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## Discoverability of Personal Injury Surveillance and Missouri's Work Product Doctrine, The

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## Comments

# The Discoverability of Personal Injury Surveillance and Missouri's Work Product Doctrine

### I. INTRODUCTION

In personal injury trials a major focus is often the legitimacy of the plaintiff's alleged injuries.<sup>1</sup> If the defendant doubts the severity of the plaintiff's injuries, it is common practice for the defendant to hire private investigators to conduct surveillance of the plaintiff.<sup>2</sup> The knowledge, prior to trial, of the existence and contents<sup>3</sup> of any surveillance is imperative for plaintiffs, either to substantiate the extent of injuries alleged,<sup>4</sup> or to prepare an argument to explain any discrepancies between the injuries alleged and those shown by the surveillance.<sup>5</sup> A defendant's interest in the non-discover-

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1. George A. LaMarca, *Overintrusive Surveillance of Plaintiffs in Personal Injury Cases*, 9 AM. J. TRIAL ADVOC. 1, 1 (1985).

2. The likelihood surveillance exists often depends on the potential value of the plaintiff's claim. The higher the value of the claim, the more likely surveillance exists. However, the ease and availability of video cameras has increased the likelihood surveillance exists in lower value cases. See generally Paul C. Ney, Jr., *Videotape Surveillance in Civil Cases*, LITIG., Summer 1991, at 11.

3. For an explanation of the distinction, see *infra* note 24 and accompanying text.

4. See, e.g., *McGee v. Burlington N. Inc.*, 571 P.2d 784, 791-92 (Mont. 1977).

5. See, e.g., *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973).

Although local rules may require pretrial disclosure of all evidence and other exhibits to be used during the trial, a plaintiff's attorney should propound written discovery requests concerning surveillance materials, similar to the following:

Interrogatory: Do you know of any films, videotapes, photographs, or audio tape of the plaintiff taken at any time subsequent to the accident in question?

Interrogatory: If your answer to the previous interrogatory was "yes", please provide the following information with respect to each film, videotape, photograph, or audio tape:

- a. Specifically what medium was used to record the activities;
- b. The person who made the film, videotape, photograph, or audio tape, including that person's employer, employer's address, and employer's phone number;
- c. The date or dates on which it was made;

ability of surveillance stems from a desire to keep the plaintiff honest when she testifies about the extent of her injuries.<sup>6</sup> The non-discoverability may also prevent the plaintiff from molding her testimony to correspond with the injuries depicted in the surveillance.<sup>7</sup> Defendants contend the mere possibility that surveillance exists deters exaggerations by plaintiffs.<sup>8</sup>

In support of the discovery of surveillance materials, plaintiffs argue that "the camera may be an instrument of deception."<sup>9</sup> Differences in lighting, camera angles, the speed of the film, editing, and splicing could make the surveillance misleading.<sup>10</sup> Plaintiffs argue that unless they can view the film and investigate the photographer's credentials and techniques and methods used, they are deprived of the opportunity to develop rebuttal evidence and to fully prepare their cross-examination.<sup>11</sup>

Defendants argue, however, that the main purpose of surveillance is to impeach the plaintiff's credibility and to maintain the plaintiff's honesty concerning injuries.<sup>12</sup> The mere possibility that surveillance exists "will often cause the most blatant liar to consider carefully the testimony he plans

- d. The place or places at which it was made;
- e. The time or times at which it was made;
- f. Specifically what it depicts;
- g. The person or persons, including addresses and phone numbers, who have possession of any such items, including any reproductions or copies of any such items.

Interrogatory: Please identify all persons who have knowledge of discoverable facts concerning this action.

Request for Production: Please produce for inspection all films, videotapes, photographs, and audio tapes of the plaintiff taken subsequent to the accident in question.

Request for Production: Please produce for inspection all written reports of investigators concerning any investigation made of the plaintiff subsequent to the accident in question.

*See Ney, supra* note 2, at 14.

Noteworthy is *Hoey v. Hawkins*, 332 A.2d 403 (Del. 1975). In this case, the plaintiff propounded an interrogatory asking the defendant to disclose the identity of persons with knowledge of the facts at issue or of persons who had been interviewed on the defendant's behalf. *Id.* at 406. The court held that the defendant had a duty to disclose the identity of the detective who conducted surveillance as such a person, and failure to do so should have rendered the surveillance inadmissible. *Id.*

6. *Snead*, 59 F.R.D. at 150.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

to give under oath."<sup>13</sup> If a plaintiff is allowed to discover whether surveillance is being used, it is possible she will alter her testimony to correspond to the surveillance.<sup>14</sup> Defendants contend a plaintiff's uncertainty as to the existence and contents of surveillance "is the best way to promote truthfulness, and the showing of such films in court [is] a proper way to penalize a plaintiff who has been dishonest."<sup>15</sup>

Defendants traditionally rely on three theories to avoid the disclosure of surveillance: work product,<sup>16</sup> attorney-client communications,<sup>17</sup> and pure impeachment material.<sup>18</sup>

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13. *Id.*

14. *Id.*

15. *Id.*

16. *See infra* notes 117, 194-96 and accompanying text; *see also* parts III, IV.

17. The attorney-client protection has not been successfully used to avoid discovery of surveillance materials and is only mentioned in a few cases. In *Suezaki v. Superior Court*, 373 P.2d 432, 437-38 (Cal. 1962), the California Supreme Court held that surveillance was not a "communication" and was not protected by the attorney-client privilege. Specifically, the court stated that the surveillance was "simply a physical object transmitted to the attorney either with or without an accompanying report or letter of transmittal." *Id.* at 437. The court held that the film could not be classified as a communication from the client to the attorney because the films were representations of the plaintiff and not of the client. *Id.* at 438.

