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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 3, 2023 Session

TERESA THOMPSON LOCKE ET AL. v. JASON D. ASTON, M.D. ET AL.

Appeal from the Circuit Court for Davidson County
No. 20C351 Amanda Jane McClendon, Judge

No. M2022-01820-COA-R9-CV

This is a health care liability action filed by a patient and her husband alleging serious injury as a result of surgery. The plaintiffs learned that the defendants had taken surveillance videos and sought discovery of those videos. The trial court allowed discovery of only the videos that the defendants intended to use at trial for impeachment purposes. The trial court gave the plaintiffs permission to seek an appeal under Tenn. R. Civ. P. 9. This Court granted the appeal. We affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Philip Norman Elbert, Olivia Rose Arboneaux, and Jeffrey Albert Zager, Nashville, Tennessee, for the appellants, Teresa Thompson Locke and Randy Locke.

Jonathan Eric Miles, Patrick M. Cumpton, and Brigham Alexander Dixson, Nashville, Tennessee, for the appellees, Jason D. Aston, M.D., and Colon and Rectal Surgery Associates of Nashville, PLC.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, Teresa and Randy Locke (collectively, "Plaintiffs") filed a healthcare liability action against Dr. Jason Aston and Colon and Rectal Surgery Associates of Nashville, PLC (collectively, "Defendants"), alleging that Defendants caused permanent injury to Ms. Locke during a colon surgery. Plaintiffs voluntarily dismissed the action without prejudice in April 2019 on the fourth day of trial. In November 2019, Defendants

obtained surveillance video of Ms. Locke in anticipation of future litigation. Plaintiffs subsequently re-filed the lawsuit against Defendants on February 11, 2020.

As the parties entered into the discovery phase in the re-filed case, Plaintiffs propounded requests for production of documents, including a request for "all photographs, video recordings, or audio recordings of Teresa Locke or Randy Locke . . . that were not previously produced in connection" with the 2016 case. Defendants objected to the request, stating that the request "seeks information that qualifies as impeachment evidence, trial preparation material and/or is protected by the work product doctrine and attorney-client privilege." Defendants acknowledged, however, that defense counsel was in possession of material responsive to the request. Plaintiffs filed a motion to compel discovery on November 8, 2021, alleging, in part, that the materials sought were relevant and not privileged. Defendants responded asserting that Plaintiffs' motion "is merely an attempt to diminish an effective cross-examination in the event the surveillance footage depicts Ms. Locke acting in a different manner from what she has repeatedly claimed and visually demonstrated." Defendants continued to rely on the work product doctrine and asserted Plaintiffs had failed to demonstrate a substantial need for Defendants' work product or an undue hardship in obtaining the substantial equivalent of the work product by other means.

On May 12, 2022, the trial court entered a Memorandum Opinion granting Plaintiffs' motion to compel, finding "the requested materials fall outside the qualified protection of the work-product doctrine and must be produced." The court concluded that "Defendants have obtained multiple surveillance videos from a precise moment in time. It is impossible for Plaintiffs to go back in time and duplicate (or otherwise obtain) such a video" and ordered Defendants to produce the surveillance videos without limitation. In rendering its decision, the trial court remarked that "there are no Tennessee cases directly on point" and relied heavily on the federal district court case, *West v. Lake State Railway Co.*, 321 F.R.D. 566 (E.D. Mich. 2017).

Subsequently, Defendants filed a motion to alter or amend or, alternatively, for interlocutory appeal requesting the court to narrow its ruling to require production only of surveillance videos Defendants intend to use at trial. On October 21, 2022, the trial court filed an order granting Defendants' motion to alter or amend, clarifying its prior order to require disclosure "of only those work product surveillance materials which the Defendant intends to use for impeachment at trial and the identity of the person who created the video." The court again cited *West* and reasoned, "Plaintiff does not need 'corroborating evidence from a video in harmony with his claim,' but only those videos which would show a discrepancy between testimony regarding the severity of Plaintiff's injuries and what the film portrays." *West*, 321 F.R.D. at 571.

