Georgia Defense Lawyers Association
Advancing the Civil Defense Bar©
www.gdla.org | 404.816.9455

GEORGIA DEFENSE LAWYER©

Volume XI, Issue III • Winter 2014

To Catch a Plaintiff:

Production of Surveillance Evidence Prior to Trial

By Whitney Lay
Drew Eckl & Farnham, Brunswick

The following is a commonplace scenario in a general liability claim. Plaintiff alleges personal injuries as a result of an accident on Defendant's premises. Defendant hires an investigator to perform surveillance on Plaintiff.

In discovery, Plaintiff requests any surveillance videos or photographs and the name of the investigator who obtained them. Defendant discloses the existence of surveillance but objects to its production on the grounds that such evidence is protected by the work-product privilege and/or is outside the scope of discovery because its sole potential use would be to impeach the Plaintiff's testimony at trial. Plaintiff files a motion to compel production of the surveillance. Then comes the tricky part—what happens next?

Background

The Georgia appellate courts have not addressed the issue of whether surveillance is discoverable under the Georgia Civil Practice Act. However, the issue has been addressed multiple times by trial courts in Georgia and also by various federal and state jurisdictions. The determinations reached by those courts vary significantly.

A number of those courts held that surveillance is discoverable, but production is not required until after the defendant deposes the plaintiff. Other courts (including several trial courts in Georgia) held that surveillance is not discoverable at all. There are certainly sound policy considerations and rationales behind both sets of decisions. At the root of the issue are three questions:

- Is surveillance protected by the work-product privilege?
- If so, can a plaintiff show substantial need and undue hardship such that the privilege is overcome?
- Aside from the work-product questions, can a defendant withhold surveillance when its sole

Continued on page 44

Inside This Issue

Past President Bubba Hughes Honored with DRI Award

The GDLA is pleased to announce that DRI honored GDLA Past President Edward M. (Bubba) Hughes of Callaway Braun Riddle & Hughes in Savannah with the 2014 Kevin Driskill Outstanding State Representative Award.

Bubba Hughes is congratulated by DRI President John Parker Sweeney (left) and DRI Executive Director John Kouris (right).

The award was bestowed at the DRI Annual Meeting in San Francisco during the awards luncheon on October 23, 2014.

Hughes began his service as the GDLA State Representative to DRI in October 2011. During his three-year term, he made significant contributions toward promoting DRI membership within Georgia, and was consistently ranked at the top among State

Continued on page 3

potential use is as impeachment evidence?

The Work-Product Privilege

O.C.G.A. § 9-11-26(b)(1) defines the scope of discovery in Georgia state courts.

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[...]" (emphasis added). More than 40 years ago, the Georgia Supreme Court affirmed a trial court's ruling that surveillance materials fall within the work-product privilege. In *Smith v. Smith*, 223 Ga. 551, 554 (1967), an action for divorce and alimony, the plaintiff-wife sought a copy of a private investigator's report.

Defense counsel had hired the investigator to perform surveillance on the plaintiff after the suit was filed. In reviewing the trial court's denial of the plaintiff's request, the Georgia Supreme Court focused on the fact that the surveillance was performed after suit was filed and after the creation of an attorney-client relationship and ultimately held that what was done by the investigator at the attorney's behest was no different than work done by the attorney himself. Id. at 554-556.

The *Smith* Court's rationale has been cited positively in several subsequent appellate cases in Georgia. *See, e.g., McMillan v. Gen. Motors Corp.*, 122 Ga. App. 855 (1970); *Jones v. Scarborough*, 194 Ga. App. 468 (1990); *Heyde v. Xtraman, Inc.*, 199 Ga. App. 303 (1991); *Stinski v. State*, 286 Ga. 839 (2010).

