STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
CLAUDIO RAFAEL MARTINEZ, INDIVIDUALLY AND AS THE NEXT FRIEND OF HIS MINOR CHILDREN, FRANCO MARTINEZ AND BRUNO MARTINEZ,	)	CASE NO. 2009-CP-10-4172
PLAINTIFFS,	)	
vs.	)	**ORDER GRANTING MOTION TO COMPEL**
SOUTH CAROLINA ELECTRIC & GAS COMPANY AND LEWIS TREE SERVICE, INC.,	)	
DEFENDANTS.	)	

The parties appeared before this Court on December 3, 2009 on Defendant Lewis Tree Service, Inc.'s ("Defendant") motion to compel the Plaintiffs to respond to discovery regarding their use of certain Social Networking Sites ("SNWs"). For the reasons stated herein, the Court finds good cause exists for such an Order, and compels the Plaintiffs to respond in accordance with this Order.

FACTS

Plaintiffs file this personal injury action on July 6, 2009. According to the allegations in the Amended Complaint, Plaintiff Franco Martinez was injured when he received an electrical shock due to the negligence of the Defendants. Plaintiffs claim Franco suffered "severe and debilitating injuries, including but not limited to" permanent burns and scars on various parts of his body, including his hands; permanent back injury resulting in the inability to lay straight on a bed, walk long distances, and exercise; neck and ankle pain, and frequent headaches. In

responding to discovery, Plaintiffs add that Franco suffers from "extreme tiredness to his eyes after extended periods of looking at books, the television, or a computer screen."

The Amended Complaint additionally alleges that Franco's brother, Plaintiff Bruno Martinez, witnessed the accident and suffered "severe emotional distress manifested by physical symptoms including, but not limited to, separation anxiety, nightmares, and behavioral problems requiring medical care and treatment."

After initiation of the instant lawsuit, Defendant served Plaintiffs with initial discovery requests, including Interrogatories and Requests for Production. Included in the Interrogatories was the following request:

> List every "Social Networking Website" (SNW) utilized or accessed by the party for the past three years. For any SNW identified in response to this or any other interrogatory, provide the following information:
>
> (a) name, physical address, and internet address of the SNW;
> (b) name, address, social security number, and date of birth of the SNW account subscriber, and if different, the individual financially responsible for the SNW account;
> (c) each and every user name, screen name, email address, or alias affiliated with the SNW account; and
> (d) password for accessing the SNW account.

Plaintiffs refused to respond, objecting on the grounds that "the requested information is irrelevant and not likely to lead to the discovery of admissible evidence." Defendant subsequently withdrew the request for Plaintiffs SNW passwords.

ANALYSIS

The subject Interrogatory inquires into whether the Plaintiffs maintain social networking accounts (such as Facebook or MySpace) and, if so, requests their usernames and email addresses. It is important to note that the Plaintiffs have not objected to the request on the basis of a privilege. Instead, they claim that their use of social networking sites is "irrelevant and not likely to lead to the discovery of admissible evidence." At the hearing, Plaintiffs raised the

application of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.*, as an additional ground for denial of the motion, suggesting that it protected the Plaintiffs from having to respond to the Interrogatory. The Court concludes that the requested information is relevant and that the Stored Communications Act has no bearing on the Plaintiffs' obligations to respond to Interrogatory No. 15.

I. Relevancy

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Rule 26(b), SCRCP. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." City of Columbia v. ACLU, 323 S.C. 384, 475 S.E.2d 747, 749 (1996). "In South Carolina the scope of discovery is very broad and 'an objection on relevance grounds is likely to limit only the most excessive discovery request.'" Samples v. Mitchell, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997).

"Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting." Bass v. Miss Porter's School, 2009 U.S. Dist. LEXIS 99916 (D.Conn. Oct. 27, 2009). Such social networking sites also allow users to post and share a wide range of information regarding their activities, interests, and social situations as well as photographs depicting their physical conditions. In most instances, these sites allow others to gain a better understanding of the user. See Advisory Committee on Standards of Judicial Conduct, Advisory Opinion No. 17-2009, October 2009 ("Allowing a Magistrate to be a member

of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge.")

