

No. 66075-6

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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IAN DEAN
Plaintiff / Appellant
v.
THE FISHING COMPANY OF ALASKA, INC.
and
ALASKA JURIS, INC.
Defendant / Appellee

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
	1. The trial judge erred when applying a strict CR 56 standard of proof to a seaman’s motion for reinstatement of his maintenance and cure, after his benefits were cut off by the shipowner	2
	2. The trial judge erred when denying plaintiff’s motion to compel a discovery response from the defendants as to whether or not the plaintiff had been under surveillance, as opposed to production of the discovery films themselves	2
	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
	1. What standard of proof should apply when a seaman moves for reinstatement of maintenance and cure, after his benefits have been cut off by the shipowner?.....	2
	2. What discovery rule should apply in regard to the surveillance of a plaintiff?.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	SUMMARY OF ARGUMENT.....	6
V.	ARGUMENT.....	8
	A. Motion by a seaman to reinstate maintenance and cure should not be decided under strict summary judgment standards	8
	B. Plaintiff is entitled to discovery as to whether or not he has been placed under surveillance, distinct from the issue of the discoverability of the surveillance films themselves	13
VI.	CONCLUSION	14
VII.	DECLARATION OF SERVICE BY MAIL.....	16

VIII. APPENDIX.....17
 Gouma v. Trident Seafoods,
 2008 A.M.C. 863 (W.D. Wash. 2008)A1-A4

 Joblove, “Discovery: Do Surveillance Films
 Constitute Attorney Work Product?”,
 33 U.Fla.L.Rev. 448 (1980-1981).....A5-A16

TABLE OF AUTHORITIES

Cases

<u>Boyden v. American Seafoods</u> , 2000 A.M.C. 1512 (W.D. Wash. 2000)	8
<u>Collick v. Weeks Marine</u> , 2010 A.M.C. 69 (D.N.J. 2009)	10
<u>Connors v. Iqueque</u> , 2005 A.M.C. 2154 (W.D. Wash. 2005)	8
<u>Coughenour v. Campbell Barge Line, Inc.</u> , 388 F.Supp. 501 (W.D. Pa. 1974)	9
<u>Dodson v. Persell</u> , 390 So.2d 704 (Fla. 1980).....	14
<u>Farrell v. United States</u> , 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949) (dissenting opinion of Justice William O. Douglas)	13
<u>Gouma v. Trident Seafoods</u> , 2008 A.M.C. 863 (W.D. Wash. 2008)	6, 9, 11, 12, 15, A1
<u>Guerra v. Arctic Storm</u> , 2004 A.M.C. 2319 (W.D. Wash. 2004)	8
<u>Huss v. King</u> , 338 F.3d 647 (6th Cir. 2003).....	10
<u>McMillan v. Tug Jane A. Bouchard</u> , 885 F.Supp. 452, 459 (E.D.N.Y. 1995)	10
<u>McNeil v. Jantran</u> , 2003 A.M.C. 689 (W.D. Ark. 2003)	10
<u>Miles v. American Seafoods</u> , 197 F.3d 1032 (9th Cir. 1999)	11

<u>Miller v. Canal Barge Co.</u> , 2001 A.M.C. 528 (E.D.La. 2000)	10
<u>Sefzik v. Ocean Pride Alaska, Inc.</u> , 844 F.Supp. 1372 (D. Alaska 1993)	10
<u>Yelverton v. Mobile Lab, Inc.</u> , 782 F.2d 555 (5th Cir. 1986)	8

Statutes

Other Authorities

Force and Norris, <u>The Law of Seamen</u> , §26:4 (section entitled “The Wardship Theory”) (5th ed. 2003)	8
Joblove, “Discovery: Do Surveillance Films Constitute Attorney Work Product?”, 33 U.Fla.L.Rev. 448 (1980-1981).....	14, A5

Regulations

CR 56	2, 5, 14
FRCP 56(c)	8
Rule 56.....	6, 9

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Plaintiff /Appellant

v.

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Defendant /Appellee

BRIEF OF APPELLANT

I. INTRODUCTION

This case presents two rather straightforward questions: What is the proper standard of proof to apply when a seaman moves for reinstatement of maintenance and cure, after cut-off by the shipowner? Is the fact of surveillance, as opposed to the surveillance films themselves, discoverable before trial?

II. ASSIGNMENTS OF ERROR

1. The trial judge erred when applying a strict CR 56 standard of proof to a seaman's motion for reinstatement of his maintenance and cure, after his benefits were cut off by the shipowner.

2. The trial judge erred when denying plaintiff's motion to compel a discovery response from the defendants as to whether or not the plaintiff had been under surveillance, as opposed to production of the discovery films themselves.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. What standard of proof should apply when a seaman moves for reinstatement of maintenance and cure, after his benefits have been cut off by the shipowner?

2. What discovery rule should apply in regard to the surveillance of a plaintiff?

III. STATEMENT OF THE CASE

In May and June 2006 appellant Ian Dean worked as a fish processor aboard the factory trawler F/T ALASKA JURIS. Mr. Dean stands 6 feet, 3 inches in height. He was assigned to work long hours in a space with an overhead of six feet or less. Working with his head bent at an angle soon resulted in neck pain. By the time Mr. Dean left the vessel he had also developed bilateral carpal tunnel syndrome. Complaint, CP (Clerk's Papers) 1-5. An unusual neurological condition, myotonia congenita, also manifested while Mr. Dean was in the service of respondent Fishing Company of Alaska's (FCA) vessel. 5/19/08 chartnote by Dr. Jane Distad, attached at Ex. A to FCA's Declaration of Theresa Fus, CP 60.

FCA initially paid for Mr. Dean's medical treatment. It also paid maintenance: \$20 per day through July 2007, and \$30 per day thereafter.

Mr. Dean saw numerous medical providers. He had bilateral carpal tunnel surgery: to the right wrist in May 2008, and to the left in January 2009. His neck problems

were virtually ignored while doctors concentrated on the myotonia congenita. CP 60.

FCA cut off cure (medical bills) in June 2009, refusing to pay for a consultation requested by Dr. Elizabeth Joneschild. CP 69.

Instead of authorizing the consultation requested by Dr. Joneschild, FCA apparently decided it was time to stop this business once and for all, demanding examination of Mr. Dean by the notorious Dr. Williamson-Kirkland. Dr. Williamson-Kirkland said the magic words “maximum cure” and the \$30 per day maintenance was cut-off on September 9, 2009. CP 40-42.

Mr. Dean had earlier filed suit, when realizing that cure had been cut off. Complaint, CP 1-5. Later, after Mr. Dean’s maintenance was cut off, appellant filed a motion to reinstate maintenance and cure. CP 9-23. Mr. Dean’s neck complaints had been treated by a Dr. Aflatooni since before the time FCA sent Mr. Dean to see Dr. Williamson-Kirkland. See Dr. Aflatooni’s letter of 6/10/09 at CP 67-68. Dr. Aflatooni stated that Mr. Dean had not reached maximum cure for his neck problems. CP 16-17. The trial judge

treated the motion as one for summary judgment under CR 56 and ruled that: “Plaintiff has failed to show that no genuine issue of material fact exists as to his entitlement to maintenance and cure such that he is entitled to judgment is a matter of law.” Order denying plaintiff’s motion to reinstate maintenance by Judge Laura Inveen, CP 76-77.

The parties went through arbitration and Mr. Dean requested trial de novo. See Agreed Order of Entry of Judgment, CP 121-122.

Mr. Dean filed a motion to compel discovery from FCA in regard to whether or not he had been placed under surveillance, as opposed to requesting production of any surveillance films themselves. CP 78. That motion was denied by the trial judge. CP 113-114.

Rather than undertaking the time and expense of trial de novo, the parties filed a joint motion for entry of judgment in favor of the defendants. CP 118-120. In support of that motion, the parties entered into a Stipulation to the effect that the “prevailing party” would be determined by the outcome of the instant appeal, and that the parties would jointly request that this Court review the trial judge’s ruling

on the discoverability of surveillance films, notwithstanding the fact that trial de novo in this matter has been foregone by stipulation. CP 118-120. The trial judge granted that motion and entered judgment. CP 121-122. Plaintiff appealed. CP 123-130.

