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### **Admissibility of Surveillance Tapes**

All relevant evidence is admissible.<sup>1</sup> Relevant evidence is any evidence that establishes the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without evidence.<sup>2</sup> However, relevant evidence may be excluded if

- (1) its probative value is substantially outweighed by the danger of unfair prejudice;
- (2) it is likely to confuse the issues;
- (3) mislead the jury;
- (4) create undue delay; or
- (5) needlessly presents cumulative evidence.<sup>3</sup>

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<sup>1</sup> Ind. Evidence Rule 402.

<sup>2</sup> Ind. Evidence Rule 401.

<sup>3</sup> Ind. Evidence Rule 403.

As a general rule, admission or exclusion of evidence is within the sound discretion of the trial court. A trial court's determination of evidentiary admission will be reviewed solely on an abuse of discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court.<sup>4</sup> In reviewing the admissibility of evidence, only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. Errors in admission or exclusion of evidence are disregarded as harmless unless they affect the substantial rights of a party.

Before photographic evidence may be admitted, an adequate foundation must be laid.<sup>5</sup> The foundation requires the testimony of a witness who can state the photograph is "a true and accurate representation of the things it is intended to depict."<sup>6</sup>

Photographs and videotapes are treated as demonstrative evidence. "As such, a photograph is not evidence in itself, but is used merely as a nonverbal method of expressing a witness' testimony and is admissible only when a witness can testify it is a true and accurate representation of a scene personally viewed by that witness."<sup>7</sup> Videotape, and to a lesser extent photographs, can be altered, so there must be a balance between the Plaintiff's interest in examining the surveillance medium and the Defendant's right to protect disclosure of the same.<sup>8</sup>

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<sup>4</sup> Kristoff v. Glasson, 778 N.E. 2d 465, 471 (Ind. Ct. App. 2002). The purpose of the rules governing discovery are to allow for a liberal discovery process in which the parties exchange information essential to litigation of the issues, to eliminate surprise, and to promote settlement. *Id.* "Due to the fact-sensitive nature of discovery matters, the ruling of the trial court is cloaked in a strong presumption of correctness on appeal." *Id.* At 15. We will reverse where the trial court "has reached an erroneous conclusion which is clearly against the logic and effect of the facts of the case." *Id.* In addition, we will not reverse a trial court's discovery order unless there has been a showing of prejudice. *Id.*

<sup>5</sup> Bergner v. State, 397 N.E.2d 1012, 1014 (Ind. Ct. App. 1979). See, Imwinkelried, Evidentiary Foundations, pp 72-75. A minimum foundation should establish that the operator was qualified to take a videotape; the operator filmed a certain activity; the operator used certain equipment; the equipment was in good working order; the operator used proper procedures to film the activity; the operator accounts for custody of the video; the video was a good reproduction of the activity; and, the operator recognizes the video.

<sup>6</sup> Bergner, 397 N.E.2d at 1014.

<sup>7</sup> *Id.* At 1015.

<sup>8</sup> 22 INPRAC, Sec 21.28.

The question becomes whether an opponent is entitled to video surveillance and if so, when?

## DISCOVERY

Indiana has a liberal and open discovery procedure where parties are provided all “information essential to litigation of all relevant issues, to eliminate surprise, and to promote settlement.” [Id.] at 528. The more information a party has, the more likely a settlement will result. This can only be accomplished with an open discovery policy. There are a few exceptions carved out in the Indiana Rules of Trial Procedure protecting or preserving some matters from discovery.<sup>9</sup> However these exceptions are narrowly and strictly construed.

IRTP 26(B)(1) requires that information sought in discovery be relevant, admissible, or reasonably calculated to lead to the discovery of admissible evidence, and not privileged. IRTP 26(B)(3) defines the work product privilege. According to subsection 3, a party may obtain discovery of documents and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his insurer) only upon a showing that the party seeking discovery:

- 1) has a substantial need for the materials in the preparation of his case; and
- 2) is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

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<sup>9</sup> (Hereinafter, IRTP), 26(B)(4).

In no event, however, is a party seeking discovery entitled to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.”<sup>10</sup>

## WORK PRODUCT

In order to constitute work product, the material sought to be discovered must:

- 1) consist of documents or tangible things;
- 2) have been prepared in anticipation of litigation or for trial; and
- 3) have been prepared by or for another party or by or for that other party’s representative.<sup>11</sup>

Documents are work product because their subject matter relates to the preparation, strategy, and appraisal of the strengths and weaknesses of an action, or to the activities of the attorneys involved.<sup>12</sup> There is no clear-cut rule to determine whether an insurance company’s investigation is discoverable; the determination whether the investigation is discoverable depends upon the facts of each case.<sup>13</sup>

The “work product” test has been articulated as “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”<sup>14</sup>

## BARTELS DECISION

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<sup>10</sup> Richey, v. Chappel, 594 N.E.2d 443, 445 (Ind. 1992).

