

66075-6

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No. 66075-6

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

IAN DEAN,

Plaintiff/Appellant,

v.

THE FISHING COMPANY OF ALASKA, INC.

and

ALASKA JURIS, INC.,

Defendants/Respondents

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The focus of the present appeal is the proper legal standard to be applied when a seaman brings a pre-trial motion for the general maritime remedies of maintenance and cure in a state court action. Respondents The Fishing Company of Alaska, Inc. and Alaska Juris, Inc. (collectively “FCA”) maintain that the only available mechanism for a pre-trial award of maintenance and cure is summary judgment. As such, the standard set forth in Civil Rule 56 must be applied, and the seaman must show that there are no disputed material issues of fact regarding his or her entitlement to maintenance and cure in order to obtain those benefits prior to trial. Because appellant Ian Dean failed to make such a showing, the trial court correctly denied his Motion to Reinstate Maintenance and Cure, and this Court should affirm that decision.

The second issue raised by this appeal is the discoverability of the existence of surveillance. Mr. Dean concedes that surveillance materials themselves are protected by the work product privilege, but argues that FCA should be compelled to disclose whether or not it has conducted any surveillance of him. Mr. Dean is mistaken in this regard, as the existence of surveillance is likewise protected attorney work product. Moreover, where the defense has no intention of introducing any such surveillance

evidence at trial, the existence of surveillance is not discoverable, because it is not likely to lead to the discovery of admissible evidence. The trial court correctly denied Mr. Dean's Motion to Compel Discovery, and that order should be affirmed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court did not err in applying the CR 56 summary judgment standard to Mr. Dean's Motion to Reinstate Maintenance and Cure.

2. The trial court did not err in denying Mr. Dean's Motion to Compel discovery regarding the existence of surveillance.

B. Issues Pertaining to Assignments of Error.

1. In a maritime personal injury case brought in state court, is a seaman required to satisfy the summary judgment standard regarding his entitlement to maintenance and cure in order to obtain a pre-trial award of maintenance and cure? (Assignment of Error 1)

2. Is the existence of surveillance materials (as opposed to surveillance materials themselves) discoverable, particularly where the defense has no intention of introducing surveillance evidence at trial? (Assignment of Error 2)

III. STATEMENT OF THE CASE

Mr. Dean alleges that he sustained an injury during the brief period in May and June of 2006 that he worked onboard FCA's vessel the ALASKA JURIS. CP 2. Mr. Dean worked for less than two weeks in a variety of positions on the vessel before quitting on June 2, 2006. CP 24-25. He departed the vessel on June 14, 2006, at which time he complained of problems with his left wrist and right ankle. CP 25. He had no complaints related to his head or neck at that time.

Following his departure from the vessel, Mr. Dean was paid the general maritime remedies of maintenance and cure, as well as unearned wages. Maintenance and cure are "no-fault" remedies that are designed to provide a seaman with food, lodging and medical care when he becomes sick or injured while in the ship's service. See The OSCEOLA, 189 U.S. 158, 175, 23 S. Ct. 483, 47 L. Ed. 760 (1903); Vaughan v. Atkinson, 369 U.S. 527, 532, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962). Maintenance is a daily stipend, and cure is the payment of medical bills. Berg v. Fourth Shipmor Assoc., 82 F.3d 307, 309 (9th Cir. 1996). Maintenance and cure are payable while the seaman is undertaking curative treatment. Id.

As noted in Mr. Dean's opening brief, it was discovered during the course of Mr. Dean's medical treatment following his departure from the

vessel that he has an unusual genetic neurological condition called myotonia congenital. CP 10.¹ Much of the medical treatment paid for by FCA between 2006 and 2009 consisted of evaluations and diagnostic tests to determine which of Mr. Dean's complaints were attributable to his myotonia and which might have been caused by his work aboard the vessel. CP 46-69. This process included evaluation by no fewer than six different physicians, as well as multiple EMGs, MRIs, and nerve conduction studies. Id.

The only medical condition at issue before the trial court in the motion that gave rise to this appeal was Mr. Dean's alleged neck pain. Mr. Dean first complained of neck pain in June 2006. CP 46. No treatment or diagnostic studies were recommended for his neck at that time. CP 46-47. In October 2006, Dean again complained of neck pain, and was diagnosed with muscle strain and prescribed Tylenol and Motrin. CP 53. For the next 20 months, Mr. Dean did not undergo any treatment for his neck, and alluded to neck pain only once in the course of 20 doctor visits during that period.

¹ The physicians involved in this case have opined that this progressive, degenerative condition is genetic in origin, and was not caused by Mr. Dean's service aboard the ALASKA JURIS.

In May 2008, Mr. Dean renewed his complaint of neck pain, and it was noted that physical therapy “may help relieve some of the symptoms in his neck.” CP 60. However, Mr. Dean never attended physical therapy. On August 5, 2008, Mr. Dean was seen by Dr. Timothy Daly, who opined that his neck symptoms were due to cervical strain and intermittent paravascular muscle spasm. CP 62. Dr. Daly recommended light massage, soaks, and gentle range of motion to maintain mobility. He did not feel there were any curative treatments for Mr. Dean’s neck. Id. Again, Mr. Dean did not undertake the recommended action to alleviate his neck symptoms.

Nine more months passed without reference to Mr. Dean’s neck complaint, until he transferred his care to Dr. Alfred Aflatooni, a family friend, who agreed to see Mr. Dean as a “favor.” CP 37. Dr. Aflatooni concluded that Mr. Dean suffered from “cervical radiculopathy, bilateral, with weakness of the neck and arms, and muscle spasm associated with severe headaches since 2006.” CP 68. Dr. Aflatooni ordered additional diagnostic studies, but made no treatment recommendations for Mr. Dean’s neck. CP 68.

In August 2009, Mr. Dean underwent a medical evaluation by Dr. Williamson-Kirkland at FCA’s request. Dr. Williamson-Kirkland

indicated that Mr. Dean had a “normal neck examination” and found “no evidence of any really significant disease in his neck that was caused at any time.” CP 41. He opined that while Mr. Dean could have sustained a neck strain aboard the vessel, any such strain would have resolved within several months. Id. Finding Mr. Dean’s neck to be normal, Dr. Williamson-Kirkland had no recommended treatment for Mr. Dean’s neck.

