by Robert I. Rubin and Mark J. Stempler

Video Surveillance in Personal Injury Cases

Covert video surveillance of a plaintiff is frequently employed by the defense to rebut damage claims in personal injury cases. Recently, the effectiveness and ease of video surveillance has been enhanced by improvements in technology, including the advent of easily concealable, high-resolution digital cameras. Surveillance can be effective at trial because it is readily understood by a jury, easily admissible, and often entertaining. It is most effective when used to impeach a plaintiff's credibility as to the extent of his or her injuries. Moreover, since the tape is factual, not opinion, it is not subject to traditional credibility attacks.

With the increasing use of surveillance, it is not surprising that courts have had to address numerous legal issues involving its use. These issues include discovery of surveillance, authentication and use at trial, and use of the video by medical experts. Other important related issues concern trespass and invasion of privacy. This article will discuss these and other important legal issues governing the use of surveillance in personal injury cases.

Balancing the Claimant's Right to Privacy and the Defendant's Right to Investigate

Courts have generally encouraged the use of surveillance as a means of investigating fraudulent personal injury claims. *Tucker v. American Employers' Ins. Co.*, 171 So. 2d 437, 438 (Fla. 2d DCA 1965), was the first Florida case to address the issue of motion picture (film at the time) surveillance. The plaintiff brought an action for personal injuries against the defendant following an automobile accident. The defendant's attorney employed a private investigator to conduct surveillance of the plaintiff. The plaintiff filed a complaint against the defendant, alleging the defendant willfully and maliciously caused the plaintiff to be "openly followed and shadowed in such a manner as to make the plaintiff and the general public aware that she was being followed, and causing her to suffer certain injuries."[1]

The trial court granted summary judgment for the defendant. However, the Second District Court of Appeal reversed and set forth the following balancing test:

> Because of the public interest in exposing fraudulent claims, a plaintiff must expect that a reasonable investigation will be made subsequent to the filing of a claim. However, there should be certain limits as to how the investigation is conducted, because there is also a social utility in not permitting a defendant to harass or intimidate a plaintiff into settling a claim on less favorable terms than those which he would voluntarily accept.[2]

The court noted the fact that the investigator openly followed the plaintiff was not in itself enough to render the investigator liable. However, the plaintiff's affidavit raised a genuine issue of material fact, such that summary judgment should not have been granted.

An invasion of a plaintiff's right to privacy may occur if the investigator is snooping around the plaintiff's home, knocking on the plaintiff's door under false pretenses, following the plaintiff closely in public places, or otherwise conducting surveillance in an unreasonable and obtrusive manner.[3]

Discovery of Surveillance

Upon receipt of a proper request to produce or interrogatories under Rule 1.280 of the Florida Rules of Civil Procedure, the defendant must disclose the existence of surveillance materials. A claimant's attorney should serve a request for production seeking all surveillance records, including video tapes, audio tapes,[4] photographs, and any other recordings of the claimant ordered or in the possession of the defendant. As a general rule, however, if the defense does not intend to introduce the tape at trial, it is considered attorney work product and, thus, subject to protection unless extraordinary circumstances exist that overcome the privilege and require production.[5]

Recently, the Fourth District Court of Appeal distinguished between a static, permanent store surveillance tape (which is generally considered *non*-work product), versus a covert investigator's tape, which is generally considered work product. In *Target Corporation v. Vogel*, 41 So. 3d 962 (Fla. 4th DCA 2010), Target sought certiorari review of the trial court's order compelling production, prior to the plaintiff's deposition, of a "static" security video (taken by a store-mounted camera) of the plaintiff's slip and fall. The Fourth District Court of Appeal held that the video was not work product prepared "to aid counsel in trying the case." Rather, it was a static video of the accident itself, discoverable under the Rules of Civil Procedure, which are designed to "prevent the use of surprise, trickery,

bluff and legal gymnastics."[6]

The court contrasted this type of static video with the surveillance video at issue in *Dodson v. Persall*, 390 So. 2d 704 (Fla. 1980). In *Dodson,* the surveillance film of a purportedly injured plaintiff was taken after the accident occurred. Such covert films, usually taken by retained private investigators, have been characterized by the Supreme Court as falling under the work product privilege, unless intended for use at trial.[7]