O.C.G.A. § 9-11-26(b)(3) addresses materials prepared in anticipation of litigation or for trial and provides that a party may obtain discovery of such documents and things only upon a showing that the party seeking discovery has *substantial need* of the materials and that he is unable without *undue hardship* to obtain the substantial equivalent of the materials by other means. See, e.g., *Lowe's of Ga. v. Webb*, 180 Ga. App. 755, 757 (1986). Thus, in order to compel production of work-product protected video footage, the plaintiff must demonstrate both prongs of the requirement.

In an effort to meet the "substantial need" and "undue hardship" requirements, plaintiffs typically argue that they have an interest in reviewing the surveillance material in order to ensure that the material has not been altered and is not misleading. Plaintiffs also point to the fact that they cannot obtain the substantial equivalent of the tape because the material is not reproducible, does

not exist elsewhere, and is in the sole custody of the defendant. In response, defendants typically argue that the plaintiff knows exactly what activities will be depicted on the surveillance because it is the plaintiff who performed them. As such, the plaintiff's direct, personal knowledge amounts to the "substantial equivalent" of the video surveillance.

Georgia Trial Courts

As noted above, this issue has not been addressed by the Georgia appellate courts, and the trial courts addressing the issue have come to different conclusions. In a May 2011 Order, the Superior Court of Whitfield County determined that surveillance was protected by the work-product privilege and that the plaintiff did not meet their burden of establishing substantial need and undue hardship. See *Michael Doran, et al. v. John C.B. Wall, D.C., et al.*, No. 10-CI-415-B (Superior Court of Whitfield County, May 2011).

In so doing, the Order noted that the plaintiff had direct personal knowledge of what was recorded on the tapes, which was the "substantial equivalent" of the tapes themselves. *Id.* Nevertheless, the court determined that if the defendants intended to use the surveillance at trial, it must be turned over to the plaintiff no later than the date of the pretrial conference (which defendant had previously agreed to do). *Id.*

In a July 2014 Order, the State Court of Liberty County likewise determined that if the defendant intended to use surveillance video at trial (for any reason), the materials must be produced. See *Allyson Rorro, et al. v. Wal-Mart Stores East, LP*, No. 11SV243 (State Court of Liberty County, July 2014).

In a December 2013 Order, the Superior Court of Ware County held that surveillance video was protected by the work-product doctrine and the plaintiff had not met their burden of showing substantial need and undue hardship. See *Robert J. Lee, et al. v. Allgood Services, Inc., et al.*, No. 11-V-0123 (Superior Court of Ware County, Dec. 2013). However, the court also held that the defendant was only required to produce the video if it intended to use the video as *substantive evidence* (rather than for impeachment) at trial. *Id.*

Taking a variation on the previous two approaches, in a December 2012 Order the State Court of DeKalb County held that the defendant was required to identify the persons who conducted surveillance and that those persons should be treated as any other "fact" witness, making discovery of any facts observed by the investigator—either through deposition or on cross-examination at trial—permissible. See *Veronica Leftridge v. Swift Transp. Co. of AZ, LLC, et al.*, No. 12A40860-7 (State Court of DeKalb County, Dec. 2012). However, similar to the Ware County Superior Court, the DeKalb County State Court held that the actual surveillance tapes and written reports constituted work product and that plaintiff had not established that she had substantial need for them or that she was unable to obtain the substantial equivalent of the materials without undue hardship. *Id.*

Taken as a whole, there are similarities running across all of these orders. First, the courts that determined surveillance was discoverable only ordered the production of the materials if the defendant intended to use it at trial, and even then only after the plaintiff's deposition. Second, each judge came to the conclusion that surveillance video was work product, thus affording it the statutory protections given to such privileged information.

Persuasive Authority and Policy Rationales

All of the Georgia trial courts that have addressed the issue of production of surveillance rely, at least in part, on persuasive authority from other state and federal jurisdictions. An examination of this authority reveals that, generally, there are two primary schools of thought: (1) surveillance is not discoverable at all, and (2) surveillance is discoverable—after pre-production discovery.

