V I R G I N I A :

IN THE CIRCUIT COURT CITY OF RICHMOND
John Marshall Courts Building

, Plaintiff,

v. Case No.:

, et al, Defendants

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY

The plaintiff, by counsel, submits this memorandum in support of her Motion to Compel Discovery.

I. INTRODUCTION.

The plaintiff, sustained severe and permanent injuries and now suffers from Reflex Sympathetic Dystrophy as a result of her injuries.

On August 19, 1997, the defendants took the deposition of Plaintiff. The deposition was detailed and lengthy as the transcript contains 196 pages. During the course of the deposition, Plaintiff was asked to answer many questions regarding her health condition, the injuries she sustained, the treatment she has received, and her disabilities and limitations resulting from her injuries.

Currently, Plaintiff lives in Pennsylvania, and recently she has experienced various incidents where her vehicle was nearly run off the road and where she and her children were harassed and frightened by individuals attempting to capture her

and her family on videotape. Plaintiff contacted the local police department about the matter and the police department conducted an investigation. After the police became involved, the harassment subsided.

In response to discovery requests served by the plaintiff on the defendants requesting production of any surveillance materials obtained, the defendants have disclosed that they are in possession of a videotape depicting the plaintiff that was taken after August 19, 1997. In their responses to discovery, the defendants have objected to requests to produce the videotape itself on the grounds that it is protected from discovery by the work product doctrine and Rule 4:1(b)(3) of the Rules of the Supreme Court of Virginia. The defendants have offered to produce the videotape if the plaintiff will provide a second deposition.

II. POINTS AND AUTHORITIES.

A. The videotape is discoverable.

Rule 4:1(b)(3) of the Rules of the Virginia Supreme Court sets forth the work product doctrine as applied in Virginia. Rule 4:1(b)(3) provides that documents that are prepared in anticipation of litigation or for trial are not discoverable unless the party seeking discovery shows that it has substantial need of the materials and can not obtain the substantial equivalent thereof without undue hardship. The party resisting discovery and asserting the protection of the work product privilege bears the burden of proving that the documents at issue fall under the protection of the privilege. See, Robertson v. Commonwealth, 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943).

Plaintiff anticipates that the videotape possessed by the defendants depicts the plaintiff engaging in certain physical activities. These materials would be evidence of the plaintiff's capabilities and/or disabilities, and are often referred to as "surveillance materials". Such surveillance are not protected from discovery by the work product doctrine.

The Supreme Court of Virginia has not decided the issue of whether surveillance materials are protected by the work product doctrine. There are, however, four reported opinions in Virginia on this issue from this Court, and discovery has been compelled in three of those cases. See, Lee v. Richmond, Fredericksburg and Potomac Railroad Co., 23 Va. Cir. 357 (Richmond 1991); McIntyre v. CSX Transportation, Inc., 22 Va. Cir. 302 (Richmond 1990; Moore v. CSX Transportation, Inc., 22 Va. Cir. 97 (Richmond 1990); cf. Smith v. National Railroad Passenger Corp., 22 Va. Cir. 348 (Richmond 1991).

Judge Randall Johnson, in Lee, the most recent of the four cases, found that the surveillance videotape was prepared in anticipation of litigation, and therefore in order for the requesting party to obtain discovery of the videotape, he had to show that he was "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Judge Johnson reasoned that although the videotape would only depict the plaintiff's activities, and the plaintiff had knowledge of any activities he may have been engaged in, the plaintiff could not possibly guess which particular activity he was videotaped engaged in. Without knowing what the surveillance materials depicted, it would be impossible to obtain their substantial

equivalent. Even if the plaintiff could guess what the videotape depicted it would be impossible to obtain the substantial equivalent because the videotape was unique in that it could never be created again.

