

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

FORMAN,

Respondent,

-against-

No. 1

HENKIN,

Appellant.

-----

20 Eagle Street  
Albany, New York  
January 2, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

MICHAEL A. BONO, ESQ.  
WADE CLARK MULCAHY  
Attorney for Appellant  
180 Maiden Lane  
New York, NY 10038

KENNETH J. GORMAN, ESQ.  
POLLACK, POLLACK, ISAAC & DE CICCIO, LLP  
Attorney for Respondent  
225 Broadway, Suite 307  
New York, NY 10007

Sara Winkeljohn  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first matter on this  
2 afternoon's calendar is appeal number 1, Forman v. Henkin.  
3 Counsel.

4 MR. BONO: May it please the court, Michael Bono,  
5 Wade Clark Mulcahy on behalf of defendant-appellant Mark  
6 Henkin. Your Honor, may I reserve two minutes for  
7 rebuttal, please?

8 CHIEF JUDGE DIFIORE: Yes, sir. You may.

9 MR. BONO: If someone showed up at a discovery  
10 conference and said that they were not going to turn over  
11 photographs because they were in a box in their closet  
12 marked "private," the clerk or the judge would probably  
13 have a good laugh. But because Facebook is involved with  
14 this matter, we are here today before the Court of Appeals  
15 in a simple discovery dispute in a personal injury case.

16 CHIEF JUDGE DIFIORE: Counsel, if we were to  
17 agree that the courts below were too restrictive in their  
18 approach, do you agree that we are limited based on the  
19 procedural posture of this case to the relief we can grant  
20 here?

21 MR. BONO: No, I don't believe so, Your Honor. I  
22 think that the order that Judge Billings issued could be  
23 enforced if the standard was not such that the only way to  
24 establish a factual predicate was via the public Facebook  
25 page. I think if the court held that targeted demands



1           towards specific allegations made Facebook postings from  
2           the private side disclosable, then I think that Judge  
3           Billings' order could be enforced as the - - -

4                   JUDGE GARCIA: But I guess the question is could  
5           we change that order or order it - - - or reconsider, ask  
6           that the court send it back for a reconsideration of the  
7           order so that it can potentially be expanded or revised?

8                   MR. BONO: That would certainly be an option. I  
9           think - - - as I said, I think it's capable of being  
10          enforced as it is. But - - -

11                   JUDGE FEINMAN: But well how - - - how do you get  
12          to that? I mean what's the standard of review? I mean are  
13          we looking at whether the Appellate Division abused its  
14          discretion or are we looking at whether the Supreme Court  
15          abused its discretion? And how do you send it back to the  
16          Supreme Court if - - - if we're just looking at what the  
17          Appellate Division did?

18                   MR. BONO: Well, I don't think it would be  
19          necessary to send it back to the Supreme Court because I  
20          think the discretion that was abused was the Appellate  
21          Division. So consistent with that, as I indicated, I think  
22          the - - - the order is capable of being enforced as written  
23          because I don't think anything that Judge Billings did - -  
24          -

25                   JUDGE FEINMAN: In fact, you didn't appeal that



1 order.

2 MR. BONO: I'm sorry?

3 JUDGE FEINMAN: You didn't file a cross-appeal of  
4 that order.

5 MR. BONO: No, we did not. Right.

6 JUDGE FEINMAN: So - - - so essentially you're  
7 not aggrieved by that order.

8 MR. BONO: No, I - - - I would like it to be a  
9 little bit different, but you're right. We did not appeal  
10 that, and we - - - we believe because it's targeted and  
11 specific that it's enforceable and should be enforced.

12 JUDGE STEIN: Well, you would agree though that  
13 your discovery request was not so targeted and specific.  
14 It was pretty broad.

15 MR. BONO: Yes.

16 JUDGE STEIN: So could we - - - since we're  
17 talking about remedy, could we - - - could we affirm based  
18 on what the discovery request was but permit you to file a  
19 new more targeted discovery request?

20 MR. BONO: Well, I think what's operative at this  
21 point and what replaced our discovery request is the  
22 court's order. Discovery conferences, motions, and the  
23 like tend to sort of be organic in the way they develop.  
24 And certain things are requested, certain arguments are  
25 advanced, and the judge at the end of it issued the order.



1 And I think that's what currently stands.

2 JUDGE WILSON: What's the procedural posture of  
3 the case now in Supreme? What's happening?

4 MR. BONO: It is currently continuing with  
5 certain depositions that were - - - there were additional -  
6 - - additional injuries that have been asserted, and we're  
7 seeking discovery based on those additional injuries.

