CITATION: Wray v. Pereira, 2018 ONSC 4623
OSHAWA COURT FILE NO.: CV-15-91778
DATE: 20180801

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Douglas Wray	)	T. Charney and A. Eckart, for the Plaintiff
Plaintiff	)	
– and –	)	
Rosemary Pereira and Gil Pereira	)	B. Lee and S. Zilli, for the Defendants
Defendants	)	
	)	**HEARD:** May 17, 2018

RULING RE: ADMISSION OF SURVEILLANCE EVIDENCE

MCKELVEY J.:

Introduction

[1] This action arises out of a motor vehicle accident which occurred on December 31, 2012. The case is being tried before a jury. During the course of the plaintiff's evidence, the defendants sought leave to introduce surveillance evidence which had been taken by an investigator retained by the defence. The request by the defence was to use the surveillance evidence for both substantive purposes and impeachment. During the course of argument the plaintiff agreed that the surveillance could be used for purposes of impeachment provided that a proper foundation was laid. The question of whether there is a proper factual foundation to use the surveillance evidence for purposes of impeachment will be addressed during the course of the plaintiff's cross-examination.

[2] This leaves the issue of whether the defence can introduce the surveillance evidence for substantive purposes. I delivered an oral decision at the conclusion of argument on this motion. I concluded that the surveillance evidence could not be admitted for substantive purposes and that written reasons would follow. These are those written reasons.

Background

[3] The following is a summary of the relevant factual background:

(a) December 31, 2012 – Date of accident.

(b) May 22, 23 and June 8, 2014 – Dates when surveillance was conducted on behalf of the defence.

(c) May 22, 2015 – Statement of Claim issued.

(d) January 28, 2016 – Date of the defendants' Affidavit of Documents which listed as a privileged document under Schedule B, a report dated June 13, 2014 by CKR Global Investigations.

(e) January 16, 2018 – A defence medical examination was conducted by Dr. Joel Finkelstein. In his report there is reference to a review of video surveillance. Dr. Finkelstein refers to surveillance showing the activities of the plaintiff.

(f) April 9, 2018 – The defendants delivered a pre-trial memo which included a copy of the surveillance report, but not the actual video showing the plaintiff's activities. It also included the report of Dr. Finkelstein.

(g) April 24, 2018 – A pre-trial was held, at which time Justice Shaughnessy ordered that the trial take place during the sittings commencing on May 14, 2018.

(h) April 27, 2018 – The report of Dr. Finkelstein was formally served by defence counsel on plaintiff's counsel.

(i) April 30, 2018 – In an email from the plaintiff's solicitor to defence counsel it is noted that Dr. Finkelstein refers to video surveillance. Plaintiff's counsel requests, "If this video surveillance was sent to Dr. Finkelstein for review, can you please provide us with a copy of the video".

(j) May 2, 2018 – In a letter sent by email to defence counsel, the plaintiff's solicitor asks the plaintiff's counsel to respond to their previous request for a duplicate of any video surveillance that was shared with Dr. Finkelstein.

(k) May 7, 2018 – A copy of the video surveillance is sent by the defendants to the plaintiff's solicitor, which states that the surveillance video is served upon him pursuant to the Rules of Civil Procedure and the *Evidence Act*.

(l) May 14, 2018 – On this date jury selection takes place and defence counsel brings a motion to adjourn the trial on the basis that Dr. Finkelstein may not be available to give evidence until May 28, 2018.

(m) May 15, 2018 – In his opening, defence counsel refers to evidence which will be introduced regarding video surveillance of the plaintiff.

(n) May 16, 2018 – During the evidence of the plaintiff, the plaintiff's solicitor asks about the anticipated use of surveillance evidence by the defence.

(o) May 17, 2018 – The defence brings a motion for leave to rely on the surveillance evidence, both for the purposes of impeachment and as substantive evidence.

The Parties Positions

[4] The defence argues that it made reference to the surveillance report and surveillance video in its Affidavit of Documents. It notes that no questions were asked at examinations for discovery about particulars of the surveillance which was taken. The defence submits that it was not possible to anticipate before the pre-trial on April 24, 2018 that the action would be set down for trial so quickly by Justice Shaughnessy. They also point to the fact that full particulars of the surveillance were provided in advance of the pre-trial by delivering a copy of the surveillance report, together with their pre-trial memo on April 9, 2018. The defence notes that there was a brief delay after receiving a request for the video itself because the video had been sent to Dr. Finkelstein and a copy of the video was not immediately available. They state that a copy of the video was sent to the plaintiff's counsel promptly upon its receipt by their office.

