

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

ANTHONY M. HUNTER and)
LAREITA HUNTER, h/w,)
)
Plaintiffs,)

v.)

C.A. No. N14C-04-080-PRW

)
PAUL ANDREW BOGIA,)
INDEPENDENT DISPOSAL)
SERVICES, LLC, WASTE)
INDUSTRIES OF DELAWARE,)
LLC, WASTE INDUSTRIES, LLC,)
and WASTE INDUSTRIES USA,)
INC.,)
)
Defendants.)

Submitted: June 26, 2015

Decided: July 29, 2015

Opinion Issued: August 19, 2015

MEMORANDUM OPINION

Upon Plaintiffs' Motion to Compel,
GRANTED.

David G. Culley, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware,
Attorney for Plaintiffs.

Joseph J. Bellew, Esquire, Cozen O'Connor, Wilmington, Delaware, Attorney for
Defendants Paul A. Bogia and Independent Disposal Services, LLC.

WALLACE, J.

I. INTRODUCTION

Before the Court is Plaintiffs Anthony and Lareita Hunter's (collectively, the "Hunters") Motion to Compel. The Hunters seek to compel Defendants Paul Andrew Bogia ("Mr. Bogia") and Independent Disposal Services, LLC, ("Independent Disposal") (collectively, "Defendants") to produce post-accident surveillance recordings of Mr. Hunter prior to his deposition. Defendants contend it is premature to disclose the surveillance materials; they should not have to produce the material until after Mr. Hunter is deposed. For the reasons set forth more fully below, the Hunters' Motion to Compel is **GRANTED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case involves a three-car collision that occurred in November 2010.¹ While waiting to turn into a parking lot from a highway's southbound lanes, Mr. Hunter stopped his vehicle.² A second vehicle stopped behind Mr. Hunter. But a third vehicle, a garbage truck operated by Mr. Bogia, failed to stop.³ The garbage truck rear-ended the second vehicle, which in turn rear-ended Mr. Hunter's.⁴ Mr.

¹ See Compl. at ¶¶ 12-15.

² See *id.* at ¶ 13.

³ See *id.* at ¶ 15.

⁴ See *id.*

Hunter alleges he has permanent bodily injuries to his head, back, neck, knee, hip, and ankle resulting from the accident.⁵

In April 2014, the Hunters instituted this negligence action against Mr. Bogia, Independent Disposal, Waste Industries of Delaware, LLC, Waste Industries, LLC, and Waste Industries USA, Inc. The Complaint alleges negligence as to Mr. Bogia, the driver of the garbage truck, and negligence as to the remaining defendants through the doctrine of respondeat superior.⁶

On March 10, 2015, the Hunters served Defendants with Interrogatories and Requests for Production of Documents.⁷ One interrogatory requested information regarding any post-accident surveillance that may have been conducted of the Hunters.⁸ While the Requests for Production of Documents asked Defendants to produce, among other things, all documents relied upon or mentioned in

⁵ See *id.* at ¶ 18. Mrs. Hunter brings a loss of consortium claim. See *id.* at ¶ 23.

⁶ See generally Compl. Waste Industries of Delaware, LLC, Waste Industries, LLC, and Waste Industries USA, Inc. have since been voluntarily dismissed from this action without prejudice. Stipulation & Order (D.I. 80). Therefore, the remaining defendants in this action, to whom the present Motion to Compel is addressed, are Mr. Bogia and Independent Disposal.

⁷ Exs. A & B to Pls.' Mot. Compel.

⁸ Ex. A to Pls.' Mot. Compel (Interrogatory No. 29).

Defendants' responses to discovery,⁹ any surveillance materials of the Hunters,¹⁰ and the file of any investigator retained to investigate or record the Hunters.¹¹

When Defendants failed to provide timely responses to the discovery requests, the Hunters' counsel, by letter, demanded answers within five days.¹² The parties then agreed to an extension to allow Defendants sufficient time to fully respond to the discovery requests.¹³ Thereafter, Counsel again conferred regarding the pending discovery.¹⁴ The Hunters agreed to confer on the pending discovery, provided Defendants would produce the requested surveillance material.¹⁵ Because the parties disagreed as to when Defendants were required to produce any surveillance materials depicting Mr. Hunter – before or after his deposition – the matter remained unsettled.

The Hunters filed a Motion to Compel under Superior Court Civil Rule 37, asking this Court to compel Defendants to: (1) produce any surveillance materials they had of the Hunters; and (2) respond in full to the Hunters' written discovery

⁹ Ex. B to Pls.' Mot. Compel (Request No. 7).

¹⁰ *Id.* (Request No. 10).