8 JUDGE FAHEY: Has your position at all changed  
9 but - - - and I'm not a Facebook user, so - - - and I would  
10 advise all judges probably not to be, but that's for  
11 another day. But - - - but anyway, is there - - - is there  
12 a distinction that needs to be made between messages, which  
13 I'm assuming are written messages, and posts which are like  
14 a photograph that you post on a Facebook page? And in a  
15 remedy, would we need to address anything like that?

16 MR. BONO: Well, I think there is a distinction  
17 between messages which are sent to one individual and posts  
18 which are posted to the entire framework of Facebook  
19 friends. And in this circumstance, I think the judge was  
20 careful in that the order was limited to number of  
21 characters and number of posts or messages. So - - -

22 JUDGE WILSON: Well, why do you think there's a  
23 distinction in terms of discoverability under 3101?

24 MR. BONO: Well, because I think a better  
25 argument can be made that a message sent to one individual



1 is not the same as a post made to all of the friends.

2 JUDGE WILSON: But not the same - - -

3 MR. BONO: Because there's no privacy,  
4 expectation.

5 JUDGE WILSON: But not the same for the purpose  
6 of thinking about a protective order or not the same for  
7 the purpose about thinking whether it's likely to lead to  
8 the discovery of admissible evidence?

9 MR. BONO: More towards the protective order  
10 side. I think they would both go towards - - - they  
11 certainly could both produce material evidence.

12 JUDGE STEIN: Well, for example, a private diary,  
13 that - - - that isn't meant to go to anybody but it may be  
14 discoverable, right?

15 MR. BONO: Absolutely.

16 JUDGE STEIN: So - - - so how does this - - - how  
17 does this relate to - - - to that situation?

18 MR. BONO: Well, I think it's based on what was  
19 said in this case insofar as usage of Facebook and the  
20 like. I think in a discovery-type - - - excuse me, in a  
21 diary-type case, it would depend on what was discussed in  
22 respect of how the diary was used and the like. So I - - -  
23 I think for that reason - - -

24 JUDGE WILSON: I mean the box of photographs you  
25 started your argument with wasn't going to anyone.



1 MR. BONO: Right. And - - - and - - -

2 JUDGE WILSON: And I take it you were saying that  
3 that's discoverable under 3101.

4 MR. BONO: Depending on what was said in respect  
5 of how the person with the photographs - - -

6 JUDGE WILSON: What the photograph is of and what  
7 the underlying cause of action was.

8 JUDGE FAHEY: But that would apply to photographs  
9 in any setting.

10 MR. BONO: Yes.

11 JUDGE FAHEY: You know, so, you know, hard copies  
12 or - - - or digital copies so that really wouldn't make a  
13 difference. See - - - see the problem with messages is if  
14 you get into drawing a distinction from messages that's  
15 different from emails or a hard copy or anything else then  
16 once again you're saying the nature of the medium is going  
17 to determine your right to discovery. And the - - - some -  
18 - - in some ways, most of the judges - - - most of us have  
19 done some commercial or certainly any - - - any PI work  
20 that involves rather large amounts of medical documents.  
21 Usually, the attorneys themselves sit down and go through  
22 them and say these are the five that are still in dispute  
23 among us after we do this. I think eventually with this  
24 kind of situation, digital discovery, we're going to be  
25 doing the same thing where the attorneys are going to



1 pinpoint those problem areas ahead of time, and then the  
2 case law will then develop around those pinpointed areas.  
3 And this may be the beginning of that.

4 MR. BONO: Yes, and you - - - I think a better  
5 argument can be advanced in respect to messages as opposed  
6 to posts, but I would argue under this circumstance they -  
7 - - they should both be discoverable.

8 JUDGE RIVERA: Let me ask you this. Under the  
9 rule that you're advocating, what is not discoverable given  
10 liberal discovery?

11 MR. BONO: I don't think - - -

12 JUDGE RIVERA: What's not discoverable?

13 MR. BONO: - - - that simply because someone has  
14 a Facebook account a litigant is entitled to access to it  
15 just because they file a personal injury suit. And I also  
16 think that general allegations aren't enough to trigger  
17 access to it. But I think like in this circumstance where  
18 there's a traumatic brain injury where part of the  
19 allegations go towards the inability to use Facebook, for  
20 example, it should be discoverable. Again, when it's  
21 targeted to specific allegations made.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. BONO: Thank you, Your Honor.