IV. SUMMARY OF ARGUMENT

Seamen are wards of the Court. The special solicitude shown seamen is most appropriate in matters of their basic benefits, maintenance and cure--the closest seamen get to workers' compensation. Judges in the federal Western District of Washington are hopelessly divided over whether or not Rule 56 summary judgment standards are appropriate to maintenance and cure motions. Even those judges finding that summary judgment is appropriate, are further divided over what burdens of proof apply to whom, and when. Appellant argues that a modified summary judgment standard is appropriate, like that used by Judge Marsha Pechman in Gouma v. Trident Seafoods, 2008 A.M.C. 863 (W.D. Wash. 2008). The seaman has the initial burden of proof, albeit featherweight, of proving an entitlement to

receive maintenance and cure in the first instance. Once the seaman has established that entitlement, the burden shifts to the shipowner to show that the seaman has achieved maximum cure or is otherwise disentitled to maintenance and cure. Conflicting medical opinions, such as were present in this case, can be weighed later by the finder of fact at trial.

As stated in the stipulation between the parties when entry of judgment was requested, the period at issue for payment of maintenance to Mr. Dean is from the cut-off on September 9, 2009 to the date of the arbitration hearing, April 13, 2010. CP 118-120. At \$30/day, that equals \$6,480 for 216 days.

A secondary issue in this case involves the discoverability of surveillance. Mr. Dean filed a motion to compel response to his interrogatory asking whether or not he was under surveillance. The motion did not request production of any surveillance films themselves. CP 78-100. The fact of whether or not surveillance films exist is not work product.

V. ARGUMENT

A. Motion by a seaman to reinstate maintenance and cure should not be decided under strict summary judgment standards

The spirit of admiralty's benevolent regard for the interests of seamen is particularly shown in matters involving maintenance and cure.

Force and Norris, The Law of Seamen, §26:4 (section entitled "The Wardship Theory") (5th ed. 2003). "A seaman's burden in establishing the value of his maintenance and cure is feather light . . ." Yelverton v. Mobile Lab, Inc., 782 F.2d 555 (5th Cir. 1986).

Federal courts in the Western District of Washington are split over the standard of proof to be used in deciding maintenance and cure motions. Compare Guerra v. Arctic Storm, 2004 A.M.C. 2319 (W.D. Wash. 2004) (not published in federal reporters), with Connors v. Iqueque, 2005 A.M.C. 2154 (W.D. Wash. 2005). See also, Boyden v. American Seafoods, 2000 A.M.C. 1512 (W.D. Wash. 2000). The conflict is over whether or not to use a strict summary judgment standard, FRCP 56(c), for maintenance and cure motions. In other words, what benefit of the doubt does the injured

seaman receive from conflicting facts or medical opinions?

The better-reasoned approach is to use a summary judgment standard for issues surrounding the seaman's initial entitlement to maintenance and cure, and then give the seaman the benefit of 'all doubts and ambiguities' when deciding whether or not maintenance should be terminated. Gouma v. Trident Seafoods, 2008 A.M.C. 863 (W.D. Wash. 2008) (Judge Marsha Pechman). A copy of Gouma is attached at the Appendix starting at p. A-1.

The shifting burdens of proof adopted by Judge Pechman in Gouma are not new, although it is a novel way to incorporate the strictures of Rule 56 with the requirement that seamen receive the benefit of all doubts. It has long been the rule that the seaman has the initial burden of proving that he is entitled to maintenance and cure, even though that burden is light. The shipowner then has the burden of proving that the seaman is disqualified from receiving those benefits. Coughenour v. Campbell Barge Line, Inc., 388 F.Supp. 501 (W.D. Pa. 1974).

It is the seaman's burden to prove his or her right to maintenance and cure (citation omitted) but it is the shipowner's burden to prove that

the seaman has reached the point of maximum medical cure.

McMillan v. Tug Jane A. Bouchard, 885 F.Supp. 452, 459 (E.D.N.Y. 1995).

Other jurisdictions are all over the map on the proper standard to be employed when deciding maintenance and cure motions. Collick v. Weeks Marine, 2010 A.M.C. 69 (D.N.J. 2009) (preliminary injunction granted requiring shipowner to pay maintenance and cure when there was a reasonable probability that the seaman would prove he was entitled to it at trial); Miller v. Canal Barge Co., 2001 A.M.C. 528 (E.D.La. 2000) (summary judgment standard); Thornsberry v. Nugent Sand Co., 2003 A.M.C. 2447 (W.D. Ky. 2003) (preliminary injunction granted to raise the maintenance rate); Sefzik v. Ocean Pride Alaska, Inc., 844 F.Supp. 1372 (D. Alaska 1993) (less than a summary judgment standard of proof required of plaintiff seeking maintenance and cure); McNeil v. Jantran, 2003 A.M.C. 689 (W.D. Ark. 2003) (“treated as something similar to a motion for summary judgment”); Huss v. King, 338 F.3d 647 (6th Cir. 2003) (summary judgment approved in dictum).

What standard will the Ninth Circuit adopt? While it has never decided the issue, the Ninth Circuit has hinted in dictum that it will not apply a strict summary judgment standard when it comes to maintenance and cure motions. Miles v. American Seafoods, 197 F.3d 1032 (9th Cir. 1999).

As FCA will no doubt urge in this case, however, it is not conceivable that the Ninth Circuit would rule that an injured seaman wins the motion whenever he or she makes a prima facie case of injury in the service of the ship, without allowing shipowners to put on their proof about intentional concealment, maximum cure, etc. When finally deciding the issue, it is here suggested that the Ninth Circuit will utilize a modified summary judgment standard for maintenance and cure motions. A shifting burden of proof, such as was recognized in Gouma v. Trident, Appendix at A-1 et seq., is appropriate. That is, the injured seaman has the burden to show that he or she is entitled to maintenance in the first instance, but then the burden shifts to the shipowner to show that the seaman is no longer entitled to maintenance based upon any of the defenses available to shipowners. For example, once a seaman establishes an entitlement to

maintenance and cure, it is not enough for the shipowner to simply hire a doctor to opine that the seaman has reached maximum cure or is otherwise ineligible, when such an opinion is in conflict with the seaman's treating physician. In this case, like the defense's doctor in the Gouma case, FCA hired Dr. Williamson-Kirkland to issue an opinion that Mr. Dean was at maximum cure and otherwise ineligible for continued maintenance and cure benefits. Mr. Dean's treating physician disagreed. Letter from Dr. Aflatooni attached as Ex. 2 to the Plaintiff's Motion to Reinstate Maintenance and Cure, CP 16-17. Merely hiring a doctor to disagree with a seaman's treating physician is not enough to justify the termination of maintenance and cure. If it is allowed to happen here, shipowners will employ that tactic in every case to escape their most basic of obligations to injured seamen.

If men are to go down to the sea in ships and face the perils of the ocean, those who employ them must be solicitous of their welfare. Maintenance and cure is an inducement on the part of the masters and owners to be solicitous of the health, safety, and welfare of seamen while they are in the service. It gives a degree of security, though injury or sickness may be incurred.

Farrell v. United States, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949) (dissenting opinion of Justice William O. Douglas).

B. Plaintiff is entitled to discovery as to whether or not he has been placed under surveillance, distinct from the issue of the discoverability of the surveillance films themselves

In the Court below, Mr. Dean propounded discovery to the defendants. Plaintiff's interrogatory number 5 asks, inter alia: "Has defendant or anyone acting on its behalf conducted a surveillance of the plaintiff or engaged any person or firm to conduct a surveillance of the plaintiff or his/her activities . . .?" FCA responded with a work product objection. Plaintiff's Motion to Compel Discovery, CP 78-79. The trial judge denied the motion. CP 113-114.

Mr. Dean is not aware of any controlling authority in Washington on this issue. Courts in other jurisdictions are divided. FCA does a thorough job of discussing cases from those other jurisdictions and Mr. Dean will not recite that authority in this brief. See FCA's Opposition to Mr. Dean's

Motion to Compel Discovery, CP 101-110. Mr. Dean asserts that the better position is that the discoverability of whether or not surveillance has been undertaken of the plaintiff, as opposed to the surveillance itself, is not work product.

Dodson v. Persell, 390 So.2d 704 (Fla. 1980). Mr. Dean adopts the reasoning of a law review article from the University of Florida, a copy of which is included in the appendix hereto at pp. A-6 et seq. Joblove, "Discovery: Do Surveillance Films Constitute Attorney Work Product?", 33 U.Fla.L.Rev. 448 (1980-1981).

