DISCOVERY OF SURVEILLANCE IN PENNSYLVANIA COURTS

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DISCOVERY OF SURVEILLANCE IN PENNSYLVANIA COURTS

The Courts in Pennsylvania have adopted the adage that if you tell the truth the first time you don't need to worry about remembering what you said. Accordingly, a defendant is not required to produce surveillance videotapes of the plaintiff prior to the plaintiff's deposition. Defendant has the right to depose the plaintiff without giving the plaintiff an opportunity to conform his testimony with what is on the videotape. Of course, plaintiff has nothing to worry about if he tells the truth.

The seminal case in Pennsylvania is Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973). In Snead, the defendant refused to answer plaintiff's detailed interrogatories regarding surveillance. In ruling on a motion to compel, the Court needed to balance the defense's interest in using the surveillance for impeachment with plaintiff's need for an opportunity to check the integrity of the photographer, his methods and the film itself. The Snead court ruled that the interrogatories must be answered, but not until plaintiff has been deposed. Any films intended to be used at trial are to be provided to the plaintiff ahead of trial.

The Snead analysis was adopted by the Pennsylvania state courts in Dominick v. Hanson, 753 A.2d 824 (Pa. Super. 2000). In Dominick, the plaintiff issued surveillance discovery to the defendant which was met with objections which were not subssequently challenged. At trial the surveillance was produced only after plaintiff's case-in-chief, prompting an objection from the plaintiff. The Dominick court adopted as Pennsylvania law the prevailing view in the Federal Court that video surveillance is discoverable, but does not need to be disclosed until after plaintiff has been deposed. However, the surveillance was admissible without having been produced prior to trial because plaintiff's counsel did not challenge defendant's objections. Counsel would be wise to object to surveillance discovery and thereby shift the burden to plaintiff to challenge the objections.

Defendant in Bindschusz v. Phillips, 771 A.2d 803 (2001), took a different approach when counsel truthfully answered discovery to the effect that he did not have surveillance at the time of answering discovery, but then took surveillance of the plaintiff six days prior to the start of trial and presented it on the afternoon of the third day of trial. The Superior Court held that it was proper for the trial court to preclude the use of this film at trial. After taking note of Snead and Dominick, the Bindschusz court ruled that failure to supplement the discovery responses and include the videotape as a listed trial exhibit resulted in unfair and prejudicial surprise.

In Duncan v. Mercy Catholic Medical Center of Southeastern Pennsylvania, 2002 Pa. Super. 373 (Pa. Super. 2002), the defendant was precluded from using a surveillance video for failure to produce the video prior to trial despite discovery requests seeking any such video. Defense counsel then attempted to get the benefit of the video by cross examining the plaintiff on the contents of the video which plaintiff had been given an opportunity to watch during a trial recess. Defense counsel cross-examined the plaintiff regarding the video and referenced the video even though the video was not shown to the jury. The Superior Court noted that the

prejudice was no less than if the videotape itself had been admitted and that the references to and portrayals of the videotape should have been inadmissible at trial. Accordingly, a ruling precluding the use of video surveillance should also prohibit cross examination based on the video and any reference to the video at trial.

In Mietelski v. Banks, 854 A.2d 579 (Pa. Super. 2004), the Court gives some guidance as to how and when surveillance video must be disclosed. Trial was set to commence on March 24, 2003 with defendant's medical expert to be deposed on Monday, March 17, 2003. Plaintiff's counsel became aware of the surveillance tape's existence when he received a fax to that effect late on Friday afternoon, March 14, 2003. Plaintiff's counsel was invited to view the tape at defense counsel's office which was over 60 miles away from plaintiff's counsel's office. Plaintiff's counsel did not have an opportunity to view the videotape until moments before the deposition of the defense medical expert. The Court noted that plaintiff's counsel had no real opportunity to prepare cross-examination on this issue despite the fact that the videotaping had been completed more than a month prior.

These cases require responses to surveillance discovery, but only after plaintiff has been deposed. Counsel should object to the discovery if raised prior to the deposition and if plaintiff's counsel does not challenge the objections then defendant can get close to the time of trial without having to produce the surveillance. However, the cases prohibit the last minute surprise of surveillance which is produced within days of trial. In fact, prior discovery responses need to be updated if surveillance occurs after surveillance discovery is answered. In addition, the video and the investigator need to be identified in the pre trial filings. The best approach is to object to discovery prior to the deposition, depose the plaintiff and then conduct surveillance. The surveillance should be disclosed no later than with the filing of a pre trial statement which would include a list of exhibits and witnesses.

Stephen Bruderle defends insured and self insured entities and corporations in all manner of casualty claims, focusing on Philadelphia and the outlying counties. Mr. Bruderle has defended individuals, construction and manufacturing companies, design professionals, medical professionals, accountants, physical therapists, product manufacturers and designers, general contractors, construction managers, property owners, property management companies and a wide array of contractors and subcontractors.