Timing of the Duty to Disclose Surveillance

Strategically, the defense usually wants to "lock" a plaintiff to his or her damage claims at deposition (preferably a video deposition), then disclose surveillance video *after* the deposition. The Florida Supreme Court in *Dodson* held that judges have discretion to order the depositions of parties to be conducted before production of a surveillance video is required. The rationale is to preserve the opportunity for impeachment of the deponent. Otherwise, it is conceivable that the deponent may alter his or her testimony based on what is depicted in the video.[8]

The timing of the disclosure of surveillance was also at issue in *Beck v. Holloway*, 933 So. 2d 4 (Fla. 1st DCA 2006). The plaintiff, Holloway, brought a medical malpractice lawsuit against his otolaryngologist, Beck, concerning the performance of meningitis-related surgery. Holloway claimed that, as a result of the malpractice, he was no longer able to drive a truck for work and could not bend over without falling. The Holloways had made no discovery requests for surveillance tapes when, four weeks before trial, Dr. Beck moved for leave to take their depositions for a second time. Dr. Beck's motion revealed that the defense had surveillance videotape in its possession and offered to furnish the plaintiff a copy of what it intended to offer at trial, but requested that the defense not be compelled to produce the videotape before the deposition. The trial court granted the motion, allowing additional depositions and permitting defense counsel to wait until after the depositions to provide the Holloways a copy of the videotape.

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At trial, counsel for the Holloways argued that no videotape should be allowed in evidence, because they did not receive an *unedited* copy of the video before trial. The trial judge sanctioned the defense by disallowing introduction of *any* video surveillance at trial. As it turned out, the only part of the tape that was not disclosed contained only "administrative time shots" (documenting when the investigator attempted to obtain surveillance but was unable to do so) and nothing of substance.

The jury returned a verdict for the Holloways, and Dr. Beck appealed. The First District Court of Appeal sustained the liability verdict for the Holloways, but ordered a new trial on damages. It found it was improper for the trial court to exclude the entire videotape without at least viewing the contents of the original, unedited videotape.

Generally, surveillance video is subject to discovery before trial and may not be used as a last minute surprise at trial. "The surveilling party's failure to comply with such a discovery request will bar the information's use as evidence in the cause unless the trial court finds that the failure to disclose was not willful and either that no prejudice will result or that any existing prejudice may be overcome by allowing a continuance of discovery during a trial recess."[9] In *La Villarena v. Acosta*, 597 So. 2d 336 (Fla. 3d DCA 1992), the defense sought to introduce surveillance video of the plaintiff taken *during* the trial. The video was not disclosed until the plaintiff rested his case. The trial judge did not permit the surveillance video to be entered into evidence because it was not listed on the defendant's exhibit list, pursuant to the pretrial order. Moreover, La Villarena was unable to explain why it did not place Acosta under surveillance earlier. The Third District Court of Appeal agreed that the video was properly excluded.

However, failure to identify the surveillance video on the exhibit list may not automatically render the video inadmissible. As indicated in *La Villarena*, the analysis may depend on prejudice to the opponent. For instance, in *Tomlinson-McKenzie v. Prince*, 718 So. 2d 394 (Fla. 4th DCA 1998), the Fourth District held that it was an error for the trial court to preclude a defendant's use of surveillance video and supporting witness testimony at trial because the video and the witness were not disclosed on the pretrial exhibit and witness lists. The video at issue went to the heart of the case regarding the plaintiff's injuries.

The witness and exhibit lists were originally submitted in preparation for trial, which was scheduled for early 1996. The trial was continued and put on a docket in the spring of 1997, more than a year later. Prior to the scheduled trial, the defendant moved to amend its witness and exhibit lists to include surveillance video of the plaintiff. The motion was denied as untimely. The trial, however, did not take place until early 1998, and the court still denied the defendant's efforts to introduce the surveillance video and supporting testimony.