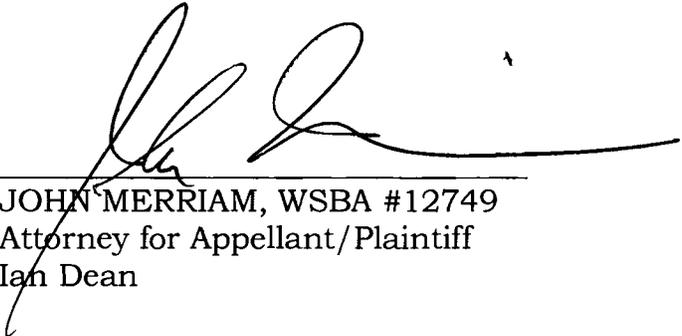
VI. CONCLUSION

Ian Dean prays that this tribunal decide that motions for maintenance and cure, if even appropriate to be decided under CR 56, be subject to a modified summary judgment standard. Once a seaman has established his entitlement to maintenance and cure, the burden of proof should shift to the shipowner to show that the seaman has achieved maximum cure or is otherwise no longer entitled to a seaman's most basic benefit, that of maintenance and cure.

Mr. Dean further prays that this tribunal declare once and for all that the existence of surveillance, as opposed to the surveillance films themselves, are not attorney work product and are discoverable.

Respectfully submitted this 3rd day of January 2011.

LAW OFFICE OF JOHN MERRIAM



JOHN MERRIAM, WSBA #12749
Attorney for Appellant/Plaintiff
Ian Dean

VII. DECLARATION OF SERVICE BY MAIL

Pursuant to 28 USC § 1746 (1976), John Merriam declares as follows:

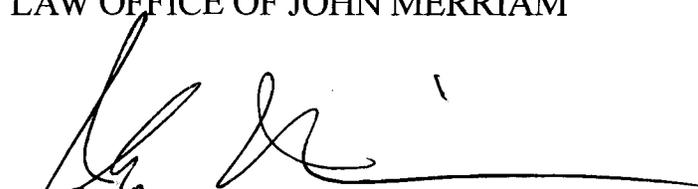
On January 3, 2011, I caused to be filed and served true and correct originals and/or copies of Appellants' Opening Brief submitted herein, by depositing the same in the United States mail, first class, postage prepaid, to:

Michael A. Barcott, Esq.
Holmes Weddle & Barcott
999 Third Avenue, Suite 2600
Seattle, WA 98104-4001

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 3rd day of January 2011, at Seattle, Washington.

LAW OFFICE OF JOHN MERRIAM



John W. Merriam
Attorney for Appellants/Plaintiff Ian Dean

VIII. APPENDIX

Gouma v. Trident Seafoods,
2008 A.M.C. 863 (W.D. Wash. 2008)A1-A4

Joblove, “Discovery: Do Surveillance Films Constitute
Attorney Work Product?”,
33 U.Fla.L.Rev. 448 (1980-1981)A5-A16

HASSAN GOUMA

v.

TRIDENT SEAFOODS, INC., ET AL

United States District Court, Western District of Washington, January 11, 2008

No. C07-1309

PERSONAL INJURY — 1412. Duration — 1445. Procedure, Trial.

On a seaman's pre-trial motion to compel cure, where there is no question about his having been in the service of his vessel when injured, he is entitled to a presumptive continuation of his maintenance and cure payments, without resorting to summary judgment procedure as in cases where the service issue was unresolved, and continued medical care is therefore ordered until maximum cure, as determined by order of the court.

H.L. George Knowles *for Gouma*

Michael A. Barcott and Theresa K. Fus (Holmes Weddle & Barcott) *for Trident Seafoods*

MARSHA J. PECHMAN, D.J.:

The above-entitled Court, having received and reviewed:

1. Plaintiff's Motion to Compel Cure, Including an Award for Damages and Attorney's Fees
2. Opposition to Plaintiff's Motion to Compel Cure and Request for Damages and Attorney's Fees
3. Plaintiff's Reply in Support of Motion to Compel Cure
4. Supplemental Brief in Opposition to Plaintiff's Motion to Compel Cure and Request for Damages and Attorney's Fees
5. Plaintiff's Supplemental Briefing in Support of Motion to Compel

and all exhibits and declarations attached thereto, makes the following ruling:

It is ordered that the motion to compel cure by authorizing Defendants to pay for the discogram/CT recommended by Dr. Becker is granted.

It is further ordered that the motion to award damages and attorney's fees in Plaintiff's favor is denied.

It is further ordered that Defendants shall not be permitted to unilaterally suspend payment of cure without approval of the Court.

Background

On February 12, 2007, while working aboard the F/V *Independence*, Plaintiff reported a work-related back injury. Despite some on-site treatment

and shifts in job responsibilities, the problem persisted and he eventually returned to Seattle for medical treatment. Initially he was being treated by a Dr. Peterson, but he switched to a physician named Dr. Becker after a few months.

On October 24, 2007, Dr. Becker recommended a discogram/CT, a procedure which Dr. Becker felt would help him arrive at a decision regarding the necessity for surgery. Defendants (who had been paying maintenance and cure up to this point) refused to authorize payment for the procedure without an independent medical examination (IME), which they scheduled for late November. Plaintiff responded by filing this motion.

While this motion was pending, the IME was conducted. Both sides submitted supplemental replies incorporating the results of the IME (and in Plaintiff's case, the response of Dr. Becker to the IME physician's recommendations). Not only did the IME physician disagree about the necessity for a discogram/CT, he also reported his conclusion that Plaintiff had reached maximum medical cure. On that basis, Defendants have indicated that they will authorize no further treatment of Plaintiff.

Discussion

The presumption in maritime injury cases operates in favor of the seaman: ample case law exists for the proposition that all doubts regarding maintenance and cure are to be resolved in the seaman's favor (*Vaughn v. Atkinson*, 369 U.S. 527, 532, 1962 AMC 1131, 1135 (1962)).

Traditional tenets of maritime law have long held that the duty of the vessel owner to provide an injured seaman with maintenance and cure subsidies is broad and inclusive, intended to be straightforward, uncomplicated and free of administrative burdens. *Vella v. Ford Motor Co.*, 421 U.S. 1, 4, 1975 AMC 563, 565 (1975). Questions about entitlement, necessity of treatment and achievement of maximum medical cure are to be adjudicated in the manner most favorable to the seaman. *Vaughn, supra*.

Defendants cite two recent decisions from this district for the position that the Court should apply a summary judgment standard to the resolution of whether Plaintiff is entitled to the continued payment of cure requested here. Judge Coughenour has reasoned that the "resolution of all ambiguities and doubts in favor of the seaman does not do away with the seaman's duty to show at trial that he was (1) 'injured or became ill while in the service of the vessel,' (2) that 'maintenance and cure was not provided; and (3) the amount of maintenance and cure to which the plaintiff is entitled' " as a basis for not granting full *Vaughn* deference to an injured

seaman's request to compel payment of cure. *Buenbrazo v. Ocean Alaska, LLC, et al.*, 2007 WL 1556529, C06-1347C, Order of Feb. 28, 2007, Dkt. No. 20 (emphasis supplied).

Judge Lasnik has cited the fact that "whether plaintiff suffers from [carpal tunnel syndrome] and, if he does, whether it was caused while he was working in service of the vessel are threshold issues on which plaintiff will bear the burden of proof at trial" as a reason to apply a summary judgment standard to the seaman's motion to compel cure payments. *Mabrey v. Wizard Fisheries, Inc.*, Slip Copy, 2007 WL 1556529 (W.D. Wash.), C05-1499L, Order Denying Motion to Compel Payment of Cure, Dkt. No. 77.

Recognizing that district court opinions have no precedential authority, and without commenting on the underlying rationale, the Court finds these cases distinguishable from the instant matter. In both of the cited cases, the purely factual question of whether the seaman had been in the service of the vessel when injured was before the court, and the fact of the unresolved "service" question was central to the findings that a summary judgment standard was an appropriate basis on which to resolve the issue. Here, there is no dispute that Plaintiff was injured while in service to Defendants' vessel; the dispute centers around the necessity of a medical procedure and whether Plaintiff has reached maximum cure.

