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December 5, 2011

BY HAND DELIVERY
Clerk of the Court
Michigan Court of Appeals
Cadillac Place
3020 West Grand Boulevard, Suite 14-300
Detroit, MI 48202

Re: Shaquitta Anderson v M.G. Trucking and Robert A. Schapman
Court of Appeals No. 306709
Wayne County Circuit Court No. 11-000165-NI

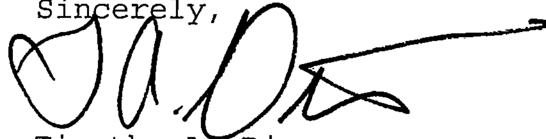
Dear Sir/Madam:

Enclosed please find the Amicus Brief of Michigan Defense Trial Counsel in Support of Application for Leave to Appeal Filed by Defendants-Appellants M.G. Trucking, Inc. and Robert Anthony Schapman, the Motion for Leave to File *Amicus* Brief Pending (Motion Filed November 29, 2011), Proof of Service and Appendix for filing with the Court.

One additional copy is also enclosed which we ask that you time stamp and return to our associate.

Thank you for your attention to this matter.

Sincerely,



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TAD/lal
cc: David E. Christenson, Esq. (Via Facsimile, Email and U.S. Mail)
David J. Yates, Esq. / Eric P. Conn, Esq. (Via Facsimile, Email and U.S. Mail)
Mark R. Granzotto, Esq. (Via Facsimile, Email and U.S. Mail)

STATE OF MICHIGAN
IN THE COURT OF APPEALS
(On Appeal from the Circuit Court for the County of Wayne)

SHAQUITTA ANDERSON,

Plaintiff/Appellee,

v

M.G. TRUCKING, INC., a Michigan corporation and ROBERT ANTHONY SCHAPMAN,

Defendants/Appellants.

Court of Appeals No. 306709

Trial Court No. 11-000165-NI

Hon. Daphne Means Curtis

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AMICUS BRIEF OF MICHIGAN DEFENSE TRIAL COUNSEL IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL FILED BY DEFENDANTS-APPELLANTS M.G. TRUCKING, INC. AND ROBERT ANTHONY SCHAPMAN

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF PENDING (MOTION FILED NOVEMBER 29, 2011)

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STATEMENT OF APPELLATE JURISDICTION

On August 21, 2011, Defendants-Appellants, M.G. Trucking, Inc., and Robert Anthony Schapman filed an Application for Leave to Appeal from a July 25, 2011 Order Denying Defendants' Motion to Compel Discovery. Pursuant to MCR 7.203(B)(1) and MCR 7.205(D)(2), the Court of Appeals is vested with jurisdiction to grant the Application for Leave to Appeal, peremptorily reverse the Order Appealed From or Grant other relief the Court of Appeals deems appropriate.

Amicus Curiae Michigan Defense Trial Counsel urges the Court of Appeals to Grant the Application for Leave to Appeal and decide this critical issue with the benefit of full briefing. Or, in the alternative, at a minimum, the Court of Appeals is urged to peremptorily reverse the Order Denying Discovery.

STATEMENT OF THE QUESTION PRESENTED

I. FOR THE REASONS EXPLAINED MORE FULLY BELOW, SHOULD THE COURT OF APPEALS GRANT THE DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL ON THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO COMPEL DISCOVERY OF THE PLAINTIFF'S ELECTRONICALLY STORED SOCIAL MEDIA PROFILE, WHERE:

A. MICHIGAN TRIAL COURTS ARE STRUGGLING TO ADDRESS THE ISSUE AND HAVE ISSUED CONFLICTING DECISIONS ON DISCOVERY REQUESTS OF SOCIAL MEDIA;

B. CASE LAW FROM ACROSS THE COUNTRY DEMONSTRATES THE RELEVANCE OF SOCIAL MEDIA DISCOVERY ON MANY CRITICAL EVIDENTIARY ISSUES IN CIVIL LITIGATION;

C. GUIDANCE IS NEEDED FROM MICHIGAN'S APPELLATE COURTS ON HOW TO IMPLEMENT MCR 2.302(B)(1) AND MICHIGAN'S BROAD DISCOVERY RULES TO DISCOVERY REQUESTS FOR ELECTRONICALLY STORED SOCIAL MEDIA INFORMATION; AND

D. THE NATIONAL TREND IS IN FAVOR OF ALLOWING SOCIAL MEDIA DISCOVERY?

Plaintiff-Appellee says "No."

