September 26, 2017

VIA ELECTRONIC FILING
Honorable Phillip L. Paley, J.S.C.
Middlesex County Superior Court
56 Paterson Street
New Brunswick, New Jersey 08903

Re: Barbara Roll and Kevin Mortensen (her husband) v. Society Hill at Kilmer Woods, et als.
Docket No.: MID-L-1962-15
Our File No.: 14-63

Plaintiffs' Motions for Discovery Relief and to compel production of surveillance video

Motions currently returnable: September 29, 2017

Dear Judge Paley:

We represent Plaintiffs Barbara Roll and Kevin Mortensen (her husband) in the above matter. Please accept this Reply Brief in connection with the motion about the surveillance video and all associated materials.

In discovery, we specifically asked defendants in sworn interrogatories:

> S11. Have you hired a private investigator or has any investigator or has any investigation been conducted with respect to the plaintiff, aside from investigation conducted by the defendant's attorney? If so, identify the name of the person conducting the investigation and set forth, in detail, what the investigation consists of and the dates the said investigation was conducted and attach hereto any and all documents which were produced, generated and/or uncovered by the investigation and indicate whether this defendant expects to call the investigator at the time of trial and/or introduce the tangible items uncovered by the investigator's efforts and, if so, for what purpose.

Defendants responded, "No" (Exhibit B). That turned out to not be the case. When defense counsel withholds information about a video before a first

deposition, they are breaching their "continuing obligation" to provide accurate discovery responses. *See McKenney v. Jersey City Medical Center*, 167 N.J. 359, 370-372 (2001).

We want the complete, unedited video material. We also want billing and log records related to our client being followed and videotaped. We also want depositions of the people who did so. (*Exhibit A, Notice to Produce and Subpoena*) Defendants refuse to provide anything, even thing even the *Jenkins* Court clearly said has to be provided.

In *Jenkins v. Rainner*, 69 N.J. 50 (1976), the Supreme Court definitively established that a plaintiff is entitled to the complete investigative materials of an investigator retained by defendant:

> Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts. Twenty-five years ago Chief Justice Vanderbilt pointed out:
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> > Our Rules for discovery . . . are designed to insure that the outcome of litigation in this State shall depend on the merits in the light of all of the available facts, rather than on the craftiness of the parties or the guile of their counsel. [Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 338, 78 A.2d 705 (1951).]
> >
> > This policy is in keeping with the modern trend which recognizes the need to make available to each party the widest possible sources of proof as early as may be so as to avoid surprise and facilitate preparation.

Id. at 56-57 (internal citations omitted). Plaintiff thus has a right to obtain the investigator's complete file 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 resulted, who presently has possession of the films, and the like." *Jenkins*, 69 N.J. at 59. Despite the clear holding of *Jenkins*, defense counsel refuses to produce to Plaintiff any of the requested discovery.

Defendants' position is they get to claim the video is privileged, withhold it from discovery, and then on the fly at trial suddenly "unclaim" privilege and surprise the plaintiff with it. This is not how discovery Rules are supposed to work. At a bare minimum defendants should be barred from utilizing the video at trial altogether. 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 video tape without sufficient prior notice and time to prepare that would allow for testing the validity of the scenes depicted on the tape. *Suanez v. Egeland*, 330 N.J. Super. 190, 196 (App. Div. 2000). Plaintiff should have received, 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."). Indeed, the Jenkins Court 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, 69 N.J. at 57-58. New Jersey law and N.J.R.E. 403 require exclusion of this unduly prejudicial evidence when 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.

In New Jersey, the discovery rules are liberally construed, and afford the broadest possible latitude in pretrial discovery. *Payton v. N.J. Tpk. Auth.*, 148 N.J. 524, 535 (1997). Pursuant to *Rule* 4:10-2(a), "parties may obtain discovery regarding any non-privileged matter that is relevant to the subject of a pending action or is reasonably calculated to lead to the discovery of admissible evidence." *In re Liq. Of Integrity Ins. Co.*, 165 N.J. 75, 82 (2000). Here, the defendant refuses to turn over the notes and reports of the videographer who observed plaintiff and taped him on the grounds that the notes, logs and reports are protected work product. They apparently even claim billing records are somehow privileged.

The threshold question when determining whether a document is protected from disclosure by the work product privilege, is whether the document was prepared in anticipation of litigation or for trial. *Miller v. J.B. Hunt Transport, Inc.*, 339 N.J. Super. 144, 148 (App. Div. 2001). A document is not entitled to protection as work product if it was prepared in the ordinary course of business rather than in anticipation of litigation. *Id.* The court defined that "a statement or other document will be considered to have been prepared in anticipation of litigation if the 'dominant purpose' in preparing the document was concern about potential litigation and the anticipation of litigation was 'objectively reasonable'."*Id* at 150.If the dominant purpose of the document was in anticipation of litigation then the work product privilege is extended to an investigator acting as an attorney's agent. *Torraco v. Torraco*, 236 N.J.Super. 500, 503 (Ch. Div. 1989).