18. The pure impeachment argument generally has not been successful to avoid the discovery of surveillance. Although beyond the scope of this Comment, it is worth some mention.

Before discussing the argument that pure impeachment materials are immune from discovery, some discussion of the differences between impeachment and substantive evidence is necessary. Substantive evidence is offered for the purpose of persuading the fact finder as to the truth of an issue on which the fact finder will be required to render a decision. *Zimmerman v. Superior Ct.*, 402 P.2d 212, 215 (Ariz. 1965). Impeachment evidence is designed to discredit a witness. *Id.* Evidence may be substantive, impeachment, or both substantive and impeachment. *Id.* at 215-16. An often made but rarely accepted argument against the disclosure of surveillance materials is that they are purely impeachment evidence and not discoverable. *Id.* at 215-17.

A case concerned solely with the discoverability of pure impeachment evidence was *Boldt v. Sanders*, 111 N.W.2d 225 (Minn. 1961). Although not a surveillance case, the *Boldt* reasoning has been used by several surveillance cases in rejecting the pure impeachment argument. *See, e.g.*, *Martin v. Long Island R.R.*, 63 F.R.D. 53, 55 (E.D.N.Y. 1974); *Zimmerman*, 402 P.2d at 216-17; *Prewitt v. Beverly-50th St. Corp.*, 546 N.Y.S.2d 815, 816 (Sup. Ct. 1989). In *Boldt*, the plaintiff brought a personal injury action against the defendant and requested, through interrogatories, any information the defendant had acquired about the injuries the plaintiff may have sustained prior to the injury in question. *Boldt*, 111 N.W.2d at 226. The defendant

Currently in Missouri, surveillance materials are protected as work product, and this protection has not been overcome by a showing of substantial need and undue hardship.<sup>19</sup> The majority of jurisdictions hold either that surveillance is not work product at all and is freely discoverable,<sup>20</sup> or

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refused to answer the question on the grounds that the information was already known by the plaintiff and was to be used solely for impeachment purposes. *Id.* In refuting the defendant's argument that impeachment evidence was not discoverable, the court stated that the defendant's evidence itself was subject to impeachment and that the defendant did not have a "monopoly on virtue." *Id.* at 227. The court stated that to accept the defendant's argument would "be judicial retrogression undermining the whole purpose of the rules of civil procedure." *Id.*

The Colorado case of *Crist v. Goody*, 507 P.2d 478, 480 (Colo. Ct. App. 1972), rendered any impeachment argument in relation to surveillance inherently void of merit when it held that surveillance materials were not impeachment evidence. The court stated the fundamental purpose of surveillance is "providing substantive evidence which tends to prove or disprove a factual issue in the case." *Id.* The court held that because the surveillance was offered for the obvious purpose of proving the fraud in the claims of injury by the plaintiff, its primary classification was substantive, and any impeachment effect was subservient. *Id.*

A rare case accepting the pure impeachment argument was *Bogatay v. Montour Railroad*, 177 F. Supp. 269 (W.D. Pa. 1959). In reaching its conclusion, the court relied on the spirit of a local pretrial rule, which required the disclosure of all evidence at a pretrial conference except non-discoverable matters, impeachment matters, and privileged matters. *Id.* at 270. The court acknowledged that the surveillance might be used as substantive evidence, but concluded that it appeared that the surveillance in this case was better classified as impeachment evidence. *Id.* The court further stated that it was for the defendant, not the court, to choose whether the surveillance would be used for impeachment evidence or as a substantive defense. *Id.* It should be noted, however, that if the defendant planned to use the evidence as substantive evidence, the *Bogatay* court held it should be disclosed in pretrial. *Id.*

*See generally* State *ex rel.* Whitacre v. Ladd, 701 S.W.2d 796 (Mo. Ct. App. 1985); R.L. Martyn, Annotation, *Discovery, In Civil Case, Of Material Which Is Or May Be Designed For Use In Impeachment*, 18 A.L.R.3d 922 (1968).

19. State *ex rel.* St. Louis Pub. Serv. Co. v. McMillian, 351 S.W.2d 22 (Mo. 1961). *See also* MO. R. Civ. P. 56.01; *infra* notes 53, 117 and accompanying text.

20. *See, e.g.*, *Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160, 161 (S.D.N.Y. 1986) (existence and contents of surveillance always discoverable); *Zimmerman*, 402 P.2d at 217 (existence and contents of surveillance always discoverable); *Camelback Contractors, Inc. v. Industrial Comm'n*, 608 P.2d 782, 784-85 (Ariz. Ct. App. 1980) (existence and contents of surveillance always discoverable); *Crist*, 507 P.2d at 480 (existence and contents of surveillance always discoverable); *Williams v. Dixie Elec. Power Ass'n*, 514 So. 2d 332, 335-37 (Miss. 1987) (existence and contents always discoverable); *McGee v. Burlington N. Inc.*, 571 P.2d 784, 791-92 (Mont. 1977) (existence and contents of surveillance always discoverable). *But see* *Prewitt*, 546 N.Y.S.2d at 815-16 (existence of surveillance always discoverable and

surveillance is protected as work product, but the protection is automatically overcome because substantial need and undue hardship are inherently present.<sup>21</sup> These jurisdictions generally permit the defendant to depose the plaintiff before disclosing the surveillance, but limit questions to the plaintiff's injuries.<sup>22</sup> Only a few jurisdictions follow Missouri and classify surveillance

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contents protected as work product but inherently overcome due to undue hardship in obtaining the substantial equivalent).

