To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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SCOTT FRUGIS,

Plaintiff

DECISION and ORDER

Index No. 58747/12
Motion Date: Feb. 24, 2014

Seq. No. 1

-against-

LAWRENCE DAVID SWIFT and
ELIZABETH SWIFT,

Defendants

----------x

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order compelling discovery of the Facebook account(s) of defendant Elizabeth Swift and granting costs to plaintiff and sanctions against defendants and for such other and further relief as this court may deem just, proper and equitable.

Order to Show Cause dated January 17, 2014
Affirmation in Support
Exhibits A-I
Affirmation in Opposition

Upon the foregoing papers and upon oral argument heard on February 24, 2014, this motion is determined as follows:

This action arises out of a motor vehicle accident that occurred on July 18, 2009. Plaintiff alleges that at the time of the accident, he was a backseat passenger in a car driven by Julian Valencia which left the roadway and struck a utility pole. According to plaintiff, before the accident, he, Valencia and others were at a party thrown by defendant Elizabeth Swift, at the house where she lived with her father, defendant Lawrence David Swift, and at which alcoholic beverages and marijuana were provided to guests, including those who were under the age of 21. In his complaint dated May 30, 2012 plaintiff asserts that the collision and his injuries were caused and/or contributed to by defendants' negligence and defendants' violation of General

Obligations Law § 11-100.

When plaintiff was deposed defendants questioned him about Facebook messages between him and defendant Elizabeth Swift. A copy of this Facebook message exchange was marked as Defendants' Exhibit A. Plaintiff started the messaging on Facebook by letting defendant Elizabeth Swift know that "I'm not suing you...I would never do that." Defendant Elizabeth Swift responded that she understood what was happening with this lawsuit after which plaintiff stated, "...I said you weren't involved or serving alcohol". Plaintiff was further questioned at his deposition about, among other things, a photo he posted on Twitter on July 10, 2013, where he was photographed running a race that occurred in June, 2013.

At her deposition defendant Elizabeth Swift testified that there were about a dozen people at the subject gathering on July 17, 2009. Defendant Elizabeth Swift could not recall if anybody was playing beer pong the night of July 17th but it is possible. She said that she could not remember, specifically, having parties or social gatherings at her father's house when she was a junior in high school. She also testified that at a social gathering, if any, at her father's house, while she was a junior or senior, she did not remember having beer. She further testified that her father advised her never to have alcohol at the house with friends and that she followed his instructions.

Plaintiff's counsel asked defendant Elizabeth Swift at her deposition if she had ever written to any of her Facebook friends regarding the circumstances of the subject accident. She answered no. She admitted that she and Julian Valencia are Facebook friends. Then she stated that other than plaintiff she had not communicated with any other friends on Facebook regarding plaintiff's accident adding that it was plaintiff who contacted her first and that she only responded to his message. When plaintiff's counsel tried to question defendant Elizabeth Swift regarding her Facebook account, defense counsel objected. Defense counsel paused the deposition and consulted with the witness outside the examination room. Plaintiff's counsel stated that was fine but commented that the Facebook inquiry was still an open question.

Daniel Santagata, a nonparty witness, was deposed on November 29, 2013. He testified that he was with plaintiff and others on the evening of July 17, 2009. They went to defendants' home. Santagata stated that there were at least 25 to 30 people there. He said he would not characterize the number of people at the party on the night of July 17th to be a small gathering of friends. Everyone was playing beer pong. Santagata further testified that he had been to that house for a party at other times. Santagata further testified that there was alcohol at the parties and that there were guests who were of drinking age and also guests who were underage drinkers. He knew that there were underage drinkers at these parties because some of the guests were from his grade in high school.

Plaintiff's counsel showed Santagata four photographs marked as plaintiff's exhibits 2-5 which the witness identified as depicting the area in defendants' home where the subject party occurred.