¹¹ *Id.* (Request No. 11).

¹² *See* Ex. C to Pls.' Mot. Compel.

¹³ *See* Ex. D to Pls.' Mot. Compel.

¹⁴ *See* Ex. E to Pls.' Mot. Compel.

¹⁵ *See id.*

requests.¹⁶ The Court heard argument on the motion to compel discovery, including the production of the surveillance video, about one week before Mr. Hunter's then-scheduled deposition.¹⁷ At oral argument, the Court invited the parties to submit supplemental briefing on the video surveillance issue, and the Hunters' depositions were rescheduled.¹⁸

Because the rescheduled depositions were subject to the Court's ruling on the surveillance discovery issue, the Court issued a letter disposition of the subject motion to compel.¹⁹ This written opinion sets forth the Court's reasoning for granting the Hunters' motion to compel.²⁰

III. STANDARD OF REVIEW

In evaluating a motion to compel discovery, the Court determines whether the discovery sought is reasonably calculated to lead to admissible, non-privileged

¹⁶ See Pls.' Mot. Compel at 1.

¹⁷ At the hearing, Defendants were ordered to provide full and complete responses to the interrogatories and requests for production, which were both served March 10, 2015, save Interrogatory No. 29 and Requests for Production Nos. 7, 10, and 11, all four of which pertain to the disputed surveillance materials. See Mot. Compel Hr'g Tr., June 22, 2015, at 9-10.

¹⁸ See Notice of Dep. Lareita Hunter (D.I. 94); Second Am. Notice of Dep. Anthony M. Hunter (D.I. 95).

¹⁹ Ltr. to Counsel, July 29, 2015 (D.I. 97) ("Defendants shall produce the surveillance materials (in response to Plaintiffs' Interrogatory No. 29 and Requests for Production Nos. 7, 10, and 11) to the Plaintiffs on or before August 3, 2015.").

²⁰ *Id.*

evidence.²¹ “The scope of permissible discovery is broad, therefore objections to discovery requests, in general, will not be allowed unless there have been clear abuses of the process which would result in great and needless expense and time consumption. The burden is on the objecting party to show why the requested information is improperly requested.”²²

IV. THE PARTIES’ CONTENTIONS

At issue here is surveillance of the Hunters (especially Mr. Hunter) conducted by Defendants after the accident giving rise to the Hunters’ claims. Defendants concede that the surveillance materials are discoverable.²³ So the issue before the Court is not one of discoverability; it is an issue of timing. More specifically, the parties dispute *when* Defendants are required to produce the video surveillance of Mr. Hunter – before or after his deposition.

The Hunters contend that Defendants should be required to produce the video surveillance before Mr. Hunter is deposed. They argue that “[t]he surveillance material here is relevant, discoverable, factual evidence of Mr. Hunter’s injuries that plaintiffs timely requested and [which they] had to move to

²¹ Del. Super. Ct. Civ. R. 26(b)(1); *Alberta Sec. Comm’n v. Ryckman*, 2015 WL 2265473, at *9 (Del. Super. Ct. May 5, 2015).

²² *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 802 (Del. Ch. 2004) (internal quotations omitted).

²³ See Mot. to Compel Hr’g Tr., June 22, 2015, at 3-4, 7.

compel to even obtain confirmation of its existence.”²⁴ According to the Hunters, the Defendants’ refusal to produce such relevant evidence in order to gain a tactical advantage (*e.g.*, by perhaps trapping a deposition witness with artful questioning) is inconsistent with Delaware’s discovery rules.²⁵

Defendants do not claim privilege or some other discoverability exception. Instead, relying on certain federal trial courts’ decisions as persuasive authority, their resistance to production is based on the fact that the Hunters have not yet been deposed. Defendants maintain the contents of the video surveillance footage should have no impact on the Hunters’ testimony at their depositions.²⁶ And because the Hunters have an obligation to tell the truth, Defendants say, they should be prepared for their depositions regardless of the content any existing video surveillance footage.²⁷ Defendants believe they should be able to maintain any tactical advantage that might accrue from withholding the surveillance materials and argue that the Hunters seek to compel production only to conform their testimony to what is shown in the video.²⁸

²⁴ Pls.’ Supplemental Br. in Support of Mot. Compel at 6.

²⁵ *Id.*

²⁶ *See* Defs.’ Supplemental Br. in Opp. to Mot. Compel at 3-4.

²⁷ *See id.* (citing *Naylor v. Martin*, 2015 WL 500703, at *1 (Del. Super. Ct. Jan 28, 2015)).

²⁸ *See* Defs.’ Supplemental Br. in Opp. to Mot. Compel at 3-4.

