

Use of surveillance in Connecticut courts

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Introduction

A party who intends to contest the extent of impairment alleged by a plaintiff in connection with physical injuries may want to consider conducting certain types of surveillance. No Connecticut appellate court has definitively stated whether facts revealed through surveillance are discoverable, or, if they are, whether the defendant may refrain from disclosing such facts until after the plaintiff has been deposed. Connecticut lower courts disagree on these issues. When confronted with such questions, the lower courts seem focused on evaluating whether such materials constitute attorney work product, whether plaintiff has demonstrated a substantial need for the investigative materials, and whether plaintiff could obtain the substantial equivalent without undue hardship.

Applicable Procedure and Appellate Court Interpretation

Even though a party's surveillance investigation may constitute materials "prepared in anticipation of litigation or trial," an adverse party may still be entitled to such materials. However, in accordance with Section 13-3 of the Connecticut Practice Book, the moving party must overcome certain hurdles:

a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only upon a showing that the party seeking discovery has [1] *substantial need* of the materials in preparation of the case and [2] is unable without undue hardship to obtain the *substantial equivalent* of the materials by other means.

Conn. Pract. Bk. § 13-3 (emphasis added).

The Appellate Court of Connecticut has had only spoken once on this issue. In *Constantine v. Schneider*, the defendant surveilled the plaintiff and voluntarily permitted opposing counsel to examine the video of same. 49 Conn. App. 378, 391-92 n.17 (1998). Neither party made any pretrial motion as to the production of the video. *Id.* at 391 n.17. During trial, the plaintiff sought to introduce the video, which the trial court refused on the ground that the video constituted attorney work product. *Id.* at 392. The Appellate Court reversed the trial court's determination, and noted in dicta that it was "puzzl[ed] that the defense counsel would voluntarily, as he did, turn over before the trial such apparently damaging evidence." *Id.* at 394, 397. This dicta represents the only appellate statement as to the discoverability of surveillance materials, and seems to imply that a defendant could properly refrain from disclosing such materials. Assuming that an appellate court does not take a more definite position, knowing the state trial and/or superior courts' approach to this discovery issue is very important.

Approach of the Lower Courts

Connecticut lower courts (Superior) have had to decide whether or not surveillance materials are discoverable more often, though the decisions are not uniform in their resolution of the issue. The lower courts seem to give the "substantial need" criterion more consideration than the "substantial equivalent" question.

In *Davis v. Daddona*, the plaintiff sought an answer as to whether the defendants conducted any video surveillance of the plaintiff, and if so, production of same. No. CV-89-0102503-S, 1990 WL 288643, at *1 (Conn. Super. Ct. Apr. 4, 1990). The defendant objected to the plaintiff's request, claiming that the plaintiff was seeking information "outside the scope for permissible discovery." *Id.* The court concluded that the attorney-client privilege did not make the surveillance materials undiscoverable, and it held that the materials were relevant because they would be

used, if at all, to impeach the plaintiff's potential exaggeration of her disabilities. *Id.* Further, according to the court, the plaintiff demonstrated a "substantial need" for the requested materials in that she needed them to assess their authenticity and accuracy before trial. *Id.* (citing Conn. Pract. Bk. § 13-3(a)); *see also Jiser v. Boroway*, No. CV-93-0306208-S, 1994 WL 700319 (Conn. Super. Ct. Dec. 6, 1994) (relying on same grounds); *Pappalardo v. Pellicci*, No. CV-90-0112723-S, 1995 WL 360743, at *1-2 (Conn. Super. Ct. Apr. 28, 1995) (same); *Labonte v. Grossman's, Inc.*, No. 119640, 1995 WL 731756, at *1 (Conn. Super. Ct. Nov. 22, 1995) (same).

However, some lower courts do not find that the plaintiff has a "substantial need" for surveillance materials, and thus classify them as undiscoverable. In *Kriskey v. Chestnut Hill Bus Co.*, No. CV-87-0090900-S, 1990 WL 284343 (Conn. Super. Ct. May 9, 1990), the plaintiff sought to depose an investigator hired by the defendant to monitor the plaintiff, and to obtain the deponent's entire file. *Id.* at *1. Unlike the *Daddona* court, Judge Landeau in *Kriskey* held that the materials were undiscoverable because they were prepared in anticipation of litigation and "the plaintiffs [we]re in the best position to make their own videos and photographs concerning [plaintiff's] physical activities . . ." *Id.* Thus, because the plaintiff was unable to demonstrate that he had a substantial need for the materials to aid him in the preparation of his case, and because the court opined he could obtain the "substantial equivalent" on his own, the surveillance materials were classified as undiscoverable. *Id.*