Robert Drinks, another nonparty witness was also deposed on November 29, 2013. He, too, testified that he was with plaintiff and others on the evening of July 17, 2009. He testified that defendant Elizabeth Swift called and invited the group over to her house. They went. Drinks further testified that when they arrived, there were around 30 people there. Beer pong was being played. There was a keg in the back room. Drinks testified he had gone to her house for parties before and alcohol had been served. Drinks also testified that he had taken the four photographs marked as plaintiff's exhibits 2-5 during a New Year's Eve party that was held on December 31, 2008 at defendants' home.

By Notice to Produce dated October 10, 2013 plaintiff requested from defendants an authorization for the username, user password, photographs and news feeds from defendant Elizabeth Swift's Facebook page for the period from July 18, 2009 through December 31, 2012 and a copy of all photographs, in color, and news feed posts from the Facebook page of defendant Elizabeth Swift for the period of July 18, 2009 through December 31, 2012.

Presently, plaintiff is moving for an order compelling defendants to provide to him discovery relating to the Facebook account of defendant Elizabeth Swift as well as costs to plaintiff and sanctions against defendants. Plaintiff notes that at a court conference on December 10, 2013 the court attorney referee directed defense counsel to provide to plaintiffs the Facebook username, password and authorization of defendant Elizabeth Swift but that defense counsel refused. His refusal led to the necessity of plaintiff making the instant motion. Plaintiff states that a "factual predicate" exists since the deposition testimony of defendant Elizabeth Swift regarding a small gathering is contradicted by the two nonparty depositions describing a large, underage drinking party. Plaintiff further notes that defendant Elizabeth Swift denied having other social gatherings while she was a junior or senior in high school, testimony contradicted by the two nonparty witnesses. Plaintiff asserts that the credibility of defendant Elizabeth Swift regarding this party is relevant. Furthermore, plaintiff notes that defendants used plaintiff's postings on Facebook in their defense of this action.

This motion is opposed by defendants. They assert that plaintiff's request is not supported by any factual predicate and, assuming that such exists, the request is overbroad and would necessarily include private information that is irrelevant to any claim, defense or damages. Also, insofar as this information is sought to attack defendant Elizabeth Swift on collateral issues, the same information has been obtained already by depositions. Defendants assert that plaintiff's goal in requesting the Facebook information, to impeach defendant Elizabeth Swift about the number of parties held at her home or the number of guests who were there, are not issues that are relevant to any claim, defense or measure of damages. Defendants also note that plaintiff already possesses this information in the form of nonparty witness testimony. According to defendants, plaintiff's own papers demonstrate that the Facebook demand is cumulative, immaterial and unnecessary. Defendants further note that the Facebook password is private information.

A defendant generally has no duty to control the conduct of third persons so as to

prevent them from harming others, even where as a practical matter defendant can exercise such control (*D'Amico v Christie*, 71 NY2d 76 [1987]). It has been said that there is no common-law cause of action for the negligent provision of alcohol (*Gutierrez v Devine* 103 AD3d 1185 [4th Dept 2013]; *O'Neill v Ithaca College* 56 AD3d 869 [3rd Dept 2008]). However, GOL § 11-100 provides that any person who is personally injured by reason of the intoxication of any person under 21 years of age, has the right to recover for damages against any person who knowingly caused the intoxication by unlawfully furnishing alcohol to such person with knowledge or reasonable cause to believe that such person was under the age of 21. This statute requires that a person furnish or procure alcoholic beverages for a minor as a predicate for liability (*see Nelson v Neng*, 297 AD2d 313 [2d Dept 2002]).

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). The relevant issues in this case are whether defendants served alcohol to Julian Valencia at a time when he was underage which resulted in plaintiff's personal injury. In determining defendants' liability, if any, in this matter, it is without consequence if there were other parties at defendants' home before the subject party or how many people were at the subject party.

Plaintiff presently seeks access to information available on the social media account, Facebook, of defendant Elizabeth Swift. A two prong analysis is relevant in determining whether a social media account is discoverable. First, the court must determine that the content in this account is material and necessary and then the court must balance whether the production of this content will result in a violation of the account holder's privacy rights (*see Jennings v TD Bank*, NY Slip Op. 32783 [Supreme Court, Nassau County, 2013]).