21. See, e.g., *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D. Pa. 1973) (existence and contents of surveillance are protected as work product but protection is inherently overcome by plaintiff's substantial need); *Davis v. Daddona*, No. CV89 0102503 S., 1990 WL 288643, at \*1 (Conn. Super. Ct. Apr. 4, 1990) (existence and contents of surveillance protected as work product but inherently overcome by plaintiff's substantial need); *Hoey v. Hawkins*, 332 A.2d 403, 406 (Del. 1974) (existence of surveillance always discoverable and contents protected as work product which is inherently overcome by showing of good cause); *In re Workers' Compensation Rules of Procedure*, 535 So. 2d 243 (Fla. 1988); *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980) (existence of surveillance always discoverable and contents protected as work product, but inherently overcome if the surveillance is used as evidence for any purpose); *Sires v. National Serv. Corp.*, 560 So. 2d 448, 449 (La. Ct. App.), writ denied, 563 So. 2d 865 (La. 1990) (existence of surveillance always discoverable and contents protected as work product, which is inherently overcome if the surveillance is used as evidence for any purpose); *Shenk v. Berger*, 587 A.2d 551, 556 (Md. Ct. Spec. App. 1991) (existence of surveillance always discoverable and contents protected by work product, which is inherently overcome if the surveillance is used as evidence for any purpose); *Jenkins v. Rainer*, 350 A.2d 473, 475-77 (N.J. 1976) (existence of surveillance always discoverable and the contents of surveillance protected as work product, but the protection is inherently overcome by plaintiff's substantial need); *Prewitt*, 546 N.Y.S.2d at 816 (existence of surveillance always discoverable and contents protected by work product, but inherently overcome due to undue hardship in obtaining the substantial equivalent); *Cabral v. Arruda*, 556 A.2d 47, 49-50 (R.I. 1989) (existence of surveillance always discoverable and contents protected by work product, which is inherently overcome if the surveillance is to be used as evidence for any purpose); cf. *Keeley v. National R.R. Passenger Corp.*, 87 Civ. 1398, (S.D.N.Y. 1989) (existence and contents of surveillance not discoverable due to impeaching value). But see *Daniels*, 110 F.R.D. at 161 (existence and contents of surveillance always discoverable); *Bogatay*, 177 F. Supp. at 270 (existence and contents of surveillance not discoverable, relying on local pretrial rule); *Kriskey v. Chestnut Hill Bus Co.*, No. CV87 0090900 S., 1990 WL 284343, at \*2 (Conn. Super. Ct. May 9, 1990) (contents of surveillance protected by work product and protection not overcome by plaintiff).

22. See, e.g., *Daniels*, 110 F.R.D. at 161 (defendant must be allowed the opportunity to depose the plaintiff); *Snead*, 50 F.R.D. at 151 (must allow defendant right to depose plaintiff); *Davis*, 1990 WL 288643 at \*2 (must allow defendant opportunity to depose); *In re Workers' Compensation Rules of Procedure*, 535 So. 2d at 250 (must allow defendant opportunity to depose); *Dodson*, 390 So. 2d at 708 (court

as work product, and do not find that the plaintiff's substantial need and undue hardship outweigh the work product protection.<sup>23</sup>

A distinction must be made between the discovery of the *existence* of surveillance and the discovery of the *contents* of surveillance.<sup>24</sup> Missouri courts currently hold that both are protected as work product and have yet to overcome such protection.<sup>25</sup> Many other jurisdictions hold both the existence and contents of surveillance freely discoverable; neither are protected as work product.<sup>26</sup> Other courts hold the existence of surveillance freely discoverable and not protected as work product,<sup>27</sup> but hold the contents of the surveillance protected as work product.<sup>28</sup> Here, however, the work product protection is often overcome.<sup>29</sup> Other courts hold both the existence and contents of surveillance protected as work product, but overcome both protections through a finding of substantial need and undue hardship.<sup>30</sup>

This Comment examines Missouri's current work product doctrine,<sup>31</sup> analyzes Missouri's treatment of surveillance as work product,<sup>32</sup> explores the theories used by plaintiffs to discover surveillance in other jurisdictions,<sup>33</sup>

has discretion to allow opportunity to depose); *Shenk*, 587 A.2d at 556 (must allow defendant right to depose before turning surveillance over); *Williams*, 514 So. 2d at 336 (must allow defendant right to depose before producing surveillance); *Jenkins*, 350 A.2d at 478 (must give defendant right to depose); *Cabral*, 556 A.2d at 50 (must allow defendant right to depose).

23. See, e.g., *Hikel v. Abousy*, 41 F.R.D. 152, 155 (D. Md. 1966) (existence of surveillance protected as work product and protection not overcome); *Kriskey*, 1990 WL 284343 at \*2 (contents of surveillance protected as work product and protection not overcome by plaintiff). But see *Davis*, 1990 WL 288643 at \*1 (existence and contents of surveillance protected as work product but protection overcome by plaintiff's substantial need); *Shenk*, 587 A.2d at 556 (existence of surveillance always discoverable and contents of surveillance protected as work product, but protection is inherently overcome if the surveillance is used as evidence for any purpose).

24. Discovering that surveillance exists without discovering the contents of the surveillance serves little purpose for the injured plaintiff. However, discovering surveillance does not exist is extremely beneficial for the injured plaintiff and assures the plaintiff that his testimony will not be challenged through surveillance of the plaintiff's own actions.