24 CHIEF JUDGE DIFIORE: Counsel.

25 MR. GORMAN: Good afternoon. May it please the





1 court, Kenneth Gorman on behalf of Pollack, Pollack, Isaac  
2 & De Cicco for the plaintiff. According to the defendant's  
3 logic, the mere possession of a Facebook account provides a  
4 sufficient basis to compel a plaintiff to provide - - -

5 JUDGE RIVERA: Well, he just said that's not the  
6 rule.

7 MR. GORMAN: Correct.

8 JUDGE RIVERA: He just got done that that's not  
9 the rule. So what - - - what's the rule you're advocating?

10 MR. GORMAN: Well, the rule - - - the rule I'm  
11 advocating is - - - is traditional discovery principles  
12 which has been applied all across the board - - - a factual  
13 predicate identifying relevant information that contradicts  
14 or conflicts with the plaintiff's alleged injuries. And it  
15 has to be narrowly tailored so that the information relates  
16 to the claimed injuries from the accident. And none of  
17 those - - - none of those prongs were met in this case.

18 JUDGE STEIN: Is there any other context, though,  
19 in which - - - and I think this is what you're advocating,  
20 correct me if I'm wrong, in which you have to essentially  
21 come up with proof from the very source that you're seeking  
22 access to in order to get access to that. Is there any  
23 other context?

24 MR. GORMAN: I don't think so. I mean I don't  
25 think - - - I mean I know the - - - that the Appellate



1 Division alluded to that but I don't think that's correct.  
2 I think you can get proof from any source.

3 JUDGE STEIN: Okay.

4 MR. GORMAN: It could be - - -

5 JUDGE STEIN: So what's - - - so what's  
6 inadequate about the proof here where - - - I mean it seems  
7 to me that the plaintiff's testimony was pretty specific  
8 about her posts - - - her pre-accident and post-accident  
9 use of Facebook and what she could and could not do. So -  
10 - - so what more would the defendant need to have done to  
11 make it an appropriate discovery request?

12 MR. GORMAN: Well, when I - - - when I read her  
13 testimony, I took it to mean that her social life was  
14 severely hampered or restricted as a result of the injuries  
15 she sustained. I don't necessarily think it was  
16 specifically limited to Facebook itself, but her - - -

17 JUDGE STEIN: Well, it may not have been limited  
18 but she specifically talked I think about her ability to -  
19 - - to post things, to read messages, to - - - to create  
20 messages - - - or I don't know if we're talking about  
21 messages or posts. I'm using those words interchangeably.  
22 I realize that may not be accurate but I think you get the  
23 gist of it. So - - -

24 MR. GORMAN: So are we - - - are we talking about  
25 her ability to socialize or - - - or her ability to



1 actually compose messages itself?

2 JUDGE STEIN: Well, I think all of those things  
3 go to her ability to socialize. She said I'm isolated now  
4 because this is what I used to do and I can't do this  
5 anymore. So it seems to me that if the goal is to show  
6 that indeed she was able to do it because she did do it  
7 that, you know, that's exactly what - - - what we  
8 traditionally look for in terms of discovery requests.

9 MR. GORMAN: Okay. I mean under those  
10 circumstances, I - - - Giacchetto v. Patchoque where they  
11 basically stated that under those circumstances - - - I  
12 mean I don't know if the court has jurisdiction to - - - to  
13 actually do this, but if the court really felt that there  
14 was evidence or the possibility of evidence the plaintiff's  
15 attorney would conduct his own inspection and produce the  
16 relevant evidence. But that wasn't the case here because  
17 he never requested it, and I don't know if the court would  
18 have jurisdiction to do it because it's not preserved. I  
19 think - - -

20 JUDGE RIVERA: Let me ask what - - - what have  
21 you turned over? Did you review the Facebook pages  
22 yourself?

23 MR. GORMAN: I didn't. I'm not the trial  
24 attorney. I didn't review it.

25 JUDGE RIVERA: Oh, I'm sorry. Did the trial



1 attorney do so? Do you know?