In reversing the decision to preclude the video, the Fourth District stated that although the trial judge has discretion to admit evidence, the decision should be, "guided primarily by whether the 'objecting party' would be prejudiced by the admission of the evidence."[10] Prejudice generally occurs when the opposing party is surprised by the evidence, and would have taken some action to protect itself if it had timely notice.[11] Since the defendant

tried to disclose the surveillance tape and identify the proper witnesses to authenticate it, and the plaintiff was aware of the tape's existence about a year before trial, the court determined there was no prejudice to the plaintiff, and the video should have been allowed into evidence.

Authentication of Video Surveillance

Evidence must be authenticated under F.S. §90.901. F. S. §90.902 lists a number of items that can be self-authenticated, *i.e.*, admitted without extrinsic evidence of authenticity. Most self-authenticating evidence includes items such as official documents, books, or other printed materials. However, neither photographs nor videotapes are self-authenticating. Authentication of video surveillance usually comes down to a simple inquiry: Can the videographer testify that what is on the video is a fair and accurate representation of what happened on the video? It is not the only way, however.

In *Cirillo v. Davis*, 732 So. 2d 387 (Fla. 4th DCA 1999), the plaintiff appealed a low damage award in an accident case, arguing that the trial court erred in admitting a surveillance videotape into evidence without having the tape authenticated by the videographer. The defense called the videographer's employer, Frank Funke, who testified as to the "chain of custody" of a 25-minute edited version of two days of videotape surveillance.

When the plaintiff objected to introduction of the surveillance (due to lack of authentication by the actual cameraman), the defense suggested that they could call the plaintiff as part of the defense case and ask her if she was the person shown in the tape. The plaintiff's objection, however, was not whether she was depicted on the tape, but rather that they were unable to cross-examine the person making the tape about what had been left out. The Fourth District found the trial court erred in admitting the unauthenticated tape into evidence, but concluded that the plaintiff failed to demonstrate that it was prejudicial.

Business Records Exception

The videographer is not the only person who can authenticate the surveillance video. At least one court has held that authentication can be accomplished by someone else under the business records exception to the hearsay rule. For example, in *King v. Auto Supply of Jupiter, Inc.*, 917 So. 2d 1015 (Fla. 1st DCA 2006), a surveillance video of a workers' compensation claimant was kept out of evidence. The video was relied upon by a testifying expert physician in his analysis of the claimant. Counsel for the claimant argued that the video and the surveillance report were inadmissible as business records because they were not verified through testimony of the person who prepared them. Instead, the records custodian of the surveillance company merely testified the report and video were prepared within the course of business.

F.S. §90.803(6) pertains to records of regularly conducted business activity. For a business record to be admissible, there must be a showing that the record was 1) made at or near the time of the event; 2) by or from information transmitted by a person with knowledge; 3) kept in the course of a regularly conducted business activity; and 4) that it was the regular practice of that business to make such a record.[12] In *King*, the records custodian, who was also the president of the surveillance company, testified that he was responsible for reviewing reports and videos, assigning work to investigators, and receiving the work from his investigators. He identified the reports and video at issue and testified they were kept in the regular course of the business. The First District Court of Appeal held that the records custodian's testimony established all of the requirements for a business records exception under the statute.

Is a Surveillance Video Hearsay?

Although the court in *King* ruled the surveillance video was admissible under the business record exception to the hearsay rule, the tape was probably not hearsay to begin with. "The Florida Evidence Code characterizes hearsay in terms of statements made by 'persons.' Subsection 90.801(1)(c) defines hearsay as including an out-of-court 'statement' of a declarant. Subsection 1(b) defines a 'declarant' as a 'person who makes a statement.'" "Therefore, only statements made by a person fall within the definition of hearsay." In *Bowe v. State*, 785 So. 2d 531, 532 (Fla. 4th DCA 2001), the court found that "caller I.D. display and pager readouts are not statements generated by a person, so they are not hearsay within the meaning of subsection 90.801(1)(c)." In a similar vein, the Fourth District Court of Appeal in *Avilez v. State*, 50 So. 2d 3d 1189 (Fla. 4th DCA 2011), ruled that the printout of a "roomkey log" of an electronic key issued to the defendant was not hearsay. Thus, surveillance videos are not hearsay, and, therefore, they have to be authenticated like a photograph.

