

FILED
Superior Court of California
County of Los Angeles

JAN 26 2011 *MC*

John A. Clarke, Executive Officer/ Clerk
By *M. Cervantes*, Deputy
M. CERVANTES

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WINSTON TIRE CASES

Case No.: JCCP 4292

Plaintiffs,

**ORDER COMPELLING PRODUCTION OF
SURVEILLANCE MATERIAL AND
REPORT**

vs.

CHRIS KENNELLY, et al.

Defendants.

I. Introduction

Plaintiff, _____ was injured in a rollover accident where she was thrown from the car that Defendant Christopher Kennelly was driving.¹ She sustained allegedly severe physical injuries. Defendants hired an investigator to conduct surveillance into Plaintiff's physical condition, which will be disputed at trial. Plaintiff propounded Form Interrogatories Set One and Request for Production of Documents ("RFPs") Set One on Defendants.² Defendants provided responses to the form interrogatories and documents. Plaintiff served supplemental requests for both the RFPs and interrogatories to which Defendants responded. Plaintiff's supplemental requests sought (1) surveillance footage obtained by Defendants' investigator over the course of nearly a year and (2) a corresponding

¹ Christopher Kennelly's father Jerry is also a Defendant in this action for allegedly negligently entrusting his car to Christopher.

² The form interrogatories asked questions about investigations done by Defendants and the RFPs sought the documents related to the form interrogatories.

1 report produced regarding the footage.³ Defendants refused to provide the footage or the report, but they
2 did provide descriptive information requested by the form interrogatories and the RFPs (describing the
3 name of the person under surveillance and the date, time and place of the surveillance.) Plaintiff moved
4 to compel production while Defendants moved for a protective order covering the same evidence.

5 II. Analysis:

6 Defendants object to discovery of the surveillance and report based on work product protection.⁴
7 CCP § 2018.030 describes protection for attorneys' work product:

8 (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal
9 research or theories is not discoverable under any circumstances.

10 (b) The work product of an attorney, other than a writing described in subdivision (a), is
11 not discoverable unless the court determines that denial of discovery will unfairly
12 prejudice the party seeking discovery in preparing that party's claim or defense or will
13 result in an injustice.

14 Subsection (a) provides absolute work product protection, which does not apply to the evidence at issue
15 here.⁵ Subsection (b) provides a qualified protection that may be overcome by a showing of unfair
16 prejudice in preparing for trial. Surprisingly, this court has found no controlling authority on how the
17 qualified work product privilege interacts with discovery of surveillance materials produced by
18 investigators in anticipation for litigation.⁶ Therefore, the court looks for guidance to the local rules and
19 any persuasive federal authority.

20 Cal. Prac. Guide: *Civil Trials and Evidence* § 10:176 states:

21 Surprise Impeachment Material: Although pretrial exchange of exhibits may be required,
22 courts generally do *not* require disclosure of material that, in good faith, is expected to be
23 used for impeachment or tactical surprise and has not been previously disclosed.

24 ³ The surveillance materials and report are referred to collectively herein as "surveillance materials."

25 ⁴ Defendants argue the surveillance and report are derivative in that "the investigations performed by Defendants'
26 investigators were done pursuant to the instructions of Defendants' attorneys. Defense theories were explained to the
27 investigators in connection and furtherance of their assignment." (Opposition to Motion to Compel, 8:9-11.)

28 ⁵ Absolute protection applies only to "a writing." Surveillance footage is not "a writing" and therefore does not qualify. The
report, while possibly "a writing," was not prepared by the attorney and is not derivative of the attorney's own opinion or
mental impressions of the case—it is derivative of the *investigator's work*.

⁶ "Surprisingly, there is no recent [California] authority dealing with claims of work product protection for photos, videos,
etc., prepared under an attorney's direction." Rutter Group, [Weil and Brown] Cal. Prac. Guide: Civ. Pro. Before Trial,
Chapter 8C ¶ 8:245.8. The court is also unaware of any cases specifically dealing with a report produced from the
surveillance which is also at issue in this motion.