<sup>11</sup> IRTP 26(B)(3).

<sup>12</sup> Indiana State Board of Public Welfare v. Tioga Pines Living Ctr., Inc., 592 N.E.2d 1274, 1277 (citing 4 Moore’s Federal practice Sec. 26.64[1] at 26-349) (Ind. App. Ct. 1992).

<sup>13</sup> Burr v. United Farm Bureau, 560 N.E.2d 1250, 1255 (Ind. App. Ct. 1990).

<sup>14</sup> Burr, 560 N.E.2d at 1254.

On November 3, 1992, a crash ensued wherein Bartels<sup>15</sup> claimed that he was injured. Video surveillance of the plaintiff was conducted, discovery requests tendered and objections filed by opposing counsel. Trial Court granted plaintiff's motion to compel the videotape prior to the plaintiff's deposition. An Appeal ensued and was reversed on the grounds that the same constituted an abuse of the Defendant's right to impeach.

The Indiana Appellate Court discussed the purposes of claimant surveillance. In sum, surveillance photographs may be an aid to an attorney in understanding the adversary's injury because of a possible lawsuit; to impeach the plaintiff's version of his or her injuries at trial; or, to offer the surveillance photographs as substantive evidence. In all three instances, surveillance photographs are made precisely in anticipation of litigation. Because the photographs were made in anticipation of litigation, the same are subject to the work product privilege and are otherwise not discoverable. However, if the attorney elects to use the surveillance tapes at trial, then the same are discoverable, only after the deposition of the plaintiff is completed.<sup>16</sup>

The Bartels Court further held that a substantial need to produce the surveillance video did not exist if the opponent did not intend to introduce the videotape at trial. In essence, the plaintiff was his own source of information and testimony regarding the extent of his injuries and that the plaintiff therefore did not need the videotapes to prove his case. While the video may have strengthened the plaintiff's case, Bartels failed to make a showing that she had a substantial need for the videotape.

The only time there will be a substantial need to know about surveillance pictures will be in those instances where there would be a major discrepancy between the testimony the plaintiff will give and that which films would seem to portray. By the same token this would be the only instance where there is a substantial need to withhold that information from the plaintiff's counsel. If the discrepancy would be the result of the plaintiff's untruthfulness, the substantial need for his counsel to know of the variance can not justify making the information available to him. On the other hand if the discrepancy would result from misleading photography, the necessary background information should be made available to the plaintiff's attorney so the fraud can be exposed. It goes without saying that the means to impeach should not be the exclusive property of the defense. Any rule to be formulated, therefore, must balance the

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<sup>15</sup> Pioneer Lumber, Inc. V. Bartels, 673 N.E.2d 12 (Ind. Ct. App. 1996).

<sup>16</sup> We find the reasoning of *Snead* persuasive. Disclosure of the surveillance videotape after Bartels has been deposed and prior to trial preserves the impeachment value of the videotape and allows Bartles to obtain the information necessary for effective cross-examination and to secure rebuttal testimony. The trial court's order requiring disclosure before Bartles's scheduled deposition resulted in prejudice to Pioneer and Wiesemann and constituted an abuse of discretion.

conflicting interests of the plaintiff against the conflicting interest of the defendant and protect both insofar as it is possible to do so. In addition, the objectives of the discovery rules must be kept in mind so that a just and speedy determination of cases can be obtained.

## KRISTOFF DECISION

Another case discussing the discovery of surveillance videotape involved a May 15, 1996 motor vehicle crash in which Kristoff was apparently injured. Defense counsel retained a videographer to document the accident scene and more particularly, the placement of an exemplar vehicle in the film. Together, the attorney and videographer visited the site of the crash. A discussion ensued between the Defense attorney and the videographer. The discussion was captured on the videotape recording. The videographer intended to turn the audio off during filming, yet failed to do so. Plaintiff's counsel requested a copy of the audio portion of the videotape, which was denied by the trial court and resulted in appeal.