Defendants-Appellants say "Yes."

Amicus Curiae Michigan Defense Trial Counsel says "Yes."

The Trial Court would say "No."

STATEMENT OF INTEREST

The Michigan Defense Trial Counsel ("MDTC") is a non-profit association organized and existing to advance the knowledge and improve the skills of civil defense lawyers, to support improvements in the adversary system of jurisprudence in the operation of the Michigan Courts as a whole, and to broadly address the interests of the legal community in Michigan. The Michigan Defense Trial Counsel appears before the Court of Appeals as a representative of Civil Defense Lawyers in Michigan, a significant portion of whom have already been affected by the issues currently before the Court of Appeals regarding the Discoverability of Electronically Stored Social Media information under MCR 2.302(B)(1).

An important aspect of the MDTC's activities is representing the interests of its members in matters of broad importance before state and federal courts. Accordingly, the MDTC regularly submits *Amicus Curiae* Briefs to the Michigan Court of Appeals and the Supreme Court of Michigan advocating on behalf of the interests of its nearly 500 members. On frequent occasions, the Supreme Court of Michigan actively invites the *Amicus* participation of the MDTC, while, in this case, the MDTC has deemed the issues at stake in this appeal critical enough to warrant the "uninvited" participation of *Amicus Curiae* and, furthermore, by filing an *Amicus Curiae* Brief in support of an

Application for Leave to Appeal, the MDTC is venturing into new territory.

Never before in its more than 25 year history has the MDTC been involved as an *Amicus Curiae* at the Discretionary review stage in the Court of Appeals. Indeed, this is how significant of an issue we feel the discoverability of Social Media such as Facebook Profiles, MySpace Accounts, etc., is to the Justice system as a whole in the State of Michigan, for the reasons advanced more fully in the Argument Section below.

INTRODUCTION

It does not seem as if a week goes by without news of online Social Media sites such as Facebook or MySpace playing a significant role in our system of justice. A juror in Michigan faced contempt charges for comments she made on her Facebook profile during a criminal trial (see Exhibit A, *Facebook Post Is Trouble For Juror*, The Macomb Daily, August 28, 2010: Juror's Facebook status update read "actually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're guilty. :P") High profile political consultant Sam Riddle used Facebook and Twitter as a criminal defendant in an attempt to preemptively weaken the case against him, implicating concerns of a tainted jury pool (see Exhibit A: *Judge Extends Sam Riddle's Gag Order To Web Sites After He Refuses To Stop Tweeting*, Booth Newspapers, December 19, 2009: *Gag Order Issued To Prevent Poisoning Of The Jury Pool Out Of Concern That the Government's Right To A Fair Trial Might Be Harmed)*. A Criminal Defendant sent Facebook Friend requests to jurors hoping they would discover that his online personality conflicted with the evidence presented against him in a murder trial (see Exhibit A, *Can Social Media Be Banned From Playing A Role In Our Judicial System?*, American Bar Association Litigation News).

One local Judge even takes it upon himself to investigate the Social Media Profiles of Criminal Defendants appearing before

him to determine whether there is evidence of a Probation Violation or some other aggravating factor that might affect sentencing (See Exhibit A, *Web 2.UH-OH*, ABA Journal Magazine, December 1, 2009, profiling Saginaw County District Judge A.T. Frank). "When I get a defendant going through the sentencing process," says District Judge A.T. Frank, "if they're 20- or 30-somethings, I'll see if they have a MySpace or Facebook page and do a search of that." (Id.) Judge Frank often uses information found on a Defendant's Facebook page when administering justice: "On a couple of occasions we found they violated" terms of probations, he says." "In one case...probationer had a Facebook page and we found out that she posted a picture of her smoking a 'blunt' -- a cigar hollowed out and filled with marijuana." (Id.)