[5] The defence argues that the video surveillance is important evidence for the jury to consider and there will be significant prejudice to the defence if this evidence is excluded. The defence relies upon rule 30.09 as well as rule 53.08. The defence argues that it could not give the 90 days' notice required under rule 30.09 because they could not reasonably have anticipated that the trial would be scheduled to take place so soon after the pre-trial.

[6] The plaintiff argues that the video surveillance ought not to be allowed for substantive purposes. It argues that the defence did not abandon its claim for privilege on the video surveillance at least 90 days before the commencement of trial. They assert that they have been prejudiced as a result. The plaintiff states that the effect of allowing surveillance evidence to be introduced during the trial would be to condone trial by ambush.

Analysis

[7] I have concluded that the defendants are in a clear breach of their obligations under the rules.

[8] Rule 30.09 provides as follows:

> Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the

> commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

[9] The defence acknowledges that it did not abandon its claim for privilege 90 days before the commencement of trial, but argues that this was because of the fact that it could not reasonably anticipate prior to the pre-trial that this case would be set for trial so shortly after the pre-trial. However, it is significant in my view that the defence delivered a copy of the surveillance report when it delivered its pre-trial memo on April 9, 2018, approximately two weeks before the pre-trial. There is no explanation for why a copy of the video was not provided at this time as well. It is apparent that the significance of the video surveillance was fully appreciated by the defendants. If they had intended to use the video surveillance video for any other purpose other than impeachment, I would have expected the video itself to be produced at the same time as they produced written reports of the surveillance.

[10] Further, the defence received a request for a copy of the video surveillance in an email on April 30, 2018, but did not respond to this request until May 7, 2018, only a week before trial. The explanation provided by the defence that they did not keep a copy of the video in their office does not provide an adequate explanation for the delay in providing the video to plaintiff's counsel. I see no reason why a copy of the video could not have been picked up promptly from either Dr. Finkelstein's office or the investigator who conducted the surveillance.

[11] Further, I have concluded that the surveillance video should have been delivered for inspection by January of 2018. Where a party has provided a document over which privilege is claimed to a health practitioner for the purpose of preparing a report pursuant to rule 33.06, there is a waiver of any litigation privilege. In *Aherne v. Chang*, 2011 ONSC 3846, Justice Perell notes that if a defendant discloses surveillance evidence to a health practitioner, "then the defendant has waived the litigation privilege associated with the surveillance evidence". As Justice Perell notes at para. 13, "put somewhat differently, the defendant's voluntary disclosure of surveillance evidence to a health practitioner for the purposes of a defence medical has the consequence that the surveillance evidence should be immediately disclosed to the plaintiff".

[12] It is also significant to note that contrary to its obligations under rule 33.06(2), the defendants failed to forthwith serve the report of Dr. Finkelstein on the plaintiff. The report of Dr. Finkelstein is dated January 25, 2018, but was not delivered to the plaintiff until April 9, 2018 as part of the defence pre-trial memo and formally served on April 24, 2018. This delay effectively prevented the plaintiff from knowing that a waiver of privilege with respect to the surveillance had occurred.

[13] I conclude, therefore, that there is no acceptable explanation for the defence failure to serve the video surveillance 90 days before trial. This was their obligation in light of the waiver of the privilege attached to that report once it was provided to Dr. Finkelstein.

[14] In light of the defence's failure to disclose the surveillance video in accordance with its obligations, it is apparent that this evidence may not be referred to during the trial for substantive purposes unless leave is given by this court. The test for leave in this regard is governed by rule 53.08. This rule provides that where evidence is admissible only with leave of the trial judge, "leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so would cause prejudice to the opposite party or would cause undue delay in the conduct of the trial".

[15] The case law makes it clear that in considering whether leave should be granted under rule 53.08, a trial judge must grant leave unless to do so would cause prejudice that cannot be overcome by an adjournment or costs. See *Marchand v. The Public General Hospital Society of Chatham* (2000), 51 OR (3d) 97 (ONCA). This mandatory orientation is understandable since relevant evidence, including surveillance is ordinarily admissible. I accept that the exclusion of the surveillance evidence in this case will prevent the defendant from adducing some relevant evidence. In a civil trial the goal is to have a fair adjudication of the dispute on its merits, subject to overall principles of fairness to both parties.