With that understanding, it is the finding of this Court that Plaintiff is entitled to a presumptive continuance of maintenance and cure payments. Even if a summary judgment standard of review were to be applied in this context, disputed questions of material fact (e.g., the differing opinions of Plaintiff's and Defendants' physicians) would simply mean that Plaintiff would be entitled to continue to receive maintenance and cure until the matter was ultimately resolved at trial. The procedural model proposed by Defendants would mean that a vessel owner could escape maintenance and cure obligations at any time prior to trial simply by finding a physician who would pronounce the seaman at maximum medical cure. This Court is not prepared to depart from the *Vaughn* standard of resolving all doubts concerning maintenance and cure in the seaman's favor to that extent. Defendants have cited no opinion from the Ninth Circuit or the Supreme Court indicating that this historic doctrine has fallen to that level of disfavor.

Similarly, Defendants may not unilaterally decide, based on the opinion of their own physician, that a seaman has reached maximum medical cure. At the very least, it violates the summary judgment standard which they themselves are championing—in the face of genuine disputes of material fact regarding the extent of Plaintiff's cure, Defendants are not entitled to

summarily (and unilaterally) determine the question in their own favor. More significantly, Defendants' action appropriates to themselves the adjudicatory function of this Court—the issue of maximum cure is one of the ultimate issues before the Court in any maritime injury litigation, and no action may be taken on it without an order of the court.

Plaintiff has requested payment of damages and attorney's fees in connection with this motion. An award of attorney's fees requires a finding of bad faith on the part of the vessel owner (*see Vaughn*, 369 U.S. at 531, 1962 AMC at 1133-34) and is appropriate only in the most egregious of circumstances (e.g., where the refusal is found to be arbitrary, capricious, callous or willful). *Morales v. Garjak, Inc.*, 1988 AMC 1075, 1078, 829 F.2d 1355, 1358 (5 Cir. 1987). The circumstances of this case do not warrant such a finding.

Compensatory damages are only appropriate in the face of an unreasonable failure to pay. *Vaughn*, 369 U.S. at 530-31, 1962 AMC at 1133. Although Plaintiff seeks damages for the delay in payment of cure, he cites neither evidence nor case law upon which the Court can find Defendants' delay rising to a level of unreasonableness which would justify an award of damages.

Conclusion

Plaintiff's motion to compel cure is granted and Defendants shall bear the cost of the procedure recommended by Plaintiff's physician. Defendants shall not suspend cure payments without an order from this Court. Plaintiff's request for an award of damages and attorney's fees is denied in the absence of evidence of egregious misconduct or unreasonable delay by Defendants.



keep pace with the society it serves. The choice of law process should allow Florida's increasingly mobile citizens to vindicate their legal rights under Florida law. Thus, the instant decision should be lauded as a recognition of Florida's interest in incidents occurring outside its borders. Choice-of-law problems will be no easier to solve under the instant decision; however, because a more thorough analysis is mandated, their resolution will be accomplished more equitably.

WILLIAM F. MERLIN, JR.

DISCOVERY: DO SURVEILLANCE FILMS
CONSTITUTE ATTORNEY WORK PRODUCT?

Dodson v. Persell, 390 So. 2d 704 (Fla. 1980)

As plaintiff in a personal injury action, petitioner propounded interrogatories to determine whether he had been subjected to surveillance by the defendant.¹ The discovery request also sought production of any surveillance films or photographs taken of the plaintiff.² Respondent's objections³ to both requests were sustained⁴ based on Florida Rule of Civil Procedure 1.280, which protects attorney work product from discovery.⁵ Respondent subsequently introduced the surveillance material into evidence at trial over plaintiff's objection. Affirming the lower court's decision, the Third District Court of Appeal held that the work product rule protected surveillance material from discovery.⁶ On writ of certiorari,⁷ the Florida supreme court quashed the decision and HELD, information regarding the existence of surveillance materials was

1. 390 So. 2d 704, 705 (Fla. 1980). Plaintiff sought to discover whether he had been the subject of surveillance, whether photographs or movies had been taken and, if so, the time and place taken, the substance of what the films purported to show, and the photographer's qualifications. *Id.*

2. *Id.*

3. 390 So. 2d at 705. Petitioner then moved to compel production. *Id.*

4. *Id.*

5. FLA. R. CIV. P. 1.280(b)(2) provides in relevant part: "Subject to the provisions of subdivision (b)(3) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court 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."

6. 365 So. 2d 413, 413 (Fla. 3d D.C.A. 1979). This was only one of the issues resolved on appeal. The district court of appeal also ruled the protective order issued was not overbroad, the attorney's comment at trial was not reason for mistrial, and failure to give an instruction did not constitute error. *Id.* at 413-14.

7. 390 So. 2d at 704. The court granted certiorari based on a conflict among the district courts of appeal. See notes 58-61 *infra*.

discoverable without qualification; further, the content of that material was discoverable if intended to be introduced as evidence.⁸

The discoverability of surveillance films has been at issue in personal injury suits where defendants have employed surveillance techniques to film the activities of plaintiffs.⁹ Such tactics are utilized in the hope of secretly recording the plaintiff undertaking tasks which, his suit claims, he is incapable of performing. Generally, the objective is to surprise the plaintiff at trial and impeach his conflicting testimony.¹⁰ In attempting to bar discovery of the content of surveillance films, defendants have sought the protection of the work product rule.

The work product rule insulates from discovery relevant and non-privileged private memoranda, written statements of witnesses, and the mental impressions or written recollections prepared by an attorney in anticipation of litigation.¹¹ Discovery of an attorney's work product is permitted only upon a showing of necessity or an indication that denial of discovery would cause undue hardship or injustice.¹² Thus, the doctrine restricts the otherwise broad scope of discovery in the federal and state courts. It is a compromise in an adversarial system that encourages extensive pre-trial exchange of information between parties.¹³

Prior to the enactment of the rules of discovery, information was infrequently disclosed between the parties in the pre-trial stages of litigation.¹⁴ The functions of notice giving, issue formulation, and fact revelation were performed primarily by the pleadings.¹⁵ This process was designed to insure against fraud at trial¹⁶ and to allow for an element of surprise in the proceedings.¹⁷ However, a method for testing the factual basis of the pleader's allegations and denials before trial was lacking.¹⁸ Therefore, the Federal Rules of

8. 890 So. 2d at 705.

9. See text accompanying notes 42-64 *infra*.

10. *Id.*

11. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

12. *Id.*

13. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 81 VAND. L. REV. 1295, 1298-99 (1978) (suggesting that proponents of the rules of discovery were not oblivious to their antagonism with the adversary system, but assumed that the rule would reduce the size of the litigation arena where adversary instincts and tactics predominate).

14. See 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §2001 at 14 (1970). The authors state that "under the philosophy that a judicial proceeding was a battle of wits rather than a search for truth each side was protected to a large extent against the disclosure of his case." *Id.*

15. See also F. JAMES, *CIVIL PROCEDURE* §6.2 (1965).

16. If an honest claimant provided an unscrupulous opponent with the facts to be offered, it was feared that the latter would prepare false evidence in denial or explanation or tamper with witnesses if advised of their identity. 6 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §1845 (Chadborn rev. 1976).

17. Each party could gain every possible advantage through the surprise of his adversary whenever the latter failed to discover or anticipate facts which the other party did discover. F. JAMES, *supra* note 15, §6.2.

18. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 216 (1937). Faced with the inefficiency of the common law system, nineteenth century re-

Civil Procedure,¹⁹ and similar state rules,²⁰ provided for pre-trial disclosure of the veritable points of dispute between the parties and facilitated the preparation of an adequate factual foundation in anticipation of trial.²¹

The restriction on discovery of work product²² was first enunciated by the United States Supreme Court in the landmark case of *Hickman v. Taylor*.²³ In a suit seeking damages for wrongful death, plaintiff propounded interrogatories seeking statements obtained from several witnesses by defense counsel in anticipation of litigation.²⁴ Also sought were the attorney's memoranda of the conversations. The Supreme Court rejected defendant's broad contention that material secured from a witness in anticipation of litigation was privileged.²⁵ The majority, however, concluded that approval of plaintiff's discovery request would contravene the public policy underlying the orderly prosecution and defense of legal claims.²⁶

In granting this immunity to work product, the Court sought to balance the interests of an adversarial trial process with the objectives of broad rules of discovery. The majority stressed that mutual knowledge of all relevant facts was essential to equitable resolution of a dispute.²⁷ Yet, the information plain-

formers adopted statutory provisions for propounding written interrogatories, compelling production of documents before trial, and taking depositions of witnesses. Unable to break the bonds of old restrictions, however, American discovery in the early twentieth century was no broader than before the statutory codes. F. JAMES, *supra* note 15, §6.1.