The same argument was also successful in the oft-cited *Sponner v. Champrey*, where the plaintiff attempted to discover information relating to surveillance done on him through interrogatory responses. No. CV-92-038566-S, 1992 WL 161993 (Conn. Super. Ct. Jul. 2, 1992). Additionally, the *Sponner* court seemed to increase the plaintiff's burden by stating that "[t]he 'substantial need' contemplated for the requirement of [Rule 13-3(a)] is one going to the essentials of preparation of the case." *Id.* at *2 (quoting Conn. Pract. Bk.). Therefore, reasoned the court, because the plaintiff was the person being surveilled, he should certainly have been aware what types of behavior was recorded on the videotape. *Id.* Accordingly, the court opined that the plaintiff failed to demonstrate that he had substantial need for the materials. *Id.* Moreover, the court reasoned that an order compelling disclosure of such materials would reveal the mental impressions of a party's attorney, which is forbidden by § 13-3(a) of the Practice Book. *Id.*; *see also Gall v. Ergmann*, No. 298813, 1992 WL 205164, at *1 (Conn. Super. Ct. Aug. 7, 1992) (finding that issue of discoverability of surveillance materials was moot, but suggesting that *Sponner* was "interesting reading.")

Another Superior court decision suggests places having influence on the nature of the discovery being sought. See *Pappalardo*, 1995 WL 360743, at *1-2. After analyzing the "substantial equivalent" requirement in § 13-3, the *Pappalardo* court held that a plaintiff would never be able to obtain "the substantial equivalent" of surveillance materials because such materials were used for impeachment. *Id.* at *1 (citing Conn. Pract. Bk. § 13-3(a)).

In *Toore v. New Haven Orthopaedic Group, PC*, the court found videotape surveillance materials to be discoverable on a number of grounds. No. CV-93355129, 1996 WL 222391, at *1-2 (Conn. Super. Ct. Apr. 11, 1996). First, the court rejected the logic relied on in *Sponner*, and asserted that the videotape should be produced so that the plaintiff can address issues of authentication because "a camera may be an instrument of deception." *Id.* at *2. Moreover, the court rejected the defendant's argument that the videotape constituted the attorney's mental impressions merely because the plaintiff might be able to infer from the existence of the videotape that the defendant intended to attack the plaintiff's claims for damages. *Id.* That fact alone, according to the court, did not constitute "mental impressions." *Id.* Finally, the court also rejected the defendant's argument that requiring production of such materials would allow the plaintiff to tailor his testimony in accordance with what was found on the videotape. *Id.* at *3.

Some other Superior courts have relied, in part, on the premise that surveillance materials are discoverable because the rules of discovery should avoid "unfair surprise." *See, e.g., Labonte*, 1995 WL 731756, at *1. Despite the defendant's objection in *Labonte* that disclosing such materials might permit a plaintiff to tailor his or her testimony to whatever behavior is recorded, the court held that such concerns were "outweighed by the need for full and open discovery. . . ." *Id.* at *2. The court noted in dicta that accompanying "narratives" of the videotape might likely constitute the "mental impressions" of an attorney, and thus not be discoverable. *Id.*

Proper Time for Disclosing Surveillance Materials

Despite the conflict in opinion as to whether surveillance materials are discoverable, a majority of the superior courts agree that a defendant may depose the plaintiff—and thus enjoy the benefit of any damaging investigation—before providing opposing counsel the opportunity to examine the surveillance materials. See *Rosado v. Carrol*, No. CV-940317847-S, 1997 WL 576303 (Conn. Super. Ct. Sept. 4, 1997); *Pappalardo*, 1995 WL 360743, at *1-2; *Toore*, 1996 WL 222391, at *1-2; *Jiser*, 1994 WL 700319, at *1; *Daddona*, 1990 WL 288643, at *1. For example, the *Daddona* court held that a defendant “must be afforded to take a plaintiff’s deposition before disclosing any information regarding the existence of surveillance films. . . .” *Id.* at *1; *Jiser*, 1994 WL 700319, at *2 (despite finding surveillance materials to be discoverable, court noted that “[n]one of this is to say, however, that the party performing the observations must turn over the fruits before their impeachment character ripens and has value.”) Moreover, one court has even permitted a defendant to conduct a supplemental—albeit “limited”—deposition of the plaintiff because the defendant did not obtain the surveillance video until after it had conducted the plaintiff’s deposition. *Pappalardo*, 1995 WL 360743, at *2.

Conclusion

It may be worthwhile for defendants to conduct surveillance investigations if the effect of a plaintiff’s impairment due to physical injuries is in doubt. Notwithstanding that a court would—in light of the case law—likely find such information to be discoverable, the courts do allow defendants to refrain from disclosing such information until after the plaintiff has been deposed.

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