The Tort and Trial Practice Section of the American Bar Association has spoken to the "social media revolution" and its ever-increasing impact on litigation throughout the country:

> Despite its inherent fluidity, it is increasingly clear that social media has fundamentally changed the way many individuals live their lives and companies conduct business. In this environment, issues have **increasingly arisen during litigation**. . . . . Social media provides parties with the opportunity to obtain information about which they would most likely be unaware if pursued only from more traditional sources of discovery. [*The Implications of the Social Media Revolution on Discovery in U.S. Litigation*, Tort & Trial Practice Section, The Brief, Summer 2011, Exhibit A (emphasis added).]

The Defense Research Institute and other Sections of the American

Bar Association have also weighed in on the growing proliferation of electronically stored Social Media, a trend that is not going away (See, Exhibit A, *Can Social Media Be Banned From Playing a Role in Our Judicial System?*; *Social Newtworking Discovery: Get Used To It*, Strictly Speaking, Defense Research Institute, Volume 7, Issue 3, Exhibit A: noting that by September 2010, there had already been **over 60 decisions from state courts** deciding cases with the benefit of evidence obtained from Facebook or MySpace; *Discovery of Social Networking Sites,* Defense Research Institute, E-Discovery Connection). Within the past week, the Wall Street Journal reported on the difficulty the National Labor Relations Board is having with workers being terminated for comments made on their Facebook pages (Exhibit A, *Workers Claim Right To Rant on Facebook*, Wall Street Journal, December 2, 2011, p B1).

Courts and administrative agencies from across the country are grappling with these issues and Michigan's trial courts are now starting to wrangle with the Discoverability of Social Media. Due to a lack of authority from our appellate courts to guide these novel issues, attorneys and parties are seeing their Social Media Discovery Requests treated with wildly divergent analyses, producing varied results and outcomes.

Until the appellate courts of Michigan intervene to provide guidance on how trial judges are to decide these discovery battles, our trial judges, attorneys and litigants will be faced

with the uncertainty of each judge's own idiosyncratic views on how to implement MCR 2.302 when the Discovery of Social Media is sought (Exhibits B & C, Discovery Orders Resolving Disputes Over Discoverability of Social Media, 2 completely different results).

In the case of Samuel v Crocenzi, Judge Kumar of the Oakland County Circuit Court ordered the plaintiff to sign limited authorizations for the release of information from his MySpace account (Exhibit B: Case No. 08-096329-NI). Taking a different approach, Judge Anderson **of the same Circuit**, compelled the plaintiff to release her Facebook records subject to a Protective Order (Exhibit C: Macklin v Progressive, Case No. 11-118932-NF). In the above-captioned case, Judge Daphne Means Curtis of the Wayne County Circuit Court took a completely different approach, privately reviewing one day's worth of Plaintiff Anderson's Facebook information, and in a manner contradicting Judges Kumar and Anderson, ruled the evidence not relevant to any issue of the case without the benefit of the Defense even being able to see what Judge Curtis deemed not relevant.[1]

As these three mutually exclusive Orders, conflicting in

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[1] In the Trial Court, Plaintiff's Counsel attached yet another Order resolving a Discovery Request concerning a plaintiff's Facebook account, an Opinion from Judge Foster in Macomb County (Plaintiff's Exhibit 1). While we dispute Judge Foster's assertion that a litigant must show the certainty of obtaining relevant information to establish Discoverability, this Opinion further supports the need for resolution of this issue by the Court of Appeals as it demonstrates four Orders from four Judges producing four different results.

process, analysis and result plainly demonstrate, litigants in Michigan are not receiving the benefit of a consistent approach to what is becoming an increasingly frequent discovery battle. We are not even seeing consistency within the same Circuit. Action from the Court of Appeals is needed to resolve and fill the juridical vacuum attorneys, litigants and the courts are currently operating in.

For these compelling, system-wide reasons, a Grant of Leave is urged by *Amicus Curiae* Michigan Defense Trial Counsel.