Courts holding that the surveillance is not discoverable have focused on the importance of ensuring the honesty of plaintiffs. These courts have also determined that the general trend in favor of access to all relevant material and the possibility that the surveillance materials may be misleading were not sufficient to warrant pre-trial disclosure of work-product privileged materials. See, e.g., *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); *Hikel v. Abousy*, 41 F.R.D. 152 (D. Md. 1966); *St. Louis Public Service Co. v. McMillan*, 351 S.W.2d 22 (Mo. 1961); *Ranft v. Lyons*, 163 Wis. 2d 282 (Wis. Ct. App. 1991).

Other jurisdictions have adopted a more middle-of-the-road approach, determining that surveillance is work product, but that other considerations can warrant its production. Courts taking this position typically focus on the fact that the plaintiff's previous activities can no longer be filmed so the plaintiff cannot obtain the substantial equivalent of the surveillance video.

Additionally, they emphasize the uniquely persuasive and potentially prejudicial nature of video, and the importance of allowing the plaintiff an opportunity to ensure the video is not misleading and has not been altered. These courts also indicate that production increases the likelihood of pre-trial settlement, because it ensures that both parties are aware of all of the evidence relevant to the case.

It should be noted, however, that all of these courts allowed for "pre-production" discovery, such as depositions and interrogatories. In so doing, these courts reasoned that the defendant's ability to obtain sworn testimony from the plaintiff before disclosing the contents of the surveillance would blunt the plaintiff's ability to "tailor" her testimony around the activities revealed therein. *See,*

e.g., Roa v. Tetrick, No. 1:13-CV-379, 2014 U.S. Dist. LEXIS 24619, 2014 WL 695961 (S.D. Ohio Feb. 24, 2014); *Martin v. Long Island R.R. Co.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Cabral v. Arruda*, 556 A.2d 47 (R.I. 1989); *Pioneer Lumber v. Bartels*, 673 N.E.2d 12, 18 (Ind. Ct. App. 1996).

Impeachment Evidence

Another argument against the disclosure of surveillance is that its sole potential use at trial is as impeachment evidence, which is outside the scope of discovery under Georgia law. In *Ballard v. Meyers,* 275 Ga. 819 (2002), the Supreme Court of Georgia held that there was no requirement to disclose documents in a pre-trial order which may be used at trial to attack the credibility of the other side's witnesses. *Id.* at 820.

The Court reasoned that defense counsel is entitled to presume a plaintiff will testify truthfully up until he or she actually fails to do so. However, the Court noted that the presumption of veracity is only a reasonable, not an irrebuttable, one and a good trial lawyer should be prepared to rebut contrary testimony or evidence that is false. *Id.* at 821-22. Although the *Ballard* decision specifically applied to the disclosure of impeachment evidence in the pre-trial order, arguably the same rationale applies to the disclosure of surveillance as well.

Similarly, the rulings in a pair of Georgia Court of Appeals cases suggest that evidence not initially disclosed can be properly admitted for the sole purpose of impeaching a witness's testimony and credibility. In *Morris v. State Farm Mut. Ins. Co.*, 203 Ga. App. 839 (1992), the plaintiff sued his automobile insurer based on the processing of a claim under his policy. *Id.* at 839. At trial, the court admitted evidence of a complaint and other documents filed in an earlier accident, solely for impeachment purposes.

The Georgia Court of Appeals affirmed the ruling, holding that "a party may show anything which may, in the slightest degree, affect the credibility of an opposing witness." *Id.* The Court further stated that a "witness may be impeached by disproving the facts testified to by him." *Id.* Likewise, in *Rosandich v. State*, 289 Ga. App. 170 (2008), the Georgia Court of Appeals affirmed the admittance of evidence purely for impeachment purposes, even where that same evidence would otherwise be inadmissible. *Id.* at 171.

Other jurisdictions addressing this same issue have taken identical approaches to those addressing work-product objections to the production of surveillance. Courts that allow a defendant to reveal surveillance materials for the first time at trial focus on the need to protect the impeachment value of the materials and the fact that the plaintiff already knows about his or her own condition.