Based upon Dr. Williamson-Kirkland’s opinions, the lack of evidence tying Mr. Dean’s neck condition to his service aboard the vessel, and the absence of curative treatment undertaken for his alleged neck condition, FCA discontinued payment of maintenance and cure as of September 9, 2009. CP 27. Mr. Dean did not undertake any curative treatment for his neck following the issuance of Dr. Williamson-Kirkland’s report.

On November 3, 2009, Mr. Dean filed a motion to reinstate maintenance and cure, arguing his neck condition was related to his service on the vessel and that further curative treatment for his neck complaints was warranted, based solely on the opinion of Dr. Aflatooni. The parties disagreed about the proper standard to be applied to such a motion, with FCA maintaining that the only mechanism for obtaining a pre-trial award of maintenance and cure was summary judgment, which

required that Mr. Dean show there were no disputed issues of material fact regarding his entitlement to these maritime remedies. The trial court agreed, applied the Rule 56 summary judgment standard, and based on the conflicting medical evidence, determined that disputed issues of material fact surrounding Mr. Dean's neck complaints precluded a pre-trial award of maintenance and cure. CP 76-77.

By separate motion dated July 14, 2010, Mr. Dean sought to compel FCA to answer an interrogatory stating whether or not it had undertaken surveillance of him. CP 78-81. FCA took the position that its strategic decision whether or not to conduct surveillance of Mr. Dean was protected from disclosure by the attorney work product doctrine. CP 101-105. Moreover, in its response to the motion to compel, FCA unequivocally stated that it did not intend to introduce any surveillance material as evidence at trial, making discovery of the existence of surveillance improper because it would not lead to the discovery of admissible evidence. CP 103. The trial court denied the motion to compel. CP 113.

IV. ARGUMENT

A. The Trial Court Did Not Err in Applying the Summary Judgment Standard and Determining that Disputed Issues of Material Fact Precluded a Pre-Trial Award of Maintenance and Cure.

1. Standard of Review.

A trial court's denial of summary judgment is reviewed de novo. Rivas v. Overlake Hosp. Med. Ctr., 164 Wn.2d 261, 266, 189 P.3d 753 (2008). The trial court's decision as to the proper legal standard to apply is a conclusion of law that is likewise reviewed de novo. See Smith v. Bates Tech. College, 139 Wn.2d 793, 800, 991 P.2d 1135 (2000) (conclusions of law are reviewed de novo).

2. Because a Seaman's Entitlement to Maintenance and Cure Requires the Court to Determine Issues of Fact, Summary Judgment Is the Appropriate Standard.

A seaman bears the burden of proving his entitlement to maintenance and cure. While this burden is not a heavy one, the seaman nevertheless must show that he was injured or became ill while in the service of the defendant's vessel in order to be entitled to payment of these maritime remedies. Guerra v. Arctic Storm, Inc., 2004 AMC 2319, 2321 (W.D. Wash. 2004) ("Generally speaking, in order to be entitled to maintenance and cure, a seaman need only prove that his injury arose while he was serving the defendant's ship."). Because a seaman bears the

burden of proof at trial as to his entitlement to maintenance and cure, the proper standard to apply when considering an award of such benefits prior to trial on the merits is the summary judgment standard set forth in CR 56.

Because the inquiry into a seaman's entitlement to maintenance and cure is factually intensive, summary judgment is generally disfavored. See 2 Martin J. Norris, The Law of Seamen § 26:21 (4th ed. 1985) (“[A] suit for maintenance and cure presents questions of fact. It should not be disposed of by summary judgment nor should payment be decreed on motion.”). However, if, in fact, there are no disputed issues of material fact regarding the claim, maintenance and cure can conceivably be awarded on summary judgment. Bloom v. Weeks Marine, Inc., 225 F. Supp. 2d 1334, 1336 (M.D. Fla. 2002).

The issue of the proper standard to apply to a seaman's pre-trial motion for maintenance and cure has been thoroughly addressed by federal courts. In numerous cases, these courts have concluded that the proper mechanism for bringing and evaluating a motion for maintenance and cure prior to trial is summary judgment. For example, in Guerra, supra, when presented with a motion for maintenance and cure, the court noted that “[o]ther than a motion for summary judgment, [the Court is] aware of no other procedure for obtaining pre-trial judgment on the merits

of a claim.” 2004 AMC at 2320. The Guerra court went on to find that disputed issues of fact regarding the seaman’s entitlement to maintenance and cure precluded summary determination. Id. at 2322. See also Garretson v. Prowler, LLC, Case No. C06-1234-JCC, Order (W.D. Wash., Feb. 7, 2008); Davis v. Icicle Seafoods, Inc., 2008 U.S. Dist. LEXIS 80818 (W.D. Wash. 2008); Mabrey v. Wizard Fisheries, Inc., 2007 U.S. Dist. LEXIS 38355 (W.D. Wash. 2007) (“the “Court applies a summary judgment standard rather than granting interim relief without an adjudication on the merits”); Finchen v. Holly-Matt, Inc., Case No. C04-1285RSM, Order on Pending Motions (W.D. Wash., Nov. 22, 2004) (finding seaman’s motion to compel maintenance and cure was more properly a motion for partial summary judgment and denying same where genuine issue of material fact existed regarding whether seaman sustained injury while aboard defendant’s vessel).

In a 2007 case, Judge Coughenour thoroughly analyzed the question of the appropriate standard for a pre-trial motion for maintenance and cure, and similarly concluded that summary judgment is the appropriate standard. Buenbrazo v. Ocean Alaska, LLC, 2007 U.S. Dist. LEXIS 98731 (W.D. Wash. 2007). Judge Coughenour noted that as the Guerra court found, the only known procedural mechanism for a court to

adjudicate a factually-based question prior to trial is summary judgment. Id. at *7. He then went on to consider the tension between the summary judgment standard, which requires all doubts to be resolved in favor of the non-moving party, and the canon of admiralty law that requires all doubts to be resolved in favor of the seaman. Id. at *7-9. He ultimately concluded as follows:

While cognizant of the weighty policies in favor of a seaman's right to maintenance and cure, the Court is skeptical that the Supreme Court's admonition that "[w]hen there are ambiguities or doubts, they are resolved in favor of the seaman," [citing Vaughan, supra] was designed to torpedo the well-established summary judgment procedure. 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." Ninth Circuit Model Civil Jury Instruction 9.11. Disregarding genuine issues of material facts on these elements that exist prior to trial before each party has had an opportunity to make their case places too heavy a thumb on the scale in favor of the seaman. Thus, the Court concludes that in spite of the canon of admiralty law that all doubts and ambiguities should be resolved in favor of the seaman, the summary judgment standard should be applied to a pre-trial motion to compel maintenance and cure.