25. See *infra* note 117 and accompanying text.
26. See *infra* note 197 and accompanying text.
27. See *infra* note 229 and accompanying text.
28. See *infra* note 230 and accompanying text.
29. See *infra* note 230 and accompanying text.
30. See *infra* notes 212-213 and accompanying text.
31. See *infra* notes 53-110 and accompanying text.
32. See *infra* notes 111-93 and accompanying text.
33. See *infra* notes 194-277 and accompanying text.

and suggests what treatment Missouri courts should give surveillance materials in the future.<sup>34</sup>

## II. THE WORK PRODUCT DOCTRINE

### A. Overview

Of the various theories used by defendants to protect surveillance from discovery,<sup>35</sup> the work product doctrine has been the most successful.<sup>36</sup> In Missouri, surveillance is currently protected as work product, and this protection has not been overcome.<sup>37</sup>

Although the work product doctrine was initially promulgated in the 1947 United States Supreme Court case of *Hickman v. Taylor*,<sup>38</sup> it was not until 1970 that the *Federal Rules of Civil Procedure* adopted Rule 26(b)(3),<sup>39</sup>

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34. See *infra* notes 278-320 and accompanying text. For other articles dealing with videotape surveillance, see LaMarca, *supra* note 1; Ney, *supra* note 2; Comment on Recent Cases, *Procedure - Production of Surveillance Material - Interrelationship of Discovery and the Prevention of Fraud*, 51 IOWA L. REV. 765 (1966); Wanda E. Wakefield, Annotation, *Photographs Of Civil Litigant Realized By Opponent's Surveillance As Subject To Pretrial Discovery*, 19 A.L.R.4TH 1236 (1991); Martyn, *supra* note 18.

35. See *supra* notes 16-18 and accompanying text.

36. See *infra* notes 117, 194-96 and accompanying text; see also parts III, IV.

37. See *infra* note 117 and accompanying text.

38. 329 U.S. 495 (1947). Prior to *Hickman*, some courts had implicitly recognized that some trial preparation materials should be protected from discovery, but formal protection was not widespread until after the *Hickman* decision. See generally Larry L. McMullen & Robin V. Foster, *Work Product In Missouri*, 50 MO. L. REV. 563, 565-66 (1985). For Missouri cases recognizing this implicit protection prior to *Hickman*, see, e.g., *State ex rel. Iron Fireman Corp. v. Ward*, 173 S.W.2d 920, 922 (Mo. 1943); *Curtis v. Indemnity Co.*, 37 S.W.2d 616, 625 (Mo. 1931).

39. Rule 26 provides:

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: . . .

(3) *Trial Preparation: Materials.* Subject to the provision of subdivision (b)(4) 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 other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials



which covered the work product doctrine in federal courts.<sup>40</sup> Many states followed by revising their work product rule or by enacting a work product rule.<sup>41</sup> Work product is defined as any notes, working papers, memoranda or similar materials prepared by an attorney in anticipation of litigation.<sup>42</sup> It includes mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.<sup>43</sup> The test most courts use to determine whether materials are prepared "in anticipation of litigation or for trial" is whether "in the light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."<sup>44</sup> Courts generally include investigators and other agents as representatives of the party protected under the work product doctrine.<sup>45</sup> Although the federal

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by other means. In ordering discovery of such 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.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

FED. R. CIV. P. 26(b)(3).

40. For a general history of the federal work product doctrine, see Cabral v. Arruda, 556 A.2d 47, 48-49 (R.I. 1989).

41. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.5, at 387 n.6 (1985). Missouri revised its work product provision in 1970 and again in 1975. See *infra* notes 111-112 and accompanying text. For a list of different states' variations of the work product doctrine, see 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2022 n.98 (1991).

42. See generally FED. R. CIV. P. 26(b)(3); BLACK'S LAW DICTIONARY 1606 (6th ed. 1990).

43. FED. R. CIV. P. 26(b)(3).

44. WRIGHT & MILLER, *supra* note 41, § 2024. See also State *ex rel.* Day v. Patterson, 773 S.W.2d 224, 228 (Mo. Ct. App. 1989).

45. See, e.g., United States v. Nobles, 422 U.S. 225, 238 (1975). The Court specifically stated:

rule refers only to documents and tangible materials, there is little doubt today that the work product protection extends to unwritten as well as written information.<sup>46</sup>

There are two levels of protection afforded under the work product doctrine.<sup>47</sup> The "mental impressions, conclusions, opinions, or legal theories of an attorney or other representatives of a party concerning litigation"<sup>48</sup> are given an absolute protection from discovery.<sup>49</sup> Materials prepared "in anticipation of trial,"<sup>50</sup> however, are not given complete protection against discovery; rather, the materials are given quasi-protection that may be overcome by a showing of substantial need for the materials and an undue hardship in obtaining the substantial equivalent.<sup>51</sup> In jurisdictions that hold surveillance materials as work product, they are generally classified as "materials prepared in anticipation of trial;" therefore, the work product protection may be overcome only by making this kind of showing.<sup>52</sup>

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At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

*Id.* See also *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950); *Ownby v. United States*, 293 F. Supp. 989 (W.D. Okla. 1968). For cases not extending the work product protection to parties other than the attorney, see *Southern Ry. v. Lanham*, 403 F.2d 119, 126 (5th Cir. 1968); *Whitaker v. Davis*, 45 F.R.D. 270, 272-73 (W.D. Mo. 1968).

