**SUPERIOR COURT**
**OF THE**
**STATE OF DELAWARE**

**CHARLES E. BUTLER**
**JUDGE**

**NEW CASTLE COUNTY COURTHOUSE**
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January 28, 2015

To: Counsel of Record

Re: ***Naylor v. Martin, et al.***
**C.A. No. N13C-01-224-CEB**
**Upon Consideration of Plaintiff's Motion to Exclude or Suppress Surveillance Evidence. DENIED.**

Dear Counsel:

I have been asked to decide whether Plaintiff can "exclude or suppress" certain evidence procured by the Defendants in this case. The short answer is "no."

Plaintiff Debora Naylor ("Plaintiff") filed a complaint in this Court claiming she was injured in a car accident involving a vehicle owned by Defendant KVA ("Defendant") that was parked on the shoulder of a highway. In the moving papers, we are told that in October, 2013, Defendants answered an interrogatory indicating they had not conducted any surveillance on Plaintiff. Apparently Defendants subsequently did conduct some surveillance of Plaintiff working on her farm in May and June of 2014, but did not seasonably notify Plaintiff of their having done so until after Plaintiff's deposition. Plaintiff gave testimony at her

deposition that we presume is undermined somehow by the video surveillance. After her deposition concluded, Defendants supplied Plaintiff's counsel with a copy of the video surveillance, causing much indigestion to Plaintiff's counsel. We are told, had Plaintiff's counsel known about the video, it would have "materially affected [his] preparation of plaintiff for her deposition."

Well, that is kind of the point, isn't it? Let us assume for the moment that Defendants knew they had video of Plaintiff laboring diligently about the horse farm, engaging in the backbreaking work of tending to horses. And let us assume further that they deliberately withheld that fact from Plaintiff and her attorney at the time of her deposition. And let us finally assume (actually we don't have to assume – it is in the transcript) that Plaintiff lamented her inability to perform these labors since the accident giving rise to the complaint.

Plaintiff went to a deposition and swore to tell the truth, the whole truth and nothing but the truth. Truth is not a function of "counsel's preparation of plaintiff for her deposition;" it is the truth. If she did not tell the whole truth, it is not the Court's duty to interpret the rules so as to save her from her dissemblance. Rather, we are instructed to construe the rules "to secure the just, speedy and inexpensive determination of every proceeding."[1]

[1] Super. Ct. Civ. R. 1.

So the real question before the Court is whether it is sufficiently "improper" for the defense to withhold damaging impeachment evidence from the plaintiff until after her deposition such that the Court ought to intervene and declare its impropriety to the point of suppression/exclusion. The parties cite us to two cases on the subject: *Hagan v. Rostien*[2] and *Hoey v. Hawkins*.[3]

*Hoey v. Hawkins* was a case in which clandestine films of plaintiff had been taken by an investigator for the defense, but not disclosed to plaintiff's counsel until the first day of trial.[4] While decrying defendant's failure to comply with the duty to seasonably update its discovery answers (by revealing the existence of the video), the Court noted that plaintiff's remedy would have been "[a]n application for a continuance or for time in which to engage an expert or to take a deposition."[5] Had plaintiff done so, a "balancing test" could have been considered by the court below, but since plaintiff did not, there was no balancing to be done and the Supreme Court thus did not inform us of the factors that ought to be balanced, although defendant's non-disclosure would certainly count against it.

[2] 1997 WL 366893, at *1 (Del. Super. Ct. Apr. 23, 1997).

[3] 332 A.2d 403 (Del. 1975).

[4] *Id*. at 405.

[5] *Id*. at 407.

Query – to what extent does the search for the truth override defendant's defalcations?

*Hagan v. Rostien*[6] did help to fill in some of the gaps in this jurisprudence. In that case, the pretrial stipulation was filed with the court and the case was ready to be tried but was continued for benign reasons.[7] After the continuance was granted, the defense revealed the existence of damaging videotape of the plaintiff, who then sought to exclude it for much the same reasons as the plaintiff in *Hoey*.[8] The trial judge did indeed engage in some balancing of the interests in *Hagan* and ultimately excluded the video because the pretrial stipulation had already been filed not mentioning the video, all discovery had been concluded, and amendments to the Rule 16 pretrial stipulation should only be undertaken to prevent "manifest injustice."[9] The trial court saw no "manifest injustice" in excluding the video and it was therefore suppressed.[10]

In this case, "manifest injustice" is not the standard by which to judge the alleged improperly delayed disclosure. There has been no pretrial stipulation filed and Rule 16 is not implicated. Likewise, the court in *Hagan* was concerned with

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[6] 1997 WL 366893, at *1 (Del. Super. Ct. Apr. 23, 1997).

[7] *Id*.

[8] *Id*.

[9] *Id*. at *3.

[10] *Id*. at *4.

the fact that all of the witnesses had been deposed, including the experts, and the court presumed that the witnesses would have to be re-deposed in light of the damaging video.[11] In addition, it was at least possible that the plaintiff would need expert testimony to repudiate the veracity or details of the video, thus imposing further delay and expense to the litigation.[12]

But while *Hagan* tells us much, it does not tell us quite enough. If the defense has video that undermines Plaintiff's credibility as to her injuries and Plaintiff's injuries are largely self reported, video would seem to be highly probative on the issue of both the injuries and Plaintiff's credibility in reporting them. Plaintiff in this case makes no argument that the pretrial stipulation has been filed or even that new, different or additional depositions will be required in light of the revelation of the video. Had Plaintiff done so, we might well entertain a motion that Defendant pay the costs of the inconveniences suffered by the Plaintiff as a result of the late disclosure. But short of some specific claim of unnecessary financial expense, or delay, or "manifest injustice," Plaintiff's generalized claim that counsel might have "prepared" Plaintiff for her deposition in some different way seems short of the mark. We must presume that Plaintiff is prepared for her

[11] *Id*. at *3.

[12] *Id*.

deposition by an admonition to tell the truth, in which case the existence of a video tape ought to have little or no effect.

All of this is not to suggest for a moment that defendant's are free to go roaming about, breaching their duties under Rule 26(e) to seasonably update their discovery responses. Exactly where this line must be drawn necessarily involves a consideration of competing interests and it is equally likely the balance could fall against the defense as for it. And even in those cases where the video tape is not excluded, an award of fees, costs and financial sanctions occasioned by the delayed disclosure is probably appropriate to ensure compliance with the Rules.

Plaintiff's counsel's office contacted chambers and advised that Plaintiff needed a ruling on this matter prior to a mediation scheduled to take place within the week. It is therefore the Court's ruling, on the record before me, that the videotape is admissible at trial. Certain as I am that this ruling will trigger further disputations between the parties, they can await the results of the mediation and further briefing should it become necessary.

**IT IS SO ORDERED.**

**/s/ Charles E. Butler**
Charles E. Butler