Id. at *9-10; see also Garretson, supra, at ___, ("While it is an adage of the special remedy of maintenance and cure that, 'ambiguities or doubts . . . are resolved in favor of the seaman,' [citing Vaughan, supra, 369 U.S. at

532] for the reasons explained by Judge Lasnik in Mabrey, and this Court in Buenbrazo, the ordinary summary judgment standard should be applied to a pre-trial motion to compel maintenance and cure.”).

These conclusions find support in similar decisions from other federal courts around the country. See, e.g., Loftin v. Kirby Inland Marine, L.P., 568 F. Supp. 2d 754 (E.D. Tex. 2007) (treating seaman’s motion for maintenance and cure as motion for partial summary judgment and concluding that disputed issues of material fact regarding seaman’s entitlement to maintenance and cure prevented pre-trial award of such benefits); Blake v. Cairns, 2004 U.S. Dist. LEXIS 16837 (N.D. Cal. 2004) (same); Bloom, 225 F. Supp. 2d at 1336-37 (denying motion for maintenance and cure because merits of maintenance and cure claim cannot be adjudicated prior to trial on mere motion, but must instead be decided on summary judgment motion under Fed. R. Civ. P. 56, motion for separate trial under Fed. R. Civ. P. 42(b), or at trial); SanFilippo v. Rosa S., Inc., 1985 U.S. Dist. LEXIS 13020 (D. Mass. 1985) (“[U]nless the seaman can show that there are no material facts in dispute and that he is entitled to summary judgment on the [maintenance and cure] claim, he cannot obtain a pre-trial order for payment.”); see also Pelotto v. L & N Towing Co., 604 F.2d 396, 402 (5th Cir. 1979) (affirming use of summary

judgment standard for pre-trial maintenance and cure motion); Lirette v. K & B Boat Rentals, Inc., 579 F.2d 968, 969 (5th Cir. 1978) (same).

While the Ninth Circuit has not ruled directly on this issue, it has declined to award maintenance and cure where there were disputed issues of material fact regarding whether the seaman's alleged accident aboard the vessel had even occurred. Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495, 1505 (9th Cir. 1995). In Glynn, the court affirmed the district court's refusal to require payment of maintenance and cure as a condition of removing a default against the defendants because genuine issues of material fact remained regarding whether the seaman had the alleged medical condition and whether it arose while he was in service of the defendant's vessel, both of which were threshold issues on which the seaman would bear the burden of proof at trial. Id.

Mr. Dean essentially relies upon a single case, Gouma v. Trident Seafoods, Inc., 2008 AMC 863, 2008 U.S. Dist. LEXIS 108278 (W.D. Wash. 2008), in support of his argument that a seaman should not be required to satisfy the summary judgment standard for a pre-trial award of maintenance and cure. Yet the Gouma decision is not persuasive here. In Gouma, the court distinguished the Buenbrazo and Mabrey decisions discussed above, noting that in both of those cases, there was a factual

question as to whether the seaman was in the service of the defendant's vessel when he was injured. 2008 AMC at 864-65. In contrast, in Gouma, it was undisputed that the plaintiff seaman was injured while in the service of the defendant's vessel. Id.

Based upon this distinction, the Gouma court found that the plaintiff was entitled to a presumptive continuance of maintenance and cure. Id. at 865. The court cited no case law in support of this proposition, and indeed, there is no support for such a presumption in maritime case law. The court went on to state that even if the summary judgment standard were applied, "disputed issues of material fact . . . would simply mean that Plaintiff would be entitled to continue to receive maintenance and cure until the matter was ultimately resolved at trial." Id. With all due respect to the trial judge in Gouma, she had the standard backwards. A material issue of fact precludes summary judgment for either party, it does not compel it for plaintiff. Under this view, maintenance and cure could never be terminated prior to trial or unless the parties reached a settlement.

Because this case presented a disputed issue of material fact regarding whether Mr. Dean actually sustained a neck injury while working aboard the ALASKA JURIS, a threshold factual question on

which Mr. Dean bears the burden of proof, it is akin to Buenbrazo and Mabrey, and summary judgment is the proper standard. The Gouma decision is factually distinguishable, just as Judge Pechman herself noted in that decision, and its reasoning is simply not applicable here.

3. Equitable Remedies Available to Federal Courts Sitting in Admiralty Are Not Available in Maritime Actions Brought at Law in State Court.

One possible source of the presumption in favor of continuing maintenance and cure adopted by Judge Pechman in Gouma – indeed, the most likely source – is the equitable powers of federal courts sitting in admiralty. The United States Constitution grants the federal courts exclusive jurisdiction over admiralty and maritime cases. U.S. Const., Art. III, Section 2; see also 28 U.S.C. § 1333(1). Courts sitting in admiralty have certain equitable powers and may therefore grant certain types of equitable relief that are not available at law. See, e.g., Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 695, 70 S. Ct. 861, 94 L. Ed. 1206 (1950); Putnam v. Lower, 236 F.2d 561, 568 (9th Cir. 1956). In particular, federal courts sitting in admiralty have relied on such powers to make pre-trial awards of maintenance and cure. See Buenbrazo, supra, at *14-15 (awarding seaman equitable relief of \$40

per day, despite finding that material issues of fact precluded summary judgment on seaman's motion for maintenance and cure).

However, this type of equitable relief is not available in Mr. Dean's case, given that he elected to bring his maritime action in state court at law, rather than in federal court in admiralty. State courts are permitted to hear maritime claims under what it commonly called the "saving to suitors" clause. 28 U.S.C. § 1333(1). While state courts are granted to authority under this statute to hear maritime cases, they may never exercise admiralty jurisdiction. Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1487 (5th Cir. 1992) ("Because admiralty jurisdiction is exclusively federal, a true 'admiralty' claim is never cognizable in state court; no 'designation' or state procedure can alter this.") Instead, maritime actions brought in state court must necessarily be "at law." Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 878-79, 224 P.3d 761 (2010).