The Kristoff Court recognized that surveillance tapes are subject to attorney work product protection when created in anticipation of litigation and/or trial.<sup>17</sup> Absent a showing of a substantial need for the videotape or undue hardship to obtain a substantial equivalent of the videotape, an opposing party is not entitled to production of the surveillance tapes.<sup>18</sup> A videotape is not so unique that an opposing party will be unable to create a substantial equivalent.<sup>19</sup>

In the present case, the Indiana Court of Appeals held that the audio recording need not be provided as the same is a "tangible item prepared in anticipation of trial" by the Defense attorney.<sup>20</sup> As such, the audio recording is attorney work product. In order to obtain the audio portion, Plaintiff's counsel was required to "show that he had a substantial need, and that he could not obtain the substantial equivalent of the materials by any other means without undue hardship." However, the Court found that Kristoff failed his burden to demonstrate a substantial need for the audio portion of the videotape.<sup>21</sup> In addition, Kristoff failed to demonstrate any prejudice and as a result, the audio recording was considered to be ("likely") privileged mental impressions, conclusions, opinions or legal theories and thus protected from disclosure.

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<sup>17</sup> See, IRTP, 26(B)(3); Kristoff v. Glasson, 778 N.E.2d 465 (Ind. Ct. App. 2002).

<sup>18</sup> Kristoff, 778N.E.2d at 467.

<sup>19</sup> Id.

<sup>20</sup> Id at 471.

<sup>21</sup> Id.

## SILENT WITNESS THEORY

Surveillance tapes are typically created by an investigator or videographer, specifically retained and/or employed by opposing counsel or insurance carrier to document a claimant's condition and activities. However, there are circumstances where surveillance or security tapes may be a silent witness at trial. Such circumstances may include traffic cameras (intersection/highway collisions), inadequate security (physical assault or attack), and premises liability claims (slip, trip and fall).

Under the "silent witness" theory, "photographic evidence may draw its verification, not from any witness who has actually viewed the scene portrayed on film, but from other evidence which supports the reliability of the photographic product."<sup>22</sup> In order for substantive photographic evidence to be admitted under the "silent witness" theory, "there must be a strong showing of authenticity and competency . . . ."<sup>23</sup> For example, in cases involving photographs taken by automatic cameras, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera. The showing of authenticity also must include proof that the photograph has not been altered in anyway.

In *Rogers v. State of Indiana*, the "silent witness" theory was recently reviewed by the Indiana Court of Appeals. On September 18, 2007, Rogers entered an Evansville CVS with the intention to acquire two half gallons of Jack Daniels and two bottles of Flare perfume. Rogers failed to pay for the goods and a police chase ensued. While Rogers vehicle was lost for a period of time, a traffic stop revealed the Jack Daniels and Flare perfume in Rogers vehicle, as well as the CVS security tags that triggered the store alarm. Rogers claimed he was innocent. While there were no eyewitnesses, the CVS store was equipped with 16 surveillance cameras, one of which was positioned at the store exit and immediately adjacent to the Flare perfume.

While there was no eyewitness to the theft, the surveillance tape revealed a man in a red shirt walking into and subsequently leaving the store. Also pictured in the video were bottles of the Flare perfume, which was missing when Rogers left the store. Unfortunately, Mr. Rogers was wearing a red shirt when he entered and left the premises. A CVS supervisor reviewed the camera feeds and downloaded the camera feed that depicted Rogers image to compact disc. The supervisor did not download any other camera angles, left gaps in the tape and failed to compare the downloaded version with the original recording stored on the camera hard drive. Over objection, the tape was admitted and Rogers appealed his conviction.

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<sup>22</sup> See 2 John W. Strong et al., *McCormick on Evidence*, § 214, at 15-16 (5th ed. 1999).

<sup>23</sup> *Edwards v. State*, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002).

On appeal, the Court held that the images were admissible as the CVS supervisor testified that he was familiar with the surveillance system, had personal knowledge of the tape and that,

“In order for substantive photographic evidence to be admitted under the “silent witness” theory, “there must be a strong showing of authenticity and competency . . . .” *Edwards v. State*, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002) (discussing the admission of videotape), *trans. denied*.

For example, in cases involving photographs taken by automatic cameras, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera.”<sup>24</sup>

#### DUPLICATE IMAGES<sup>25</sup>

In *Rogers*, the Court also examined the admissibility of a duplicate image, including videotape and photographs. A duplicate, “is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”<sup>26</sup>

The CVS supervisor testified that the disc and photographs introduced into evidence were merely duplicates of the original recording.<sup>27</sup> Although the disc and photographs were redacted versions of the original, there was no evidence that they were altered or changed.<sup>28</sup> The Court emphasized that it is imperative to avoid the

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<sup>24</sup> *Rogers v. State of Indiana*, March 17, 2009, No. 82A04-0807-CR-432.