V. DISCUSSION

The timing of production of surveillance recordings – whether such evidence must be disclosed prior to a plaintiff’s deposition or may be withheld until after a plaintiff is deposed – is uncharted territory in Delaware. The Court now considers whether a party who has received an opponent’s timely and proper discovery request may delay production of images, recordings, or related materials obtained surreptitiously after an incident that gives rise to that opponent’s claims.

As an initial matter, the circumstances under which this case comes before the Court are far different than those recently addressed in *Naylor v. Martin*.²⁹ Defendants’ reliance on *Naylor* – in which a plaintiff sought to exclude surveillance evidence that had been belatedly disclosed through inadvertence – is, therefore, unavailing.

In *Naylor*, the defendants conducted post-accident surveillance of the plaintiff working on her farm; they did not produce the recordings generated during that surveillance due to an oversight and failure to seasonably update their discovery responses.³⁰ The defendants had indicated there was no surveillance in an early discovery answer – one sent before any surveillance had in fact been

²⁹ 2015 WL 500703, at *1-2.

³⁰ *Id.* at *1.

conducted.³¹ And the defendants did not supplement their discovery responses and disclose the existence of the intervening surveillance recording until after the plaintiff was deposed.³² Upon receiving a copy of the surveillance recording, the plaintiff sought to exclude it from evidence.³³

This case is different. Here, the Hunters do not seek to preclude the use of surveillance materials at trial. They simply seek the materials' production prior to their depositions. The Hunters have timely requested the surveillance materials during discovery, and the surveillance has already been conducted.

Because Delaware state courts have not spoken directly on when video surveillance must be produced in civil discovery, Defendants urge the Court to follow the reasoning of several nearby federal district courts' decisions as persuasive authority.³⁴ The majority of their cited federal court decisions lends support to Defendants' request to withhold the surveillance video until after the

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See Defs.' Supplemental Br. in Opp. to Mot. Compel at 3 (citing *Machi v. Metro. Life Ins. Co.*, 2008 WL 2412947 (W.D. Pa. June 10, 2008); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973)).

Hunters are deposed. Those decisions seem to place a premium on the video evidence's potential impeachment value.³⁵

While this Court is oft-times in agreement with the persuasive opinions of its sister trial courts interpreting like federal rules of procedure, as to this issue the Court must demur.

A. The Nature and Purpose of Discovery in Delaware

Delaware Superior Court Rule of Civil Procedure 26(b)(1) states “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action”³⁶ In Delaware, it is now well-recognized that a broad and liberal discovery process has been designed and adopted to avoid surprises during civil litigation.³⁷ In turn, the eschewing of litigation maneuvers tending toward a “sporting theory of justice” has been the Delaware norm for quite some time.³⁸ It began in 1948, when the Delaware courts

³⁵ See, e.g., *Machi*, 2008 WL 2412947, at *2; *Williams v. Picker Intern., Inc.*, 1999 WL 1210839, at *2 (E.D. Pa. Dec. 2, 1999); *Snead*, 59 F.R.D. at 150-51. But see *Gardner v. Norfolk S. Corp.*, 299 F.R.D. 434, 437-38 (D.N.J. 2014).

³⁶ Del. Super. Ct. Civ. R. 26(b)(1).

³⁷ See, e.g., *Levy v. Stern*, 1996 WL 742818, at *2 (Del. Dec. 20, 1996) (“This Court has long recognized that the purpose of discovery is to advance issue formulation, to assist in fact revelation, and to reduce the element of surprise at trial.”); *Hoey v. Hawkins*, 332 A.2d 403, 406 (Del. 1975) (rejecting notion of trial by ambush and emphasizing the broad and liberal spirit of Delaware’s discovery rules); *McCaffrey v. City of Wilmington*, 2014 WL 598030, at *3 (Del. Super. Ct. Jan. 31, 2014) (“The days in which surprise was an acceptable way of proceeding in civil litigation are long over.”).

³⁸ See e.g., *Hoey*, 332 A.2d at 406 (“The obvious tactical objective sought was surprise and that does not comport with the spirit of the Discovery Rules. We thought that had been settled

adopted new rules governing civil procedure.³⁹ One of the most significant procedural developments was in the area of discovery.⁴⁰ The new discovery practice, adopted in the Delaware Rules, “helps us to ascertain the truth.”⁴¹ To that end, Delaware courts place great value on an up-front discovery process that

almost twenty years ago [when] Chief Justice (then Judge) Herrmann wrote in *The New Rules of Civil Procedure in Delaware*, Del., 18 F.R.D. 327 (1956). . .”).