By choosing to bring his maritime claims in state court, Mr. Dean foreclosed his ability to seek equitable remedies available only in admiralty. Thus, while Judge Pechman may have awarded maintenance and cure in Gouma with the federal admiralty court's equitable powers in mind, state courts are limited to procedures available at law. As outlined

above, the applicable standard for adjudicating fact-based questions such as entitlement to maintenance and cure is summary judgment, and the trial court here applied the correct standard.

To the extent that Mr. Dean alludes to other mechanisms available in state court for obtaining a pre-trial award of maintenance and cure, such as a preliminary injunction, FCA notes that Mr. Dean did not avail himself of such procedures. Even if he had, it is unlikely that he would have succeeded in obtaining this type of provisional remedy under CR 65, as it, too, requires a movant to make certain factual showings. CR 65; see Spokane v. AFSCE, 76 Wn. App. 765, 770, 888 P.2d 735 (1995) (temporary restraining order requires showing of irreparable harm); Ameriquet Mortgage Co. v. Office of Att’y Gen., 148 Wn. App. 145, 157, 199 P.3d 468 (2009) (preliminary injunction requires showing of likelihood of prevailing at trial on the merits of underlying claim). As recognized by the court in SanFilippo, such a showing may be difficult if not impossible in the context of a maintenance and cure claim, where the harm from denial of payments can be remedied by payment of damages after trial. SanFilippo, *supra*, at *5 (“[A] seaman seeking a preliminary injunction mandating the payment of maintenance and cure would be faced with the problem that the denial of payments is clearly compensable

by the payment of damages.”) Again, that question is neither here nor there, as Mr. Dean did not elect to pursue such a remedy below, but instead filed a motion for maintenance and cure, which in light of the authorities cited above and their reasoning, was properly treated by the trial court as a motion for partial summary judgment.

4. Disputed Issues of Fact Regarding Mr. Dean’s Entitlement to Maintenance and Cure Warranted Denial of His Pre-Trial Motion.

Summary judgment is appropriate where the moving party establishes that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. CR 56(c). In the present case, the trial court properly denied Mr. Dean’s motion because there were disputed issues of material fact regarding whether his neck complaints were attributable to an injury that occurred while he was in the service of FCA’s vessel and whether his alleged neck condition had reached maximum medical improvement (MMI).

In his declaration, Mr. Dean asserted that his neck started hurting “about” the time he left the ALASKA JURIS. CP at 14. Mr. Dean also relied on the opinion of Dr. Aflatooni, the family friend who agreed to see him as a favor, who stated in a letter that Mr. Dean’s neck problems arose while he was aboard FCA’s vessel in 2006. (“In regard to his neck

problems, Dean has not achieved MMI from a condition that first manifested while he was on the fishing vessel in 2006.”) CP 17. This was nothing more than a conclusory statement, made without reference to a factual basis or supporting rationale for such a conclusion.

Mr. Dean’s meager showing was contradicted by FCA’s evidence, specifically the opinion of Dr. Williamson-Kirkland, who found that Mr. Dean had no current neck complaints, let alone any neck complaints associated with his time aboard the vessel. CP at 41. Dr. Williamson-Kirkland opined that any neck complaints Mr. Dean may have had as a result of working on the vessel would have resolved within a few months of leaving the vessel. *Id.* The trial court correctly found that this dispute over material issues of fact surrounding causation and Mr. Dean’s entitlement to maintenance and cure for his alleged neck condition precluded summary judgment.

FCA also successfully demonstrated that disputed issues of fact precluded summary judgment as to whether Mr. Dean had reached MMI for his neck condition. Again, Mr. Dean relied solely on the letter from Dr. Aflatooni stating that additional testing and treatment for Mr. Dean’s neck were needed. CP 17. In contrast, Dr. Williamson-Kirkland concluded that Mr. Dean’s neck was normal, and that there was no further

treatment that would improve its condition. CP 41. Given this stark dispute on the issue of MMI, the trial court properly determined that summary judgment was not appropriate.

B. The Trial Court Did Not Err in Denying Mr. Dean's Motion to Compel the Existence of Surveillance.

1. Standard of Review.

A trial court's denial of a motion to compel discovery is reviewed for abuse of discretion. Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001). A trial court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds or reasons. Id.

2. Whether or Not Surveillance Is Undertaken Is a Strategic Decision That Is Protected from Disclosure by the Attorney Work Product Privilege.

The decision whether to conduct surveillance is a strategic one squarely protected by the work product doctrine. Both tangible materials prepared for in anticipation of litigation and the intangible mental impressions, legal opinions, and strategies of counsel are protected by the attorney work-product privilege. See CR 26(b)(4); see also F.R.C.P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495, 510, 67 S. Ct. 385, 91 L. Ed.

451 (1947).² Federal and state courts deciding this issue almost universally hold that surveillance conducted by a defendant is work product.³ Surveillance is afforded work product protection because it is prepared in anticipation of litigation. Fletcher v. Union Pac. R.R. Co., 194 F.R.D. 666, 670 (S.D. Cal. 2000).

This goes for both the surveillance materials themselves, and for the attorney's "strategic decision" of whether to conduct surveillance. Ranft v. Lyons, 163 Wis.2d 282, 301, 471 N.W.2d 254, 261 (Wis. 1991); Snead, 59 F.R.D. at 151.

The decision [whether to conduct surveillance] not only reflects the lawyer's evaluation of the strengths or weaknesses of the opponent's case but the lawyer's instructions to the person or persons conducting the surveillance also reveals the lawyer's analysis of potentially fruitful areas of investigation. . . . Disclosure of the fact of surveillance and a description of the materials recorded would thus impinge on the very core of the work-product doctrine.

² Washington courts have routinely held that where the state and federal rules are the same, cases construing the federal rule are pertinent to construction of the state rule. See, e.g., In re Green, 14 Wn. App. 939, 942, 546 P.2d 1230 (1976).

³ See Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973); Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145 (S.D. Ind. 1993); Fletcher v. Union Pac. R.R. Co., 194 F.R.D. 666, 673 (S.D. Cal. 2000); Forbes v. Hawaiian Tug & Barge Corp., 125 F.R.D. 505 (D. Haw. 1989); Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782 (Ariz. Ct. App. 1980); Crist v. Goody, 507 P.2d 478 (Colo. Ct. App. 1972); Collins v. Crosby Group, Inc., 551 So.2d 42 (La. Ct. App. 1989); Shenk v. Berger, 587 A.2d 551 (Md. Ct. Spec. App. 1991); Williams v. Dixie Elec. Power Ass'n, 514 So.2d 332 (Miss. 1987); Kane v. Her-Pet Refrigeration, Inc., 587 N.Y.S.2d 339, 344 (N.Y. App. Div. 1992); Dodson v. Persell, 390 So.2d 704 (Fla. 1980).