Judge Johnson proceeded to reject the defendant's argument that allowing discovery of the surveillance tapes would lead to embellishment or perjury of the plaintiff's claims. Judge Johnson opined that any such holding accepting that argument by the defendant would be directly contrary to the primary purposes of the discovery rules: preventing surprise and facilitating an orderly and expeditious trial. Judge Johnson relied on the Supreme Court of Virginia's adoption of the discovery rules removing surprise as an element of litigation in Virginia as support for his decision.

In Lee, Judge Johnson further reasoned that denying discovery of the surveillance materials would cause unwanted and needless delay in the trial because once the materials were offered, the trial would have to be stopped to allow opposing counsel to view the tapes and make appropriate objections. If the objections are sustained, then further delay would inevitably ensue as the materials would require editing.

Judge Johnson also disagreed with published opinions that implicitly or explicitly assume that plaintiffs and their attorneys are inherently more dishonest than defendants and their attorneys. Judge Johnson concluded his reasoning for compelling discovery by citing to an opinion from a Pennsylvania court which set forth the various manners in which surveillance materials may be misleading:

> . . . the camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be slowed down or speeded up. The editing and splicing of films may change the chronology of events. An emergency situation may be made to appear commonplace. That which has occurred once can be described as an example of an event which recurs frequently. We are all familiar with Hollywood techniques which involve stuntmen and doubles. Thus, that which purports to be a means to reach the truth may be distorted, misleading, and false. Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa.1973).

In McIntyre, Judge Robert Harris also found surveillance materials to be discoverable, by reasoning that plaintiff needs to assure, and should have an opportunity for meaningful investigation of, the accuracy of any such materials.

Judge Melvin Hughes, in Moore, granted the plaintiff's discovery request for a surveillance film finding that the plaintiff needed to remove the element of surprise and prepare for trial. The purpose of the discovery rules is to remove the element of surprise by letting each side know the evidence. Judge Hughes rejected the defendant's argument that discovery should not be compelled because the plaintiff knew his own activities and lifestyles better than anyone else. Judge Hughes reasoned that the plaintiff still needed to ascertain the occasion recorded and have details which his memory alone could not supply; and concluded that the plaintiff could not obtain a substantial equivalent of the tape because his past activities could no longer be filmed.

In Moore, Judge Hughes explicitly stated what was implicit in Lee and McIntyre, that the surveillance materials are not absolutely protected under the

work product doctrine because they clearly do not implicate disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel. Unlike the lone opinion in Smith rejecting discovery, these three opinions are in accord with the weight of authority on this issue.

Discovery of surveillance materials was also compelled in Wilson v. Irizarry, At Law No. CL95-823 (Chesterfield Cir. Ct. 1996). In Wilson, Judge Herbert C. Gill, Jr. compelled the defendant to identify and produce any surveillance materials he possessed. (See Order attached hereto as Exhibit A).

B. Courts in other jurisdictions compel discovery of surveillance materials.

Because few courts in Virginia have issued opinions on the subject, decisions rendered in other jurisdictions further elucidate the reasons for compelling discovery. The weight of authority on the issue of the discoverability of surveillance material favors compelling the discovery. Wegner v. Cliff Viessman, Inc., 153 F.R.D. 154, 159 (N.D. Iowa 1994)("The published decisions uniformly compel discovery of the information" at 156). Forbes v. Hawaiian Tug & Barge Corp, 125 F.R.D. 505, 507 (D. Hawaii 1989); Corack v. Travelers Ins. Co., 347 So.2d 641, 642 (Fla. Dist. Ct. App. 1977); Spencer v. Beverly, 307 So.2d 461, 462 (Fla. Dist. Ct. App. 1975).

Courts in other jurisdictions have condemned the use of surveillance material as surprise at trial. Hoey v. Hawkins, 332 A.2d 403, 406 (Del. 1975)("The obvious tactical objective sought was surprise and that does not comport with the spirit of the

Discovery Rules."). One court declared, "[t]he 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 and developing counter-evidence is gone or at least greatly diminished." Jenkins v. Rainner, 350 A.2d 473, 477 (N.J. 1976).