ARGUMENT

FOR THE REASONS EXPLAINED MORE FULLY BELOW, THE COURT OF APPEALS IS URGED TO GRANT THE APPLICATION FOR LEAVE TO APPEAL FILED BY THE DEFENDANTS IN THE ABOVE-CAPTIONED CASE. SYSTEM WIDE, TRIAL COURTS ARE STRUGGLING TO RESOLVE THE QUESTION OF WHETHER ELECTRONICALLY STORED SOCIAL MEDIA IS SUBJECT TO DISCOVERY. UNTIL THE COURT OF APPEALS PROVIDES GUIDANCE, THE RULE OF LAW IN THIS EVER INCREASINGLY PREVALENT DISCOVERY BATTLE WILL REMAIN IN FLUX. THE LEGAL ISSUES AND DAMAGES SOUGHT IN THIS CASE MAKE IT THE IDEAL CANDIDATE FOR REVIEW BY THE COURT OF APPEALS.

Statement of Standard of Review

MCR 2.302(B)(1) permits parties in a pending action to obtain discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action," or that "appears reasonably calculated to lead to the discovery of admissible evidence." Bauroth v Hammoud, 465 Mich 375, 381; 632 NW2d 496 (2001). "The interpretation and application of a court rule involves a question of law that this Court reviews *de novo*." Johnson Family Ltd Partnership v White Pine Wireless, LLC, 281 Mich App 364, 387; 761 NW2d 353 (2008).

Furthermore, the Question Presented is whether it was legal error not to allow the Discovery. See Barnett v Hidalgo, 478 Mich 151, 159, 732 NW2d 472 (2007) (when the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed *de novo*; legal error constitutes an abuse of discretion.)

A. Cases from Across the Country Demonstrate How Valuable Electronically Stored Social Media Can Be in Litigation; Relevance Is Beyond Dispute

Unlike in other jurisdictions, Michigan's Appellate Courts have not yet been called upon to address the discoverability or admissibility of electronically stored Social Media. See, for example, Dexter v Dexter, 2007 WL 1532084 (Ohio App, 2007) (upholding admission of MySpace postings regarding a woman's admitted illicit drug use as relevant evidence in a custody dispute); EEOC v Simply Storage Management, LLC, 270 FRD 430 (SD Ind 2010) (discovery of Social Media postings required where the claimants sued for sexual harassment by a supervisor and the Court found that Social Media postings might be relevant to the claimants' alleged emotional and mental injuries); Barnes v CUS Nashville, LLC, 2010 WL 2265668 (MD Tenn 2010) (resolving discovery dispute over the discoverability of the personal injury claimant's Facebook Profile, featuring photos of the plaintiff and her friends dancing on a bar); McCann v Harleysville Ins Co of New York, 788 Ad3d 1524, 910 NYS2d 614 (2010) (reversing a blanket denial of all discovery of the plaintiff's Facebook account); Romano v Steelcase, Inc, 30 Misc 3d 426, 430, 907 NYS2d 650, 654 (NY Supp 2010) ("The information sought by Defendant regarding Plaintiff's Facebook and MySpace accounts is **both material and necessary to the defense** of this action and/or **could lead to admissible evidence**.") (Emphasis added.); Held v Ferrell

Gas, Inc, 2011 WL 3896513, 1 (D Kan 2011) (granting Defendant's Motion to Compel access to the plaintiff's Facebook Profile); Offenback v LM Baughman, Inc, 2011 WL 2491371, 2 (MD Penn 2011) (limited access to Plaintiff's Facebook Profile granted in an auto negligence case where the plaintiff's Facebook Profile pictures depicted the Plaintiff riding a motorcycle and hunting).[2] These reported examples of the relevant evidence uncovered from Social Media Profiles in other cases make it very difficult to accept Judge Curtis' holding that information from the Ms. Anderson's Facebook Profile would not be relevant to any issue at trial.[3]

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[2] Unpublished authorities are compiled and attached as Exhibit D.