Ranft, 163 Wis.2d at 301-02 (citing Hickman, *supra*, 329 U.S. at 513 (lawyer's memorialization of a witness' oral statement is work product because it reveals "what he saw fit to write down."); Shelton v. American Motors Corp., 805 F.2d 1323, 1326, 1328-1329 (8th Cir. 1986) (attorney's selection or compilation of documents in anticipation of litigation may be protected work product); Sporeck v. Peil, 759 F.2d 312, 315-317 (3d Cir. 1985) (attorney's selection or compilation of documents in anticipation of litigation may be protected work product).

The discoverability of surveillance materials depends upon whether the party in possession of such materials intends to use them at trial. If the defendant intends to introduce surveillance materials into evidence at trial, such evidence must be produced in discovery. Fisher, *supra*, 152 F.R.D. at 158 (S.D. Ind. 1993). On the other hand, a defendant need not produce surveillance materials in discovery if it has no intent of using such evidence at trial, unless the requesting party demonstrates substantial need for the non-evidentiary surveillance. Fletcher, 194 F.R.D. at 672; Fisher, 152 F.R.D. at 153, 158; *see also* Goma v. American Seafoods Co., LLC, Case No. 2:07-cv-02077-TSZ, Minute Order (W.D. Wash. September 9, 2008) (denying plaintiff's motion to compel response to interrogatory asking whether surveillance had been conducted, absent

showing that defendant intended to offer surveillance evidence at trial or demonstration of substantial need and undue hardship standards sufficient to overcome work product protection).

This same distinction applies with regard to the discoverability of the existence of surveillance. All discovery requests must be “reasonably calculated to lead to the discovery of admissible evidence.” Fisher, 152 F.R.D. at 158 (quoting Fed. R. Civ. Proc. 26(b)(1)); Fletcher, 194 F.R.D. at 156. Since the surveillance materials themselves are not discoverable if they will not be used at trial, then acquiring information about the existence of such materials cannot lead to discovery of “admissible evidence.” Id. at 157; see also Snead, 59 F.R.D. at 151 (holding that defendant need not state whether surveillance exists, but failure to do so prohibits its production at trial). Although the bounds of discovery are broad, disclosure of the existence of surveillance where it has been conceded that no surveillance materials will be introduced at trial “exceeds the boundaries of relevant material.” Fisher, 152 F.R.D. at 157.

Mr. Dean relies solely on the decision of the Florida Supreme Court in Dodson v. Persell, 390 So.2d 704 (Fla. 1980). The court in Dodson did state that “the existence of surveillance and photographs is discoverable in every instance.” Id. at 704. Notably, however, the

Dodson court engaged in no analysis in reaching this conclusion, nor did it cite any supporting case law or address the case law that holds to the contrary. The only rationale offered for its decision is that “knowledge of its existence is necessary before a judicial determination can be made as to whether the contents are privileged.” Id. at 707.

In the present case, given that FCA unequivocally stated that it would not introduce surveillance materials (if any exist) at trial, there is no need or reason to determine whether the contents of the surveillance (again, if any exists) are privileged. Thus, the Dodson court’s rationale is inapposite here, and the trial court correctly declined to follow it.

FCA’s decision whether or not to conduct surveillance of Mr. Dean was a strategic decision that is protected by the attorney work product doctrine. Moreover, FCA made it abundantly clear to the trial court that it had no intention of introducing any surveillance materials at trial. CP 103. As such, disclosure of the existence of surveillance was not only protected by work product, but was also unwarranted because discovery of that information was not likely to lead to the discovery of admissible evidence.

Mr. Dean’s only other avenue for overcoming work product protection under the circumstances would have been to demonstrate

“substantial need” for the information and the inability to obtain the substantial equivalent thereof by any other available means. See Fletcher, 194 F.R.D. at 670 (citing Forbes, *supra*, 125 F.R.D. at 507-08); Ford v. CSX Transportation, Inc., 162 F.R.D. 108, 111 (E.D. N.C. 1995); Fisher, 152 F.R.D. at 150-51; Ranft, 471 N.W. 2d at 261. The showing of a substantial need “must be more than alleged. It must be demonstrated.” Fletcher, 194 F.R.D. at 675. Here, Mr. Dean made no such showing, and absent a demonstration of substantial need and undue hardship, the trial court had no basis for ordering FCA to respond to the discovery request at issue.

V. CONCLUSION

Summary judgment is the appropriate standard for determining factual issues surrounding a seaman’s entitlement to maintenance and cure prior to trial on the merits. Here, the trial court applied the proper standard and determined that disputed issues of material fact regarding Mr. Dean’s entitlement to maintenance and cure for his alleged neck injury precluded a pretrial award of maintenance and cure. The trial court also properly denied Mr. Dean’s motion to compel disclosure of the existence of surveillance, given that such information is protected by attorney work product, FCA did not intend to introduce surveillance

materials at trial, and Mr. Dean made no showing of substantial need or undue hardship. FCA therefore respectfully requests that this Court affirm the trial court's orders regarding maintenance and cure and discovery of surveillance.

RESPECTFULLY SUBMITTED this 18 day of February, 2011.

HOLMES WEDDLE & BARCOTT, P.C.



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APPENDIX

1. Garretson v. Prowler LLC, Case No. 2:06-cv-01234-JCC,
Order dated February 7, 2008 A1.1-1.7
2. Finchen v. Holly-Matt, Inc., Case No. 2:04-cv-01285-RSM,
Order on Pending Motions dated November 22, 2004 A2.1-2.2
3. Goma v. American Seafoods Co., LLC, Case
No. 2:07-cv-02077-TSZ, Minute Order dated
September 9, 2008 A3.1-3.2

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STANLEY GARRETSON,

Plaintiff,

v.

PROWLER LLC, et al.,

Defendants.

CASE NO. C06-1234-JCC

ORDER

This matter comes before the Court on Plaintiff's Motion to Compel Payment of Maintenance and Cure (Dkt. No. 14), Defendants' Response (Dkt. No. 17), and Plaintiff's Reply (Dkt. No. 19), together with supporting affidavits and exhibits. Having considered the papers submitted by the parties, and finding oral argument unnecessary, the Court hereby DENIES Plaintiff's motion, as follows.