Courts also have recognized the potential for abuse in the creation and use of surveillance materials. This potential for misuse has best been explained by the court in Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D. Pa. 1973) in the passage cited in Judge Johnson's opinion and quoted above. See also, DiMichel v. South Buffalo Ry. Co., 604 N.E.2d 63, 68 (N.Y. 1992), cert. denied 114 S. Ct. 68 (1993)("Because films are so easily altered, there is a very real danger that deceptive tapes, inadequately authenticated, could contaminate the trial process. . . . surveillance films are extraordinarily susceptible to manipulation, and, once altered, are peculiarly dangerous."); Jenkins v. Rainner, 350 A.2d 473, 477 (N.J. 1976)(surveillance films); Olszewski v. Howell, 253 A.2d 77, 78 (Del. Super. Ct. 1969)(surveillance film).

Only by acquiring these materials can the plaintiff establish their accuracy and authenticity. Plaintiff may also need to depose the individuals responsible for making the surveillance materials in order to aid in establishing their accuracy and authenticity, and to ascertain the circumstances surrounding their creation. Courts have continually found these reasons to be sufficient to establish substantial need. See, Suezaki v. Superior Court of Santa Clara County, 373 P.2d 432 (Cal.

1962)(discovery granted to plaintiff who had to protect against surprise and to prepare examination of person who took pictures); Atchison, Topeka & Santa Fe Railway Co. v. Superior Court, 25 Cal Rptr. 54 (Cal. Dist. Ct. App. 1962)(trial court did not abuse its discretion in ordering production of surveillance photos in order to protect against surprise and to prepare cross examination of photographer); Prewitt v. Beverly-50th Street Corp., 546 N.Y.S.2d 815, 816 (N.Y. Sup. Ct. 1989)(production of surveillance film ordered because plaintiff had substantial need to examine and test film's authenticity and undue hardship was manifest); Ancona v. Net Realty Holding Trust Co., 583 N.Y.S.2d 784 (N.Y. Sup. Ct. 1992)(plaintiff entitled to discovery of any motion pictures, videotapes, or other surveillance photographs because has substantial need to ascertain the accuracy and authenticity of these materials and inability to duplicate); Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102 (E.D. N.C. 1993)(disclosure allows plaintiff to review the materials for authenticity and properly prepare for trial).

It is anticipated defendants may make the argument rejected by Judge Johnson, that the surveillance materials should not be discovered in order to retain a disincentive for the plaintiff to alter the truth at trial. Judge Johnson rejected this argument failing to accept that plaintiffs are more likely to alter the truth than defendants. Furthermore, incentive also exists for the defendants to alter the truth, and "[o]nce it is conceded, as it must be, that not only those surveilled may be tempted to alter the truth, but that those conducting the surveillance may be subject to the same temptation, it becomes clear that surveillance information and material

must be subject to discovery." Boyle v. CSX Transportation, Inc., 142 F.R.D. 435, 437 (S.D. W.Va. 1992). Accord, Jenkins v. Rainner, 350 A.2d 473, 477 (N.J. 1976)("It is no more unlikely that a defendant may resort to chicanery in fabricating motion pictures of one alleged to be the plaintiff than it is that a plaintiff may indeed be a faker.").

Contrary to the anticipated argument by the defendants, it is significant that Plaintiff has already been deposed, has provided interrogatory answers, and the defendants have Plaintiff's medical records. Because of these facts, her position on the injuries she sustained has already been established by the pretrial record. The Court in Olszewski was presented with the identical factual circumstances and argument by the defendant, but found the risk of disclosure to be minimal and therefore ordered disclosure.

Courts in other jurisdictions have concluded, as Judge Johnson and Judge Hughes, that parties can not obtain the surveillance materials, or their equivalent, by any other manner short of compelling production by the defendants. It is obviously impossible to turn back the hand of time to make any recordings of the circumstances in the surveillance material in the defendants' possession. See, Martin v. Long Island Rail Road Co., 63 F.R.D. 53, 55 (E.D. N.Y. 1974). Without knowing exactly what the surveillance materials depict, and because the materials are unique, it is impossible for Plaintiff to obtain their substantial equivalent. See, DiMichel v. South Buffalo Ry. Co., 604 N.E.2d 63, 69 (N.Y. 1992), cert. denied 114 S.