[3] From the record, it does appear that Plaintiff's Counsel turned over on an *In Camera* basis Facebook information from the date of the auto accident, only, and that Judge Curtis on an *In Camera* basis, without Defense Counsel having the opportunity to review what was submitted, held that the very limited information was not relevant. Judge Curtis' focus apparently, and we do not know for sure because the *In Camera* review was shrouded in secrecy, was exclusively on the possibility of Facebook postings providing details of the auto accident, itself. While that information would certainly be relevant, Defendants' focus was much broader. As a Third Party, No Fault Case under MCL 500.3135, the Serious Impairment Threshold requires a comparison of the Plaintiff's life **BEFORE AND AFTER** the accident. See McCormick v Carrier, 487 Mich 180, 202, 795 NW2d 517 (2010) (determining the effect or influence that the impairment has had on a Plaintiff's ability to lead a normal life necessarily requires a comparison of the Plaintiff's life before and after the incident.) By the terms of the ruling, Judge Curtis did not even consider whether Facebook information could possibly lead to relevant proof of a serious impairment, the *sine qua non* threshold legal issue of this case.

The experience of these other Courts that have tackled this issue head on reveals that a wealth of information may be available from Social Media Profiles and Postings. In the case of Largent v Reed (Exhibit E), for example, the Court of Common Pleas of Pennsylvania held that the Facebook Profile of the Personal Injury Plaintiff was discoverable because the information was relevant to the defense of the case. The Plaintiff, allegedly injured in an automobile accident such as the Plaintiff here, sought damages for physical and mental pain, depression and spasms in her legs, and claimed that she required a cane to walk (Exhibit E). However, on her Facebook Profile, the Plaintiff had included status updates about exercising at a gym and also featured photographs of her and her family that undermined her claimed injuries she was seeking damages for (Id.)

In rejecting the Plaintiff's relevancy dodge, the Court, in a 14-page Opinion and Order (attached hereto as Exhibit E), allowed Social Media Discovery:

> As far as the threshold relevancy inquiry is concerned, **it is clear that material on social networking web sites is discoverable** in a civil case. Pennsylvania's discovery rules are broad, and there is no prohibition against electronic discovery of relevant information. Furthermore, Courts in other jurisdictions with similar rules have allowed discovery of social networking data.
>
> ***
>
> The information sought by Rosko is **clearly relevant.** The information sought by Rosko might prove that Largent's injuries do not exist, or that they are exaggerated. Therefore, Rosko satisfies the relevancy requirement. [Exhibit E, p 8 (Emphasis added).]

B. Michigan's Discovery Rules Are Intended to Be Broad and Far Reaching

Like Pennsylvania, Michigan has broad discovery rules, with a particular provision for the discoverability of electronically stored information. Definitionally, "electronically stored information" would include Social Media. See MCR 2.302(B)(1).

> **(B) Scope of Discovery.**
> (1) *In General.* 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 defenses of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or **electronically stored information** and the identity and location of persons having knowledge of a discoverable matter. [MCR 2.302(B)(1) (Emphasis added).]

Michigan's Court Rules implement "an open, broad discovery policy." Cabrera v Ekema, 265 Mich App 402, 406-407, 695 NW2d 78 (2005); see also Reed Dairy Farm v Consumers Power Co, 227 Mich App 614, 616, 576 NW2d 709 (1998). MCR 2.302(B)(1) additionally allows for the discovery of evidence that may ultimately prove to be inadmissible "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Judge Curtis' crimped view of the Court Rules does not remotely fit within the open and broad discovery policy employed by Michigan Courts. The *In Camera* Review of the Facebook postings from one day only, if allowed to stand, will frustrate the free flow of information between the parties necessary to

facilitate trial preparation and to further the ends of justice. Domako v Rowe, 438 Mich 347, 360, 475 NW2d 307 (1991).

Because the Discovery Request was denied in its entirety, and because Judge Curtis reviewed only one day's entry of Facebook information from Ms. Anderson, the Defendants cannot say with certainty what Ms. Anderson's Facebook Profile actually contains. And that is exactly the point of the Discovery Request: in light of the wealth of information other Courts have uncovered through Social Media Discovery, it is difficult to accept the Trial Court's Ruling that all electronically stored Facebook information is not relevant and not calculated to lead to the discovery of admissible evidence. Bauroth, supra, 465 Mich 381. Defendants even offered to agree to a Protective Order shielding disclosure of any Social Media Discovery obtained. This is the approach taken by Judge Anderson in Exhibit C and the approach more aligned with Michigan's Public Policy allowing Broad Discovery of non-privileged matters.