19. See 28 U.S.C. §2072 (1976) (United States Supreme Court has the authority to adopt rules of civil procedure).

20. See generally Silverstein, *Adoption of the Federal Rules of Discovery in State Practice*, 11 KAN. L. REV. 213 (1962); Note, *Discovery Practice in States Adopting the Federal Rules of Civil Procedure*, 68 HARV. L. REV. 673 (1955).

21. 4 J. MOORE, FEDERAL PRACTICE §26.02(1) (2d ed. 1979). See *Olszewski v. Howell*, 253 A.2d 77, 78 (Del. Super. Ct. 1969). "[A] trial decision should result from a disinterested search for truth from all the available evidence rather than tactical maneuvers based on the calculated manipulation of evidence and its production." *Id.*

See *Developments in the Law - Discovery*, 74 HARV. L. REV. 940, 944-46 (1961) (description of the benefits of discovery). See generally Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253 (1979) (critical appraisal of the present operation of the discovery rules).

22. Other restrictions on discovery include: 1) privileged or irrelevant matters, 2) physical or mental examination reports unless the physical or mental condition is in controversy and good cause is shown and 3) judicial discretion. 8 C. WRIGHT & A. MILLER, *supra* note 14, §2007.

23. 329 U.S. 495 (1947).

24. *Id.* at 498-99. Specifically, the attorney interviewed the surviving crew members of the tug. The interrogatories sought to determine if such statements had been taken and, if so, sought their production. *Id.*

25. *Id.* at 508. The court implicitly limits the definition of privilege to its definition in the law of evidence. Clearly, an attorney's work product immunity is distinct from the attorney-client privilege. See *Radiant Burns, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962). See generally Sedler & Simeone, *The Realities of Attorney-Client Confidences*, 24 OHIO ST. L.J. 1 (1963).

26. 329 U.S. at 510.

27. *Id.* at 507. The court emphasized that "[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Id.*

tiff sought was distinguished as an unwarranted inquiry into an attorney's files and mental impressions. Allowing such discovery would adversely affect an attorney's ability to prepare his client's case.²⁸ The Court noted that, in an effective adversary system, the attorney must have sufficient privacy to develop his strategy.²⁹

However, in an effort to accommodate the countervailing goals of discovery, the work product immunity was not made absolute. Where the written material sought was relevant and non-privileged, and denial of discovery would result in undue prejudice, hardship or injustice, the Court found discovery permissible.³⁰ Only the attorney's mental impressions or memoranda of a witness' oral statements were afforded absolute immunity.³¹ To allow otherwise, the Court concluded, would breed inaccuracy and untrustworthiness.³²

In the ensuing years the Federal Rules of Civil Procedure incorporated the *Hickman* decision,³³ and the rule was adopted in several states as well.³⁴ The Florida supreme court initially imposed a complete prohibition on the discovery of the work product of a party, his agent or his attorney.³⁵ This stringent standard was later relaxed, however, to permit discovery where the witnesses were no longer available, where necessary for purposes of impeachment, and in other "rare and exceptional circumstances."³⁶ Additionally, in *Surf Drug v.*

28. *Id.* at 511. The Court warned, if such materials were open to opposing counsel most of what is written down would remain unwritten and inefficiency, unfairness, and sharp practices would result.

29. *Id.* at 510-11. "A common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from an adversary." *Id.* at 516 (Jackson, J. concurring).

30. *Id.* at 511.

31. *Id.* at 512-13.

32. *Id.* The Court found no legitimate purpose for discovery of an attorney's mental impressions or memoranda of oral statements made to him by witnesses. Disclosure would force the attorney to testify about what he remembered or wrote down regarding witness remarks. The material would not qualify as evidence and the court warned that its use for impeachment or corroborative purposes would make the attorney less of an officer of the court and more of an ordinary witness. *Id.*

33. Compare FED. R. Civ. P. 26(b)(3) with FLA. R. Civ. P. 1.280(b)(2). The rules use identical language except that the federal version requires a showing of "substantial need" rather than "need" for discovery of work product.

34. See, e.g., ARIZ. R. Civ. P. 26(b); N.M. R. Civ. P. 26(b) (1978); O. Civ. P. 36(b)(3) (1979); TENN. R. Civ. P. 26.02 (1977).

35. *Atlantic Coast Line R.R. v. Allen*, 40 So. 2d 115, 116 (Fla. 1949). The court also adopted the *Hickman* rationale, 329 U.S. at 509-10, noting the public policy concern for the orderly prosecution and defense of legal claims. 40 So. 2d at 116. *Accord*, *McGee v. Cohen*, 57 So. 2d 658 (Fla. 1952) (transcript of prior criminal proceeding made by independent court reporter hired by defendant was work product in subsequent civil suit arising from the same accident).

36. *Miami Transit Co. v. Hurns*, 46 So. 2d 390 (Fla. 1950). *Cf.* *Seaboard Air Line R.R. v. Timmons*, 61 So. 2d 426 (Fla. 1952) (general demand that material may be relevant to action insufficient to justify an exception to the work product rule). Compare *Shell v. State Road Dep't.*, 135 So. 2d 857, 861 (Fla. 1961) (condemnation proceeding discovery of state's work product was allowed) with *Pinellas County v. Carlson*, 242 So. 2d 714 (Fla. 1970) (government not entitled to condemnee's work product in condemnation litigation). The *Shell*

Vermette the Supreme Court of Florida distinguished evidence to be introduced at trial from material used by an attorney to prepare for trial.³⁷ Though the latter constituted work product, the former was held within the scope of discovery.³⁸ Therefore, the court found that interrogatories seeking the names and addresses of any person having relevant information were proper, while those requesting an evaluation of a witness' testimony were not.³⁹ Similarly, documents, pictures, statements, and diagrams to be presented as evidence at trial were not exempt from discovery as work product.⁴⁰

Other jurisdictions have dealt specifically with whether photographs and films employed as demonstrative evidence constitute work product.⁴¹ In *Zimmerman v. Superior Court*⁴² the Arizona supreme court permitted the discovery of surveillance films.⁴³ Noting that work product did not include all materials utilized for trial preparation,⁴⁴ the court strictly limited its interpretation of the privilege. Surveillance films were deemed outside the scope of "memoranda, briefs, and writings."⁴⁵ The court similarly rejected defendant's contention that impeachment evidence should be excluded from discovery.⁴⁶ An examination of Arizona law revealed no precedent for distinguishing between impeachment and substantive evidence, and the court doubted that the surveillance films would be without bearing on the substantive issues at trial.⁴⁷

_____ court noted that not only was the private party's property at stake, but that his state taxes contributed to the unlimited resources of his adversary. 135 So. 2d at 861.

37. 236 So. 2d 108, 112 (Fla. 1970).

38. *Id.*

39. *Id.* at 113.

40. *Id.* at 112. The court limited work product to the personal views of the attorney concerning how and when to present evidence, his evaluation of its importance, personal notes about witnesses, proposed arguments, and other matters which he may refer to at trial for his convenience. *Id.*

41. See, e.g., *Brush v. Harwick*, 9 F.R.D. 681 (S.D. Mo. 1950) (photographs of altered accident scene were discoverable, although diagrams depicting attorney's notion of the accident were not); *Sanders v. Ayrhart*, 89 Idaho 302, 404 P.2d 589 (1965) (interrogatories concerning accident scene photographs were proper because they sought only to determine the existence of the information rather than its content); *Mudge v. Thomas J. Hughes Constr. Co.*, 16 A.D.2d 106, 225 N.Y.S.2d 833 (1962) (photographs of accident scene taken shortly after accident were subject to pre-trial discovery as material evidence); *Crull v. Preferred Risk Mut. Ins. Co.*, 36 Wis. 2d 464, 153 N.W.2d 591 (1967) (photographs and negatives assembled by attorney in preparation for litigation were protected as work products except that the photographs were discoverable upon a showing of good cause and unavailability of information from other sources).

42. 98 Ariz. 85, 402 P.2d 212 (1965). See generally Comment, *Procedure — Production of Surveillance Material — Interrelationship of Discovery and the Prevention of Fraud*, 51 Iowa L. Rev. 765 (1966).

43. 98 Ariz. at 93, 402 P.2d at 217. *Accord*, *Camelback Contractors, Inc. v. Industrial Comm'n.*, 125 Ariz. 203, 608 P.2d 782 (Ct. App. 1980).

44. 98 Ariz. at 88-89, 402 P.2d at 214.

