

IN THE SUPERIOR COURT OF WARE COUNTY

STATE OF GEORGIA

ROBERT J. LEE AND DONNA M. LEE,

Plaintiffs,

vs.

ALLGOOD SERVICES, INC., A GEORGIA  
CORPORATION, AND JOSHUA C. WHITE,  
INDIVIDUALLY,

Defendants.

CIVIL ACTION FILE

NO.: 11-V-0123

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**ORDER ON PENDING DISCOVERY DISPUTES**

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The above-captioned lawsuit arises out of a motor vehicle accident that occurred on July 22, 2010 in Waycross, Georgia. Plaintiffs are seeking damages for personal injuries allegedly sustained in the accident. Defendants answered and generally denied the allegations of plaintiffs' Complaint. At issue before the Court are: (1) Plaintiffs' Motion to Compel the results of surveillance conducted by Defendants (2) Defendants' Motion to Compel plaintiff Robert Lee to sign HIPAA compliant authorizations, and (3) Defendants' Motion to Open and Extend Discovery. Following a hearing on October 25, 2013, and in the exercise of this Court's discretionary authority to control the time and scope of discovery, it is HEREBY ORDERED as follows:

- (1) Plaintiffs' Motion to Compel the results of surveillance conducted by Defendants.

On July 19, 2013, plaintiffs served defendants with their supplemental interrogatories and request for production of documents. Among other things,

plaintiffs have requested that defendants disclose the name and contact information for each person hired by defendants, their attorney, or their insurer to perform surveillance on plaintiffs after the commencement of this suit, the identity of each person who played any role in the decision to perform surveillance on plaintiffs after the commencement of this suit, including insurance adjusters and the defendants' attorneys, and the production of any reports prepared by a private detective hired by the defendants, their attorney, or their insurer to conduct surveillance on plaintiffs after the commencement of this suit. Defendants filed a timely objection to plaintiffs' supplemental discovery requests and have moved this Court for a Protective Order. Defendants contend that the information requested by plaintiffs is protected by the work product doctrine. Defendants also contend that the existence of surveillance and surveillance materials constitute impeachment evidence which are outside the scope of discovery.

O.C.G.A. § 9-11-26(b)(1) defines the scope of discovery in Georgia. That statute provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." One such privilege is the work product privilege, which was first recognized by the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the Supreme Court found that the doctrine promoted the "orderly prosecution and defense of legal claims" by providing attorneys with a zone of privacy "essential to [their] adversary role." Id. at 510-11. Georgia has long recognized the privilege of work product materials, which

consists of information and documents utilized and obtained by an attorney to prepare his client's case, including interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, legal strategy, intended lines of proof, and countless other tangible and intangible items. See, e.g., Atl. Coast Line R. Co. v. Daugherty, 111 Ga. App. 144, 151-52, 141 S.E.2d 112, 117 (1965); McKinnon v. Smock, 264 Ga. 375, 376, 445 S.E.2d 526, 527 (1994).

Although the Georgia Appellate Courts have not ruled on the discoverability of surveillance, this issue has been addressed by courts in other jurisdictions. Some courts have held that the existence of surveillance and surveillance materials are absolutely protected by the work product doctrine. Fletcher v. Union Pac. R.R., 194 F.R.D. 666, 670 (S.D. Cal. 2000); Ward v. CSX Transp., Inc., 161 F.R.D. 38, 40 (E.D.N.C. 1995); St. Louis Public Service Company v. McMillian, 351 S.W.2d 22 (Missouri Supreme Court, 1961). Other courts have held that the existence of surveillance and surveillance materials constitute impeachment evidence and are only discoverable if the defendant intends to use them as substantive evidence at trial. Bogatay v. Montour Railroad, 177 F. Supp. 269 (W.D. Pa. 1959); Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (United States District Court, Pennsylvania, 1973); Gibson v. National Railroad Passenger Corp., 170 F.R.D. 408, 410 (E.D. Pa. 1997). Finally, some courts have held that the existence of surveillance and surveillance materials are not protected by the work product doctrine and must be produced through discovery.