Plaintiffs filed a motion for permission to file an interlocutory appeal pursuant to Tenn. R. App. P. 9, which the trial court granted. This Court granted Plaintiffs' application for interlocutory appeal to consider whether the trial court erred in limiting discovery of surveillance videos to only those videos that the Defendants intend to use at trial.

STANDARD OF REVIEW

The trial court's decisions on pre-trial discovery matters are subject to review under the abuse of discretion standard. *West v. Schofield*, 460 S.W.3d 113, 120 (Tenn. 2015). "An abuse of discretion occurs when the trial court applies incorrect legal standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Id*. Under the abuse of discretion standard, an appellate court is not allowed to second-guess the trial court. *White v. Vanderbilt Univ*., 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). Neither may we substitute our judgment for that of the trial court. *Myint v. Allstate Ins. Co*., 970 S.W.2d 920, 927 (Tenn. 1998).

ANALYSIS

Tennessee Rule of Appellate Procedure 9(b) states: "When the trial court is of the opinion that an order, not appealable as of right, is nonetheless appealable, the trial court shall state in writing the specific issue or issues the court is certifying for appeal and the reasons for its opinion." The trial court said it was allowing a Rule 9 appeal "with respect to [the trial] Court's ruling narrowing the required disclosure of surveillance materials to only those that Defendants intend to use for impeachment at trial."[1] The trial court also determined "that interlocutory review of the Court's October 21, 2022 Order on Defendants' Motion to Alter or Amend is appropriate in this case in order to develop a uniform body of law with respect to the scope of discoverability of surveillance materials." This Court granted the Rule 9 appeal in an order dated January 13, 2023, and stated "[t]he sole issue on appeal shall be whether the trial court erred in limiting discovery of surveillance videos to only those videos that the defendants intend to use at trial." Any other issues raised in oral argument or in the briefs are not included in this appeal.

Some background on discovery may be helpful. Discovery did not exist at common law. *Harrison v. Greeneville Ready-Mix, Inc*., 417 S.W.2d 48, 51 (Tenn. 1967). One had to file "a bill of discovery in chancery for the production of the documents in possession of the opposite party." *Id*. In 1938, the Federal Rules of Civil Procedure were created, including workable rules for discovery. As the United States Supreme Court found,

> No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

Hickman v. Taylor, 329 U.S. 495, 507 (1947) (footnote omitted).

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[1] Technically, the trial court's statement did not satisfy Rule 9. As this Court's order of January 13, 2023, stated, "The trial court's order granting permission to appeal does not state the issue or issues being certified for appeal. Nevertheless, pursuant to Tennessee Rule of Appellate Procedure 2, we have elected to waive the failure to comply with Rule 9(b) and to decide the application on its merits.

The Deposition Law of 1959 included provisions "virtually identical to the discovery provisions of the Federal Rules of Civil Procedure as they existed in 1959." *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 354 (Tenn. Ct. App. 1985), *superseded on other grounds by* TENN. R. CIV. P. 26.02(4)(B). The law made discovery "an integral part of pre-trial preparation." *Conger v. Gowder*, No. E2000-01584-COA-R3-CV, 2001 WL 301155, at *4 (Tenn. Ct. App. Mar. 29, 2001). Discovery was encouraged as "the logical method of preventing surprise and permitting both the court and counsel to have an intelligent grasp of the issues to be litigated and knowledge of the facts underlying them." *Harrison*, 417 S.W.2d at 52.

The Tennessee Rules of Civil Procedure, adopted by the Tennessee Supreme Court and approved by the General Assembly, became effective on January 1, 1971, and superseded many acts regarding court procedures, including discovery. 1972 TENN. PUB. ACTS, ch. 565. Under Tenn. R. Civ. P. 26.02(1), broad discovery is permitted:

> Parties 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 or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Thus, discovery is permitted if it is relevant, relates to a claim or defense of a party, and consists of "the existence, description, nature, custody, condition and location" of any tangible things. TENN. R. CIV. P. 26.02(1). No one contends that the trial court erred in its determination that the surveillance videos fit within these parameters.

Defendants maintained in the trial court that the videos were attorney work product and should not be turned over. This argument brought Tenn. Rule Civ. P. 26.02(3) into play. Rule 26.02(3) provides:

> Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect

> against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

TENN. R. CIV. P. 26.02(3).