The "Silent Witness" Doctrine

If there is no witness that can authenticate the surveillance video, it may still be admitted under the "silent witness" theory.[13] This doctrine provides that the video can be admitted as evidence if the reliability of the process that produced the video can be proven. This requires a determination from a judge that 1) there is evidence establishing the time and date of the video; 2) there was no tampering with the video; 3) the video equipment used was sound; and 4) there is testimony identifying the participants depicted in the video.

Copies, Edited, and Enhanced Video

In criminal cases, it has been held that time lapse video, as well as edited and enhanced videos, may be admissible if they fairly and accurately represent what is depicted.[14] This principle likely would also apply to use of video surveillance in personal injury lawsuits. Under F.S. §90.953, a duplicate is admissible into evidence unless a "genuine question is raised about the authenticity of the original or any other document or writing," or "it is unfair, under the circumstance, to admit the duplicate in lieu of the

original."[15]

If a party contends that the video may not be a fair and accurate representation of the original video, it should make specific objections to the portions of the video at issue, based on the original video. The court may then have to compare the original to the allegedly "manipulated" video for an authenticity analysis. Failure to timely object may waive a party's ability to later contest the video.[16]

Admissibility of Video Surveillance

Surveillance video is also subject to the balancing test under F.S. §90.403. If its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury, it may not be admissible. For example, in *Hendry v. Zelaya*, 841 So. 2d 572 (Fla. 3d DCA 2003), the Third District Court of Appeal upheld the trial court's decision to exclude static surveillance video from a bar which depicted the incident at issue, a victim getting hit in the head by another patron with a bottle. The judge determined that the video was confusing and lacked probative value for the jury. Instead, the court admitted still-frame photos from the videotape.

Physician Commentary on Surveillance

The claimant or defendant may show a surveillance tape to their medical expert and seek to have the expert comment on it at trial. This may be done to bolster the expert's opinion, or may be used to modify an expert's opinion previously expressed in a report or deposition. For example, in the *King* case discussed above, the defense showed a worker's comp IME physician a surveillance video.

In *H & H Electric, Inc. v. Lopez*, 967 So. 2d 345 (Fla. 3d DCA 2007), Lopez was injured when his motorcycle was struck by an employee of H & H. During the course of litigation and approximately 16 months after the accident, H & H procured a surveillance video of Lopez washing his car and riding his motorcycle. H & H gave the video to Dr. Cantana, its "independent" medical examiner. Apparently, Dr. Cantana's exam confirmed some of claimant's injuries. However, after watching the video, Cantana changed his opinion and said the claimed injuries were exaggerated.

The parties argued over whether the video should be admitted into evidence. Ultimately, it was allowed. However, Dr. Cantana's commentary on the video and how it contradicted the injuries claimed by Lopez was precluded. Dr. Cantana was also not permitted to testify as to how his viewing the video led him to change his opinion of Lopez's injuries. The trial court allowed the defendants to make arguments concerning the video to the jury, but determined that allowing the expert to comment on the video would "elevate" the video in the eyes of the jury. Moreover, the court reasoned that the jury would be able to make its own determination as to the content of the video.

The district court found no abuse of discretion in the trial court's limiting Cantana's testimony and noted an appellate court shall not overturn such a decision unless it was "arbitrary, fanciful or unreasonable," *i.e.*, an abuse of discretion.

Motion to Dismiss for Fraud on the Court

An effective surveillance tape can also serve as the basis for a defense motion to dismiss the complaint for plaintiff perpetuating a fraud on the court. However, dismissal for fraud requires a high standard:

> It occurs where, "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's

claim or defense."[17]

In *Amato v. Intindla*, 854 So. 2d 812 (Fla. 4th DCA 2003), the trial court dismissed the plaintiff's complaint after concluding that he perpetrated a fraud. The trial court's dismissal was based on a videotape taken by an investigator which depicted the plaintiff performing several activities that he testified he was unable to perform. However, the Fourth District Court of Appeal reversed, holding that dismissal with prejudice was an abuse of discretion. It determined that a plaintiff's claims concerning the severity of an injury was an issue of fact for the jury's determination.

Although no Florida court to date has upheld a dismissal for fraud on the court based on contradictory surveillance tape, the opportunity to do so remains if the right set of facts are at issue.