46. FRIEDENTHAL, *supra* note 41, § 7.5. See also FED. R. CIV. P. 26(b)(3); *infra* notes 65-70 and accompanying text. Many jurisdictions include diagrams, maps, drawings, and movies as materials which may classify for work product protection. See, e.g., *Suezaki v. Superior Ct.*, 373 P.2d 432 (Cal. 1962); *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22 (Mo. 1961). Other states define work product more narrowly. See, e.g., *Zimmerman v. Superior Ct.*, 402 P.2d 212 (Ariz. 1965).

47. FED. R. CIV. P. 26(b)(3). The text of the Rule appears *supra* note 39.

48. FED. R. CIV. P. 26(b)(3).

49. *Id.*

50. *Id.*

51. *Id.*

52. See *supra* note 21 and accompanying text.

## B. Missouri's Work Product Doctrine

### 1. Classification

Like the federal rule, Missouri Rule of Civil Procedure 56.01(b)(3)<sup>53</sup> provides two levels of work product protection. Mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party are absolutely protected from discovery.<sup>54</sup> Documents and tangible things prepared in anticipation of litigation or for trial are protected, but discoverable upon a showing of substantial need and inability to obtain the substantial equivalent without undue hardship.<sup>55</sup> In Missouri, surveillance materials are generally classified as tangibles prepared in anticipation of litigation;<sup>56</sup> therefore, they can only be discovered upon a showing of substantial need and undue hardship.<sup>57</sup>

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53. Rule 56.01(b)(3) provides:

Subject to the provisions of subdivision (b)(4) of this Rule 56.01 [facts and opinions held by experts], a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule 56.01 and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the 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.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. For purposes of this paragraph, a statement previously made is: (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, audio, video, motion picture or other recording, or a transcription thereof, of the party or of a statement made by the party and contemporaneously recorded.

Mo. R. Civ. P. 56.01(b)(3).

54. *Id.*

55. *Id.* For an excellent discussion of Missouri's work product doctrine and its mechanics, see McMullen & Foster, *supra* note 38.

56. *See infra* note 117 and accompanying text.

57. *See supra* note 55 and accompanying text.

There are four requirements that must be met for materials to be classified as work product in Missouri.<sup>58</sup> The materials must be (1) documents and tangible things;<sup>59</sup> (2) otherwise discoverable under 56.01(b)(1);<sup>60</sup> (3) prepared by or for a party or that party's representative;<sup>61</sup> and (4) prepared in anticipation of litigation or for trial.<sup>62</sup> If any one of these requirements is not met, the materials are not work product and are freely discoverable.<sup>63</sup> If all the requirements are met, the materials are classified as work product and may be discovered only upon a showing of substantial need and undue hardship.<sup>64</sup>

Documents and tangible items afforded work product status include photographs of the scene of an accident,<sup>65</sup> incident reports,<sup>66</sup> surveillance films,<sup>67</sup> maps,<sup>68</sup> diagrams,<sup>69</sup> and drawings.<sup>70</sup> The "otherwise discoverable under 56.01(b)(1)"<sup>71</sup> provision simply means a determination as to work product status is not necessary if the materials are privileged from discovery.<sup>72</sup> Privileges that may apply to materials potentially protected as work product include the attorney-client privilege,<sup>73</sup> insurer-insured privilege,<sup>74</sup>

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58. Mo. R. Civ. P. 56.01(b)(3). *See supra* note 53 and accompanying text; *see also* McMullen & Foster, *supra* note 38, at 576.

59. *See* McMullen & Foster, *supra* note 38, at 575.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Porter v. Gottschall, Inc.*, 615 S.W.2d 63, 64-65 (Mo. 1981). *See infra* note 139 and accompanying text.

66. *May Dep't Stores Co. v. Ryan*, 699 S.W.2d 134, 137 (Mo. Ct. App. 1985). *See infra* note 92 and accompanying text.

67. *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 25 (Mo. 1961). *See infra* note 117 and accompanying text.

68. *See State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn*, 257 S.W.2d 69, 74 (Mo. 1953) (*dicta*).

69. *Id.*

70. *Id.*

71. *See supra* note 53.

72. If the materials are privileged, then there is no need to determine whether the materials are work product or not, because the privilege prevents disclosure under all circumstances, regardless of the materials' classification as work product.

73. *See State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 386 (Mo. 1978); *see generally* McMullen & Foster, *supra* note 38, at 571.

74. *See State ex rel. Cain v. Barker*, 540 S.W.2d 50, 52 (Mo. 1976); *see generally* McMullen & Foster, *supra* note 38, at 571.

husband-wife privilege,<sup>75</sup> physician-patient privilege,<sup>76</sup> priest-penitent privilege,<sup>77</sup> and accountant-client privilege.<sup>78</sup> Attempts to use other privileges to protect surveillance materials from discovery have generally been unsuccessful.<sup>79</sup>

Rule 56.01(b)(3) specifically includes a party's attorney, consultant, surety, indemnitor, insurer, or agent as persons qualified to cloak materials with the work product classification.<sup>80</sup> Missouri courts consistently have included investigators and other agents who assist in the compilation of trial preparation materials in this category.<sup>81</sup> However, the attorney, representative, or agent must be working on the client's behalf to invoke the protection.<sup>82</sup>

To determine whether the materials have been prepared "in anticipation of litigation or for trial,"<sup>83</sup> the test is "whether 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'"<sup>84</sup> Factors courts commonly examine to determine whether the materials were created in anticipation of litigation or for trial include:<sup>85</sup> whether the materials have a business purpose aside from assisting with litigation;<sup>86</sup> the time the materials were created;<sup>87</sup> the individual who created

75. See generally McMullen & Foster, *supra* note 38, at 571-72.

76. See MO. REV. STAT. § 491.060(5) (Supp. 1991); see generally McMullen & Foster, *supra* note 38, at 572.

77. See MO. REV. STAT. § 491.060(4) (Supp. 1991); see generally McMullen & Foster, *supra* note 38, at 572.

78. See MO. REV. STAT. § 326.151 (1986); see generally McMullen & Foster, *supra* note 38, at 572.

79. See *supra* notes 17-18 and accompanying text.

80. Mo. R. Civ. P. 56.01(b)(3).

81. Halford v. Yandell, 558 S.W.2d 400, 407 (Mo. Ct. App. 1977) (quoting United States v. Nobles, 422 U.S. 225, 238 (1975)).

