

MEMORANDUM:

TO: Mark Morris
FROM: Ali Silva
RE: Silva – 15-94 – Surveillance Video Motion Research
DATE: July 15, 2019

I. Motion to bar defendant’s use of surveillance video at trial and motion to produce the video.

As required by Form C Interrogatory question # 9, defense is required to turn over any and all information with regard to their investigation, including information about their investigator, logs, reports, and unedited videos of the surveillance. Dong v. Alape, 361 N.J. Super. 106, 125-26 (App. Div. 2003). The court in Dong held “because the videotape had not been furnished through discovery the defense would not be permitted to use it at trial.” Ibid. Consequently here, because defendants did not furnish any surveillance video they had of plaintiff, their use of such video should be barred at trial.

Providing discovery when requested before the discovery end date is crucial in avoiding unfair surprise at trial. Jenkins v. Rainer, 69 N.J. 50 (1976). The Jenkins court quoting Justice Vanderbilt stated “[o]ur rules for discovery. . .are designed to insure that the outcome of litigation in this State shall depend on its merits in the light of all of the available facts, rather than on the craftiness of the parties or the guile of their counsel.” Id. at 57 (quoting Lang v. Morgan’s Home Equip. Corp., 6 N.J. 333, 338 (1951)).

Jenkins is a pre-best practices case and since the holding in the 1970's, the court rules require parties to answer Form Interrogatories. Specifically, videotape evidence is required to be provided within the discovery period in order to avoid surprise. Form C Interrogatory #9 provides:

If any photographs, videotapes, audio tapes or other forms of

electronic recording, sketches, reproductions, charts or maps were made with respect to anything that is relevant to the subject matter of the complaint, describe:

- a. the number of each;
- b. what each shows or contains;
- c. the date taken or made;
- d. the names and addresses of the persons who made them; and
- e. in whose possession they are at present

It is too late for defendants to amend their discovery at this point. See R. 4:17-7. The court rules provide “if a party who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the end of the discovery period...” Id.

In the post-best practices case of Dong, supra, the Appellate Division reversed and remanded the case for a new trial where defendant was permitted, over plaintiff’s objection, to present surveillance evidence including video surveillance to the jury. Just as in the instant matter, the surveillance in Dong had not been provided during discovery. As such, in reversing and remanding the case for a new trial the Appellate Division held:

without viewing the tape, [plaintiff] put in his entire case. . .[h]ad he known in advance, he likely would have adjusted his presentation. . . the judge’s reversal of his earlier order placed plaintiff at a distinct disadvantage, giving the jury the impression that plaintiff was now scrambling and engaging in damage control. . .this was unfair to plaintiff.

[Dong, supra, 361 N.J. Super. at 126-27.]

The basis for this decision was that the untimely production of the surveillance videotape at the time of trial was a discovery violation as plaintiff’s interrogatories sought continuing production of all photographs and videotapes in defendant’s possession. Id. at 126.

Even the pre-best practices decision in Jenkins recognizes surveillance discovery of plaintiff must be turned over to plaintiff's counsel prior to trial to avoid the unfair surprise that would inevitably result if the videotape were only produced at the time of trial. Specifically, the court stated:

The surprise which results from distortion of misidentification is plainly unfair. If it is unleashed at the time of trial, the opportunity for an adversary to protect against its damaging inference by attacking the integrity of the film ad developing counter-evidence is gone or at least greatly diminished.

[Jenkins, supra, 69 N.J. at 57-58.]

This recognition, before there was a solid continuing obligation – now derived from Form Interrogatories – demonstrates the prejudice plaintiff suffers by virtue of the last minute notification of defendant's possession of surveillance discovery.

Moreover, a 2014 decision from the United States District Court found a defendant in a personal injury case must turn over surveillance video to plaintiffs prior to deposing them, despite the objection that disclosure would defeat the footage's impeachment value. Gardner v. Norfolk Souther Corp., 299 F.R.D. 434 (D.N.J. 2014). Because the surveillance materials directly relate to the plaintiff's physical condition, they have a substantive value in the case that goes beyond using them for impeachment and thus permitting the delay sought by the defense "would nullify the discovery process. '[F]airness concerns weigh against the kind of sandbagging involved when the moving party sets up grounds for impeachment by using undisclosed materials in an attempt to manufacture inconsistencies.'" Id. at 438.