2 MR. GORMAN: No, I don't. I don't know if the  
3 trial - - -

4 JUDGE RIVERA: Do you know what, if anything, has  
5 been turned over?

6 MR. GORMAN: From Facebook?

7 JUDGE RIVERA: Yes.

8 MR. GORMAN: Not - - - I don't think anything's  
9 been turned over from Facebook. So I mean under these  
10 circumstances the same rules apply to Facebook as any other  
11 - - -

12 JUDGE FAHEY: Isn't that really the question? In  
13 - - - it seems the First Department has created case law  
14 that says there's a threshold requirement and that there is  
15 no threshold requirement for the exact same picture, let's  
16 just stick with photographs, in a non-digital setting. In  
17 a non-digital setting, you wouldn't have this threshold  
18 requirement. You'd ask a question at a deposition. You'd  
19 say did you do any of these things? Have you taken any  
20 photographs of yourselves over the last year? Yes. Who  
21 did it? Have you - - - do you have any photographs of the  
22 accident scene? Do you have any photographs of yourself at  
23 work? Those kind of questions, pretty normal, standard PI  
24 kind of questions. That would all be discoverable.  
25 Afterwards, you'd get hit with a demand and you'd have to



1 turn it over.

2 MR. GORMAN: Yeah.

3 JUDGE FAHEY: How would this be different?

4 MR. GORMAN: I don't think it would be different.  
5 I think that if the - - - if the initial threshold  
6 requirement was met, a factual predicate based on relevant  
7 information, then a defendant could actually serve a  
8 tailored demand to that effect.

9 JUDGE FAHEY: So - - - so is it - - - is it maybe  
10 that all of us, all the courts, all of us maybe are just  
11 misinterpreting the height or the - - - or how high this  
12 threshold is and maybe it's just a matter of the  
13 specificity of the request rather than the - - - the  
14 requirement? The requirement is the same for all types is  
15 what you're arguing?

16 MR. GORMAN: I think you're exactly right. I  
17 think it's - - -

18 JUDGE FAHEY: So - - - so you would argue that  
19 it's the specificity of the request and that could solve  
20 some of these problems?

21 MR. GORMAN: That's exactly right. The burden's  
22 on the defendant.

23 JUDGE RIVERA: Okay. So what did - - - what did  
24 they have to ask for? What would have made it specific?

25 MR. GORMAN: I don't want to do their job for



1           them but - - -

2                   JUDGE RIVERA: Well, okay. But - - -

3                   MR. GORMAN: But I mean - - -

4                   JUDGE RIVERA: Well, then let's go with a  
5           hypothetical.

6                   MR. GORMAN: Okay, a hypothetical.

7                   JUDGE RIVERA: You have a plaintiff who sits up  
8           and says I cannot type on my computer without it affecting  
9           me severely and it takes me hours to try and compose a  
10          sentence. Asked did you compose something during this time  
11          frame? I don't remember.

12                  MR. GORMAN: I mean - - -

13                  JUDGE RIVERA: What can they ask for?

14                  MR. GORMAN: I mean they can ask for text  
15          messages. They can ask for emails. They can ask for  
16          anything - - -

17                  JUDGE RIVERA: So how is that different from what  
18          they did here?

19                  MR. GORMAN: That's correct. Well - - -

20                  JUDGE RIVERA: How is it different?

21                  MR. GORMAN: Well, they didn't ask. They asked  
22          for everything. They - - - they didn't - - -

23                  JUDGE RIVERA: And they didn't get everything.

24                  MR. GORMAN: Well, they - - -

25                  JUDGE RIVERA: They got some stuff.



1 MR. GORMAN: Right. Well, that's - - -

2 JUDGE RIVERA: They got an order that would give  
3 them some stuff.

4 JUDGE WILSON: Why isn't the burden on you under  
5 3102 to seek a protective order on the grounds of  
6 oppressiveness or overbreadth or burdensome instead of the  
7 other way around? If you get an over - - - I mean doesn't  
8 this happen typically? You get an overbroad request and  
9 you either negotiate it or you move for protective order?

10 MR. GORMAN: Well, I mean, you - - - you could  
11 oppose the motion to compel or you can make - - - you can  
12 make a cross-motion for a protective order. I - - - I  
13 personally would have made a cross-motion for a protective  
14 order. But I don't think it's fatal - - - I don't think  
15 it's fatal to this case because - - -

16 JUDGE WILSON: The court here narrowed it and  
17 gave something substantially less than what was requested.

18 MR. GORMAN: True. But I don't think that - - -

19 JUDGE WILSON: Why doesn't that solve the  
20 specificity problem?

21 MR. GORMAN: Because the production of all  
22 pictures taken after the accident is too broad, at least in  
23 my opinion. And - - -

24 JUDGE WILSON: Well, how - - - how does that  
25 square with 3101(i)?



1 MR. GORMAN: Liberal discovery? I - - -

2 JUDGE WILSON: No, not - - - no, that's (a). (i)  
3 relates to photographs particularly.

4 MR. GORMAN: Because it wasn't - - - it - - - I  
5 mean there - - - there has to be some - - - I thought that  
6 there has to be some factual predicate for the photographs.  
7 I mean you just can't ask for all photographs. I mean  
8 every family album that you have or every picture that  
9 you've taken since the accident, is that discoverable? I  
10 don't think so.