45. *Id.* at 89, 402 P.2d at 215. The Court held the films were not work product as defined by the rule which protects writings that reflect an attorney's mental impressions or conclusions. *Id.*, 402 P.2d at 215.

46. *Id.*, 402 P.2d at 216. *Contra*, *Leach v. Chesapeake & O. R.R.*, 35 F.R.D. 9 (W.D. Mich. 1964); *Coyne v. Monongahela Connecting R.R.*, 24 F.R.D. 357 (W.D. Pa. 1959); *Bogatay v. Montour R.R.*, 177 F. Supp. 269 (W.D. Pa. 1959).

47. 98 Ariz. at 90, 402 P.2d at 215-16. In contrasting substantive and impeachment evi-

Furthermore, in response to assertions that protection was necessary to expose fraudulent claims, the court noted that such a ruling would ignore plaintiff's right to impeach the accuracy of defendant's films.⁴⁸

The right to discovery of surveillance films was also recognized in the leading case of *Snead v. American Export — Isbrandtsen Lines, Inc.*⁴⁹ In its opinion, the United States district court held that plaintiff's substantial need to protect against deception required discovery of the film, despite its classification as work product.⁵⁰ On the other hand, if plaintiff's need for the film had been predicated solely on a desire to tailor his testimony, discovery of work product would have been barred.⁵¹ Accordingly, the defendant was entitled to depose the plaintiff prior to production to insure the film's impeachment value.⁵²

dence, the majority indicated that substantive evidence "is offered for the purpose of persuading the trier of fact as to the truth of the proposition on which the determination of the tribunal is to be asked . . ." Impeachment evidence was described as "that which is designed to discredit a witness, i.e., to reduce the effectiveness of his testimony by bringing forth evidence which explains why the jury should put faith in him or his testimony." *Id.*, 402 P.2d at 215-16. The court noted that Ariz. R. Civ. P. 26(b) required that a matter need only be relevant and not privileged to be discoverable. 98 Ariz. at 92, 402 P.2d at 217. *Accord*, *Crist v. Goody*, 507 P.2d 478 (Colo. Ct. App. 1972). *But cf.* *Wharton v. Lybrand, Ross Bros., & Montgomery*, 41 F.R.D. 177, 179 (E.D.N.Y. 1966) (although the issue of credibility may control the lawsuit, it is not necessarily relevant to the subject matter and discovery should be denied).

48. 98 Ariz. at 93, 402 P.2d at 217. The court stated that impeachment testimony may be the subject of impeachment itself, and the plaintiff is entitled to know what evidence the defendant will produce to contradict plaintiff's claim. *Id.* The court cited *Boldt v. Sanders*, 261 Minn. 160, 111 N.W.2d 225 (1961), which noted: "Defendant's entire argument proceeds on the premise that defendant's evidence which plaintiffs seek to elicit constitutes the unblemished truth which, if prematurely disclosed, will prevent defendant from revealing to the jury the sham and perjury inherent in plaintiff's claims. While defendant disclaims such assumption, it is implicit in his position that witnesses whose testimony is designed to impeach, invariably have a monopoly on virtue and that evidence to which the attempted impeachment is directed is, without exception, fraudulent." *Id.* at 164, 111 N.W.2d at 227.

49. 59 F.R.D. 148 (E.D. Pa. 1973). *See generally* Comment, *Federal Courts and Procedure — Discovery — Discovery of Surveillance Films Intended to be Used by Adversary for Impeachment*, 18 How. L.J. 228 (1973).

50. 59 F.R.D. at 151. The court noted that the films were unavailable to plaintiff through other means. Thus, there was a substantial need for the films to insure that the camera was not used as an "instrument of deception." *Id.* at 150-51. *Accord*, *Jenkins v. Rainner*, 69 N.J. 50, 350 A.2d 473 (1976). The court noted that a surprise film introduced at trial would be unfair. Additionally, since the information in the film was unique and could not be recreated, the court found there would be undue hardship in getting the substantial equivalent. *Id.* at 55-58, 350 A.2d at 476-77. *See* *Ballan v. General Motors*, 121 N.J. Super. 118, 296 A.2d 317 (App. Div. 1972) (cross-examination alone does not ordinarily provide a sufficient avenue of rebuttal with respect to motion picture evidence).

51. 59 F.R.D. at 150-51. "We hear some of them complaining that the new Federal Rules . . . with their hospitality to pre-trial discovery have engendered fraud and perjury. The answer is that no one knows. Unfortunately, perjury and coaching of witnesses existed in the old days; no data is available to show whether those evils have waxed or waned in these newer days." *Hoffman v. Palmer*, 129 F.2d 976, 997 (2d Cir. 1942) *aff'd*, 318 U.S. 109 (1943).

52. 59 F.R.D. at 151. The court believed that a pre-discovery deposition would protect the impeachment value of the films and noted that plaintiff's knowledge of the film's existence at deposition "should have a salutary effect on any tendency to be expansive." *Id.* *Accord*, *Blyther v. Northern Lines, Inc.*, 61 F.R.D. 610 (E.D. Pa. 1973) (extended the *Snead*

Despite the trend toward discovery of surveillance films,⁵³ several jurisdictions continue to grant immunity from production. For example, discovery was barred in *Hikel v. Abousy*,⁵⁴ where the material was held to be work product. The United States district court reasoned that where the film's only possible use was to thwart effective cross-examination, discovery would be prohibited.⁵⁵ Because plaintiff possessed knowledge of the extent of his injury, the court concluded that his sole motivation in seeking discovery was to align his testimony with the film.⁵⁶ This rationale was employed by another federal court where the films were intended to be used solely for impeachment purposes.⁵⁷ Essentially, discovery was refused because it would not have aided the preparation of plaintiff's case.⁵⁸ In cases similar to *Hikel*, California and Missouri courts have protected the films as work product used to aid the attorney in organizing his case.⁵⁹

In considering the discoverability of surveillance films and photographs, the Florida district courts of appeal reached conflicting interpretations of the Florida work product rule. The Third District Court of Appeal held the content of surveillance films beyond the scope of discovery.⁶⁰ The court stated that

decision to allow pre-disclosure deposition of any person who would gain an advantage from knowledge of the existence of films and might be tempted to alter his testimony as a result).

53. See, e.g., *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974) (federal discovery found broad enough to include surveillance films); *Ortiz v. H.L.H. Products Co.*, 39 F.R.D. 41 (D. Del. 1965) (contents of photographs not protected by state doctrine protecting attorney work product); *Hoey v. Hawkins*, 332 A.2d 403 (Del. 1975) (defendant had duty to update interrogatories to disclose the existence of motion pictures).

54. 41 F.R.D. 152 (D. Md. 1966) (diversity action arising out of an automobile accident).

55. *Id.* at 155. See, e.g., *Stone v. Marine Trans. Lines, Inc.*, 23 F.R.D. 222 (D. Md. 1959).

56. 41 F.R.D. at 155. The court noted that possession of the motion pictures could influence the testimony of witnesses. In cases where testimony would not be influenced, the court suggested that the information would be of little or no value to the plaintiff. *Id.* See *Margeson v. Boston & Marine R.R.*, 16 F.R.D. 200 (D. Mass. 1954) (threat of impeachment tends to discourage witnesses from giving false testimony in support of groundless claims).

57. *Bogatay v. Montour R.R.*, 177 F. Supp. 269 (W.D. Pa. 1959).

58. *Id.* at 270. The court held that the real purpose of interrogatories is to aid in the preparation of one's case. No need could be found for information on whether defendant observed plaintiff carrying on any activities. Furthermore, the local rules of the district forbade discovery of impeachment evidence. *Id.*

59. *Suezaki v. Superior Ct.*, 58 Cal. 2d 466, 23 Cal. Rptr. 368, 373 P.2d 432 (1962) (surveillance films do not constitute work product and are not protected by attorney-client privilege); *State ex. rel. St. Louis Pub. Scriv. Co. v. McMillan*, 351 S.W.2d 22 (Mo. 1961) (surveillance films taken by defendant's employee in anticipation of litigation constitute work product).

