Surveillance of the Incident: What Time Is the Right Time for Production?
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Since the Florida Supreme Court decided *Dodson v. Persell* in 1980, the law has been well-settled that surveillance videos and photographs are discoverable in a personal injury to the extent those items will be used at trial.[1] However, where surveillance exists of the incident at issue in the lawsuit, defendants generally object to producing the footage at least until after the plaintiff's deposition. Conversely, plaintiff attorneys argue they are entitled to the footage before the plaintiff is deposed. Florida courts have provided inconsistent rulings on the issue of when this type of surveillance must be produced. This article outlines those rulings and provides recommendations for defendants.

One of the first courts in Florida to address this issue appears to have been the U.S. District Court for the Southern District of Florida in 2010. In *Bolitho v. Home Depot USA, Inc.*,[2] Home Depot objected to producing surveillance of the incident based on work product immunity, but offered to produce it immediately after the plaintiff's deposition. The plaintiff filed a motion to compel, arguing the surveillance was not work product, and that "even if work product . . . it should not be withheld until after Plaintiff's deposition."[3]

The district court denied the motion, and agreed with Home Depot that the surveillance was work product. The court cited the Florida Supreme Court case of *Dodson v. Persell*[4] for the idea that "within the trial court's discretion, the surveilling party has the right to depose the party or witness filmed before being required to produce the contents of the surveillance information for inspection."[5]

One month later, the Fourth District Court of Appeal handed-down the opinion of *Target Corp. v. Vogel*.[6] In *Vogel*, Target argued it should be permitted to depose the plaintiff before producing the footage because the surveillance contradicted the plaintiff's description of the accident in the medical records. The trial court granted the plaintiff's motion to compel, ordering the surveillance produced in advance of the deposition. The appellate court affirmed, concluding that, unlike surveillance obtained on a plaintiff after an accident, the surveillance at issue was not work product. The court offered no reasoning for this conclusion, but went on to note that the surveillance "was a video of the accident itself, discoverable evidence under the Rules of Civil Procedure."[7] It distinguished *Dodson v. Persell* on the basis that *Dodson* involved post-accident surveillance, as opposed to surveillance of the actual incident.

The following year in 2011, the Southern District again dealt with this issue in *Schulte v. NCL (Bahamas) Ltd*.[8] The defendant stipulated that the footage initially was not work product, but argued it became work product when it later was preserved at the request of counsel. The court rejected this argument, and cited *Vogel* for the idea that the act of preserving the footage did not bestow work product immunity. The court reasoned the defendant was duty-bound to preserve the surveillance when it became aware of the accident, regardless of what its counsel may have instructed. Although the court ordered the surveillance produced before the plaintiff's deposition, it acknowledged that (1) based on different (unspecified) facts, it could be possible

for surveillance of the incident to be afforded work product protection and (2) "under appropriate [unspecified] circumstances, the Court would not require production of a videotape prior to a plaintiff's deposition."[9]

In 2012, the Southern District in *Parks v. NCL (Bahamas) Ltd*.[10] ruled the defendant need not produce the surveillance until after the plaintiff was deposed. During the course of discovery, the plaintiff sought production of "videotapes of the scene of Plaintiff's accident during the seven days before and the day of [the subject] accident." The defendant admitted to possession of surveillance video, and several photographs extracted from that video, depicting the subject accident, but objected based on work product grounds. The court declined to analyze the issue of whether the footage was work product. Instead, it noted that "Whether or not the videotape is protected work product, Federal Rule of Civil Procedure 26(d) grants the Court broad discretion to decide the timing and sequence of discovery."[11] The court agreed with the defendant and found it proper to withhold production of the surveillance until after the plaintiff's deposition to ensure her testimony was based on her own independent recollection of the events. The court also found the plaintiff would not suffer any prejudice by the delay in production.