<sup>25</sup> Ind. Evid. Rule 1001 defines a duplicate as a “counterpart produced by the same impression as the original . . . or by means of photography . . . or by mechanical or electronic rerecording . . . or be video tape . . . which accurately reproduces the original.”

<sup>26</sup> Ind. Evid. Rule 1003.

<sup>27</sup> See, Ind. Evid. R. 1001(4). (A “duplicate“ is a counterpart produced by the same impression as the original . . . or by means of photography, . . . or by mechanical or electronic rerecordings, . . . or video tape or by other equivalent techniques which accurately reproduces the original.”)

<sup>28</sup> See *Bergner*, 397 N.E.2d at 1017

dangers of misrepresentation or manufactured evidence, which are possible through composite or retouched photographs.

#### RULE OF COMPLETENESS

The Indiana Rules of Evidence provide that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.”<sup>29</sup> All modes of conveying information, including videotapes, constitute writings or recordings for purposes of Rule 106. In fact Rule 1001(2) defines a photograph to include “still photographs, x-ray films, videotapes and motion pictures”.

As Rule 1001 explicitly states, its definitions are “for purposes of this Article” of the Indiana Rules of Evidence, (Article X) which deals with “Contents of Writings, Recordings and Photographs,” and contains a number of provisions that treat “writings and recordings” differently from “photographs.” But the purpose of Article X is to address issues raised by the various means of reproduction of the several media, such as what a “duplicate” or “original” means in the context of technology that includes photographs, videotapes, etc. The definitions are by their terms limited to that Article of the Rules of Evidence.

On the other hand, Rule 106 (Article I) deals with substantive fairness, and embodies a doctrine recognized at common law long before Thomas Edison, Edwin Land or Bill Gates was heard from. Rule 106 provides, in straightforward terms, that if a party introduces a part of a “writing or recorded statement”<sup>30</sup> and fairness requires that additional portions of it be introduced, then an adverse party may require that the additional parts be admitted.<sup>31</sup> Thus, the doctrine is wholly independent of the peculiarities of the technology by which any particular medium transmits information, and applies to any mode of conveying information, including those identified for purposes of Article X as “photographs.” To the extent other jurisdictions have considered the point, they have reached the same conclusion under counterparts to Rule 106.<sup>32</sup>

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<sup>29</sup> Ind. Evid. Rule, 106.

<sup>30</sup> It is also worth emphasizing that the language “writing or recorded statement,” as used in Rule 106, is not the same as the specifically defined term “writings and recordings” used in Ind. Evid. Rule 1001(1).

<sup>31</sup> See, e.g., *Evans v. State*, 643 N.E.2d 877, 881-82 (Ind.1994).

<sup>32</sup> See, e.g., *United States v. Spearman*, 186 F.3d 743, 755 (6th Cir.1999) (under Federal Rule of Evidence 106, defendant had opportunity to present videotape in its entirety after government played only portions of video); *State v. Austin*, 585 N.W.2d 241, 244 (Iowa 1998) (State permitted to introduce entire videotape when

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portions of information contained therein referred to by defense); *State v. Baca*, 120 N.M. 383, 902 P.2d 65, 72 (1995) (trial court should have admitted video tape under rule of completeness). It is also worth noting that the language “writing or recorded statement,” as used in Rule 106, is not the same as the specifically defined term “writings and recordings” used in Rule 1001(1).

## **PLAINTIFF'S INTERROGATORIES TO DEFENDANT**

Comes now the Plaintiff, by counsel, and request that Defendant herein answer the following Interrogatories under oath within thirty (30) days of delivery (if personally served or hand delivered) or within thirty-three (33) days of the posting (if mailed) of these Interrogatories:

### **INTERROGATORY NO. 1:**

List the name, address and place of employment of any person who has conducted an investigation, in any form whatsoever, of the incident that occurred on XXXX involving Plaintiff. This request includes Defendant or any of his representatives, including insurance representatives, investigators or attorneys.

**ANSWER:**

### **INTERROGATORY NO. 2:**

List the name, address and place of employment of any person who has conducted surveillance of the Plaintiff at any time on behalf of Defendant, or any representative of Defendant (whether insurance representative or attorney).