On the other hand, courts requiring pre-trial disclosure of surveillance have found that the factors unique to a video, such as its highly persuasive nature and inability to be duplicated, as well as concerns that the materials presented may be misleading or incomplete, tip the balance in favor of disclosure. However, even under this approach, the defendant is entitled to depose the plaintiff prior to production and the defendant must only produce the surveillance if defendant intends to use it trial (either as substantive or impeachment evidence).

These courts also note that post-deposition production facilitates effective settlement discussions because it allows the parties the opportunity to evaluate all possible evidence. *See, e.g., Gibson v. Nat'l R.R. Passenger Corp.*, 170 F.R.D. 408, 410 (E.D. Pa. 1997); *Bogatay v. Montour R.R.*, 177 F. Supp. 269 (W.D. Pa. 1959); *Snead v. Am. Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973); *Smith v. AMTRAK*, 22 Va. Cir. 348 (1991).

Another Approach?

As Georgia law currently stands, it is difficult to predict whether surveillance must be produced prior to trial, as the determination is left to the discretion of trial court judges and there are sound policy rationales favoring both production and non-production. These competing policy concerns also lend themselves to an alternative approach to the two discussed above.

Under this approach, a defendant will not be required to produce surveillance until after the plaintiff testifies on direct examination at trial (at which point the defendant will know whether the impeachment evidence is relevant). Once the surveillance is produced, the plaintiff will have the opportunity to review the surveillance, ensure its authenticity, and verify that it has not been altered. This approach better protects the value of the surveillance as impeachment evidence, because the plaintiff has less of an opportunity to shade or alter her testimony to "fit" what is shown on the surveillance. Post-direct examination production of surveillance also comports with the *Ballard* court's reasoning that the defendant is entitled to believe that the plaintiff will testify truthfully up until the time she actually fails to do so (at trial) and, thus, impeachment evidence does not become relevant until that time.

Although this approach does not appear to have been utilized by other state or federal jurisdictions, inasmuch as Georgia courts currently have discretion to apply the approach that they deem most appropriate, it is certainly worth suggesting when arguing against a motion to compel production.

Obviously, the potential pitfall with this approach is that a judge would have to suspend the trial between the direct and cross examinations in order to allow the plaintiff adequate opportunity to review the surveillance video. As such, whether this approach is truly feasible depends on the facts and circumstances of the case.

This article is reprinted with permission from the Winter 2014 *Georgia Defense Lawyer* newsletter by the Georgia Defense Lawyers Association (GDLA).

Practical Considerations

When faced with the issue of whether to produce surveillance, there are key practical considerations to address. The first (and most obvious) step is to object to production on the ground that the materials sought were prepared in anticipation of litigation and are protected by the work-product privilege—even if surveillance has not yet been obtained. From there, the issue is one of risk tolerance. A defense attorney must evaluate how important the surveillance is to defending the case and whether the possibility of exclusion at trial for failure to identify and produce the evidence is outweighed by the benefit of ensuring that the plaintiff has the smallest window in which to tailor his or her testimony to fit the surveillance contents.

Worth noting is that these considerations also apply in the context of a relatively recent source for impeachment evidence—social media. Obviously, the policy rationales against disclosure in the surveillance context are only heightened in the context of a plaintiff's social media page.

After all, it is the *plaintiff's* page—the plaintiff obviously knows of its existence and contents because it is the plaintiff who created and maintains it. However, a plaintiff would almost certainly raise the same concerns regarding completeness and authenticity noted by various courts addressing the production of surveillance. Given that the issue is unsettled in Georgia, it is difficult to predict with any accuracy how a court would rule. Thus, ultimately, it seems the best approach is to identify any evidence (including surveillance and social media evidence) which you *intend to use at trial* either in discovery (if asked) or in the pre-trial order.

Although this approach may lessen the sting of impeachment to a certain degree, it ensures that crucial evidence does not get excluded. ❖

Whitney Lay is an associate in the Brunswick office of Drew Eckl & Farnham. She focuses her practice on the areas of workers' compensation area and general casualty.