] Access to the PDMP is strictly limited to patients obtaining their own information, prescribers, dispensers, the Office of the Attorney General, authorized law enforcement personnel, guardians of individuals under 18 or an individual's health care power of attorney, municipal coroners, and certain other State employees and medical personnel.[4] It is a misdemeanor in the first degree to knowingly or intentionally obtain information from the PDMP for purposes other than those specified under statute.[5]

The court agreed with the position asserted by Plaintiffs that Mr. Harkey's PDMP records should not be subject to discovery. A release would be inconsistent with the purposes of the PDMP. Noted the court:

> The PDMP is intended to educate patients about their own health information, to enable prescribers and dispensers to ensure that patients are receiving proper care, and to empower law enforcement to investigate criminal substance abuse. The PDMP is not intended to help parties bolster their claims within a civil lawsuit. Further, as plaintiffs have noted, defendants already have access to Mr. Harkey's pharmacy records dating back to 2010, so Mr. Harkey's PDMP records would be merely duplicative. There is no evidence beyond mere supposition that the provided pharmacy records are incomplete.

With respect to the social media issue, Defendants claimed that they would automatically be discoverable because Harkey claimed that he suffered physical disability, loss of life's pleasures, loss of earnings and difficulty walking and ambulating. The social media posts show that Mr. Harkey took multiple trips after the collision, including motorcycle rides, engaging in work at a restaurant and bar owned by the Plaintiffs. This, according to Defendants, even though Plaintiffs were seeking damages to hire replacement employees.

It was noted, in defending against this Motion, that Mr. Harkey's two social media accounts were all set to "public" in any event. The court surveyed other common pleas decisions on the subject, and found that a party seeking discovery of non-public information on the social media count must show a "factual predicate" with respect to

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[2] 35 P.S. § 872.2.
[3] *Id.*
[4] 35 P.S. § 872.9.
[5] 35 P.S. § 872.10.

relevancy. Even when the "factual predicate" has been satisfied, the discovery request must be utilized "with reasonable particularity" to avoid embarrassment and burden upon the party whose information is sought.

The court found as follows:

> In the instant case, the Court finds that defendants have made a threshold showing that Mr. Harkey's private social media account information could be relevant by citing information on the publicly accessible side of his accounts that implicates his claims for future damages. However, defendants' request for all account postings lacks the requisite particularity necessary to avoid undue embarrassment and burden not only to Mr. Harkey, but also to any third parties potentially involved in private messaging or other non-public communications with Mr. Harkey on these accounts. Further, defendants could themselves easily screenshot and download information that is publicly posted on Mr. Harkey's accounts, and so this publicly posted information will likewise not be subject to discovery.[6] Therefore, defendants' request that the Court compel the product of downloads of Mr. Harkey's social media postings is DENIED.

The decision provides further guidance on the limits of discovery which may be sought in connection with alleged pharmaceutical use and social media access.

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[6] *See Boyle v. Steiman*, 631 A.2d 1025, 1031 (Pa. Super. 1993) (citations omitted) ("It is not a purpose of discovery for a party to supply, at its own expense, information already under the control or readily available to the opposing party.")