The mere fact that a document may have been prepared in anticipation of litigation does not, however, mean that the document is not discoverable. In a sense, "litigation can be foreseen from the time of occurrence of almost any incident, and thus some reasonable limits have been set upon the scope of the immunity." *Harper v. Auto-Owners Insurance Company*, 138 F.R.D. 655, 659 (1991). Much of what was once considered non-discoverable work product has been stripped of its absolute protection with the favored status of absolute immunity being essentially reserved for "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Jenkins v. Rainner*, 69 N.J. 50, 55 (1976); *see also, State v. CIBA-GEIGY Corp.*,247 N.J. Super. 314 (App. Div. 1991) (privilege is narrowly construed). As Justice Clifford declared, "now one is hard put to conceive of any non-privileged relevant material which enjoys and unqualified protection against discovery[.]" *Id.* The rationale for the limiting the

privilege is that essential justice is better achieved when there has been full disclosure so that the parties are knowledgeable of all available facts. *Id.* at 55. Accordingly, documents and tangible things that are prepared in anticipation of litigation are discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *R.* 4:10-2(c).

In the present matter, plaintiff has a substantial need for the videographer's file in order to be able to properly challenge his credibility at trial and to fairly explore authentication issues with regard to the video and associated testimony and materials. As Judge Brochin recognized, there is no equivalent to a witness's inconsistent prior statement. *Medford v. Duggan*, 323 N.J. Super. 127, 140 (App. Div. 1999)(Brochin, J. Dissenting). When a fact witness testifies for an adverse party, any statements of that witness must be produced on demand for use in cross-examination as a potential tool for impeachment of credibility. *Dinter v. Sears Roebuck& Co.*, 252 N.J. Super. 84, 100 (App. Div. 1991). In a dissent, Judge Brochin opined that the decision of *Dinter*, should be extended to require the production of a fact witness's statements before their deposition is taken. *Medford v. Duggan*, 323 N.J. Super. 127, 140 (App. Div. 1999)(Brochin, J. Dissenting). In *Pfender v. Torres*, 336 N.J. Super. 379 (App. Div. 2001), the Appellate Division adopted Judge Brochin's rationale and determined that there is no equivalent to a witness's inconsistent statement and, therefore, extended *Dinter* to provide for the discovery of statements before the party or witness is interrogated at a pre-trial deposition. *Id.* at 392.

At deposition, the videographer would be required to answer all questions "directed to 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 resulted, who presently has possession of the films, and the like." *Jenkins*, 69 N.J. at 59. These are factual questions surrounding the taking of the videotapes. Any statements the videographer recorded in his notes and/or report concerning these events must be produced before he testifies so that plaintiff can properly impeach his testimony. *See, Dinter*, 252 N.J. Super. at 100; *Pfender*, 336 N.J. Super. at 392. Without having to turn over their notes, videographers can make up any facts without the fear of being impeached. In *Hess v. Hess*, 83 N.J. Super. 583, 585 (App. Div. 1964) it was specifically held that an investigator's report must be turned over for use on cross-examination as a tool for testing the investigator's credibility. Moreover, "the camera itself may be an instrument of deception, capable of being misused with respect to distances, lighting, camera angles, speed, editing and splicing, and chronology." *Jenkins*, 69 N.J. at 57. In an apparent conflict between the videographer's version of what is on the video and the actual video; the videographer's notes, logs, and records would be vital to challenge the integrity of the film and protect against the otherwise damaging inference of a distortion. *Id.*

Plaintiff not only has a 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 videographer's file is a unique document 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*, 69 N.J. at 58. The only source of the information contained in the videographer's file is that file. Thus, plaintiff has satisfied both requirements of *R.* 4:10-2(c) and the file should be produced before the deposition. The plaintiff respectfully submits that the defendant should be compelled to turn over the videographer's notes, logs, reports and billing records so that plaintiff will have the ability to challenge the videographer's testimony.

It would be inconsistent to hold that the videographer is required to answer all questions surrounding the filming of plaintiff, as directed by the Supreme Court, and then hold that the documents involving the same information, which would allow the plaintiff to test the veracity of the videographer's testimony, is not discoverable. The file of the videographer provides a record which may assist in the pursuit of the truth and allow fair challenge to the presentation of pseudo-expert testimony.

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. Because the surveillance materials directly relate to the plaintiffs' 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," the court decided in *Gardner v. Norfolk Southern Corporation*, 299 F.R.D. 434 (D.N.J. 2014) "Fairness 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.

Beyond all this, this Court always has the inherent power under Rule 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 taking asking the same questions over again of this fragile woman, and as the record otherwise shows, good cause is present. The Court could thus properly enter a protective order under R. 4:10-3 that no third deposition of the plaintiff will take place and the videos must be produced now. Certainly such a decision would be appellate-proof.

For all these reasons it is respectfully requested the Court Order that Defendants immediately turn over the surveillance video and all associated materials. Alternatively the Court could bar defendants’ use of the video and all associated materials and testimony at trial. The Court could also Order production of all the associated materials.

Respectfully submitted,

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For the Firm

GHC/bhs
Enclosures
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