I. BACKGROUND

During 2005 and 2006, Plaintiff Stanley Garretson worked as a crewmember aboard the F/V PROWLER, a vessel owned and managed by Defendants. On March 1, 2006, while in the service of the F/V PROWLER, Garretson reported an injury to his right arm, sustained when he slipped and fell on a grate while carrying an anchor across the deck. (Report of Personal Injury (Dkt. No. 18 at 9).) Garretson was examined in the next port of call, where his right shoulder was relocated. (Iliuliuk Family & Health Servs. Visit Form (Dkt. No. 18 at 76).) After leaving the vessel, Garretson sought treatment from Dr.

ORDER – 1

1 Dennis Smith of Olympia Orthopaedic Associates. (*See* Release to Work (Dkt. No. 18 at 11).) Although
2 Dr. Smith released Garretson for regular work without restriction on April 24, 2006 (*id.*), Garretson
3 apparently continued to experience instability in his right shoulder and underwent surgery on July 31,
4 2007. (*See* Dr. Smith Notes (Dkt. No. 20-3 at 2).) Defendants have paid all medical bills related to the
5 treatment of Garretson's right shoulder. (Pl.'s Mot. 4 (Dkt. No. 14).)

6 At issue in this action is Defendants' refusal to pay for treatment of Garretson's *left* shoulder,
7 which he claims to have injured in service of the F/V PROWLER on December 15, 2005.¹ Defendants
8 oppose maintenance and cure, arguing that there is a genuine issue of material fact as to any connection
9 between the condition of Garretson's left shoulder and his employment with Defendants.² Garretson's
10 position is that, in attempting to create a genuine dispute of material fact, Defendants do nothing more
11 than make "conclusory allegations, speculations or argumentative assertions," (Pl.'s Reply 8-9 (Dkt No.
12 19)); however, Defendants submit no small measure of evidence supporting their opposition brief, most
13 of which Garretson either admits or does not dispute.

14 Significantly, Garretson does not dispute that he failed to fill out an accident report documenting
15 the alleged December 2005 injury to his left shoulder, and that the first time he reported this injury to Dr.
16 Smith was in August 2006. (Dr. Smith Dep. 38:25-39:3 (Dkt. No. 18 at 18).) Garretson's deposition
17 testimony appears to blame his failure to report the injury at the time it occurred on Brian Colson, a
18 fellow crewmember whom Garretson claims told him not to fill out an accident report. (Garretson Dep.
19 54:21-55:1 (Dkt. No. 15-3 at 2-3).) However, in the same deposition, Garretson testifies that the only
20 person he spoke to about his left shoulder injury was the ship's skipper, and that in speaking to the

21
22 ¹ Plaintiff's motion offers January 15, 2006, as the date of this alleged injury (Pl.'s Mot. 2 (Dkt.
23 No. 14)); however, all other documents that reference it—including the Complaint—state that the injury
24 occurred on December 15, 2005. (*See, e.g.*, Compl. ¶ 3.2 (Dkt. No. 1).) The Court, therefore, assumes
that Plaintiff's reference to January 15, 2006, is a typographical error.

25 ² Defendants also argue that Garretson forfeited any entitlement he may have had to maintenance
26 and cure by intentionally concealing his left shoulder injury. Because the Court denies the motion based
upon genuine issues of material fact, it need not and does not reach Defendants' forfeiture argument.

1 skipper, he attributed any injury to “an old football injury, which it was.” (Garretson Dep. 64:22–24,
2 66:15–16 (Dkt. No. 18 at 44, 45).) Garretson states he may have also told the first mate, Bruce Watson,
3 that he had dislocated his shoulder. (*Id.* at 67:12–14; *see also* 55:21–25 (Dkt. No. 15-3 at 3).) Neither
4 party presents testimony from the skipper, Brian Colson, or Bruce Watson.

5 Garretson also does not dispute that, upon completion of the season during which he allegedly
6 injured his left shoulder, he executed an End of Voyage Statement affirming that he had not been injured
7 while on the voyage. (Dkt. No. 18 at 7.) Garretson admits that prior to August 23, 2006, the only people
8 he talked to about his left shoulder injury were the skipper on the F/V PROWLER, and maybe Bruce
9 Watson. (Garretson Dep. 66:12–67:14 (Dkt. No. 18 at 45).) Garretson does not contest that he did not
10 mention the injury to Dr. Smith during two other visits between December 2005 and August 2006, or
11 that Dr. Smith had previously x-rayed his left shoulder and found that x-ray normal. (Dr. Smith Dep.
12 41:25–42:7 (Dkt. No. 18 at 19).)

13 At the time Garretson brought this motion, this case was scheduled for trial on March 17, 2008;
14 however, the parties have since successfully sought a continuance, and trial is now scheduled for July 21,
15 2008. Through the instant motion, Garretson seeks an order compelling Defendants to pay maintenance
16 and cure prior to resolution of the relevant issues at trial. Garretson thus seeks an interim order of
17 maintenance and cure “including but not limited to, the guarantee of payment for treatment and surgical
18 repair of [his] left shoulder.” (Pl.’s Mot. 1 (Dkt. No. 14).) Garretson also requests the Court award him
19 actual attorney’s fees and costs incurred in obtaining maintenance and cure. (*Id.*)

20 In opposing the motion, Defendants point out that Garretson failed to report or document any
21 injury to his left shoulder until eight months after the injury allegedly occurred, and that, in the interim, he
22 was cleared for work with no restrictions. In addition, medical records indicate that, on occasion,
23 Garretson has self-reported a history of left shoulder problems dating before the alleged injury occurred.³

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25 ³ Garretson replies that Defendants “misinterpret” “[a]ny reference to Plaintiff suffering from
26 ‘chronic’ shoulder problems,” but Garretson does not explain the references cited by Defendants. (Pl.’s
ORDER – 3

1 (See, e.g., Kennewick General Hosp. ER Note Dec. 20, 2006 (Dkt. No. 18 at 78).) Finally, Defendants
2 argue that Garretson's report of the injury came after Defendants refused to offer him continued
3 employment, and that soon thereafter Garretson worked as a farm laborer and then as a crew member for
4 Pacific Longline Company ("PLC"). Garretson failed to report his prior shoulder injury to PLC during the
5 hiring process in September and October of 2006, and later that October he suffered another injury to his
6 right arm while working for PLC on the F/V DEEP PACIFIC. (Injury Report (Dkt. No. 15-5 at 2).) In
7 Garretson's Appraisal and Season Report for the F/V DEEP PACIFIC, his supervisor appears to have
8 written, "Mr. Garretson should only be allowed to continue to work for PLC if his shoulder(s) is operated
9 on and a professional judges him 'fit for duty[.]'" (Dkt. No. 18 at 41.) All of this evidence—Defendants
10 argue—raises a genuine issue of material fact as to whether Garretson's left shoulder condition came
11 about as a result of his employment by Defendants.

