CITATION: Arsenault-Armstrong v. Burke et al, 2013 ONSC 4353
COURT FILE NO.: C-9-12
DATE: 2013-06-24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Elizabeth Arsenault-Armstrong	)	Alden M. Dychtenberg, for the Plaintiff
Plaintiff	)	
– and –	)	
Cheryl Burke and Christine Solcan	)	
Defendants	)	Amberlee Small, for the Defendant, Burke
	)	Jeffrey E. Naganobu, for the Defendant, Solcan
	)	**HEARD:** June 20, 2013

THE HONOURABLE MR. JUSTICE P.B. HAMBLY

REASONS FOR JUDGMENT

[1] This is a motion brought by the plaintiff in a personal injury action for an order for a defendant to produce particulars of observations made during surveillance of the plaintiff, even if the plaintiff does not intend to rely upon it at trial, either as substantive evidence or for purposes of impeachment.

Facts

[2] The plaintiff was injured in a motor vehicle accident on January8, 2007. She alleges that she suffered injuries when a motor vehicle struck the vehicle which she was driving after it had

been struck by a third vehicle. She commenced an action against the owner and driver of each of the other two vehicles on June 2, 2009. The parties agreed that the defendant, Cheryl Burke (the defendant Burke), could be examined for discovery by way of written questions. The plaintiff posed written questions to this defendant as follows:

> "4. If any surveillance is conducted in future please provide within a reasonable time of the date it was conducted, the dates on which the surveillance was conducted, the time each session began and the time it ended, where it took place, what was seen on each occasion, and the name and address of the person(s) who conducted the surveillance on each occasion."
>
> and,
>
> "5. If video or photographs were/are taken during the course of any surveillance, please advice when the video or photograph was taken, what the image depicts and, if video, what time it was started or stopped."

[3] She agreed to provide information as follows:

> (1) the date(s) of the report(s); (2) the date(s) that the surveillance was taken; (3) the name of the investigator; (4) the number of pages in the report; and (5) the number of photographs or the number of minutes of video taken.

She declined to provide further particulars if she did not intend to rely on the surveillance at trial.

Analysis

[4] If the defendant intends to rely on the surveillance as substantive evidence at trial it must produce the surveillance report including a video tape pursuant to Rule 30.09. If the defendant intends to rely upon the surveillance evidence only for impeachment purposes, she must produce full particulars of the surveillance, although she need not produce the actual report or a video tape. In *Walker v. Woodstock*, [2001] O.J. No. 157 the Divisional Court in the judgment of Justice O'Leary answered the following question in the affirmative:

1 ...

> Whether a party who conducts surveillance on another party is required to disclose full particulars of the surveillance in circumstances where the surveillance will not be used as substantive evidence but only, if at all, to impeach the testimony of the party observed.

Justice O'Leary stated the following:

> **12** It follows then that the defendants in this case must make full disclosure of all particulars of the surveillance conducted by them, even if, they only intend to use the surveillance to impeach the testimony of a witness.

[5] The question remains as to whether a defendant is required to produce the particulars of surveillance evidence if it does not intend to rely on it.

[6] In *Niederle v. Frederick* 1985 CarswellOnt 562 the plaintiff sought production of surveillance evidence obtained by the defence after his counsel had made an opening statement. The defendant had made a general undertaking at his discovery to disclose to the plaintiff "information subsequently acquired going to the issues in this case." (para. 4). Justice Osborne (as he then was, later ACJ Osborne of the Court of Appeal) stated the following:

> **15** It seems to me that the intent of the disclosure rules would be fractured if disclosure were limited to answers to the questions who took the film and when was the film taken. Obviously the Rules intended that there be reasonable and full disclosure subject to rights of privilege which are recognized both at common law and by the new Rules.
>
> **16** I think Mr. Kennedy is correct in stating that even more is required in these circumstances. In my view the defence must disclose not only surveillance activities resulting in evidence that it may or does wish to lead at trial, but also surveillance activity that did not result in evidence upon which the defence relies or may rely.

> **17** That disclosure requirement comes from a broad view of the undertaking given on discovery and what I view to be the requirement of full disclosure emerging from a liberal interpretation of the new Rules of Civil Procedure.

[7] In *Marchese v. Knowles*, [2009] O.J. No. 1159, Justice Cavarzan dealt with a motion in a personal injury case by the plaintiff to compel a defendant to produce surveillance evidence as follows:

> **6** …: 4) An Order compelling the defendant to provide all past, present and **future surveillance particulars** as required by the *Rules* and existing case law, including the dates, times, precise locations of the activities, particulars of the activities and observations made, names and addresses of persons who conducted surveillance and all attempted investigations, enquiries, attempted enquiries, and **particulars of all video surveillance, surveillance reports, pictures and so forth**. (emphasis added)

He relied on the above passage from *Niederle* quoted with approval by Justice Borins (later Borins J.A.) in *Sacrey v. Berdan* [1986] O.J. No. 2575 at para. 19. He made an order requiring the defendant to provide full particulars of the surveillance.