C. Michigan's Appellate Courts Will at Some Point Necessarily Need to Deal with and Provide Guidance Concerning the Discoverability and Admissibility of Social Media Information. The Issues in Controversy in this Case Provide the Court of Appeals with the Perfect Analytical Template for This Critical Determination, Affecting The Judicial System As A Whole.

Judge Curtis' secret review of very limited, one day's worth of Facebook information, is particularly troublesome given the nature of the claims at issue in this case. Recall that this is

a Third Party Auto Negligence Claim under the No Fault Act, MCL 500.3135. This "serious impairment" case requires the comparison of Ms. Anderson's life before and after the accident. However, Judge Curtis limited the secretive *In Camera* Review to the date of the accident, only, an extremely narrow view which completely missed the mark of the purpose of Defendants' Discovery Request designed to elicit purported change in lifestyle evidence that is at the heart of this case. See MCL 500.3135(7) (a "serious impairment of body function" is "an objectively manifested impairment of an important body function **that affects the person's general ability to lead his or her normal life.**") (Emphasis added.); see also, McCormick v Carrier, 487 Mich 180, 218, 795 NW2d 517 (2010) (in deciding whether the plaintiff met the serious impairment threshold, the parties are required to examine the plaintiff's pre and post accident lifestyle).

In resolving the serious impairment analysis, the McCormick Court examined the hobbies, working life and leisure activities of the Plaintiff before the accident in comparison to the limitations on these activities, such as golfing and fishing, as a result of the injuries suffered in the auto accident. Id. Facebook exists to allow users to broadcast details of their daily activities, the precise focus of the Serious Impairment analysis. Cases from across the country plainly show how germane Facebook evidence would be in a serious impairment case like this

one.

Furthermore, by pursuing monetary damages from Defendants for injuries she claims she sustained as a result of their negligence, Ms. Anderson must satisfy the Court and possibly a jury that her general ability to lead her normal life has been affected. By filing this lawsuit, she, herself, has put her lifestyle as partially depicted on her Facebook profile directly in dispute. See, for example, Domako v Rowe, 438 Mich 347, 360, 475 NW2d 307 (1991) (pre-HIPPA case holding that by placing her physical conditions in dispute with the filing of a Medical Malpractice Action the plaintiff opened up access to her medical records).

To further make this lawsuit the ideal candidate for Appellate Review of these critical issues, Ms. Anderson is claiming a closed head injury and is specifically seeking damages for social withdrawal. She claims injuries sustained in the automobile accident have caused her to withdraw from social interaction with her family and friends. Ms. Anderson's social interactions on Facebook would clearly shed light on the strength and veracity of her alleged social isolation. Furthermore, taking a broader view, with Facebook, Ms. Anderson broadcasts the details of her daily, social life; how can this be deemed not relevant when the entire purpose and existence of Facebook is to publicly interact socially with others?

D. **In Personal Injury Cases, the Clear Trend Across the Country Is to Allow Discovery of Social Media Information.**

In EEOC v Simply Storage Management, 270 FRD 430 (SD Ind 2010) (Exhibit D), the District Court ordered production of portions of the employees' social networking site content holding that the Social Media content was plainly relevant to a claim for mental anguish damages at issue in the case. In particular, the Plaintiffs were asserting severe emotional and mental injuries and the Court ruled that Facebook postings were certainly relevant to defending and assessing these claims:

> It is **reasonable to expect severe emotional or mental injury to manifest itself in some SNS [Social Networking Sites] content**, and an examination of that content might reveal whether onset occurred, when and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is **also relevant.** [270 FRD 435.]

The United States District Court for the Middle District of Pennsylvania allowed limited discovery of the Plaintiff's Facebook Profile, over the objection of the Plaintiff. See Offenback v LM Baughman, Inc, 2011 WL 2491371 (MD Penn 2011) (Exhibit D). That case also arose out of a motor vehicle accident and the Plaintiff's claims for physical and psychological injuries as a result of the accident. Following a battle over whether Facebook and MySpace Profile information was discoverable, the Magistrate reviewed the Plaintiff's Social Media Profiles on an *In Camera* basis to determine whether the

evidence was relevant. Naturally, the Magistrate found that not everything on the Facebook and MySpace Profiles was relevant to the defense of the case, but did find an abundance of potentially relevant information that was required to be produced to the Defendants, including the Plaintiff, who was claiming severe physical injuries, was photographed riding motorcycles, taking motorcycle trips across the country, hunting for deer, and photographs of him riding a mule.