In the case at bar, Plaintiffs claim they suffered physical and emotional injuries that continue to the present time. The Court finds inquiry into Plaintiff Franco's involvement in social networking sites is relevant to the issue of his alleged damages, including his claim of inability to sit in front of a computer for long periods, his inability to fully use his hands, and his claims of emotional injuries. Inquiry into Plaintiff Bruno's involvement in social networking sites is also relevant to the issue of his claims of "severe emotional distress" and "separation anxiety." The information and photographs the Plaintiffs share on these sites will provide a relevant and accurate depiction of the Plaintiffs' states of mind, their emotional and physical states, and the affect these alleged injuries have on their everyday lives. Plaintiffs' position regarding relevancy, if accepted, would allow Plaintiffs to be the sole arbiter of what is deemed relevant. See Bass, supra ("relevance of the content of Plaintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations, and production should not be limited to Plaintiff's own determination of what may be 'reasonably calculated to lead to the discovery of admissible evidence.'"). Particularly in the context of a narrowly tailored request such as this, and in light of the relatively low bar set by Rule 26, Plaintiffs' objection based on relevance fails. Samples, supra.

II. Stored Communications Act

At the hearing, Plaintiffs' counsel raised the application of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.*, as an additional ground for denial of the motion, suggesting that it prohibited discovery of the Plaintiffs' social networking activities. The Court finds this argument has no merit.

The Stored Communications Act prohibits a "person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). The pertinent portion of the statute reads:

> (a) Prohibitions.— Except as provided in subsection (b) or (c)—
>
> (1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and
>
> (2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—
>
> (A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;
>
> (B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing;

18 U.S.C. § 2702.

The clear language of the statute indicates that it applies only to service providers, rather than private individuals. Moreover, the statute prevents service providers from disclosing communications and electronically stored information. The statute contains no provisions prohibiting a party from responding to discovery regarding the maintenance of social networking sites or the specific account information for such sites. Interrogatory No. 15 seeks information which is certainly within the bounds of Rule 26 and the Plaintiffs are obligated to respond.

Furthermore, in the course of supplemental briefing requested by the Court, Defendant indicated that an affirmative response to the Interrogatory would not end its line of inquiry. According to the Defendant, confirmation that the Plaintiffs maintain social networking accounts

would result in the service of targeted Requests for Production under Rule 34, SCRCP, requesting tangible and electronically stored information from these accounts "which is relevant to the claims and defenses in this matter (inclusive of evidence relating to the Plaintiffs' alleged ongoing injuries)." Since that time, Plaintiffs' counsel has confirmed that the Plaintiffs maintain such accounts. After careful consideration of the claims in this case and the nature of the information contained on such social networking sites, the Court finds that certain information from the Plaintiffs' accounts is properly discoverable. Therefore, the Plaintiffs are ordered to produce documents containing the following information from any Facebook or MySpace accounts, either in tangible or electronic form: (1) all Profile pages; (2) all Wall Postings, including status updates and comments from or to the Plaintiff; (3) all photographs depicting the Plaintiffs, including all mobile uploads and photographs in which the Plaintiffs are "tagged;" and (4) all information reflecting the "fan pages" and groups in which Plaintiffs are members. Plaintiffs are ordered to produce these documents/information placed or reflected on the site accounts for the time period beginning on the day of the accident (May 26, 2008) and continuing through the present.

The Court anticipates that the Plaintiffs may claim they are not able to gather all such responsive material by simply logging into their accounts. Further, the Court recognizes that the SCA arguably prevents the social networking sites from providing most information from the Plaintiffs' accounts via subpoena. However, the SCA does permit the disclosure of otherwise protected communications if the subscriber, or the author or the intended receiver of such communications gives his consent. 18 U.S.C. § 2702(b)(3); 18 U.S.C. § 2702(c)(3). As the language of Rule 34 makes clear, and as the courts have confirmed, a request for production need not be confined to documents or other items in a party's possession, but instead may properly

extend to items that are in that party's "control" Rule 34(a)(1), SCRCP. In interpreting the identical provision of the Federal Rule, the Sixth Circuit and other courts have held that documents are deemed to be within the "control" of a party if it "has the legal right to obtain the documents on demand." In re Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995); Mercy Catholic Medical Center v. Thompson, 380 F.3d 142, 160 (3d Cir. 2004); Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984).