Turning to the first prong of this test, in order to compel production of a private social media account, the party seeking access must demonstrate a good faith basis for making the request by showing some credible facts that the account holder posted information or photographs that are material and necessary in the prosecution or defense of the action (*Fawcett v Altieri*, 38 Misc3d 1022 [Supreme Court, Richmond County, 2013]; *Winchell v Lopiccolo*, 38 Misc3d 458 [Supreme Court, Orange County, 2012]). In other words, to warrant discovery, the party seeking it must establish a factual predicate for its request by identifying relevant information in the account (*Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]).

The defendant Elizabeth Swift's mere possession and utilization of a Facebook

account is an insufficient basis to compel defendants to provide access to the account or to have the court conduct an in camera inspection of the account's usage. The contradictions between the deposition testimony of defendant Elizabeth Swift on the one hand and the deposition testimonies of the two nonparty witnesses on the other does not establish a necessary factual predicate to compel production of the account information. As herein above stated, the number of people who attended the subject party or how many parties, if any, defendants had in their home previously to hosting the subject party, are not issues that are material and relevant to the matter at hand. The pivotal issue here is whether on or about July 17, 2009, defendants knowingly served alcohol to a person under the age of 21 who then injured plaintiff. Furthermore, there is no evidence anywhere on this record that defendant Elizabeth Swift or anyone else (including but not limited to the two nonparty witnesses who were deposed in this matter) posted information, messages or photos, related to the relevant issues of this case on social networking pages. The only Facebook evidence is an exchange between plaintiff and defendant Elizabeth Swift in May and June 2011 whereby plaintiff told her he was not suing her. Clearly, plaintiff has access to his own Facebook account.

This court notes that the request in this case is unlike the requests for Facebook access that many courts have dealt with previously. In many of these cases it is defendants who seek access to the Facebook account after demonstrating that plaintiff's Facebook profile contained a photograph that was probative of the issue of the extent of plaintiff's injuries. Courts have found that in such circumstances it is reasonable to believe that other portions of the Facebook profile may contain further evidence relevant to that issue (*Richards v Hertz Corp.*, 100 Ad3d 728 2d Dept 2012]; *Pereira v City of New York*, 40 Misc3d 1210 (A) [Supreme Court, Queens County 2013]; *Nieves v 30 Ellwood Realty, LLC*, 39 Misc3d 63 [Supreme Court, Appellate Term, New York 2013]; *Romano v Steelcase, Inc.*, 30 Misc3d 426 [Supreme Court, Suffolk County, 2010]). In a recent case the Second Department found that plaintiff should provide a videotape compilation and its sources, created by a nonparty (the brother of plaintiff's decedent), to the Supreme Court for an in camera inspection (*Reid v Soults*, ___AD3d___ [2d Dept, Feb. 26, 2013]). However, the supreme court decision in that case (Westchester County, March 21, 2012) indicates that defense counsel had located and disclosed a publicly posted YouTube video containing clips of the decedent drinking, smoking and using guns which defense counsel argued was relevant to the issue in that case of decedent's life expectancy and damages. In other words, there was a factual predicate in *Reid* that is not present now.

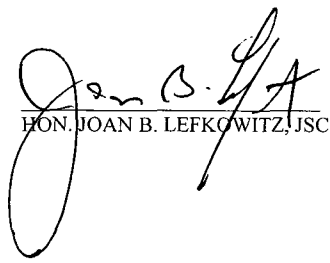
The court finds that plaintiff has failed to satisfy the first prong of the two prong analysis used in such cases. Plaintiff failed to make the requisite showing that the requested disclosure will result in disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on his claims. Accordingly, it is:

ORDERED that plaintiff's motion is denied in its entirety; and it is further,

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendants within ten (10) days of entry of this order; and it is further,

ORDERED that the parties appear for a conference in the Compliance Part, Room 800, on April 9, 2014, at 9:30 A.M.

Dated: White Plains, New York
March 24, 2014



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