11 JUDGE GARCIA: Is that what they ordered, or I  
12 thought it was any photos of her?

13 MR. GORMAN: Any photos of her after the  
14 accident.

15 JUDGE GARCIA: So a photo of her dog, say, would  
16 not be discoverable?

17 MR. GORMAN: Well, I think that would if - - -  
18 under a properly tailored approach that the - - -

19 JUDGE GARCIA: Under this order.

20 MR. GORMAN: Under this order? I think that all  
21 photos taken after the accident - - -

22 JUDGE GARCIA: But it - - - doesn't it say all  
23 photos of her?

24 MR. GORMAN: All, well, yeah. I mean - - -

25 JUDGE FEINMAN: And then it was also further





1 limited, you know, not romantic, not nude, you know,  
2 whatever to protect privacy interests.

3 MR. GORMAN: Right. Not - - - right. I still  
4 think that's too broad.

5 JUDGE FEINMAN: I mean the problem that I'm  
6 having here is - - - is applying 3101 liberally, whether or  
7 not all of this stuff will ultimately be admissible is - -  
8 - is down the road. The judge tailored something, how is  
9 it an abuse of discretion of what either the trial court  
10 did? And that's what I just don't understand if that's the  
11 standard.

12 MR. GORMAN: I mean I - - - well - - -

13 JUDGE FEINMAN: I mean different judges are going  
14 to tailor it differently, but we're not going to  
15 micromanage either at the Appellate Division or the Court  
16 of Appeals that kind of tailoring.

17 MR. GORMAN: True, but I just don't think that  
18 under these circumstances this particular order was  
19 tailored to the facts of this case. With the exception - -  
20 - I mean I think it's too broad. Just limiting it to non-  
21 nude photos and nonromantic photos and everything else  
22 taken after the accident is just too broad. I think the  
23 defendants have to, you know, take some responsibility here  
24 for not tailoring their demands appropriately. And I don't  
25 think Judge Billings actually had a - - - her order was not



1 specific enough.

2 JUDGE STEIN: I asked defendant's attorney and  
3 I'll ask you do you think that we could, if we were so  
4 inclined, affirm what the Appellate Division did here but  
5 make clear that defend - - - that defendant could serve a  
6 more narrowly tailored discovery request?

7 MR. GORMAN: I think the defendants free to serve  
8 the - - - I mean as long as there's no other issues in that  
9 file the defendant's free to serve more narrowly tailored  
10 discovery requests.

11 JUDGE STEIN: And that is the case now, discovery  
12 is still ongoing?

13 MR. GORMAN: I'm not - - - I don't know.

14 JUDGE STEIN: Okay.

15 MR. GORMAN: I - - - I wouldn't think so since  
16 this order was from 2015, but I just - - - I don't think  
17 that issue's properly before this court.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MR. GORMAN: Thank you.

20 CHIEF JUDGE DIFIORE: Counsel.

21 MR. BONO: I - - - I would just confirm that the  
22 note of issue had been filed, so withdrawing that would  
23 need to be part of the procedural mechanism. But beyond  
24 that, if the court has no further questions - - -

25 JUDGE RIVERA: Well, let me ask you.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. BONO: Yes.

JUDGE RIVERA: If during the deposition she - - - she's asked did you use Facebook past 'X' date, she says I did not even though I didn't - - - except to deactivate it three months later. Can you request for anything during that period if she actually says I never used it?

MR. BONO: I think that would be - - - there would be a strong argument against disclosure in that statement - - -

JUDGE RIVERA: Then you're on a fishing expedition and you have no basis to believe?

MR. BONO: I think that would be a stronger argument for a fishing expedition, yes, with that type of testimony.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. BONO: Thank you, Your Honor.

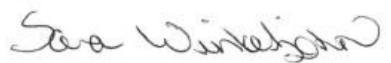
(Court is adjourned)



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Forman v. Henkin, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers  
Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001  
Date: January 07, 2018