**ANSWER:**

### **INTERROGATORY NO. 3:**

Please state the present custodian of any and all photographs, videotapes, or other images that were taken of Plaintiff, including surveillance, since the incident giving rise to the lawsuit filed herein.

**ANSWER:**

### **INTERROGATORY NO. 4:**

Regarding any surveillance of Plaintiff since the incident giving rise to the lawsuit filed herein, please state:

- A. Who hired the person(s) or entity conducting the surveillance;
- B. When the person(s) or entity conducting the surveillance was first hired/retained;
- C. Whether any contract was executed regarding such surveillance work;
- D. The specific dates that surveillance was conducted of Plaintiff;
- E. The specific amount of money invoiced and/or paid to any person or entity conducting surveillance of Plaintiff to date.

**ANSWER:**

### **INTERROGATORY NO. 5:**

Has any information been obtained concerning the Plaintiff herein from the internet (including but not limited to Facebook, Myspace or any other social networking

or internet site)? If so, what was obtained, by whom and when?

ANSWER:

INTERROGATORY NO. 6:

State the names, addresses and telephone numbers of all persons answering or giving information directed toward answering these Interrogatories.

ANSWER:

### **PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO DEFENDANT**

Comes now Plaintiff, XXX, by counsel, and pursuant to CR 34 requests the Defendant to answer the following Requests for Production of Documents under oath within thirty (30) days of service hereof. These Requests are to be used for all purposes permitted by the Civil Rules of Procedure and are to be considered continuing.

REQUEST NO. 1:

Please produce a complete and unedited copy of any and all surveillance video taken by anyone on behalf of or at the direction of the Defendant, its legal counsel or any other entity acting on behalf of the Defendant herein.

RESPONSE:

REQUEST NO. 2:

Please produce a copy of any and all reports, logs, minutes and/or other documentation, including billing charges, from anyone who performed surveillance on the Plaintiff, XXX at the request of the Defendant, its legal counsel or any other entity acting on behalf of the Defendant herein.

RESPONSE:

REQUEST NO. 3:

A complete copy of any photographs, videotape, image, document, or printout of any information stored electronically, concerning any surveillance conducted of Plaintiffs in this cause at any time.

RESPONSE:

REQUEST NO. 4:

A complete copy of any billing statements, invoices, e-mails, letters or memoranda regarding the hiring of or payment to any investigator or entity conducting investigations resulting in surveillance of Plaintiff at any time.

RESPONSE:

REQUEST NO. 5:

Produce any other information obtained concerning the Plaintiff, including information obtained on the internet (including but not limited to Facebook, Myspace or

any other social networking or internet site).

### **Surveillance: Cross-Exam<sup>33</sup>**

- . Who hired you?
- . Is it your understanding that you were hired to tail my client?
- . What is an invasion of privacy?
- . Have you ever been tailed?
- . Is there some sort of school that you go to hone your ability to snoop around and videotape people?
- . You certainly did not have my client's permission to videotape?
- . Did you tail my client's family too?
- . Will you go anywhere to tail a person?
- . A bathroom, church, doctor office?
- . How much have you charged to date?
- . How many hours / days have you followed my client?
- . Where you hiding the entire time that you were taking videotape of my client?
- . Tell us some of the places that you hide?
- . How is this shot achieved?
- . Where are all of the surveillance tapes?
- . Submit entire videotape to defense counsel?
- . Have the tapes been edited?
- . Who directed you to edit the tapes?
- . Who gave you the assignment and what did they tell you about my client?
- . Did you peek through my client's window?
- . % of work: breakdown (attorneys, claims, insurance)
- . Did you keep a log book?
- . Log of what shot?
- . We are to assume that you have edited out nothing that would should our client's injuries.
- . We are to trust that you are fair and unbiased.
- . Yet you trail, and hide, basically act as a spy for a living.
- . Trying to shown what could/couldn't do with injured foot?
- . Do you believe you were successful in your editing of the tapes?
- . Review edit with defense counsel (pre and post)
- . Where did you have the most difficulty setting up your spying operation?
- . Who alerted you to where my client would be?
- . I noticed you had the camera off 8 different times- ranging from XX to XX minutes
- . How do we know what happened when the camera was off?
- . If you were willing to run the tape for XXX consecutive minutes for the jury,

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<sup>33</sup> Credit to Scott Montross.

seems like those other times would've been easy to fast-forward through to prove to the jury there wasn't something you didn't want them to see.

- By the way, are you hiding in a (plant), (tree), (car), (truck), (trash can)?.