The work product doctrine, originally recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947), was incorporated into Fed. R. Civ. P. 26(b)(3) in 1970. Tennessee eventually adopted the concept as well. *See* TENN. R. CIV. P. 26.02(3). The work product doctrine "prevents litigants from taking a free ride on the research and thinking of their adversary's lawyer." *Boyd v. Comdata Network, Inc*., 88 S.W.3d 203, 219 (Tenn. Ct. App. 2002) (citing *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999)). "The doctrine embodies the policy that attorneys, doing the sort of work that attorneys do to prepare a case for trial, should not be hampered by the prospect that they might be called upon at any time to hand over the results of their work to their adversaries." *Id*.

Ultimately, the trial court determined the videos that would be used to contradict Plaintiffs' position were discoverable. Quoting *West v. Lake State Railway. Co*., 321 F.R.D. 566, 571 (E.D. Mich. 2017), the trial court found that the remainder of the videos would not be discoverable, stating that "Plaintiff does not need 'corroborating evidence from a video in harmony with his claim,' but only those videos which would show a discrepancy between testimony regarding the severity of Plaintiff's injuries and what the film portrays." Thus, the trial court essentially ruled that Plaintiffs had not shown a substantial need for any videos that corroborate their position.

Plaintiffs' brief emphasizes the relevance of the videos they seek, but the relevance of the videos is not in dispute. Plaintiffs place great importance on *Pettus v. Hurst*, 882 S.W.2d 783 (Tenn. Ct. App. 1993), *Seagraves v. Plaza Mach. & Tool*, No. 02S01-9612-CH-00104 (Tenn. Sup. Ct. Spec. Workers' Comp. Panel (Jan. 7, 1998), and *Cockrill v. Jersey Miniere Zinc*, No. 01S01-9601-CH-00007 (Tenn. Sup. Ct. Spec. Workers' Comp. Panel Nov. 14, 1996), as cases that allow full discovery of surveillance videos or photographs. These cases, however, provide no real discussion or analysis of the exact issue before this Court. Thus, they are of little use to our analysis.

Once a party seeking discovery has shown that materials sought are discoverable, which no one has disputed in this case, "the burden shifts to the party opposing discovery to show that the materials are work product protected by Tenn. R. Civ. P. 26.02(3)." *Boyd*, 88 S.W.3d at 220. To show that the videos are work product under Tenn. R. Civ. P. 26.02(3), the opposing party must "establish (1) that the materials sought are documents or tangible things, (2) that the documents were prepared in anticipation of litigation or for trial, and (3) that the documents were prepared by or for another party or by or for that other party's representative." *Id*. at 221 (citing *Caremark, Inc. v. Affiliated Comput. Servs., Inc*., 195 F.R.D. 610, 613 (N.D. Ill. 2000); *Kidwiler v. Progressive Paloverde Ins. Co*., 192 F.R.D. 536, 542 (N.D. W. Va. 2000); *Moore's Fed. Prac.* § 26.70[5]). There can be no serious doubt that the surveillance videos sought fit these categories. Thus, they are work

product. The videos are ordinary or fact work product because they do not contain the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party in litigation." *Id*.

The conclusion that the surveillance videos are fact work product does not end the analysis. Fact work product may still be obtained if the requesting party can show "(1) that it has a substantial need for the materials and (2) that it is unable to obtain these materials or their substantial equivalent by other means without undue hardship." *Id*.; *see also* TENN. R. CIV. P. 26.02(3). The "substantial need" prong is where the trial court found Plaintiffs came up short.

Plaintiffs claim to have a substantial need for the "non-evidentiary videos"[2] for two reasons. First, they believe Defendants do not intend to use the videos because they "presumably undercut the value of the videos Defendants do intend to use at trial." Second, Plaintiffs maintain that they have a substantial need because the non-evidentiary videos can be used to determine whether the impeachment videos are "incomplete or otherwise misleading."