[8] In *Beland v. Hill*, [2012] O.J. No. 3997, Justice Howden assessed costs in a personal injury trial over which he presided. The defendant was successful at the trial. During the trial he had declined to permit the defendant to use surveillance evidence for purposes of impeachment, which the defendant had not disclosed. He held that the time spent on a voir dire on this issue should result in a decrease of the defendant's costs. He stated the following:

> **49** In this case, at the defendant Heidi Hill's examination, she was asked whether surveillance of the plaintiff had been arranged and defendant's counsel on discovery said that she did not know of any; in other words, the answer on discovery was no, no such surveillance had been commissioned. That appeared to have been true at the time because no surveillance occurred until well after completion of the examinations for discovery, in 2011. As well, at the time the defendant's affidavit of documents was delivered, no surveillance record existed. However, once surveillance had been conducted, the record became a privileged

document in the defendant's possession. This is where, in my view, the continuing duty to disclose imposed by the rules kicks in. The existing affidavit of documents had become incomplete and inaccurate where it stated that all privileged documents in the defendant's control were listed in Schedule B. By rule 30.07(b), the defendants were required to serve a supplementary affidavit disclosing the additional document, i.e. the surveillance record, in a timely manner before trial. Rule 48.04(2) affirms that intent by exempting, from the setting - down prohibition of further proceedings, disclosure of information subsequently obtained.

50 The defendants' counsel's negative answer to the question concerning surveillance on discovery was no longer correct by 2011. By rule 31.09(1)(b) and the discovery disclosure rules, the defendants were required to provide a complete summary of the surveillance to the plaintiff. Following *Ceci* and *Landolfi*, the discovery rules are to be read in a manner to discourage tactics and encourage full and timely disclosure in order to encourage early settlement and reduce court costs. Carthy J.A. in *Ceci* set out the rationale for this reading of rule 30.09 in context with the informational discovery rules:

> **10.** In my view, the discovery rules must be read in a manner to discourage tactics and encourage full and timely disclosure. Tactical manoeuvres lead to confrontation. Disclosure leads sensible people to assess their position in the litigation and to accommodate. In cases such as this, there will be very few litigants who successfully maintain a dishonest stance simply because they have been exposed to the other party's evidence in advance of giving answers. It is more likely that the process of discovery will make it difficult for a litigant to conceal untruth and that a plaintiff will back away voluntarily from claims that are exposed as invalid, limiting further expense in the litigation.

51 To argue, as Mr. Forget does, that a litigant is entitled to hold back information and documents that are clearly relevant and are needed by the opposing party to properly assess the case, well before trial with its accompanying heavy costs burden, in my view is to run directly counter to the direction by the Court of Appeal and the meaning and intent of the Rules of Civil Procedure. It is a holdover from pre-1984 days when surprise was too often the order of the day for trials. While the plaintiff's evidence as given in chief did coincide to some extent with what the surveillance showed, the overall impression given by the surveillance differed from the tenor of his evidence. It showed the plaintiff working for relatively lengthy periods of time on his garden and yard, using a shovel and an axe, pulling up weeds using some force, washing the inside of a car as well as playing an active role in building and carrying a floating dock and driving a wheelbarrow relatively full of earth a significant distance along the beach near the cottage. It would have been important for counsel to know this information as the general effect contradicted the tenor of his evidence that he could not do activities for any considerable length of time without flare-ups of severe back pain. I am not suggesting, of course, that the defendants were under a

> duty to disclose the actual surveillance record but the requirement of full disclosure of relevant evidence before trial required defendants' counsel to deliver a complete and accurate account and summary of the content of the surveillance.
>
> **52** The defendants' counsel failed to deliver an up-dated affidavit of documents and failed to correct the examination for discovery concerning the subsequent surveillance in a timely manner before trial. Where the opposing party is kept in the dark about the existence of a document or record by lapses in the duty to disclose before trial, I fail to see how that party can exercise their right to move for the relevant information to be produced before trial. …. The timing of, and failure to disclose relevant documents and information following the examinations for discovery is an example of smart (sharp?) practise which encourages costly trials and makes more difficult early settlement of cases before trial. In my view, it must be discouraged by a significant reduction in the defendants' costs. …

[9] In *Bell v. Brown* 2012 CarswellOnt 1426, the same issue was before Justice Tranmer. He defined the issue at para. 12 as follows:

> Issue #2: Defendant refused to undertake to produce "the particulars of any future surveillance, including the dates and times of the surveillance and a description of any videos or photographs that are taken."

[10] He held that there was no authority to grant the relief that the plaintiff sought. I respectfully disagree. *Marchese* and *Beland* do not seem to have been cited to him.

[11] The consequences of the defence not producing the full particulars of surveillance evidence in its possession, even if in the period leading up to the trial the defence is of the view that it will not rely on it at trial are well illustrated in *Beland*. The surveillance evidence will assist the plaintiff in evaluating the strength of her case and arriving at her settlement position prior to trial. Even if the defendant will not be able to use the surveillance evidence for impeachment purposes, as a result of its non-disclosure, the defence will gain knowledge of the plaintiff from the surveillance evidence which it will be able to use to its benefit. A requirement

that the defence produce it even if it does not presently intend to use at trial is consistent with what the Court of Appeal said in *Ceci v. Bank* (1992), 7 O.R. (3d) 381 quoted above by Justice Howden. In *Beland*, after a 17 day trial a jury dismissed the plaintiff's case. The trial judge fixed costs against the plaintiff, exclusive of HST at $115,318. This is a devastating result for a plaintiff. Perhaps it could have all been avoided if the disputed surveillance evidence had been produced by the defendant.

Result

[12] The motion is allowed. An order will go as asked, namely, the following:

1. Requiring the defendant Burke to provide the information and documents requested by the plaintiff in questions 4 and 5.

2. Amending the timetable of Whitten J. dated November 22, 2012 extending the time for bringing motions arising out of undertakings and refusals to June 20, 2013.

[13] The plaintiff may make submissions on costs within 10 days and the defendants may make submissions within 10 days of receipt of the plaintiff's submissions.

Justice P. B. Hambly

Released: June 24, 2013

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Released: June 24, 2013