12 II. ANALYSIS

13 A. *Legal Standard*

14 The parties dispute the applicable standard, and the Court must determine if the summary
15 judgment standard applies, or if a standard significantly more lenient is appropriate, due to the strong
16 policy in favor of providing maintenance and cure to an injured seaman. Briefly, the obligation of a
17 shipowner to pay maintenance and cure arises when a seaman is injured or becomes ill while in the ship's
18 service. However, "[a] seaman whose illness or injury manifests after conclusion of his or her
19 employment with the shipowner is generally not entitled to recover for maintenance and cure absent
20 'convincing proof of causal connection' between the injury or illness and the seaman's service." *Wills v.*
21 *Amerada Hess Corp.*, 379 F.3d 32, 52 (2d Cir. 2004). Whether a plaintiff's later-manifested injury was in
22 fact caused while working in the service of the defendant vessel is a threshold issue on which the plaintiff
23 bears the burden of proof at trial. See *Mabrey v. Wizard Fisheries, Inc.*, No. 05-1499, 2007 WL
24 1556529, at *2 (W.D. Wash. May 24, 2007).

25 Reply 4 (Dkt. No. 19).
26 ORDER – 4

1 While it is an adage of the special remedy of maintenance and cure that, “ambiguities or doubts
2 . . . are resolved in favor of the seaman,” *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962), for the reasons
3 explained by Judge Lasnik in *Mabrey*, 2007 WL 1556529, at *2, and this Court in *Buenbrazo v. Ocean*
4 *Alaska, LLC*, No. 06-1347 (W.D. Wash. Feb. 28, 2007) (Dkt. No. 20), the ordinary summary judgment
5 standard should be applied to a pre-trial motion to compel maintenance and cure. Finding otherwise in the
6 instant situation—where the parties credibly disagree whether Garretson was actually injured in the
7 service of the F/V PROWLER—would place “too heavy a thumb on the scale in favor of the seaman.”
8 *Id.* at *6. Moreover, the Ninth Circuit has approved the application of Rule 56(c)’s well-established
9 standard when there is a material issue of fact as to whether the plaintiff is entitled to maintenance and
10 cure. *See Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 787 (9th Cir. 2007); *Glynn v. Roy Al Boat*
11 *Mgmt. Corp.*, 57 F.3d 1495, 1505–06 (9th Cir. 1995).

12 Rule 56(c) provides in relevant part, that “[t]he judgment sought should be rendered if the
13 pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine
14 issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV.
15 P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most
16 favorable to the nonmoving party and draw all reasonable inferences in that party’s favor. *Anderson v.*
17 *Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
18 1996). The inquiry is “whether the evidence presents a sufficient disagreement to require submission to a
19 jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at
20 251–52. The moving party bears the burden of showing that there is no evidence which supports an
21 element essential to the nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once
22 the movant has met this burden, the nonmoving party then must show that there is in fact a genuine issue
23 for trial. *Anderson*, 477 U.S. at 250.

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26 ORDER – 5

1 **B. *Genuine Material Issue of Fact Exists As to Causation of Garretson's Left Shoulder***
2 ***Injury***

3 Under a summary judgment standard, Garretson is not entitled to maintenance and cure at this
4 time, because a genuine issue of material fact exists as to the causation of his left shoulder injury.
5 Garretson protests that the causation of the injury is not reasonably debatable, because “the crew and
6 captain were not only at the scene of the accident, but helped [Garretson] ‘pop’ his shoulder back in to
7 place.” (Pl.’s Reply 5 (Dkt. No. 19).) No support is provided for this statement, other than Plaintiff’s
8 citation to his own motion, which itself cites Garretson’s deposition testimony that a fellow crewmember
9 was present and that “the guys on the boat” told Garretson how to self-relocate his shoulder. (See Pl.’s
10 Mot. 2–3 (Dkt. No. 14).) The Reply is the first time Garretson appears to argue that the ship captain was
11 actually *present* at the time of the injury, and Garretson makes no effort to contest or explain his
12 deposition testimony highlighted by Defendants—that he may or may not have told his fellow
13 crewmember Bruce Watson about the injury and that he explained any shoulder problems to the skipper
14 as the result of “an old football injury, which it was.” (Garretson Dep. 64:22–24, 66:15–16, 67:12–14
15 (Dkt. No. 18 at 44, 45).) As such, Defendants have successfully demonstrated that a genuine issue of
16 material fact exists regarding the causation of Garretson’s left shoulder injury.

17 **C. *Attorney's Fees***

18 Garretson has also requested attorney’s fees related to the filing of this motion. Attorney’s fees
19 are available where the shipowner acted arbitrarily, recalcitrantly, or unreasonably. *See Vaughan*, 369
20 U.S. at 531–32; *Kopczynski v. The Jacqueline*, 742 F.2d 555, 559 (9th Cir. 1984). In light of the
21 conflicting evidence regarding the causation of Garretson’s left shoulder injury, and strong evidence
22 offered by Defendants that Garretson did not complain of the injury until several months after leaving the
23 service of the F/V PROWLER, the Court is unable to find that Defendants’ refusal to pay maintenance
24 and cure was arbitrary, recalcitrant or unreasonable.

1 **III. CONCLUSION**

2 For the foregoing reasons, Plaintiff's Motion to Compel Maintenance and Cure is DENIED.

3 SO ORDERED this 7th day of February, 2008.

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8 John C. Coughenour
9 United States District Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MIKE FINCHEN,

Plaintiff,

v.

HOLLY-MATT, INC., a Washington
corporation, *in Personam*.

Defendant.

CASE NO. C04-1285RSM

ORDER ON PENDING MOTIONS

This matter is now before the Court on plaintiff's motion to compel maintenance and cure, and defendant's motion to compel discovery. For the reasons set forth below, the Court denies both motions.