³⁹ The Honorable Daniel L. Herrmann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327 (1956). These new rules were closely modeled upon the Federal Rules of Civil Procedure. *See id.*

⁴⁰ With regard to discovery, the commentary provides:

. . . In the application of the new Rules, we see a complete reversal of attitude as to discovery. Each party is now entitled to the use of any relevant information in the possession of the other party, if not privileged. Depositions, interrogatories, inspection of books and records, medical examinations, and requests for admissions are discovery devices now in widespread and constant use in this jurisdiction.

Broad and liberal discovery has revolutionized litigation in Delaware courts. By use of available discovery devices, a lawyer may now come to trial almost as familiar with his opponent’s case as with his own. The objection to the “fishing expedition” is repudiated, surprise has been reduced to a minimum and the “sporting theory of justice” has been eliminated in the interest of the ascertainment of truth. The exponents of surprise testimony as the best weapon against a perjurious adversary become fewer and fewer as experience proves the contrary view. Discovery under the Rules may enable a party to establish legal rights which might have been otherwise denied to him. Discovery and pretrial practices usually result in the narrowing and clarifying of issues so as to shorten trials and to bring about a greater degree of clarity and justice in the presentation of facts to juries.

Id. at 339.

⁴¹ *Id.* at 340 (explaining that ascertaining the truth “is our *raison d’etre*”).

exposes all of the available evidence.⁴² And so evidence pertaining to relevant factual issues in a case is discoverable.⁴³

Defendants suggest that the Hunters seek the surveillance recording before their depositions because they “are more concerned with testifying consistently with video surveillance than with testifying as to the truth.”⁴⁴ Defendants want to generate perceived inconsistencies between the Hunters’ testimony (that Defendants hope to artfully craft at deposition) and what they believe is depicted in any recording.⁴⁵ But the fact that relevant evidence may impeach a witness does not establish a sufficient basis for delaying production of discoverable

⁴² See *Olszewski v. Howell*, 253 A.2d 77, 78 (Del. Super. Ct. 1969) (“[T]here is now, at least in civil cases, a well established policy of pretrial disclosure which is based on a rationale that a trial decision should result from a disinterested search for truth from all the available evidence rather than tactical maneuvers based on the calculated manipulation of evidence and its production.”).

⁴³ See, e.g., *Hoey*, 332 A.2d at 406 (finding disclosure of detective’s identity was “relevant and discoverable since it pertained to the sole factual issue in the case”).

⁴⁴ Defs.’ Supplemental Br. in Opp. to Mot. Compel at 2.

⁴⁵ If successful, such inconsistencies could become instrumental components of Defendants’ trial strategy. See, e.g., Tricia E. Habert, “*Day in the Life*” and *Surveillance Videos: Discovery of Videotaped Evidence in Personal Injury Suits*, 97 DICK. L. REV. 305, 310 (1993) (discussing how defendant’s surveillance of plaintiff’s activities can deflate a plaintiff’s disability claim, resulting in lower damages or even a defense verdict). On the other hand, by providing substantive evidence of the extent of Mr. Hunter’s injuries, the surveillance materials may actually corroborate (rather than impeach) the Hunters’ claims. Either way, no matter the surveillance recording’s content, its disclosure now, before the Hunters’ depositions, can prove fruitful. See *Olszewski*, 253 A.2d at 78 (“[D]isclosure should expedite the disposition of the case by encouraging settlement, by bringing to head any objections to the evidence, and by giving the plaintiffs an advance opportunity to develop counter-evidence.”).

information.⁴⁶ Impeachment evidence (in a variety of forms) is potentially available in almost every case; permitting parties to begin identifying certain species of such relevant evidence for delayed production would essentially nullify Delaware's discovery process.⁴⁷

Here, Defendants furtively obtained surveillance footage depicting Mr. Hunter after the accident at issue. A crucial issue in this case is Mr. Hunter's post-accident physical condition. Because the surveillance recording demonstrates his post-accident condition, it is substantive evidence that is relevant to the parties' claims and defenses.⁴⁸ The fact that such evidence might also, in the right case, be used as impeachment evidence is of no moment under Delaware's discovery construct.

There are undoubtedly equities on both sides of the issue.⁴⁹ But the scope of permissible discovery is broad to promote the disinterested search for the truth.⁵⁰

⁴⁶ *Gardner v. Norfolk S. Corp.*, 299 F.R.D. 434, 438 (D.N.J. 2014).

⁴⁷ *See id.*

⁴⁸ *See id.* at 437 (finding surveillance evidence directly related to plaintiff's physical condition; therefore, it was evidence "relevant to the subject matter of this action, and discoverable" pursuant to Federal Civil Rule of Procedure 26"); *see also* Del. Super. Ct. Civ. R. 26 (parties may obtain discovery relating to any party's claim or defense).