Ct. 68 (1993)("visual evidence of this kind is unique because it memorializes a particular set of conditions that can likely never be replicated.").

C. The purposes of the discovery rules favor discovery.

Courts rendering decisions on this issue also echo Judge Johnson's and Judge Hughes' reasoning that the broad discovery rules favor disclosure and militate against trial by surprise. See, Crist v. Goody, 507 P.2d 478, 480 (Colo. Ct. App. 1972)(surveillance movies are discoverable as "the purpose of the discovery rule . . . is to eliminate secrets and surprises at trial, simplify the issues, and lead to fair and just settlements without having to go to trial."); Pettus v. Hurst, 882 S.W.2d 783, 786 (Tenn. Ct. App. 1993)("The Tennessee Rules of Civil Procedure embody a broad policy favoring the discovery of any relevant, non-privileged information. Their purpose is to do away with trial by ambush, and to rid trials of the element of surprise that often leads to results based not upon the merits but upon unexpected legal maneuvering." Citations omitted); Prewitt v. Beverly-50th Street Corp., 546 N.Y.S.2d 815, 816 (N.Y. Sup. Ct. 1989)("The policy of broad and liberal disclosure has been applied so as to prevent surprise or prejudice at trial in many decisions of courts in other jurisdictions which permitted disclosure of surveillance films, videotapes, and the like.").

When parties have greater access to the evidence as a result of broad discovery, trial decisions will result more from a "disinterested search for truth from all the available evidence rather than tactical maneuvers based on the calculated

manipulation of evidence and its production." Olszewski v. Howell, 253 A.2d 77, 78 (Del. Super. Ct. 1969)(surveillance discoverable). See also, Martin v. Long Island Rail Road Company, 63 F.R.D. 53, 54 (E.D. N.Y. 1974)(Court ordered the production of photographs and movies as "cases are more likely to be decided fairly on their merits if the parties are aware of all the evidence. Both sides are then in a position to contradict opposing evidence and the adversarial process works most efficiently."); Jenkins, 350 A.2d at 477 (adversarial system works most efficiently where parties are aware of all of the evidence).

Courts that rely on the broad discovery rules have opined that modern trials are to be fair contests where each party can knowledgeably evaluate the strength of its evidence and chances of success rather than games of blind man's bluff, Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 517 (5th Cir. 1993)(only U.S. Court of Appeals known to address this issue, and held that surveillance videotape had to be disclosed), or poker where artifice and camouflage are rewarded, Boldt v. Sanders, 111 N.W.2d 225, 227-228 (Minn. 1961)(in rejecting party's argument that surveillance should not be discoverable the Court said that "to revert to this philosophy would be judicial retrogression undermining the whole purpose of the rules of civil procedure. . . . It is essential to the achievement of justice that all of the admissible evidence be brought to light in time for both parties to evaluate it and adequately prepare for trial or settlement with full knowledge of the facts.").

By providing for broad discovery, courts can also promote settlement of cases as each party will have greater knowledge of the evidence that would be presented at

trial. Moore, 22 Va. Cir. at 98; Blount, 162 FRD at 104; Olszewski, 253 A.2d at 78; Martin, 63 F.R.D. at 54. By allowing for discovery at this juncture, courts will also avoid needless delay in trials that would invariably result when the surveillance materials were offered into evidence, a point specifically made by Judge Johnson. See also, Jenkins, 350 A.2d at 477 (the delay that would inevitably ensue should be avoided).