82. See *State ex rel. Missouri Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532, 535-36 (Mo. 1968).

83. Mo. R. Civ. P. 56.01(b)(3).

84. *State ex rel. Day v. Patterson*, 773 S.W.2d 224, 228 (Mo. Ct. App. 1989) (citing *Stix Prods., Inc. v. United Merchants & Mfrs, Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969)).

85. For a detailed discussion on these factors, see generally McMullen & Foster, *supra* note 38, at 578-82.

86. See *In re Board of Registration for the Healing Arts v. Spinden*, 798 S.W.2d 472, 478 (Mo. Ct. App. 1990) (investigative information compiled by the state board while investigating a disciplinary complaint was compiled in the ordinary course of business and not in anticipation of litigation; therefore, the information was not work product); *St. Louis Little Rock Hosp. v. Gaertner*, 682 S.W.2d 146, 151 (Mo. Ct. App.

the materials;<sup>88</sup> and the time lapse from the event giving rise to the cause of action and the creation of the materials.<sup>89</sup>

## 2. Substantial Need and Undue Hardship

There is little guidance in Missouri as to what is necessary to overcome the work product protection afforded trial preparation materials. Rule 56.01(b)(3) states the party seeking discovery must demonstrate a substantial need for the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent.<sup>90</sup> The Missouri courts have yet to delineate what is necessary to meet the substantial need and undue hardship requirement.<sup>91</sup>

The Missouri Court of Appeals for the Eastern District in *May Department Stores Co. v. Ryan*<sup>92</sup> provides some insight. In *May*, the desired document was an incident report filled out by an employee of May Company after a customer was detained on suspicion of shoplifting.<sup>93</sup> The report was subsequently delivered to the May Company's insurer.<sup>94</sup> The court classified the report as work product and found no substantial need or undue hard-

1984) (holding the incident report was prepared in the ordinary course of business and not in anticipation of litigation, therefore not work product).

87. *See State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn*, 257 S.W.2d 69, 75 (Mo. 1953) (photos taken after event which gave rise to litigation). *But see State ex rel. State Highway Comm'n v. Jensen*, 362 S.W.2d 568, 569 (Mo. 1962) (reports prepared before commencement of action).

88. *See, e.g., State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 24-25 (Mo. 1961).

89. *See, e.g., State ex rel. Iron Fireman Corp. v. Ward*, 173 S.W.2d 920, 922 (Mo. 1943).

90. Mo. R. Civ. P. 56.01(b)(3). *See supra* note 53.

91. *See, e.g., McMullen & Foster, supra* note 38, at 584-85. The authors suggested several key factors which *should* influence the courts. These included: (1) the date the requested item was created relative to the cause of action—the closer to the liability-creating event, the more likely it will be held unique; (2) the availability of alternative sources including reasonable access to witnesses, non-protected documents, and other items which could substitute for the requested item; (3) the requesting party's trial preparation and whether they had the same opportunity to discover the evidence; (4) the uniqueness of the evidence, for example, photographs, tape recordings, and documentation of destroyed evidence; (5) the passage of time since the evidence in question was recorded. *Id.*

92. 699 S.W.2d 134 (Mo. Ct. App. 1985).

93. *Id.* at 135.

94. *Id.*

ship.<sup>95</sup> The court stated, "Here the plaintiff seeks a report concerning an incident about which she herself can testify. There is no showing that defendant Lutz, who prepared the report, is unavailable. Plaintiff has demonstrated neither a need nor an inability to obtain substantially equivalent evidence."<sup>96</sup>

The *May* court distinguished the facts of this case from those in *Porter v. Gottschall, Inc.*,<sup>97</sup> in which the court found sufficient substantial need and undue hardship to overcome the work product protection.<sup>98</sup> In *Porter*, the plaintiff sought discovery of photographs taken by the defendant of the scene of the accident.<sup>99</sup> Specific factors that influenced the *Porter* court's decision to permit discovery included: (1) the trial was six and one-half years after the accident;<sup>100</sup> (2) the photos were of the accident scene and the automobiles involved in the accident;<sup>101</sup> (3) the plaintiff had been incompetent since the accident and was unable to give an account of what happened;<sup>102</sup> (4) the defendant died before the trial;<sup>103</sup> (5) these were the only photographs that could have shown the position of the vehicles after the accident, the debris on the road, and possibly the skid marks;<sup>104</sup> and (6) the photos in question may very well have been the best evidence of what occurred.<sup>105</sup>

These two cases seemingly indicate that the substantial need and undue hardship finding is dependent on several factors. These factors include the knowledge of the party seeking to overcome the work product protection concerning the contents of that item,<sup>106</sup> the availability of the preparer of the item sought to be deposed or to testify,<sup>107</sup> the time lapse between the event giving rise to the liability and the trial,<sup>108</sup> the availability of substitutes to

95. *Id.* at 137. The court also found the document privileged as attorney-client communication; therefore, even if the required showing had been met, the document would not have been discoverable. *Id.*

96. *Id.*

97. 615 S.W.2d 63 (Mo. 1981). See *infra* note 136; part III.B.