I. Defendant's Motion to Compel Discovery (Dkt. # 16, Pg. 2, Line 12).

Defendant has moved for an Order directing plaintiff to supplement his answers to interrogatories, and to make himself available for deposition. Dkt. # 16. A motion to compel discovery "must include a certification that the movant has in good faith conferred or attempted to confer. . ." F.R.Civ. Proc. 37(a)(2)(A). Under the rules of this Court, a good faith effort "requires a face-to-face meeting or a telephonic conference." Local Rule CR 37(a)(2)(A) (emphasis added). The remedy under the local rule for a failure to respond to a request to confer is provided in Local Rule GR 3, not CR 37. Counsel's non-specific reference in his motion to unreturned telephone calls does not constitute the required certification of a good faith attempt to confer. Accordingly, the motion to compel is DENIED, without

1 prejudice to renewal with proper certification. Plaintiff's request for attorney's fees incurred in opposing
2 the motion is also DENIED, as counsel has not controverted the assertion that he failed to return
3 telephone calls.

4 II. Plaintiff's Motion to Compel Maintenance and Cure, Costs of Repatriation, and Attorney's Fees (Dkt.
5 # 13).

6 Plaintiff has asked the Court to compel defendant to pay maintenance and cure, together with
7 costs of repatriation, and attorney's fees. Defendant, while disputing plaintiff's right to any payments at
8 all, asserts that plaintiff has been brought up to date on both maintenance and cure. It appears that what
9 remains in dispute is the daily rate upon which maintenance is to be paid, repatriation, and attorney's fees
10 for the expense of bringing this motion. These matters cannot be decided on the record before the Court.

11
12 The issues presented by plaintiff are more properly the subject of a motion for partial summary
13 judgment, not a motion to compel. While it is in the Court's power to determine whether a given daily
14 rate is reasonable, there are no facts in the record from which the Court could find that \$35 a day is not a
15 reasonable rate. Further, the Court declines to find that defendant's payment of maintenance and cure
16 pending investigation of the claim constitutes an admission of liability. Plaintiff's right to the payments
17 remains in dispute. The affidavits and declarations of Randy Griffith, Mark Chinitz, Mike Finchen and
18 Stan Van Matre present conflicting accounts of events on the *Lady Jessie*, and cannot be reconciled.
19 There is thus a genuine issue of material fact as to whether plaintiff's injury was actually incurred aboard
20 the vessel on January 27, 2004, as alleged.

21 Accordingly, plaintiff's motion to compel payment of maintenance and cure is DENIED.

22
23 DATED this 22 day of November, 2004.

24
25 /s/ Ricardo S. Martinez
26 RICARDO S. MARTINEZ
27 UNITED STATES DISTRICT JUDGE

28 ORDER ON PENDING MOTIONS - 1

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL GOMA,

Plaintiff,

v.

AMERICAN SEAFOODS COMPANY, LLC
and NORTHERN HAWK, LLC in personam;
et al.,

Defendants.

C07-2077Z

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Plaintiff's motion to compel, docket no. 27, is DENIED IN PART and STRICKEN IN PART as follows.

(a) Plaintiff's motion to compel a response to Interrogatory No. 5, asking in relevant part whether "defendant or any one acting on its behalf conducted a surveillance of the plaintiff," is denied. The interrogatory seeks information protected from disclosure by the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3); *see also Fletcher v. Union Pac. R.R. Co.*, 194 F.R.D. 666, 670 (S.D. Cal. 2000); *MacIvor v. S. Pac. Transp. Co.*, 1988 WL 156743 at *2 (D. Or.). Plaintiff would be entitled to such discovery in only two circumstances: (i) if defendant intends to proffer surveillance results as either substantive or impeachment evidence; *see MacIvor*, 1988 WL 156743 at *2 (directing the defendant to produce any surveillance materials it intended to offer as substantive evidence); *see also Forbes v. Hawaiian Tug & Barge Corp.*, 125 F.R.D. 505, 508 (D. Haw. 1989) (requiring the production of surveillance movies, provided that the impeaching character was preserved via, for example, allowing the defendant to conduct a post-film, pre-disclosure deposition of the plaintiff); *compare Harrison v. Taiwan Super Young Co.*, 1997 WL 3627 (9th Cir.) (affirming the admission of a "day-in-the-life" videotape, which was not disclosed before trial, as impeachment evidence); or (ii) if defendant does not intend to introduce such evidence, but plaintiff satisfies the "substantial need" and "undue hardship" standards

MINUTE ORDER 1-

1 permitting the piercing of the work product privilege; *see* Fed. R. Civ. P. 26(b)(3)(A)(ii); *see*
2 *also Fletcher*, 194 F.R.D. at 670-71. On this record, plaintiff has not met the criteria for
3 forcing defendant to disclose work product that it does not anticipate using at trial. To the
4 extent defendant intends to offer surveillance results as either substantive or impeaching
5 evidence, defendant shall provide notice to plaintiff by the dispositive motions filing
6 deadline. Defendant shall make all surveillance materials that it intends to use as evidence
7 available for plaintiff's counsel's inspection at least thirty (30) days before the mediation
8 deadline.

9 (b) Plaintiff's motion to compel production of "all crew lists in effect
10 aboard the vessel for September 2007" is STRICKEN as moot. Defendant has provided the
11 requested crew list as Exhibit 7 to its response brief. Plaintiff's request for *inter alia* names,
12 addresses, and telephone numbers is worded in the alternative, to be produced only if "crew
13 lists were not maintained."

14 (2) The Clerk is directed to send a copy of this Minute Order to all counsel of
15 record.

16 Filed and entered this 9th day of September, 2008.

17 BRUCE RIFKIN, Clerk

18 s/ Claudia Hawney

19 By _____
20 Claudia Hawney
21 Deputy Clerk
22
23
24
25
26

MINUTE ORDER 2-

No. 66075-6

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

IAN DEAN,

Plaintiff/Appellant,

v.

THE FISHING COMPANY OF ALASKA, INC.
and ALASKA JURIS, INC.,

Defendants/Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2011, I caused a true and correct copy of the Brief of Respondents to be served on the following in the manner indicated below:

***Via Hand Delivery
Legal Messenger***
Counsel for Appellant:
John Merriam
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Division I
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Adina Davis