This Court finds that the existence of surveillance and surveillance materials constitute impeachment evidence which fall outside of the scope of discovery. This Court also agrees with the approach followed by the courts in Bogatay v. Montour Railroad, 177 F. Supp. 269 (W.D. Pa. 1959); Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (United States District Court, Pennsylvania, 1973); Gibson v. National Railroad Passenger Corp., 170 F.R.D. 408, 410 (E.D. Pa. 1997). Therefore, it is hereby **ORDERED** that Plaintiffs' Motion to Compel and For Sanctions is **DENIED**, and Defendants' Motion for a Protective Order is **GRANTED**. The defendants are not required to respond to plaintiffs' supplemental interrogatories and request for production of documents unless the defendants have conducted surveillance and intend to use the results of surveillance as substantive evidence at trial. That is, the defendants are not required to answer said discovery if they only intend to use the results of surveillance for impeachment purposes, or if they do not intend to use the results of surveillance in any manner at trial. The burden will be on the defendants to determine the manner in which surveillance will be used at trial (if at all), but if the defendants attempt to introduce evidence of surveillance in the substantive part of their case at trial, said evidence may be excluded if it is not produced to the plaintiffs' attorney through discovery and prior to trial.

(2) Defendants' Motion to Compel plaintiff Robert Lee to sign HIPAA compliant authorizations in order to obtain his records from the United States Government, particularly the VA, as well as medical providers located outside of the State of Georgia.

Through discovery, the defendants have determined that plaintiff Robert Lee treated with the Veterans Administration medical facilities ("VA") in Gainesville, Florida and Lake City, Florida after the accident, and the defendants believe that Mr. Lee has also treated with a VA medical clinic in Waycross, Georgia. Furthermore, Mr. Lee treated at St. Vincent's Hospital in Jacksonville, Florida before the accident. Defendants formally requested Mr. Lee's medical records from these providers pursuant to O.C.G.A. § 9-11-34; however, all of the providers have refused to provide the requested documents, and issued responses indicating that no records would be produced without a HIPAA compliant authorization accompanying the requests. The defendants then requested that Mr. Lee execute the authorizations required by the VA and St. Vincent's Hospital, but Mr. Lee has refused to do so. Accordingly, the defendants filed a Motion to Compel Mr. Lee to sign said authorizations so that his medical records can be obtained.

Georgia law provides that where one places his physical health and the extent of his injuries at issue in a civil proceeding, he waives his privacy privilege as to his health records (except to the extent the records are protected under Georgia's mental health, or related privileges). O.C.G.A. § 24-9-40.

Further, it is well-established under Georgia law that

Discovery is an integral and necessary element of our civil practice. Wide latitude is given to make complete discovery possible. The broad purpose of the discovery rules, under the Civil Practice Act, is to enable the parties to prepare for trial so that each party will know the issues and be fully prepared on the facts. Discovery is specifically designed to fill a two-fold purpose: issue formulation and factual revelation. The use of the discovery process has been held to be broadly construed.

Moses v. Jordan, 310 Ga. App. 637, 714 S.E.2d 262 (2011).

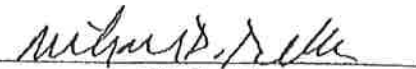
Additionally, under Georgia law “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery...” Mincey v. Ga. Ve’t of Cmty. Affairs, 308 Ga. App. 740, 708 S.E.2d 644 (2011). (Cits. Omitted). Finally, the trial court has the authority to facilitate discovery and Order a party to execute a medical authorization as a prerequisite to prosecuting his claim. *See e.g. Arby's Rest. Grp., Inc. v. McRae*, 292 Ga. 243, 734 S.E.2d 55; Doye v. Martin, No. CV408-174, 2010 WL 3463614, at \*2 (S.D. Ga., August 31, 2010).

Here, Mr. Lee has placed his physical health at issue in this litigation, and the records sought by the defendants are relevant to the issues presented in this suit. Moreover, this Court may not have jurisdiction over the VA or St. Vincent’s Hospital, but does have jurisdiction over Mr. Lee on account of him filing the above-captioned lawsuit. Therefore, Defendants’ Motion to Compel is hereby **GRANTED**, and Robert Lee is **ORDERED** to provide signed HIPAA compliant authorization forms to counsel for defendants within **twenty (20) days** from the date of this Order. Said HIPAA compliant authorization forms shall allow counsel for defendants to obtain Mr. Lee’s records from the Veterans Administration medical facilities in Lake City, Florida, Gainesville, Florida, Waycross, Georgia, and St. Vincent’s Hospital in Jacksonville, Florida.

(3) Defendants’ Motion to Open and Extend Discovery

It is hereby **ORDERED** that Defendant's Motion to Open and Extend Discovery is **GRANTED**. Discovery shall be extended for **four (4) months** from the date of this Order.

SO ORDERED, this the 16 day of December, 2013.

  
Honorable Michael D. DeVane  
Judge, Superior Court of Ware County

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