In 2013, the Southern District in *Muzaffarr v. Ross Dress for Less, Inc.*[12] acknowledged that *Schulte* and *Parks* reached opposite conclusions on similar facts. The *Muzaffarr* court then went on to make its own path. It distinguished between surveillance used solely for impeachment purposes and "surveillance tapes having predominantly substantive value as evidence of the underlying facts surrounding the incident giving rise to the plaintiff's complaint."[13] It ruled that the footage at issue fell primarily into the latter category, and as such its production should not be delayed. It ordered the defendant to produce the footage before the plaintiff's deposition.

Also in 2013, the Fourth District issued its opinion of *McClure v. Publix Supermarkets, Inc.*[14] In *McClure*, another slip and fall negligence case, the plaintiff sought certiorari review of an order compelling her deposition prior to the production of a store security video of the subject incident. In response to the plaintiff's motion to compel, Publix did not argue for work product protection, but rather asked only for authorization to delay production until after the plaintiff's deposition. The trial granted that permission and the appellate court affirmed. The appellate court noted the broad discretion of trial courts in overseeing discovery, and concluded that the plaintiff was not entitled to certiorari relief due to the lack of irreparable, material injury.

In 2014, the Southern District again examined this issue in *Holbourn v. NCL (Bahamas) Ltd.*[15] *Holbourn* was a trip and fall case. NCL admitted that it captured the plaintiff's fall on three different closed-circuit television cameras, but refused to produce the videos until after the plaintiff's deposition. In denying NCL's Motion for Protective Order, the *Holbourn* court largely adopted the analyses of *Schulte* and *Muzaffarr*. The court distinguished between surveillance video used solely for impeachment purposes, and surveillance video having predominantly substantive value as evidence of the underlying facts surrounding the subject incident. The court found the primary evidentiary value of the surveillance tape at issue was proof of the underlying facts surrounding the incident, and not simply for impeachment purposes.

As shown above, even courts within the same district or circuit have not arrived at a consensus regarding the timing for production of incident footage. For this reason, trial judges are free to exercise their discretion regarding when footage should be produced.[16] Where this issue is contested, defendants should explain to the Court that the interests of justice weigh in favor of at least a delay in production until after the plaintiff's deposition. Defendants need the opportunity to explore a plaintiff's perception of the incident sequence, as well as the extent of the plaintiff's recollection. This information would become forever lost should the plaintiff view the footage first. After viewing the footage, the plaintiff's memory of the incident will become forever limited in that it will morph into whatever is depicted in the footage. Defendants also should explain why the plaintiff will not be prejudiced by a delay in production. The plaintiff already has a memory of the incident in his or her mind, and if she cannot recall one or more aspects of the incident, he or she can say as much in response to a deposition question. Beyond this, the issue of whether the footage is work product still is unsettled, providing another ground for the judge to rule against production altogether or for a delay in production at minimum.

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[1] 390 So. 2d 704 (Fla. 1980).

[2] No. 10-60053-CIV, 2010 WL 2639639 (S.D. Fla. June 3, 2010).

[3] *Bolitho*, 2010 WL 2639639, at *1.

[4] 390 So. 2d 704 (Fla. 1980).

[5] *Bolitho*, 2010 WL 2639639, at *1.

[6] 41 So. 3d 962 (Fla. 4th DCA 2010).

[7] *Vogel*, 41 So. 3d at 963.

[8] No. 10-23265-CIV, 2011 WL 256542 (S.D. Fla. Jan. 25, 2011).

[9] *Schulte*, 2011 WL 256542, at *4.

[10] 285 F.R.D. 674 (S.D. Fla. 2012).

[11] *Parks*, 285 F.R.D. at 675.

[12] 941 F. Supp. 2d 1373 (S.D. Fla. 2013).

[13] *Muzaffarr*, 941 F. Supp. 2d at 1375.

[14] 124 So. 3d 998 (Fla. 4th DCA 2013).

[15] ---F.R.D.---, 2014 WL 8630709 (S.D. Fla. Sep. 26, 2014).

[16] *See* Fed.R.Civ.P. 26(d)(2); Fla.R.Civ.P. 1.280(e).