Regarding Plaintiffs' first reason, the issue in this case is one that rarely arises in the case law. "Those courts which have considered this specific issue have, for the most part, allowed discovery of all surveillance films, including the non-evidentiary tapes, prior to trial." *Fisher v. Nat'l R.R. Passenger Corp*., 152 F.R.D. 145, 150 (S.D. Ind. 1993) (citations omitted); *see also Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Jus.*, 867 N.W.2d 58, 71 (Iowa 2015) ("The consensus also seems to be that surveillance loses the status of protected work product once a determination is made that the surveillance will be used at trial."). However, "many, if not most, of the courts which ordered the production of non-evidentiary videotapes did so without explicitly considering or applying the work product doctrine." *Fisher*, 152 F.R.D. at 150. Some do though. For example, In *Smith v. Diamond Offshore Drilling, Inc*., 168 F.R.D. 582, 586 (S.D. Tex. 1996), the court applied the work product doctrine and stated, "given the impact of surveillance evidence and its importance at trial, personal injury plaintiffs in general have a substantial need for any surveillance evidence when preparing their cases for trial." *See also Papadakis v. CSX Transp., Inc*., 233 F.R.D. 227, 228 (D. Mass. 2006) ("In personal injury cases, surveillance materials are evidence of whether and to what extent a claimant was injured. As the existence and extent of injury is the very essence of Plaintiff's claims in the case at bar, the surveillance tapes need to be produced."); *Gutshall v. New Prime, Inc*., 196 F.R.D. 43, 46 (W.D. Va. 2000) (holding that surveillance evidence the defendant intended to use for impeachment purposes only was nevertheless discoverable and not protected by the work product privilege); *Bachir v. Transoceanic Cable Ship Co*., No. 98 Civ. 4625 JFK HBP, 1998 WL 901735, at *2 (S.D. N.Y. Dec. 28, 1998) (requiring production of surveillance evidence notwithstanding its work product status). The analysis applied in these cases appears to require production of the videos in virtually every circumstance. Other cases reject this

[2] This appears to be an appropriate term to reference surveillance videos not intended for use at trial. *See Fisher v. Nat'l R.R. Passenger Corp*., 152 F.R.D. 145, 150 n.4 (S.D. Ind. 1993).

approach. *See Marchello v. Chase Manhattan Auto Fin. Corp*., 219 F.R.D. 217, 219 (D. Conn. 2004) ("Plaintiff's invitation that the Court conclude that plaintiffs in a personal injury case always have a *per se* substantial need for a defendant's surveillance films is declined.").

Defendants counter Plaintiffs' substantial need argument with a quotation from *West*:

> Plaintiff has his own medical records and testimony to rely on and would not need any further corroborating evidence from a video in harmony with his claim. *Fletcher v. Union Pacific Railroad Co*., 194 F.R.D. 666, 673 (S.D. Cal. 2000). However, this case fits squarely within the pronouncement in *Snead v. American Export-Isbrandtsen Lines, Inc*., 59 F.R.D. 148, 150 (E.D. Pa. 1973) that "[t]he only time there will be substantial need to know about surveillance pictures will be those instances where there would be a major discrepancy between the testimony the plaintiff will give and that which the films would seem to portray" i.e., when the video will be used for impeachment purposes.

West, 321 F.R.D. at 571.

There are other cases that support Defendants' position. For example, in *Fisher v. National Railroad Passenger Corp*, 152 F.R.D. 145, 151 (S.D. Ind. 1993), "the only question before the court is whether Plaintiff has satisfied Rule 26(b)(3)'s requirement that he demonstrate a 'substantial need' for the tapes in the preparation of his case." The *Fisher* court observed that:

> It is not unreasonable to conclude from the fact that Defendant has decided not to offer all of the videos as evidence that the videos probably depict occurrences favorable to Plaintiff; otherwise Defendant would offer the videos to support its defense. But, even assuming that the non-evidentiary videotapes contain evidence favorable to Plaintiff, Plaintiff overlooks the fact that he already has a readily available source of information regarding his injuries, his own knowledge and testimony, and thus has no need for the videotapes to prove his case. Existence of a viable alternative to invading work product, will, in most situations—and in this case—negate any substantial need.