1 The practice guide cites L.A. Sup. Ct. Rule No. 7.9(h) for this proposition. Rule 7.9(h) deals primarily
2 with scheduling issues in preparation for trial and exchange of things like proposed jury instructions,
3 witness lists and exhibit lists. Rule 8.6 is the correct rule: "All Exhibits should be exchanged and
4 prenumbered in accordance with [Rule] 7.9(h), except for those anticipated in good faith to be used for
5 impeachment. . ." However, Rule 8.6 uses permissive language and makes no mention of the work
6 product doctrine or the policy interests served by avoiding surprise and prejudice to the opposing party
7 during trial upon presentation of the impeaching exhibits. For these reasons, the local rules are of little
8 help on this issue.

9 *Fisher v. National R.R. Passenger Corp.*, (S.D. Ind. 1993) 152 F.R.D. 145, nicely summarizes
10 some of the federal authority:

11 Many courts have considered the discoverability of surveillance tapes *which are intended*
12 *to be introduced as evidence at trial*. Almost uniformly, these courts have held that
13 evidentiary films or videotapes *must be provided to the opposing party prior to trial*.
14 *E.g., Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir.1993); *Forbes v.*
15 *Hawaiian Tug & Barge Corp.*, 125 F.R.D. 505, 507-08 (D.Hawaii 1989); *Snead v.*
16 *American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150-51 (E.D.Pa.1973); *Kane v.*
17 *Her-Pet Refrigeration, Inc.*, 181 A.D.2d 257, 587 N.Y.S.2d 339 (1992); *Williams v.*
18 *Dixie Elec. Power Ass'n*, 514 So.2d 332 (Miss.1987); *Camelback Contractors, Inc. v.*
19 *Industrial Comm'n*, 125 Ariz. 205, 608 P.2d 782 (Ct.App.1980); *Crist v. Goody*, 31
20 Colo.App. 496, 507 P.2d 478 (1972). However, few courts have considered the precise
21 issue presented in this case: Whether surveillance tapes of a Plaintiff which Defendant
22 does not intend to introduce at trial, but which it possesses, are discoverable by the
23 Plaintiff prior to trial. Those courts which have considered this specific issue have, for
24 the most part, allowed discovery of all surveillance films, including the non-evidentiary
25 tapes, prior to trial. *E.g., Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435, 437
26 (S.D.W.Va.1992); *Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160, 161
27 (S.D.N.Y.1986); *Martin v. Long Island R.R. Co.*, 63 F.R.D. 53 (E.D.N.Y.1974); *Dodson*
28 *v. Persell*, 390 So.2d 704 (Fla.1980); *Jenkins v. Rainer*, 69 N.J. 50, 350 A.2d 473
(1976); *Olszewski v. Howell*, 253 A.2d 77 (Del.1969); *Suezaki v. Superior Court*, 58
Cal.2d 166, 23 Cal.Rptr. 368, 373 P.2d 432 (1962). Despite the abundance of opinions on
the subject, divergent in analysis as they may be, no controlling precedent is available to
guide the decision of this court, for neither the Seventh Circuit nor the Supreme Court
has addressed this issue. Moreover, as will be shortly demonstrated, *many, if not most, of*
the courts which ordered the production of non-evidentiary videotapes did so without
explicitly considering or applying the work product doctrine."

27 *Fisher, supra*, at 150. As the *Fisher* court indicates, the substantial majority of federal cases permit
28 discovery of surveillance materials when those materials are intended to be introduced as evidence at

1 trial. The *Fisher* court qualifies its summary by noting that few courts have considered the issues with
2 express consideration to the work product doctrine.

3 The District Court in *Fletcher v. Union Pacific R.R. Co.*, (S.D. Cal., 2000) 194 F.R.D. 666,
4 expressly deals with the application of the work product doctrine. The *Fletcher* court opens its
5 discussion with the broader proclamation that “numerous courts have held that surveillance films
6 constitute work product and are subject to qualified immunity.” (*Id* at 670; Citing *Forbes, supra.*, 125
7 F.R.D. at 507-08; *Ford v CSX Transportation, Inc.*, (E.D.N.C.1995) 162 F.R.D. 108, 111; and *Fisher,*
8 *supra*, 152 F.R.D. at 150-51.) For the most part, the facts from *Fletcher* are analogous to the instant
9 case.⁷ However, one fact is distinguishable: *the parties in Fletcher later stipulated not to introduce the*
10 *surveillance at trial.* (*Id* at 677.) The *Fletcher* court rejected the plaintiff’s request for discovery of the
11 materials. The court found the parties’ stipulation important, noting: “Whether films will be used at trial
12 is a significant factor in determining whether the party seeking to discover them has a ‘substantial need’
13 for the material.” (*Id* at 670, citing *Fisher, supra*, 152 F.R.D. at 158.) In the instant case, Defendants
14 have not determined how they will use the materials, i.e., whether they will attempt to admit them as
15 evidence at trial, or whether they will use the materials solely to impeach Plaintiff. (November 29,
16 2010, Transcript of hearing on motion, 2:16-23.)