⁴⁹ In explaining these opposing positions, this Court observed more than four decades ago:

Both positions strike the Court as having merit insofar as general litigation policy is concerned. On the one hand, a plaintiff shows need for protection against the rather distasteful business of having an opposing litigant possibly use, and even misuse, motion pictures of the plaintiff, taken secretly without the plaintiff's knowledge

And deliberately withholding discoverable information is inconsistent with the nature of our discovery rules.⁵¹ Because the surveillance evidence directly relates to Mr. Hunter’s physical condition, it constitutes substantive “evidence relevant to the subject matter of this action, and discoverable” under the standards set forth in Rule 26.⁵² The Hunters expressly requested the disputed surveillance materials. They are entitled to request such information during discovery and have timely done so.

Defendants fail to meet their burden in demonstrating why the information sought – here, the surveillance materials – is improperly requested at this time.⁵³

Defendants articulate no reason to defer production of this discoverable

and consent, in a manner deliberately designed to impeach the plaintiff’s credibility and to degrade the plaintiff generally. On the other hand, a defendant demonstrates a need to protect himself against a possible exaggerated claim, and even false claim, of personal injury and shows that a premature disclosure of the impeachment evidence could result in a conscious or subconscious tailoring of the plaintiff’s case in chief to meet the challenge.

Olszewski, 253 A.2d at 77-78.

⁵⁰ See *id.* at 78; see also *Alberta Sec. Comm’n v. Ryckman*, 2015 WL 2265473, at *9 (Del. Super. Ct. May 5, 2015).

⁵¹ *Levy v. Stern*, 1996 WL 742818, at *3 (Del. Dec. 20, 1996) (“The withholding of discoverable information, either directly or through obfuscation, does not comport with the spirit of our discovery rules.”). See also *Inferreera v. Wal-Mart Stores, Inc.*, 2011 WL 6372340, at *2 (D.N.J. Dec. 20, 2011) (when resolving a similar dispute under the federal discovery rules, the court observed: “The purpose of the court system is to resolve civil disputes in a civil way. Thus, ‘gotcha games’ are not acceptable.”) (internal citations omitted).

⁵² *Gardner*, 299 F.R.D. at 438.

⁵³ See *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 802 (Del. Ch. 2004).

information other than that it may have impeachment value.⁵⁴ This is not enough. Because the Hunters' request for relevant and discoverable information was timely, Defendants must now diligently seek out such requested materials and produce them.⁵⁵

VI. CONCLUSION

This Court finds no reason to depart from Delaware's established discovery procedures. Surveillance recordings and related materials in person injury cases are substantive evidence that is directly relevant to the parties' claims and defenses. Those materials should, therefore, be produced when properly requested through timely discovery, as would any other discoverable evidence relevant to the

⁵⁴ This is to Defendants' detriment, as the burden is now on them as the objecting party to show why the requested information is improperly requested. *See id.* Perhaps their continued objection is grounded in their clear misapprehension as to with whom the burden now lies. *E.g.* Defs.' Supplemental Br. in Opp. to Mot. Compel at 2 ("Plaintiffs have failed to articulate a legitimate reason why the video surveillance should be disclosed prior to Plaintiffs' depositions."). *See In re Appraisal of Dole Food Co., Inc.*, 114 A.3d 541, 551 (Del. Ch. 2014) (Upon objection, "the party seeking the information must first provide some minimal explanation as to why the discovery satisfies the requirements of relevance and conditional admissibility. It is then up to the party opposing discovery to show that the explanation is erroneous and that the Rule 26(b)(1) standard has not been met.") (internal citations omitted).

⁵⁵ Diligence is required in order to avoid subsequent *Naylor*-type situations and the associated costs of additional layers of discovery and investigation to sort out the validity of the surveillance information. *See Naylor v. Martin*, 2015 WL 500703, at *2 (Del. Super. Ct. Jan 28, 2015) (discussing potential costs of occasioned by delayed disclosure of such materials); *see also Olszewski v. Howell*, 253 A.2d 77, 78 (Del. Super. Ct. 1969) (noting "moving picture evidence is subject to misuse by splicing, angle of shooting, misleading condensation, selective lighting, either natural or artificial, and many other variables" which might engender additional discovery, analysis, and investigation).

subject matter of the pending litigation. The Hunters' Motion to Compel is
GRANTED.

IT IS SO ORDERED.

/s/ Paul R. Wallace _____
PAUL R. WALLACE, JUDGE

Original to Prothonotary
cc: All counsel via File & Serve