This is the type of information Defendants seek to find out if it exists on Ms. Anderson's Facebook account. It is absurd to assert that attempts to uncover information regarding her lifestyle before and after the accident or information substantiating or disproving her claimed injuries would amount to a "fishing expedition" or some other unauthorized attempt at discovery when the information sought is the "be all, end all" proofs of this case. Grievance Adm'r v Attorney Discipline Bd, 444 Mich 1218, 515 NW2d 360, 366 (1994) (information that may have only some minimal value still required to be disclosed, held not to be a "fishing expedition"); see also, State Farm Mut Ins Co v Broe Rehabilitation Services, Inc, 289 Mich App 277, ___ NW2d ___ (2010) (discovery allowed, held not to be a "fishing expedition").

Again, the very clear national trend is to allow the discovery of Social Media information. See, in addition,

Zimmerman v Weiss Markets, Inc, (Exhibit E), case no. CV-09-1535 (Motion to Compel Production and preservation of the Plaintiff's Facebook and MySpace information granted, held relevant to Defendant's claims that the Plaintiff's health had been seriously and permanently impaired and compromised); McMillen v Hummingbird Speedway, Inc (Exhibit D), 2010 WL 4403285 (Motion to Compel Production of the Plaintiff's Facebook Account Granted where the Personal Injury Plaintiff's claim of significant physical injuries was potentially contradicted by Facebook postings about fishing trips and attendance at Nascar races); Dexter v Dexter, 2007 WL 1532084 (Ohio App, 2007) (Exhibit D) (upholding admission of MySpace postings regarding a woman's admitted illicit drug use as relevant evidence in a custody dispute);Barnes v CUS Nashville, LLC, 2010 WL 2265668 (MD Tenn 2010) (Exhibit D) (resolving discovery dispute over the discoverability of the personal injury claimant's Facebook Profile, featuring photos of the plaintiff and her friends dancing on a bar); McCann v Harleysville Ins Co of New York, 788 Ad.3d 1524, 910 NYS2d 614 (2010) (reversing a blanket denial of all discovery of the plaintiff's Facebook account); Romano v Steelcase, Inc, 30 Misc 3d 426, 430, 907 NYS2d 650, 654 (NY Supp 2010) ("The information sought by Defendant regarding Plaintiff's Facebook and MySpace accounts is **both material and necessary to the defense** of this action and/or could lead to admissible evidence.") (Emphasis

added.); Held v Ferrell Gas, Inc, 2011 WL 3896513, 1 (D Kan 2011) (Exhibit D) (granting Defendant's Motion to Compel access to the plaintiff's Facebook Profile); Offenback v LM Baughman, Inc, 2011 WL 2491371, 2 (MD Penn 2011) (Exhibit D) (limited access to Plaintiff's Facebook Profile granted in an auto negligence case where the plaintiff's Facebook Profile pictures depicted the Plaintiff riding a motorcycle and hunting).

CONCLUSION AND RELIEF REQUESTED

A couple points made in the Statement of Interest really deserve to be repeated and expanded upon, documenting why Discretionary Review should be exercised by the Court of Appeals on an Interlocutory Basis under MCR 7.203(B)(1) and MCR 7.205(D)(2). First, while the Michigan Defense Trial Counsel is an organization predominantly consisting of Civil Defense Lawyers, many of our members and their firms have practices that extend into other areas of the law (divorce, commercial litigation, worker's compensation and, on occasion, plaintiff's personal injury work). Furthermore, as stated above, the MDTC exists to support improvements in the adversary system of jurisprudence in the operation of the Michigan Courts **as a whole,** and to broadly address the interests of the legal community in Michigan.

The Discoverability and Admissibility of Social Media impacts virtually every area of the law. The Dexter case cited

above shows how a Social Media posting can impact a custody proceeding, where one parent bragged about illicit drug use on her MySpace account. District Court Judge Frank of Saginaw peruses the Social Media profiles of criminal defendants appearing before him as that information might be relevant at sentencing or determining whether there has been a parole violation.