17 In any event, federal court decisions from other circuits provide guidance based on public policy
18 that is equally applicable here. Most recently the federal court in *Ford v CSX Transportation, Inc.*
19 (E.D.N.C. 1995) 162 F.R.D. 108, explained that surveillance used solely to impeach should still be
20 discoverable when defendants have previously deposed the plaintiff regarding the extent of her injuries:

21
22 [The order compelling production of surveillance issued by the magistrate judge] properly
23 analyzed the work product doctrine of Rule 26(b)(3) concluding that the materials were
24 entitled to a qualified immunity and that plaintiff had overcome it by showing a
25 substantial need for the materials, under the logic of *Wegner v Viessman, Inc.*, 153 F.R.D.
26 154, 156 (N.D.Ia.1994).

27 ⁷ The plaintiff in *Fletcher* worked for a railroad and was injured when he fell from the defendants train. (*Id* at 667.) He
28 claimed to be permanently injured and disabled and sued the railroad for personal injuries. *Id.* Defendant conducted
surveillance by videotaping the plaintiff on several occasions. *Id.* Defendant also had the plaintiff examined by an expert
who found the plaintiff’s injuries to be exaggerated. *Id.* The plaintiff served interrogatories and requests for production on
defendant railroad asking about surveillance. Defendant railroad objected claiming work product privilege. *Id.*

1 Defendant's argument against discovery of surveillance materials has the appeal that they
2 would be used only if plaintiff lies or misleads in his testimony about the extent of his
3 injuries, in which case he should bear the consequences of his perjury or
4 misrepresentation. This assumes that only a plaintiff might attempt to mislead the court.
5 However, the court's neutrality precludes any such biased assumption. From the bench's
6 point of view, the defendant is just as likely to resort to chicanery as the plaintiff. Just as a
7 plaintiff can lie or exaggerate, so can a defense surveillance film be distorted through
8 photography or editing. Plaintiff hypothesizes that a film showing a plaintiff carrying a
9 heavy load might be stopped so as not to show him grabbing his back in agony from the
10 strain. The undersigned recalls a case in which a surveillance film showed an injured
11 plaintiff to be engaged in activity (yard work) inconsistent with his claims of resulting
12 disability. By learning of the film in advance of trial, however, he was able to produce
13 records showing that following the activity he was forced to get medical treatment and
14 was admonished by a physician not to do such work. Also, as *Wegner* points out,
15 discovery of the materials would permit them to be studied before their use at trial to
16 ensure that the photography was not misleading in any way.

17 The [magistrate's order] balanced the needs of both parties by required (sic) the
18 production of the materials pursuant to discovery, but only after defendant had an
19 opportunity to depose plaintiff, by video-deposition, if it so chose. Such a deposition
20 could require a demonstration of strength or range of motion in advance of the plaintiff
21 learning what materials were available to defendant. If plaintiff testified at his deposition
22 inconsistently with the surveillance film, that inconsistency would be preserved and could
23 be used at trial.

24 This same issue has been considered at least twice before in this district, once by the
25 undersigned, *Blount v. Wake Electric Membership Corporation, et al.*, 162 F.R.D. 102,
26 (Sept. 24, 1993), and once by Magistrate Judge Charles K. McCotter, Jr. involving this
27 same defendant, *Smith v. CSX Transportation, Inc.*, No. 93-373-CIV-5-F, 1994 WL
28 762208, (May 18, 1994). Both of those rulings were that surveillance materials were
discoverable after an opportunity to depose the subject of the surveillance.

In the absence of any ruling by the Fourth Circuit, and considering the split of other
authority on the subject, the undersigned again concludes that allowing discovery of
surveillance materials after the deposition of the plaintiff, but before trial, best meets the
ends of justice and the spirit of the discovery rules to avoid surprise at trial. Accordingly,
on reconsideration, the [magistrate's order] stands.

