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If and When Surveillance Is Discoverable

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Special to the Legal

I am sure most of us have been in positions of debating whether surveillance is discoverable (especially if the defense chooses not to use it) and when it must be produced. While appellate cases on discovery are often difficult to locate, there are a number of helpful decisions, in both state and federal court, and depending upon whether you are in federal court or state court, the outcome may be different.

Pursuant to Pennsylvania Rule of Civil Procedure 4003.1, “a party 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 ... including the existence ... of any ... tangible things.” Therefore, the threshold question is whether surveillance is relevant to the litigation. Surveillance is videotapes/photographs of the plaintiff. It may show the plaintiff’s injuries or lack thereof. Surveillance is certainly relevant to the litigation.

It is often argued that surveillance is work product and, therefore, need not be disclosed. However—and this is where the Pennsylvania rules differ from the Federal Rules of Civil Procedure—the



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vast majority of work product in state court is discoverable. Pursuant to Pennsylvania Rule 4003.3, “a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party’s representative. ... The discovery shall not include disclosure of the mental impression of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” This limitation on what may be withheld is strictly construed. As indicated in the explanatory comment, “the rule is carefully drawn and means exactly what it says. It immunizes the lawyer’s mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more.” Thus, the

work-product rule in state court is very clear and very narrow. Work-product is largely discoverable.

In 1999, the Pennsylvania Superior Court decided *Dominick v. Hanson*, 753 A.2d 824 (Pa. Super. 1999). In *Dominick*, the issue was whether the trial court committed error in permitting introduction of surveillance, despite it not having been produced in discovery. The court’s analysis explained why surveillance is discoverable, why the court was going to follow portions of the federal court decision of *Snead v. American Export-Isbrandtsen Lines*, 59 FRD 148 (E.D. Pa. 1973), but also why it was not exactly adopting *Snead* based upon differences between the Pennsylvania rules and the federal rules.

When the *Dominick* court was first evaluating the discoverability of surveillance, it held that “although there are no Pennsylvania appellate cases addressing the issue, we agree that videotaped surveillance evidence is discoverable.” As indicated by the court, “clearly a defendant’s videotape surveillance of a plaintiff, who claims to have been injured as a result of the defendant’s negligence, is ‘relevant’ to the subject matter of the lawsuit. Although this evidence constitutes work product

because it is prepared solely in anticipation of litigation, Pa.R.C.P. 4003.3 provides that work product is discoverable,” with limited exception.

The court considered the federal decisions that surveillance need not be turned over until after the plaintiff’s deposition as persuasive, but indicated that it was not going to rule “at this time when disclosure must occur.” Nevertheless, the court ruled, “suffice it to say that under the Pennsylvania rules ... [defendants] were required, when questioned, to disclose whether they conducted videotape surveillance.”

In relying, in part, upon *Snead*, the court noted the distinction between the requirement to produce work product under the Pennsylvania rules versus the federal rules: “Pennsylvania’s work-product rule Pa.R.C.P. 4003.3 is broader than its federal counterpart, Fed.R.Civ.P. 26(b) (3); the federal rule permits discovery of work product only when the party seeking discovery shows substantial need of the materials in the preparation of his case and is unable, without undue hardship, to obtain substantial equivalent of the materials by other means.” Thus, in federal court, as discussed further below, surveillance is discoverable only upon “substantial need,” which has been interpreted in federal court to mean when the defense intends to utilize the same at trial.

In *Bindschusz v. Phillips*, 771 A.2d 803 (Pa. Super. 2001), the Superior Court ruled upon the timing of the disclosure in state court, which was left unanswered in *Dominick*. The court ruled that surveillance must be disclosed by the defense; “however, the defense must be given an opportunity to depose the plaintiff fully as to his injuries, their effects and his present disabilities” first, the court ruled. Sometimes language in *Bindschusz* is cited for the proposition that surveillance need not be produced if it is not going to be used. However, the *Bindschusz* court specifically noted that it was not reaching that conclusion.