60. *Collier v. McKesson*, 121 So. 2d 673 (Fla. 3d D.C.A. 1960). Defendant took surveillance movies of plaintiff who alleged permanent injuries in a negligence action. The Third District Court of Appeal quashed the trial court's pre-trial order for production of the films. In an interpretation of the Florida rule governing pre-trial conferences, the court limited a judge's discretionary authority to narrowing and clarifying the issues. The trial judge was held to have exceeded his discretionary authority by ordering production of work product materials possibly protected by Fla. R. Civ. P. 1.28. *Cf. Reynolds v. Hoffmann*, 305 So. 2d 294 (Fla. 3d D.C.A. 1974) (audio tapes of meeting held in anticipation of litigation not immune from discovery as work product). See generally Comment, *Trial Practice — Discovery — "Surveillance Movies" as a Work Product*, 40 Or. L. Rev. 94 (1960).

notice of the films' existence and their intended use for impeachment would sufficiently achieve the general policy of reducing the potential for surprise at trial.⁶¹ In dealing with analogous facts, the Fourth District Court of Appeal arrived at a contrary conclusion and held both the film's existence and its contents were subject to discovery.⁶² The court viewed any distinction between impeachment and substantive evidence as inconsistent with the goals of discovery. Therefore, any evidence intended for use at trial had to be provided upon request.⁶³ Although the First District Court of Appeal has dealt only in limited fashion with the matter, it has permitted discovery of the existence of surveillance films.⁶⁴

The instant case, one of first impression for the Florida supreme court, resolved the conflicting opinions of the district courts of appeal.⁶⁵ Continuing to narrow its definition of work product,⁶⁶ the court afforded only limited protection from discovery to surveillance films and photographs. The court stated that truth and justice were best served by a liberal discovery policy which placed all relevant facts before the tribunal.⁶⁷ Therefore, only in limited circumstances would the work product rule preclude discovery of surveillance materials.⁶⁸

The existence of all surveillance films as well as the content of those to be introduced as evidence at trial were held subject to discovery.⁶⁹ Whether the material was intended for impeachment, substantive or corroborative purposes was irrelevant to the decision.⁷⁰ As long as the evidence was relevant to the issues at trial, it could not remain hidden in the attorney's files.⁷¹ The court

61. 121 So. 2d at 675.

62. *Spencer v. Beverly*, 307 So. 2d 461 (Fla. 4th D.C.A. 1975) (per curiam). In a personal injury action, the plaintiffs propounded interrogatories to determine the content of surveillance films taken by defendant. Defendant acknowledged the existence of the films, but sought to protect them as work product to be used for impeachment purposes. *Id.*

63. *Id.* at 462. *Accord*, *Corack v. Travelers Ins. Co.*, 347 So. 2d 641 (Fla. 4th D.C.A. 1977). *Cf. Hughes v. Grove*, 47 F.R.D. 52 (W.D. Mo. 1969) (photographs of accident scene held not work product and discoverable).

64. *Howard Johnson's Motor Lodges, Inc. v. Baranov*, 379 So. 2d 114 (Fla. 1st D.C.A. 1979). The court offered no rationale for its decision. The question of whether the content of the films was discoverable was not presented.

65. 390 So. 2d at 705. The court approved of the decisions in *Spencer*, *Corack*, and *Howard Johnson's*. The decision in *Collier* was disapproved. See notes 58-62 *supra*.

66. See notes 35-40 *supra* (discussion of the case history of Florida's work product rule).

67. 390 So. 2d at 707. The court stressed that the relevant facts should determine the trial's outcome rather than "gamesmanship, surprise, or superior trial tactics." Discovery should not be allowed to cause litigation delay and excessive costs. *Id.*

68. *Id.* at 707-08.

69. *Id.* The court noted that revelation of the strengths and weaknesses of each side, prior to trial, facilitates the settlement of cases and avoids costly litigation. *Id.* at 707. Further, the seeking party must have a reasonable opportunity to view the surveillance films before trial. Failure to comply with the discovery request will bar the materials' introduction as evidence at trial unless the failure was unwillful, caused no prejudice, or caused prejudice that can be overcome by a continuance or through discovery during a trial recess. *Id.* at 708.

70. *Id.* at 707. If a film is to be used as evidence, it ceases to be work product and is subject to discovery.

71. *Id.* See Fla. R. Civ. P. 1.280(b) (permits discovery of all relevant and unprivileged materials).

indicated that to allow otherwise would defeat the discovery goal of reducing the tactical element of surprise.⁷² Additionally, the court recognized that discovery of the existence of surveillance films was a necessary prerequisite to a decision concerning the discoverability of their contents.⁷³

The court, however, denominated the purpose for which the discovered material would be used as dispositive in determining whether it was protected work product. Only surveillance material not to be introduced as evidence at trial receives the protection of the work product rule.⁷⁴ The court noted that diagrams, charts, and pictures used only for the attorney's convenience at trial, were not discoverable.⁷⁵ It further stated, however, that certain written materials, although work product, were not afforded an absolute immunity. Where the material was "unique or otherwise unavailable," the work product rule's protective veil may be pierced.⁷⁶ Photographs of a changed accident scene⁷⁷ or the impracticability of obtaining an adversary's expert opinion⁷⁸ were listed as examples of this exception.

Although the instant decision interpreted the work product rule narrowly, it sought to protect a litigant's ability to impeach his filmed adversary. The court found merit in the contention that surveillance films have the capacity to prevent overstated and fraudulent claims.⁷⁹ Therefore, prior to production of the films for pre-trial examination, the revealing party may again depose his opponent to ascertain his claims.⁸⁰ The court viewed this procedure as effective in ensuring that relevant evidence reached the trier of fact in a fair and accurate fashion.⁸¹

The instant case continued the Florida trend of restricting the protection

72. 390 So. 2d at 707. The court lists the major objectives of discovery as: 1) identification of the real issues early in the proceedings, 2) facilitation of trial preparation by providing each party with all available sources of proof as early as possible, and 3) abolition of the tactical element of surprise in the adversary process. *Id.* at 706.

73. *Id.* at 707.

74. *Id.* at 707-08.

75. *Id.* at 707 (citing *Surf Drvgs*, 236 So. 2d at 112).

76. *Id.* (citing *Hickman*, 329 U.S. at 511).

77. *Id.* See *Pierson v. Seale*, 128 So. 2d 887 (Fla. 3d D.C.A. 1961) (where work product photographs are the only means of proof available, they are discoverable). Cf. *Galambus v. Consol. Freightways Corp.*, 64 F.R.D. 468 (N.D. Ind. 1974) (work product rule has no application to photographs in hands of third person who is neither a party nor interested in the outcome of the suit); *Saccante v. Toterhi*, 35 A.D.2d 692, 314 N.Y.S.2d 593 (App. Div. 1970) (photographs of plaintiff taken by defendant were discoverable within the terms of the statute that allows a party to obtain a copy of his own statement). See generally M. HOUTS, *PHOTOGRAPHIC MISREPRESENTATION* (1964); K. HUGHES & B. CANTOR, *PHOTOGRAPHS IN CIVIL LITIGATION* (1973).

78. 390 So. 2d at 707, 707 n.4. See, e.g., *Ford Motor Co. v. Havee*, 123 So. 2d 572 (Fla. 3d D.C.A. 1960) (expert's report is undiscoverable work product unless the information is otherwise unavailable or denial would defeat the interests of justice). See generally Comment, *Discovery of Expert Information Under Rule 1.280 of the Florida Rules of Civil Procedure*, 26 U. FLA. L. REV. 566 (1974).

79. 390 So. 2d at 708.

80. *Id.* The court found that such a procedure was sufficient to establish any inconsistency in a claim. *Id.*

81. *Id.*

of work product.⁸² The work product rule evolved from efforts to protect the adversary model from the deleterious effect of unrestricted discovery.⁸³ In balancing these competing policies, the court gave greater weight to extensive pre-trial issue formulation,⁸⁴ than to adversarial combat at trial.⁸⁵ The decision to allow discovery of the existence and content of certain surveillance films comports with the greater weight of authority, and affords uniform treatment to all evidence intended to be introduced at trial.⁸⁶

Indeed, discovery of the existence of surveillance films has been a minor issue in most cases. In Florida the only appellate court that dealt specifically with the issue required that the interrogatory be answered.⁸⁷ Such a ruling accords with the Federal and Florida Rules of Civil Procedure which permit discovery of material "reasonably calculated to lead to the discovery of admissible evidence."⁸⁸ As stressed by the present court, judicial cognizance of a film's existence was a necessary prerequisite to a decision regarding discovery of its content.⁸⁹

Accordingly, it was the ruling on the film's content that resolved the central issue of dispute. In classifying as work product the content of surveillance material not intended to be introduced as evidence, the opinion stressed that an attorney in an adversary proceeding should not benefit from the opposition's investigation.⁹⁰ Such a rationale conformed to the intent of the work product doctrine.⁹¹ The standard announced by the court, however, actually dilutes discovered only upon a showing of need for the information and that it would be unavailable otherwise without undue hardship.⁹² In contrast, the instant de-

82. See notes 35-38, 40 *supra*.

83. One commentator has suggested that the rationale for the work product rule is to preserve the advantages of the adversarial system while allowing discovery of information to narrow the issues for trial. This is thought to improve the system of justice and keep alive the adversarial system. Note, *Discovery of Attorney's Work Product*, 12 *GONZ. L. REV.* 284, 294-95 (1977).