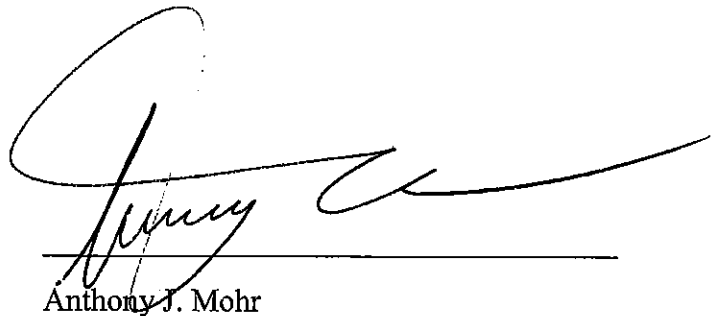
Ford, supra, at 111-112. As was the case in *Ford*, Plaintiff in the instant case has been deposed by
Defendants and has testified about her claimed injuries. (November 29, 2010, Transcript of hearing on
motion, 6:20-24.) To that end, if Plaintiff testified that her injuries were different from those reflected in
the surveillance materials, her testimony could be impeached. Defendants' ability to impeach Plaintiff's

1 deposition either exists at this time or it does not. The only difference in compelling production of the
2 surveillance materials is that Plaintiff will be prepared to combat that evidence at trial. Perhaps Plaintiff
3 will discover that the surveillance portrays her actions in a false light, in which case she can gather
4 evidence to contradict the surveillance. This result serves the two important policy considerations
5 identified by the *Ford* court: producing a just result and avoiding undue surprise at trial.
6

7 For these reasons, the court is persuaded to follow the holding in *Ford* and compel production of
8 the surveillance materials as requested by Plaintiff. Plaintiff's motion is GRANTED. Defendants are
9 ordered to produce the surveillance materials in 20 days.
10

11 **IT IS SO ORDERED.**

12 DATED: January 21, 2011

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14 _____

15 Anthony J. Mohr

16 Judge of the Los Angeles Superior Court
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/21/11

DEPT. 309

HONORABLE Anthony J. Mohr

JUDGE

M. CERVANTES

DEPUTY CLERK

HONORABLE
10

JUDGE PRO TEM

M. RODRIGUEZ, Courtroom Assistant
ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

JCCP4292

Plaintiff

Counsel

COORDINATION PROCEEDING
SPECIAL TITLE RULE (1550(b))

Defendant

Counsel

NO APPEARANCES

WINSTON TIRE CASES

NATURE OF PROCEEDINGS:

RULING ON MATTER TAKEN UNDER SUBMISSION ON
NOVEMBER 29, 2010 [V. KENNELLY]

In this matter heretofore taken under submission on November 29, 2010, the court now issues its ruling as reflected in its ORDER COMPELLING PRODUCTION OF SURVEILLANCE MATERIAL AND REPORT signed and filed this date.

A copy of the above-titled order is sent to counsel listed below.

Counsel for plaintiff shall give notice.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 01/21/11 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: January 21, 2011

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/21/11

DEPT. 309

HONORABLE Anthony J. Mohr

JUDGE

M. CERVANTES

DEPUTY CLERK

HONORABLE
10

JUDGE PRO TEM

M. RODRIGUEZ, Courtroom Assistant
ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

JCCP4292

Plaintiff

Counsel

COORDINATION PROCEEDING
SPECIAL TITLE RULE (1550(b))

Defendant

Counsel

NO APPEARANCES

WINSTON TIRE CASES

NATURE OF PROCEEDINGS:

John A. Clarke, Executive Officer/Clerk

By: _____

M. Cervantes

Kim Schumann
Stephanie M. Tran
SCHUMANN, RALLO & ROSENBERG, LLP
3100 Bristol Street, Suite 400
Costa Mesa, CA 92626

Nicholas A. Carlin
Cari A. Cohorn
PHILLIPS, ERLEWINE & GIVEN LLP
50 California Street, 35th Floor
San Francisco, CA 94111

David McCann
Aaron Glenn Capps
YOKA & SMITH LLP
777 S. Figueroa Street, Suite 4200
Los Angeles, CA 90017