

VERMONT SUPERIOR COURT  
Bennington Unit  
207 South St  
Bennington VT 05201  
802-447-2700  
www.vermontjudiciary.org



CIVIL DIVISION  
Case No. 21-CV-00299

John Wilkinson v. Susan Borden

## DECISION ON MOTION

This is a civil personal injury case, pre-trial. Plaintiff filed a motion to compel disclosure of surveillance footage of Plaintiff. Defendant opposed the motion. The issue is whether surveillance footage is discoverable.

The motion to compel is granted in part. No surveillance shall be introduced at trial unless it is disclosed to the opposing party no later than 30 days prior to the pre-trial conference. If no surveillance is to be used at trial, no surveillance need be disclosed. However, if surveillance is potentially to be used at trial, all surveillance must be disclosed within the deadline. This order applies to surveillance footage and photographs only and does not apply to any reports, summaries, or analyses conducted by Defendants as attorney work-product.

### Background

Plaintiff served Defendant with discovery on July 1, 2021. The discovery requested production of “[a]ny and all photographs or surveillance films of Plaintiffs”.

Defendant attested, at time of filing, that no surveillance as such sought by Plaintiff yet existed. However, Defendant has stated Defendant may produce surveillance in future and thus opposed the motion.<sup>1</sup>

### Analysis

V.R.C.P. 26 (b)(1), V.R.C.P. 26 (b)(4), and V.R.C.P. 26(e)(2) control discovery issues.

V.R.C.P. 26 (b)(1) states the general scope a of discovery.

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the

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<sup>1</sup> Under V.R.C.P. 26(e)(2) any interrogatory or request for production is a continuing one. V.R.C.P. 26(e)(2) poses a continuing requirement for production. Defendant has an ongoing obligation to comply with valid prior-discovery requests and interrogatories. The ongoing obligation contradicts Defendant's mootness argument.

discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

V.R.C.P. (b)(1).

V.R.C.P. 26(b)(4) outlines exemptions of trial preparation materials from discovery.

Subject to the provisions of paragraph (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

V.R.C.P. 26(b)(4).

V.R.C.P. 26(e)(2) makes discovery requests and obligations ongoing.

A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement or correct the response to include information thereafter acquired with respect to the following matters if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing:

...

(2) Any other prior response to an interrogatory, request for production, or request for admission.

V.R.C.P. 26(e).

The Vermont Supreme Court has not addressed the issue of surveillance footage discovery.

The Vermont Rules of Civil Procedure allow for broad discovery. VRCP 26(b)(1). Rule 26(b)(4) provides some disclosure protection to surveillance footage not intended for use in trial. However, that shield is not perpetual and dissolves when a party wishes to use the footage as evidence at trial.

“The majority rule... is that a party is entitled not only to know before trial whether he or she has been subjected to photographic or video surveillance but to have pre-trial access to the surveillance materials as well.” *Ranft v. Lyons*, 471 N.W.2d 254, 261 (Wis. Ct. App. 1991) (citing to Annotation, *Discovery of Surveillance Photographs*, 19 A.L.R. 4th 1236 (1983) but holding discovery not required in Wisconsin).

Courts that conclude non-evidentiary surveillance need not be discoverable recognize, “Those courts which have considered this specific issue have, for the most part, allowed discovery of all surveillance films, including the non-evidentiary tapes, prior to trial.” *Fisher v. Nat’l R.R. Passenger Corp.*, 152 F.R.D. 145, 150 (S.D. Ind. 1993) (citations omitted).<sup>2</sup>

The Federal District Courts for the Districts of Vermont and Massachusetts have both held that surveillance footage is discoverable. See *Hunt, et al. v. Mt. Snow, et al.*, File No. 91-08 (D. Vt. 1991) (order July 11, 1991) and *Papadakis v. CSX Transp., Inc.*, 233 F.R.D. 227 (D. Mass. 2006).

Additionally, the context of admitted evidence is discoverable for use as impeachment of that evidence. *Middleton v. Beckett*, 960 P.2d 1213, 1216 (Colo. App. 1998). If a party seeks to use surveillance evidence at trial, the opposing party is entitled to discovery of the full context of that evidence, including other obtained surveillance. It is prohibited to cherry pick which video snippets will be used when the broader context would create a meaningful discrepancy. See *Snead v. American Export—Isbransten Lines, Inc.*, 59 F.R.D. 148 (E.D.Pa. 1973) (ordering that the interrogatories regarding surveillance and the films, if they exist, need not be answered and exhibited to plaintiff until plaintiff has been deposed. Specifically, the Court in *Snead* wrote “all this should take place as close to the time of trial as possible but, before the pre-trial conference” *Id.* at 151)

One Vermont trial court has addressed this issue. *Thiewes v. Deiss* No. S308-95wrC (Vt. Super. Ct. Jan. 26, 1996)(Fisher, J.) (Noting the penalty for nondisclosure was simply preclusion of use at trial.) *Thiewes* provide a defendant with a certain number of days, from the date of obtaining the surveillance to determine the utility of surveillance videos for trial. However, an arbitrary deadline from *the date the surveillance is obtained* does not consider what additional time may be required to investigate the usefulness of the surveillance.<sup>3</sup>

To ensure a fair and just determination of the action, the parties should be allowed to develop evidence that is relevant to the issue. See, V.R.C.P. 1; V.R.E. 102.

Vermont Rules of Civil Procedure state, “[The rules] shall be construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive* determination of every action.” V.R.C.P. 1 (emphasis added).

Vermont Rules of Evidence state, “These rules shall be construed *to secure fairness* in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” V.R.E. 102 (emphasis added).

A just and fair ascertainment of the truth occurs through balancing the need for discovery of relevant evidence with the protection of attorney work product.

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<sup>2</sup> In *Fisher* the Court dismissed defendant’s argument about the usefulness of “non-evidentiary” surveillance to impeach the “evidentiary surveillance” selected by plaintiff.

<sup>3</sup>For example, subsequent discovery to/of the opposing party based on the surveillance may be necessary before the surveillance is revealed. This may not be concluded within thirty days as a party has thirty days to respond to interrogatories and request to produce and a deposition may take more than thirty days to schedule.

That balance is found with a surveillance disclosure deadline 30 days prior to the pre-trial conference. This deadline provides each party significant time to investigate and reflect on the footage's utility, while securing a just and fair ascertainment of the truth.

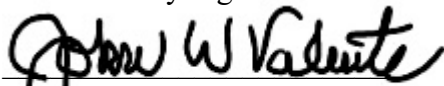
### **Order**

The motion to compel is GRANTED, in part.

No surveillance shall be introduced at trial unless it is disclosed to the opposing party no later than 30 days prior to the pre-trial conference. If no surveillance is to be used at trial, no surveillance need be disclosed. However, if surveillance is potentially to be used at trial, all surveillance must be disclosed within the deadline.

This order applies to surveillance footage and photographs only and does not apply to any reports, summaries, or analyses conducted by Defendants as attorney work-product.

Electronically Signed 7/12/2022 11:37 AM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink that reads "John W. Valente". The signature is written in a cursive, slightly slanted style.

John W. Valente  
Superior Court Judge