The case of Flagg v. City of Detroit, et al., 252 F.R.D. 346 (E.D. MI. 2008) is particularly instructive in this regard. In Flagg, the defendant city moved to prevent Plaintiff from discovering communications exchanged among certain city officials and employees via city-issued text messaging devices. While the defendant did not store copies of these communications, the city's non-party service provider, SkyTel, purportedly did have records of these communications. The plaintiff filed a third-party subpoena directed at SkyTel, which objected, claiming that the SCA did not recognize an exception for civil subpoenas and barred Skytel from divulging the emails to the plaintiff. The court addressed the issue by directing the plaintiff to instead submit a FRCP Rule 34 request for production upon the defendant city, along with a form the city could execute granting its consent to disclosure under the SCA. Flagg, 252 F.R.D. at 352. Rule 34(a) permits parties to request the production of documents and other items that are "in the responding party's possession, custody, or control." Id. *quoting* Fed. R. Civ. P. 34(a). The court reasoned that "if the City can block the disclosure of SkyTel messages by withholding its consent, it surely follows that it can permit the disclosure of these communications by granting its consent," and that this acknowledged power constituted the requisite "control." Flagg, 252 F.R.D. at 355.

As a result, in the event the Plaintiffs cannot produce all material this Order requires them to produce, Plaintiffs are instructed to execute a Consent Form, to be provided by the Defendant, granting the social networking sites permission to disclose the information to both the Plaintiffs and the Defendant. Defendant shall bear responsibility for all costs associated with such a request to the social networking sites.

For the reasons set forth herein, the Plaintiffs' use of social networking sites, and certain information contained on those site accounts, is relevant to the subject matter involved in the pending action.

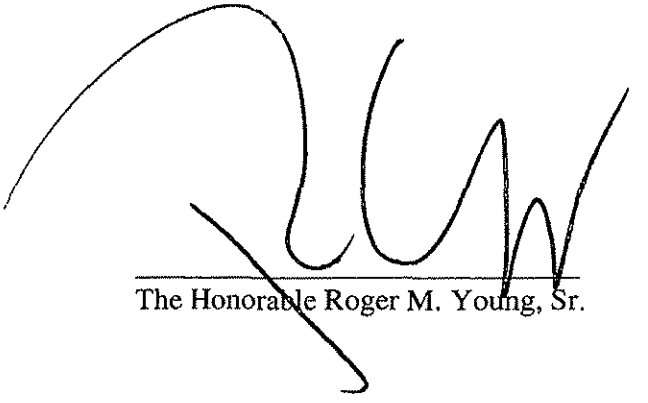
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, within 45 days of entry of this Order, the Plaintiffs shall:

(1) provide a full and complete response to Interrogatory No. 15, with the exception of the withdrawn inquiry into account passwords;

(2) produce documents containing the following information from any Facebook or MySpace accounts, either in tangible or electronic form: (a) all Profile pages; (b) all Wall Postings, including status updates and comments from or to the Plaintiff; (c) all photographs depicting the Plaintiffs, including all mobile uploads and photographs in which the Plaintiffs are "tagged;" and (d) all information reflecting the "fan pages" and groups in which Plaintiffs are members. Such production shall include all documents/information placed or reflected on the site accounts from the date of the accident through the present; and

(3) in the event the Plaintiffs cannot produce all material this Order requires them to produce, Plaintiffs are instructed to execute a Consent Form, to be provided by the Defendant, granting the social networking sites permission to disclose the information to both the Plaintiffs and the Defendant.

AND IT IS SO ORDERED!



The Honorable Roger M. Young, Sr.

Dated: 2/4/10

Charleston, South Carolina