And in the civil arena, this is not strictly Discovery that would benefit Defendants to the detriment of Plaintiffs. It is not difficult to imagine how a Civil Defendant's Social Media postings could bear on issues at trial in a negligence case.

These global, system wide concerns are what sparked the second point raised above that deserves to be repeated in conclusion: this is the first time in the over 25 year history of the Michigan Defense Trial Counsel that the organization has decided to use its resources and influence to weigh in on a case at the Discretionary Review phase of a case in the Court of Appeals. That speaks to how significant of an issue we believe this is to the justice system as a whole.

The discoverability and admissibility of Social Media is a trending legal issue that has been on the radar of the Michigan Defense Trial for some time now. It is the unique characteristics of this particular case that spurred the group into action as an *Amicus Curiae* participant for the very first

time when the review available is discretionary, only. We filed this Brief before the Court of Appeals agreed to even accept it, knowing it is possible that it might not even be read.

The threshold Serious Impairment inquiry in this case and a key element of Ms. Anderson's claim for damages are both directly impacted by her use of Social Media generally and in particular the electronically stored information on her Facebook account. The evidentiary issues of this particular case make it the ideal candidate for review by the Court of Appeals.

Because of these concerns, the MDTC supports the Defendants' Request for a Full Grant of Leave to Appeal, with a Stay of the Trial Court Proceedings to allow for the benefit of full briefing of the parties. While again, a top to bottom Grant of Leave to Appeal is requested, a Peremptory Reversal of the Order Appealed From is warranted, for the reasons advanced by Defendants in their Application Briefing.

Respectfully Submitted,

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December 5, 2011

STATE OF MICHIGAN
IN THE COURT OF APPEALS
(On Appeal from the Circuit Court for the County of Wayne)

SHAQUITTA ANDERSON,	Court of Appeals No. 306709
Plaintiff/Appellee,	Trial Court No. 11-000165-NI
v	Hon. Daphne Means Curtis
M.G. TRUCKING, INC., a Michigan corporation and ROBERT ANTHONY SCHAPMAN,	
Defendants/Appellants.	

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PROOF OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

LYNN LASHER, being duly sworn, deposes and says that on the 5th day of December, 2011 she did cause to have served the following documents:

AMICUS BRIEF OF MICHIGAN DEFENSE TRIAL COUNSEL IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL FILED BY DEFENDANTS-APPELLANTS M.G. TRUCKING, INC. AND ROBERT ANTHONY SCHAPMAN

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF PENDING (MOTION FILED NOVEMBER 29, 2011)

PROOF OF SERVICE

APPENDIX

VIA FACSIMILE, U.S. MAIL AND E-MAIL

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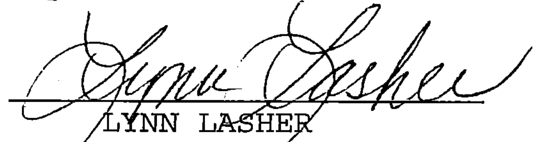
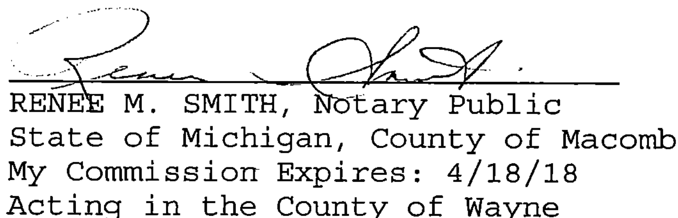
by placing said copy in an envelope correctly and plainly addressed to the above noted persons, and depositing said envelope in the United States Mail with first-class postage thereon fully prepaid; and service of the Brief and Appendix was further effectuated through e-mail to the persons above.

FURTHER DEPONENT SAYETH NAUGHT.



LYNN LASHER

Subscribed and sworn to before me this 5th day of December, 2011



RENEE M. SMITH, Notary Public
State of Michigan, County of Macomb
My Commission Expires: 4/18/18
Acting in the County of Wayne