Id.[3] at 152; *see also Witman v. Knight Transp., Inc*, No.: 3:15-cv-01102-H-NLS, 2016 WL 9503738, at *2 (S.D. Cal. Apr. 29, 2016) ("Plaintiff acknowledges that she does not have

[3] The *Fisher* court also observed:

> Admittedly, in some cases a Plaintiff's own testimony might be inferior to the videotapes of his activities; then the testimony would not be equivalent to the tapes and a

a substantial need for surveillance footage to prepare her case in terms of supporting her claims for injuries."); *Marchello*, 219 F.R.D. at 219 ("Plaintiff should know of his own activities and should be able to prepare his case without any immediate need for Defendant's surveillance tapes. . . ."); *Fletcher*, 194 F.R.D. at 675 ("Plaintiff is familiar with his physical condition from the day he was injured to the present."). "Merely claiming that surveillance tapes prepared in anticipation of litigation *might* contain substantive evidence, especially when an alternative source for that evidence exists, does not provide 'substantial need' to invade attorney work product." *Fischer*, 152 F.R.D. at 153; *see also Pioneer Lumber, Inc. v. Bartels*, 673 N.E.2d 12, 17 (Ind. Ct. App. 1996) ("Bartels has shown only that production of the videotape would strengthen her case; she has not made the required showing that she has a substantial need for the videotape. . . . Bartels can effectively prove the extent of her injuries without the benefit of the surveillance videotape.").

Based on the caselaw, the possibility of further information, which is essentially corroborative in nature, is not a basis for invading the Defendants' work product.

Plaintiffs' second reason, that they have a substantial need because the non-evidentiary videos can be used to determine whether the impeachment videos are "incomplete or otherwise misleading," is a common reason for requesting and granting production of surveillance videos. As one court stated, "[o]nce it is conceded, as it must be, that not only those surveilled may be tempted to alter the truth, but that those conducting the surveillance may be subject to the same temptation, it becomes clear that surveillance information and material must be subject to discovery." *Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435, 437 (S.D. W. Va. 1992) (footnote omitted). Similarly, another court allowed discovery of all surveillance video because it was "persuaded by the argument that production of all surveillance video is required to contextualize the portions of the video that Defendant has chosen to disclose and to ensure that Defendant's isolated disclosures are not a product of 'cherry-picking.'" *Herrera v. Berkley Reg'l Ins. Co.*, Civ. No. 20-142 CG/GBW, 2021 WL 354005, at *2 (D. N.M. Feb. 2, 2021).

The *Fischer* court, on the other hand, expressed a contrary view:

> Plaintiff profits from disclosure of non-evidentiary videotapes only to the degree that they provide relevant information helpful in impeaching the evidentiary videotape. Quite clearly, the evidentiary videotape must be produced prior to trial to allow inquiry and investigation into its production. However, mere surmise, on Plaintiff's part, that the non-evidentiary tapes

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> better argument for intruding into work product could be made. Here, because Plaintiff has offered nothing to demonstrate that the evidence contained in the surveillance tapes is unique or of a higher quality than that which is available to him, intrusion into work product is not justified.

Id. at 153.

> may prove some assistance in impeaching the evidentiary tape is insufficient to breach attorney work product.

Fischer, 152 F.R.D. at 155. Indeed, granting access to all the non-evidentiary videos based on speculative concerns about manipulation obliterates the work product doctrine as to surveillance videos. Furthermore, it seems rather harsh to express concerns about tampering with the evidentiary videos when one has not even viewed them yet. Presumably, during further discovery or at trial, Plaintiffs will be given the opportunity, if needed, to probe the authenticity of the evidentiary video. *Marchello*, 219 F.RD. at 220.

There is a great deal of conflicting case law as to whether the trial court erred in limiting discovery of surveillance videos to only those videos that the Defendants intend to use at trial. Fortunately, we are aided by the standard of review. We merely have to determine whether the learned trial judge abused her discretion in limiting the discovery of the surveillance videos. *West*, 460 S.W.3d at 120. "An abuse of discretion occurs when the trial court applies incorrect legal standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Id*. Based on the analysis above, we see no application of incorrect legal standards. The trial judge's conclusions were logical, based on the law, and we find no injustice to the Plaintiffs. Thus, we find no error in the trial judge's ruling.

CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellants, Teresa and Randy Locke, for which execution may issue if necessary.

_/s/ Andy D. Bennett_______________
ANDY D. BENNETT, JUDGE