Additionally, since there is no claim of privilege with respect to the surveillance, as it was proffered as part of "discovery", the instant matter is more akin to Inferrera v. Wal-Mart Stores, Inc.,

2011 WL 6372340 (D.N.J. 2011) and Herrick v. Wilson, 429 N.J. Super. 402 (Law Div. 2011), than Jenkins.

In the more recent federal court case, Inferrera, *supra*, defendants sought to withhold a videotape of plaintiff's falling until after plaintiff's deposition. The District Court held the defendant may not withhold the videotape until after plaintiff's deposition. In so holding, the District Court recognized defendant was essentially seeking a protective order to delay production of relevant evidence until after plaintiff's deposition. The court went on to state this practice was inappropriate, as

[i]mpeachment evidence is available in virtually every case. If a party could delay the production of relevant evidence to use for impeachment purposes at a deposition, than large swatches of discovery could be withheld. In addition, the same issue present here would come up in almost every case. If defendant's reasoning is adopted, the same argument could be made with regard to incriminating documents, e-mails, photographs, audiotapes, etc. Defendant's position would create an avenue to delay producing relevant discovery that does not exist.

[Inferrera, *supra*, at *1.]

In the instant matter, by not producing the surveillance during discovery, defendants have not only failed to meet their ongoing discovery obligations under the rules, but also are blatantly withholding relevant evidence from plaintiff.

Similarly in Herrick, *supra*, defendant was not permitted to withhold a video of plaintiff's auto collision until after her deposition. The court stated allowing defendants to withhold the video would fundamentally alter how pretrial discovery was conducted and allow parties to delay production of relevant information to gain the upper hand in discovery. Herrick, *supra*, 429 N.J. Super. at 406-407. Further, the court recognized

[t]he discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel. ‘A lawsuit is not a parlor game; it is a solemn search for truth conducted by a court of law.’ ‘Pretrial procedures make a trial less of a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.

[Id. at 407 (citations omitted)]

As such, the court in Herrick concluded there was no reason to treat videotapes surreptitiously made different from any other discovery. Ibid. Therefore, consistent with R. 4:10-2, defendant was compelled to produce the surveillance video of plaintiff’s collision.

Just as in Infererra and Herrick, *supra*, defendants in the instant matter continue to withhold surveillance discovery in a case where discovery has been closed for quite some time. Accordingly, defendants should be barred from referring to, relying on, or otherwise presenting the surveillance video at the time of trial.

Plaintiff also moves for a motion to compel the video surveillance tapes. In Jenkins, *supra*, the Supreme Court established that a plaintiff is entitled to the complete investigative materials of an investigator retained by defendant. Plaintiff has a right to obtain these materials prior to trial, including materials that may show “the time or times the movies were taken, how long the surveillance continued, what plaintiff was doing, who was present, how many reels of film result, who presently has possession of the films, and the like.” Jenkins, *supra*, 69 N.J. at 59.

It would be extremely prejudicial to have introduction of surveillance evidence for which defense counsel has failed to produce sufficient materials to allow plaintiff to challenge the evidence and otherwise assess its authenticity. An adversary should not be confronted with a videotape

without sufficient prior notice and time to prepare that would allow testing the validity of the scenes depicted on the tape. Suanez v. Egeland, 330 N.J. Super. 190, 196 (App. Div. 2000). Plaintiff should receive, prior to trial, evidence regarding the circumstances under which the video was created so that plaintiff can challenge the proffered evidence. See, e.g., State v. Wilson, 135 N.J. 4,17 (1994) (“[M]otion pictures are generally admissible if properly authenticated with: (1) evidence relating to the circumstances surrounding the taking of the film; (2) evidence detailing the manner and circumstances surrounding the development of the film; (3) evidence in regard to the projection of the film; and (4) testimony by a person present at the time the motion pictures were taken that the pictures accurately depict the events as that person saw them when they occurred.”). The Jenkins court similarly stated:

[i]f it is unleashed at the time of trial, the opportunity for an adversary to protect against its damaging inference by attacking the integrity of the film and developing counter-evidence is gone or at least greatly diminished.

[Jenkins, supra, 69 N.J. at 57-58.]

Further, N.J.R.E. 403 requires the exclusion of prejudicial evidence. This evidence is unduly prejudicial if plaintiff is totally precluded from effectively challenging this evidence when defense counsel has refused to provide plaintiff with neither the video itself nor the complete file of defendant’s investigator.

Plaintiff not only has substantial need for the file but he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Here, the video and the investigator’s file are both unique evidence that cannot be recreated from any other source. “If evidence is unique, such that a party cannot copy or otherwise recreate it, then the hardship in

obtaining a substantial equivalent seems manifest.” Jenkins, supra, 69 N.J. at 58. Thus, plaintiff has satisfied both requirements of R. 4:10-2(c) and the file should be produced before a second deposition of plaintiff.

The court also has the inherent power under R. 4:10-3 to issue a protective order for “good cause shown” that “discovery not be had.” Given the circumstances of this case and the unjustified deposition asking the same questions over and over again, and as the record otherwise shows, good cause is present. The court could thus properly enter a protective order that no second deposition of the plaintiff will take place and the videos must be produce immediately.

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