98. *May*, 699 S.W.2d at 137 (citing *Porter*, 615 S.W.2d at 65).

99. *Porter*, 615 S.W.2d at 64-65.

100. *Id.* at 66.

101. *Id.*

102. *Id.*

103. *Id.* at 64.

104. *Id.* at 66.

105. *Id.*

106. *Porter*, 615 S.W.2d at 66; *May*, 699 S.W.2d at 137.

107. *Porter*, 615 S.W.2d at 66; *May*, 699 S.W.2d at 137.

108. *Porter*, 615 S.W.2d at 66; *May*, 699 S.W.2d at 137.

the desired items,<sup>109</sup> and the importance of the desired items to the issues of the trial.<sup>110</sup>

### III. MISSOURI'S TREATMENT OF SURVEILLANCE

#### A. *The McMillian Case*

Prior to 1975, work product was privileged and not discoverable in Missouri.<sup>111</sup> Under the old rule, the party desiring discovery could not inquire "as to the contents or substance of statements, written or oral, obtained from prospective witnesses by or on behalf of another party."<sup>112</sup> The old rule also provided that any writing prepared or obtained in anticipation of litigation or in preparation for trial by the adverse party's attorney, surety, indemnitor or agent was privileged and not discoverable.<sup>113</sup> An early case expressly stated, "the discovery of confidential communications, oral or written, between an attorney and his client with reference to . . . litigation pending or contemplated, cannot be compelled at the instance of a third party."<sup>114</sup> It was under this old rule that the current surveillance case law was decided.<sup>115</sup>

*McMillian*, decided under the old rule, represents the most current case law concerning the discoverability of surveillance material in Missouri.<sup>116</sup>

109. *Porter*, 615 S.W.2d at 66; *May*, 699 S.W.2d at 137.

110. *Porter*, 615 S.W.2d at 66; *May*, 699 S.W.2d at 137.

111. See *Porter*, 615 S.W.2d at 65; *In re Board of Registration for the Healing Arts v. Spinden*, 798 S.W.2d 472, 475 (Mo. Ct. App. 1990); *Highway & Transp. Comm'n v. Anderson*, 759 S.W.2d 102, 105 (Mo. Ct. App. 1988); *Enke v. Anderson*, 733 S.W.2d 462, 466 (Mo. Ct. App. 1987); *Halford v. Yandell*, 558 S.W.2d 400, 406 (Mo. Ct. App. 1977).

The word "privileged" is used to denote absolute protection from discovery. See Mo. R. Civ. P. 56.01. Privileged materials are not discoverable, regardless of the showing by the party desiring discovery. *Id.* Quasi-privileged or "protected" materials are discoverable if the discovering party is able to demonstrate substantial need and undue hardship in obtaining the substantial equivalent. *Id.*

112. *Halford*, 558 S.W.2d at 406 (quoting from the pre-1975 Mo. R. Civ. P. 57.01(b)).

113. *Id.*

114. *State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn*, 257 S.W.2d 69, 73 (Mo. 1953).

115. *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22 (Mo. 1961).

116. Although the holding of *McMillian* was questioned in *Porter v. Gottschall, Inc.*, 615 S.W.2d 63, 65 (Mo. 1981), it was not overruled by *Porter*. See *infra* note 158 and part III.B.



The *McMillian* court held surveillance protected as work product and not discoverable.<sup>117</sup>

In *McMillian*, the plaintiff brought a personal injury suit against the defendant and propounded interrogatories asking whether any surveillance existed and, if so, requested production of such surveillance.<sup>118</sup> The defendant objected to the interrogatory on the grounds that any surveillance would be protected as work product.<sup>119</sup> The trial court overruled the defendant's objections as to the existence of any surveillance, but sustained the objection as to production of such surveillance.<sup>120</sup> In response, the defendant filed a petition for prohibition with the Missouri Supreme Court.<sup>121</sup>

The Missouri Supreme Court acknowledged, without discussion, the relevancy of the surveillance to the issue of injury and quickly focused on the issue of work product privilege.<sup>122</sup> The court discussed at some length a previous Missouri Supreme Court decision, *State ex rel. Terminal Railroad Ass'n v. Flynn*.<sup>123</sup> *Flynn* involved photographs of the scene of an accident taken before the plaintiff was removed from the scene; it did not involve surveillance photos.<sup>124</sup> The plaintiff filed a motion requesting the defendant to produce these photographs, and the defendant objected to the request based on the work product doctrine.<sup>125</sup> The *Flynn* court held that the photographs were work product and not subject to discovery.<sup>126</sup>

Relying on the logic of *Flynn*, the court in *McMillian* held that "any existing photographs or movies taken of plaintiff by defendant since the date of her alleged injury would clearly be privileged as a work product."<sup>127</sup> Although agreeing with the holding in *Flynn*, the court distinguished the facts of this case from *Flynn* and stated, "[T]here is no question here [as there was

A recent surveillance case, *Erbschloe v. General Motors Corp.*, 823 S.W.2d 117 (Mo. Ct. App. 1992), explored the ability to discover surveillance as a party's own statement, but did not address discovery of surveillance through a showing of substantial need and undue hardship. See *infra* notes 173-85 and part III.C.

117. *McMillian*, 351 S.W.2d at 25.

118. *Id.* at 23.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 24.

123. 257 S.W.2d 69 (Mo. 1953).

124. *Id.* at 70.