[16] However, the Court of Appeal has made it clear that the court expects parties to comply fully and rigorously with the disclosure and production obligations under the rules. Where significant prejudice occurs, exclusion of surveillance evidence is justified. The leading case in this area is *Iannarella v. Corbett*, 2015 ONCA 110. In that case the Court of Appeal concluded that the defence had breached their obligations in disclosing surveillance evidence. At para. 90 of their decision the Court found that the trial judge erred by failing to advert to and apply the rule 53.08 test in its entirety. As a result, the conditions for admissibility under rule 53.08 were not satisfied and it was therefore an error for the trial judge to have admitted the surveillance evidence.

[17] The Court of Appeal in *Iannarella* sets out the factors to be taken into consideration under rule 53.08. It notes at para. 67 that the trial judge ought to have considered how the case would have developed if the respondent had complied with the rules. At paras. 82 and 83 the Court notes that had the trial judge considered rule 53.08 it would have been apparent that the appellants had already suffered significant prejudice and that the main benefits which might have been obtained through timely disclosure of the surveillance particulars were gone. The Court of Appeal stated,

> The appellants did not have the benefit of considering the surveillance in assessing the possibility of pre-trial settlement, and their counsel had little time to prepare an appropriate examination in chief of Mr Iannarella. The prejudice was baked in and the trial was well under way. In my view the application of the test for leave to introduce the surveillance should have led the trial judge to refuse its admission even for the purpose of impeachment.

[18] In the present case there would not appear to be any basis to exclude the surveillance evidence for purposes of impeachment. This is based on the fact that the defendants did

disclose the existence of the surveillance report in their Affidavit of Documents and presumably would have disclosed the particulars of the surveillance had they been asked about this at examination for discovery.

[19] However, by failing to produce the surveillance video when they were required to do so, I have concluded that there will be significant prejudice to the plaintiff if the evidence is used substantively by the defence. The plaintiff has not had the benefit of considering the surveillance in the context of any pre-trial settlement. This includes consideration of the surveillance video in the preparation and delivery of any rule 49 offers. In addition, given that the defence motion was not brought until the plaintiff was giving his evidence, the plaintiff is at some disadvantage in planning the most effective strategy for dealing with this evidence in the plaintiff's examination in chief. The plaintiff also argues that they have been disadvantaged because they have not had an opportunity to obtain responding reports from medical physicians they intend to call at trial. They refer to the fact that there is an order excluding witnesses which prevents them from speaking with these witnesses. I am mindful that there could be an order made to address this situation. For example, I could provide an exception to the order excluding witnesses which would facilitate the preparation of responding reports by the plaintiff's experts. In any event, it is my understanding that the medical witnesses have in fact been shown a copy of the surveillance video.

[20] However, there are more general concerns about allowing the surveillance evidence in at this point. The defence motion was not brought until after opening statements were made by both parties to the jury and the plaintiff had started to give his evidence in chief. The defence argues that the plaintiff could have brought a motion itself to exclude the surveillance evidence earlier. However, I accept the plaintiff's position that it was not entirely clear whether the defence intended to introduce the video for substantive purposes. There was no clearly stated position by the defence about their intended use of the video when they delivered the video surveillance to the plaintiff on May 7, 2018. The reason for the plaintiff's demand for the video surveillance was on the basis that privilege may have been waived by the plaintiff if in fact the video surveillance had been given to Dr. Finkelstein. It is also apparent that the onus to bring a motion for leave under rule 53.08 lies with the party seeking leave to introduce the evidence, which in this case is the defendant.

[21] This is not a situation where an adjournment can cure the potential prejudice to the plaintiff. The trial has commenced. The time for making offers to settle under rule 49 have expired. The parties have committed to their positions in the openings which have been given and much of the plaintiff's evidence in chief has already been given. Defence counsel has suggested that this problem has been caused as a result of the court's refusal to grant them the adjournment requested. However, at the time of the adjournment request no reference was made to this issue, and therefore it was not considered by me.

Conclusion

[22] This case bears a number of similarities to the *Iannarella* decision. There have been clear violations by the defence of their obligations to produce the video surveillance at a much earlier stage of the litigation. As a result of the defence conduct, there is the potential for significant prejudice to the plaintiff due to the defence failure to comply fully and rigorously with its disclosure and production obligations. Granting leave to the defendants under rule 53.08 to use the video surveillance for substantive purposes is not appropriate given the potential for prejudice to the plaintiff. The defendants' application for leave under rules 30.09 and 53.08 is therefore dismissed. The surveillance evidence may not be used for substantive purposes by the defence.

Justice M. McKelvey

Released: August 1, 2018

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Plaintiff

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