Defendants may also make another argument specifically rejected by both Judge Johnson and Judge Hughes, that the plaintiff should not be entitled to discovery of surveillance because any materials would only show that which the plaintiff knows better than anyone else - the truth of her physical condition. However, this argument against discovery has also been repeatedly rejected by courts in other jurisdictions. See, DiMichel, 604 N.E.2d at 68-69. For example, in Jenkins v. Rainner, 350 A.2d 473 (N.J. 1976) the defendant argued that the plaintiff did not have substantial need for the materials because she herself knew better than anyone else the truth of her physical condition. The court rejected that argument and stated that "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." Id. at 476.

In order to adequately prepare for trial, Plaintiff must have the surveillance material. Because surveillance materials, especially photographs and videotapes, can be misleading it is important for Plaintiff to be able to examine the materials with sufficient time for detailed analysis. McIntyre v. CSX Transportation, Inc., 22

Va. Cir. 302 (Richmond 1990)(surveillance videotape must be produced prior to trial); Boyle v. CSX Transportation, Inc., 142 F.R.D. 435, 437 (S.D. W.Va. 1992): ("if the adversarial process is to function efficiently, discovery must be accomplished at a time when opportunity exists to test, through further discovery, the manner and means by which surveillance was conducted."). By compelling disclosure at this time Plaintiff will have sufficient opportunity to prepare for trial.

D. Production of the videotape cannot be made contingent upon submitting to a second deposition.

The attorneys for the defendants have conditioned production of the videotape upon Plaintiff's submitting to a second deposition. This is nothing more than a thinly disguised attempt to make up for the fact that they are new counsel of record and have not had the opportunity to "see and question" Plaintiff. The defendants have already conducted a lengthy deposition, by their former counsel of Hunton & Williams, during which Plaintiff was required to answers a multitude of questions regarding her health condition, the injuries she sustained, the treatment she has received, and her disabilities and limitations resulting from her injuries. At the time of her deposition, Plaintiff's injuries were so severe that she had been unable to work since June of 1995. Plaintiff suffers the same condition, Reflex Sympathetic Dystrophy, which was diagnosed in 1995. Her condition, treatment, and activities are essentially unchanged since the time of her deposition. The defendants are in possession of Plaintiff's medical records which detail her health condition at all times, and are scheduled to take the deposition of her treating neurologist on April 7, 1998. Furthermore, Plaintiff is submitting to a medical examination in April with a physician and psychologist chosen by the defendants.

The Rules of the Supreme Court of Virginia contain no condition that a party submit to multiple depositions in order to obtain discoverable information from an opposing party, and no such requirement should be fashioned by this Court. Should the defendants be permitted to condition discovery of the videotape upon multiple

depositions, then all defendants could obtain surveillance materials throughout the litigation process and require plaintiffs to submit to separate depositions after each surveillance material was created. It would therefore become the case that a plaintiff could have to submit to three, four, five, or more depositions simply in order to obtain the materials necessary to prepare for trial. This scenario elucidates the imprudence in conditioning discovery upon a plaintiff submitting to additional depositions.

E. Production of the videotape should be required immediately so that plaintiff can conduct additional discovery into the circumstances surrounding the creation of the videotape.

Plaintiff and her family have been harassed and terrorized by the individuals suspected to have created the videotape. Counsel for plaintiff may need to conduct future discovery into the circumstances surrounding the creation of the videotape in order to adequately present the information on these matters to the jury at trial. By ordering the defendants to produce the videotape immediately, plaintiff will have the ability to conduct any necessary out-of-state formal and informal discovery into the relevant circumstances.

III. CONCLUSION.

For the foregoing reasons, Plaintiff requests that the Court order that Defendants produce a copy of the videotape to counsel for the plaintiff, and that the plaintiff be awarded reasonable expenses incurred, including attorney's fees, in bringing this motion before the court.

By_____
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This brief was filed by Carolyn Lavecchia to compel a defendant to produce video surveillance we suspected the defendant was taking of our client in a medical malpractice action. To learn more about our practice areas, please visit our website or click here to contact Carolyn Lavecchia.