In state court, surveillance is discoverable and must be produced after the plaintiff’s deposition. While it is work product, it is not the type of work product that is subject to protection. In cases where surveillance was withheld in discovery despite proper requests, but was nevertheless utilized at trial, rulings allowing its use have been ruled to be reversible error, as in *Bindschusz* and

Duncan v. Mercy Catholic Medical Center of Southeastern PA, 813 A.2d 6 (Pa. Super. 2002). In fact, in *Duncan*, after a liability defense verdict following a trial where the court partially allowed the use of surveillance, the verdict was reversed despite defense counsel’s challenge that the surveillance only went to damages, not liability. The Superior Court held that the surveillance was utilized for credibility in general, which could certainly affect liability.

Several trial court opinions also discuss the discoverability of surveillance, such as *Glover v. CSX Transportation*, 2007 Phila. Ct. Com. Pl. Lexis 249 (August 22, 2007), and *Morganti v. Ace Tire and Parts*, 2004 Pa. Dist. And Cnty. Dec. Lexis 270 (December 28, 2004). In *Morganti*, Allegheny County Court of Common Pleas Judge R. Stanton Wettick Jr. provided a detailed analysis of the difference between the Pennsylvania rules and the federal rules, which explains why surveillance should be disclosed in all cases under the Pennsylvania rules. As noted by Wettick, “the Pennsylvania rules ... with respect to attorney work product, differ from the federal rules. Except in limited circumstances that do not apply to surveillance activities, Pennsylvania does not protect trial preparation material. To the contrary, Pa.R.C.P. 4003.3 specifically provides that a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation for trial.”

Under the federal rules, the court will not require the disclosure of work product absent a showing of substantial hardship. “Thus, for Pennsylvania [state] courts, the issue is not whether the plaintiff has shown a substantial need for the surveillance material but, rather, whether it is a matter discoverable under Pa.R.C.P. 4003.1.” The court continued, “Rule 4003.1(a) permits a party to obtain discovery ‘regarding any matter not privileged.’ Thus, the court indicated discovery regarding surveillance activity and surveillance material comes within the scope of this provision because it relates to the claims of the plaintiff.”

Because surveillance would tend to show a plaintiff’s physical condition, movements and restrictions, federal courts also consider such evidence to be relevant, as in *Gibson v. AMTRAK*, 170 F.R.D. 408, 409 (E.D. Pa. 1997), and *Snead*. Because such video is obtained in

anticipation of litigation by a party’s representative, federal courts also note the material to be work product, as in *Williams v. Picker International*, No. 99-3035, 1999 U.S. Dist. LEXIS 19107 (E.D. Pa. 1999), and *Gibson*. In federal court, since it is work product, it need not be produced absent substantial need.

When a defendant in federal court intends to use the surveillance evidence at trial, the work-product privilege is considered waived on account of the plaintiff’s “substantial need for evidence that may prove critical at trial, and inability to obtain the substantial equivalent of this record of plaintiff’s condition at a particular time and place,” as the court held in *Gibson*. Therefore, if a defendant intends to use surveillance evidence at trial but fails to produce it during discovery, the defendant should be precluded from using the surveillance evidence at trial. However, if a defendant does not intend to use the surveillance evidence at trial, the federal courts have ruled that the work-product protection is not waived, and the surveillance need not be produced, as in *Gibson* and *Ward v. AT Systems*, 2008 U.S. Dist. LEXIS 67990 (E.D. Pa. 2008).

As such, it is evident that surveillance is relevant and discoverable under the Pennsylvania rules. In situations where surveillance discovery is objected to as work product, action must be taken to have said objections struck. Once a plaintiff is deposed, plaintiffs counsel should request an amended discovery response to disclose surveillance or confirm it does not exist. As seen in *Dominick*, a perception by the court that a plaintiff has not taken necessary steps to compel production may result in otherwise discoverable information being admitted at trial, despite it not being disclosed. Except in federal court, it is not a defense to producing surveillance that the defense does not intend to utilize it at trial. Surveillance is discoverable work product. Whether it’s favorable for the plaintiff or for the defendant, it is subject to discovery in state court and must be produced. •