84. See note 72 *supra*.

85. "In this adversarial system, biased presentations are prepared independently by rival parties after which the judge or jury finds the true law and facts." Note, *supra* note 85, at 284 (citing W. GLASER, *PRE-TRIAL DISCOVERY: THE ADVERSARY SYSTEM* 9-10 (1968)).

86. 390 So. 2d at 708. See also *Surf Drugs v. Vermette*, 230 So. 2d 108 (Fla. 1970). See text accompanying notes 42-52 *supra*.

87. See note 64 *supra*.

88. Fed. R. Civ. P. 26(b); Fla. R. Civ. P. 1.280(b).

89. 390 So. 2d at 707.

90. *Id.* at 708.

91. See, e.g., *Southern Ry. v. Lanham*, 403 F.2d 119, 126 (5th Cir. 1968) ("work product exception is based on the public policy of preserving the independence of lawyers through the avoidance of unwarranted intrusions into their private files and mental processes"); *E.I. duPont DeNemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 419 (D. Del. 1959) (work product embodies the "policy that a lawyer, doing a lawyer's work in preparing a case for trial, should not be hampered by the knowledge that he may be called upon at any time to hand over the results of his work to his opponent"); *Greyhound Corp. v. Superior Ct.*, 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266 (1961) (work product doctrine is based on theory that a lawyer may not take undue advantage of his adversary's efforts).

92. Fla. R. Civ. P. 1.280(b)(2).

cision allowed discovery of surveillance work product when it was unique and otherwise unavailable.⁹³ The very nature of surveillance films will render the information contained therein "unique and otherwise unavailable." This more liberal standard contrasts with the history of the rule which required rare and exceptional circumstances for discovery of work product.⁹⁴ Not only did the instant decision grant the judge greater discretion in ordering discovery, it also effectively eliminated the required showing of need for the films. Consequently, by allowing discovery of unneeded material, the court in the instant decision unjustifiably reduced the protection of the attorney's work product.⁹⁵

While the court's decision to exclude surveillance films to be introduced as evidence from work product immunity accords with most recent decisions,⁹⁶ its chosen procedure is unique.⁹⁷ The procedure satisfies the objectives of broad discovery rules and simultaneously safeguards essential components of the adversary process. First, the element of surprise is reduced. Although plaintiffs are aware of the extent of their own injuries,⁹⁸ the unveiling of a doctored film at trial could result in a surprise that discovery would have averted.⁹⁹ Second, discovery of the films will not frustrate cross-examination as feared in *Hikel*.¹⁰⁰ Rather, each side is provided the opportunity to impeach his adversary's credibility.¹⁰¹ Third, discovery will not aid a plaintiff in tailoring his testimony to perpetuate a fraudulent claim.¹⁰² Instead, deposition prior to production will memorialize the testimony for impeachment at trial if necessary.

The procedure adopted in the instant case effectively balances discovery's

93. 390 So. 2d at 707. A photograph of an accident scene since changed was the court's example. Such a photograph, however, would have been discoverable under the present work product rule. See, e.g., *Pierson v. Seale*, 128 So. 2d 847 (Fla. 3d D.C.A. 1961).

94. See, e.g., *McCullough Tool Co. v. Pan Geo Atlas Corp.*, 40 F.R.D. 490, 493 (S.D. Tex. 1966) (document containing attorney's mental impressions, theories, and conclusions held discoverable where document contained evidence highly relevant and only incidentally concerned with functioning of counsel); *Hanson v. Gartland S.S. Co.*, 34 F.R.D. 493, 495 (N.D. Ohio 1964) (in rare situations difficulty of access to witnesses will require that an attorney's file be partially open to his adversaries); *Dade County v. Monroe*, 237 So. 2d 598 (Fla. 3d D.C.A. 1970) (discrepancies between work product witness statements and statements of same and other witnesses were not adequate basis for ordering production of work product).

95. The court listed three major goals of discovery. See note 72 *supra*. Discovery of films that are unique and otherwise unavailable, for which no showing of need can be made, will not facilitate achievement of these goals.

96. See text accompanying notes 42-52 *supra*.

97. See *Snead*, 59 F.R.D. at 151; *Jenkins v. Rainner*, 69 N.J. 50, 53, 350 A.2d 473, 477 (1976).

98. See *Bogatay*, 177 F. Supp. at 270.

99. See note 50 *supra*. A court has warned that release of a distorted film at trial would leave little chance for an adversary to protect against its damaging effects. Furthermore testing of the film would delay trial. *Jenkins v. Rainner*, 69 N.J. 50, 57-58, 350 A.2d 473, 477. *But cf. Mort v. A/S D/S Svendborg*, 41 F.R.D. 225, 227 (E.D. Pa. 1966) (discovery of impeachment evidence denied; plaintiff would be given full opportunity at trial to explain any innocent lapses in memory as to his prior condition).

100. See note 52 *supra*.

101. See note 48 *supra*.

102. 390 So. 2d at 708. See generally *Lipman, Malinger in Personal Injury Cases*, 35 *TEMP. L. Q.* 141 (1962) (the general problem of a person who feigned injuries).

goals with the need for effective impeachment. Some jurisdictions completely protect impeachment evidence as work product.¹⁰⁵ Other courts have instituted a case-by-case balance test where evidence found to serve predominantly impeachment purposes is not discoverable while that bearing on the merits is available to the adverse party.¹⁰⁶ The deposition requirement in the instant case balances the tactical advantages of each side and keeps judicial intervention at a minimum.¹⁰⁷ Both sides are provided an equal opportunity with the same evidence, and the elimination of surprise better assures the achievement of justice.¹⁰⁸ Maximum information is provided and the truth is more precisely ascertained.¹⁰⁹

The innovative procedure regarding discovery of films used as evidence permits a battle of wits at trial and expedites the achievement of discovery objectives. Fears that discovered evidentiary surveillance films will be misused should be allayed because the procedure prevents claimants from altering their claims after having viewed the films.¹⁰⁸ The court in the instant case, however, failed to require a sufficient showing of need prior to discovery of surveillance films which would *not* be introduced into evidence. To require the party seeking discovery to show the films are unique and otherwise unavailable is not enough. Under this standard every film would be discoverable, regardless of a party's need to view the films. The work product rule historically has protected materials used by attorneys to prepare for trial unless actually needed by a party.¹⁰⁹ To the extent that the instant decision departs from that rule, it detrimentally affects the adversary process without facilitating discovery goals.

MICHAEL JOBLOVE

105. See note 59 *supra*.

104. *Bogatay v. Montour R.R.*, 177 F. Supp. 269, 270 (W.D. Pa. 1959). The balancing approach would appear to liberalize discovery procedure by lifting the burden to show a special need from the one seeking discovery. Under balancing, the court would have greater discretion.

One commentator has suggested simultaneous disclosure of surveillance material to the court and plaintiff at the pre-trial conference. This approach attempts to discourage plaintiff's ability to perpetuate a fraudulent or overstated claim and yet allows discovery under legitimate circumstances. Comment, *supra* note 44, at 770-73.

105. The mechanics of the process of serving interrogatories was revised with a 1970 amendment designed to reduce court intervention in the procedure. *FED. R. CIV. P. 33 Notes of Advisory Committee on Rules* (1970 amendment); see *FLA. R. CIV. P. 1.940(a)*.

106. See *Boldt*, 111 N.W.2d at 228 (quoting *Hickman v. Taylor*, 329 U.S. 495 (1947)).

107. The overriding purpose of discovery is to provide "the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith." *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966).

108. This procedure was recommended by one commentator who viewed it as an effective means to impeach claimants who testify untruthfully, while allowing a party to prepare to meet impeaching material which was susceptible of honest explanation or refutation. Cooper, *Work Product of the Rulemakers*, 53 *MINN. L. REV.* 1269, 1318 (1969).

109. See note 28 *supra*.