Conclusion

The recent advent of easily concealable, high-resolution digital video cameras has made covert surveillance in personal injury cases more popular and effective. A persuasive surveillance video may defeat the plaintiff's claims of injury. Challenging legal issues concerning discovery, authentication, use at trial, manipulation, and invasion of privacy have arisen. This article has sought to assist personal injury attorneys and courts grapple with these interesting emerging legal issues.❑

[1] This is sometimes known as "rough shadowing."

[2] *Tucker,* 171 So. 2d at 438.

[3] *Pinkerton Nat. Detective Agency, Inc. v. Stevens*, 132 S.E.2d 119 (Ga. Ct. App. 1963) (Attempts to shadow the plaintiff by snooping around her house, peeping in her windows, calling at her door under the guise of being a television salesman, and following her closely in public places was held to constitute an actionable invasion of her right of privacy. The court determined that the defendant had no right to investigate the plaintiff in an unreasonable and obtrusive manner intent on disturbing the sensibilities of an ordinary person without hypersensitive reactions).

[4] Covert audio recordings are prohibited under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, commonly referred to as the "Federal Wiretap Act." The Florida Security of Communication Act, FLA. STAT. Ch. 934 (1993), is patterned after the federal wiretap act.

[5] *See Dodson v. Persell,* 390 So. 2d 704 (Fla. 1980); *see also Huet v. Tromp*, 912 So. 2d 336 (Fla. 5th D.C.A. 2005) (When investigator who conducted video surveillance has assembled protected work product, counsel cannot avoid the protection of the work product doctrine by deposing the investigator and asking about "observations," which reflected the contents of the protected work product).

[6] *Vogel*, 41 So. 3d at 963, *quoting Surf Drugs v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970).

[7] *Pinkerton*, 132 S.E.2d at 199; in summary, the Supreme Court in *Dodson* held that: "1) the existence of surveillance movies and photographs is discoverable in every instance; 2) the contents are discoverable if the materials will be used as evidence either substantively or for impeachment; 3) if the movies or photographs will not be used as evidence by the holder, the contents are discoverable only upon a showing of exceptional circumstances; 4) the party seeking discovery must be afforded a reasonable opportunity to observe the movies or photographs before their presentation as evidence; and 5) within the trial court's discretion, the surveilling party has the right to depose the party or witness filmed before being required to produce the contents of the surveillance information for inspection."

[8] *See also* Joseph E. Brooks, *Surveillance – the Law and Common Sense*, TRIAL ADVOC. Q. (Spring 2010).

[9] *Dodson*, 390 So. 2d at 708; *see Pinkerton*, 132 S.E. 2d 119.

[10] *Tomlinson-McKenzie*, 718 So. 2d at 396.

[11] *Id. Binger v. King Pest Control*, 401 So. 2d 1310, 1313 (Fla. 1981) ("Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, … [its] independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases).").

[12] *Id.*, *citing Jackson v. State*, 738 So. 2d 382, 386 (Fla. 4th D.C.A. 1999); *see also Yisrael v. State,* 993 So. 2d 952 (Fla. 2008).

[13] *Hannewacker v. City of Jacksonville Beach*, 419 So. 2d 308 (Fla. 1982).

[14] *Jefferson v. State*, 818 So. 2d 565 (Fla. 1st D.C.A. 2002).

[15] FLA. STAT. §§90.953(2) and 90.953(3).

[16] *Bryant v. State*, 810 So. 2d 532, 537 (Fla. 1st D.C.A. 2002).

[17] *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th D.C.A. 1998), *quoting Aoude v. Mobil Oil Corp.,* 892 F.2d 1115, 1118 (1st Cir. 1989).

Robert I. Rubin *is a shareholder at Becker & Poliakoff, P.A., in West Palm Beach. He focuses his practice on personal injury and insurance disputes. He obtained his bachelor degree from Brandeis University,* magna cum laude*, and his law degree from George Washington University.*

Mark J. Stempler *is an associate at Becker & Poliakoff, P.A., in West Palm Beach, where his practice focuses on government bid protests and construction litigation. He obtained his bachelor degree from the University of Miami and his law degree from Florida International University, with honors.*

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