125. *Id.* at 70-71.

126. *Id.* at 75.

127. *McMillian*, 351 S.W.2d at 25.

in *Flynn*] concerning photographs of a place of injury.<sup>128</sup> The difference in facts between the *McMillian* case (surveillance photos of the plaintiff) and the *Flynn* case (photos of the scene of the accident) led the *McMillian* court to conclude surveillance photos were more obviously protected as work product than the photos of the scene of the accident.<sup>129</sup> The court determined this because the surveillance "could have been taken for only one possible purpose, namely, in anticipation of litigation or in preparation for trial."<sup>130</sup> The court confined its opinion to surveillance materials only.<sup>131</sup>

Lending indirect support to the holding, the *McMillian* court also noted that if a party is in possession of all the facts, discovery serves no legitimate purpose other than to pry into an adversary's trial preparation.<sup>132</sup> The court further stated that the production of evidence that would be material only by way of impeachment had been refused in earlier cases.<sup>133</sup>

In summary, the *McMillian* court held that the existence of surveillance photographs was protected as work product,<sup>134</sup> and the contents of surveillance photographs were protected as work product and need not be produced.<sup>135</sup> Although the court relied in part on the logic of *Flynn*, the court distinguished the facts of *Flynn* from those of *McMillian* and stated that its opinion was limited to surveillance materials only.<sup>136</sup>

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 26.

132. *Id.* (citing *State ex rel. Laughlin v. Sartorius*, 119 S.W.2d 471 (Mo. 1938)). This is essentially the pure impeachment argument discussed earlier. See *supra* note 18.

133. *McMillian*, 351 S.W.2d at 26 (citing *State ex rel. Missouri Pac. R.R. Co. v. Hall*, 27 S.W.2d 1027 (Mo. 1930)). The court recognized that *Hall* was decided prior to the adoption of the then present discovery rules but concluded that the difference would have no effect in this case. *Id.* The court specifically stated that "the broadened provision of Rule 57.01(b) permitting inquiries which might be 'reasonably calculated to lead to the discovery of admissible evidence' would have no pertinence here." *Id.*

134. See *supra* note 117 and accompanying text.

135. See *supra* notes 117, 127 and accompanying text.

136. See *supra* note 131 and accompanying text.

### B. *The Porter Case*

In 1975, the adoption of Rule 56.01(b)(3)<sup>137</sup> permitted the discovery of work product if the discovering party demonstrated a substantial need for the item and was unable to obtain the substantial equivalent without undue hardship.<sup>138</sup> It was under this new discovery provision that *Porter v. Gottschall, Inc.*<sup>139</sup> was decided.

In *Porter*, the Missouri Supreme Court held that photos of an accident scene and of automobiles involved in it were work product because they were taken in anticipation of litigation.<sup>140</sup> The photos, however, were discoverable because of the plaintiff's substantial need and undue hardship.<sup>141</sup>

The facts of *Porter* are similar to those in *Flynn*.<sup>142</sup> In *Porter* the plaintiff brought a personal injury action and filed interrogatories asking if any photos existed of the scene or the vehicles involved in the accident.<sup>143</sup> The interrogatory also requested the production of any photos that existed.<sup>144</sup> The defendant initially answered "no" to the interrogatory but later was granted leave to amend his answer to "yes" the day of the trial.<sup>145</sup> The defendant then produced only one photograph of the defendant's vehicle and claimed, relying on the holding of *Flynn*, that the additional requested photographs were protected as work product.<sup>146</sup> The trial court denied the plaintiff's request to order production, and the Missouri Supreme Court elected to hear the appeal.<sup>147</sup> The court held that the adoption of a new Missouri Rule of Civil Procedure, Rule 56.01(b)(3),<sup>148</sup> changed the work product protection from an absolute protection, as it was under *Flynn* and *McMillian*, to a limited protection.<sup>149</sup> This limited protection could be overcome by

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137. See *supra* note 53 for the text of MO. R. CIV. PRO. 56.01(b)(3).

138. See *supra* note 90 and accompanying text; see also MO. R. CIV. P. 56.01(b)(3).

139. 615 S.W.2d 63 (Mo. 1981).

140. *Id.* at 65.

141. *Id.*

142. See *supra* note 124 and accompanying text.

143. *Porter*, 615 S.W.2d at 64-65.

144. *Id.*

145. *Id.* at 65.

146. *Id.*

147. *Id.*

148. See *supra* note 137.

149. *Porter*, 615 S.W.2d at 65 ("Rule 56.01(b)(3), with the 'force and effect of law,' now permits the discovery of tangible items prepared in anticipation of litigation, including photographs, if substantial need for the items and an inability to obtain the substantial equivalent without undue hardship are shown.").

demonstrating a substantial need for the items and an inability to obtain the equivalent without undue hardship.<sup>150</sup>

Several factors weighed in the court's conclusion that the plaintiff had demonstrated a substantial need for the photos. These factors included the substantial time lapse between the accident and the trial.<sup>151</sup> In addition, the photos had a direct relation to the cause of action,<sup>152</sup> neither party could testify as to what happened,<sup>153</sup> and the photos were the only evidence of the position of the vehicles after the accident, the debris on the road, and the skid marks.<sup>154</sup>

The holding of *Porter* is similar to that of *Flynn* in that both held photos of the accident scene were work product.<sup>155</sup> When *Flynn* was decided, however, work product was absolutely protected.<sup>156</sup> The *Porter* decision, decided under a new Missouri Rule of Civil Procedure, held the work product immunity was overcome by the plaintiff's showing of substantial need and inability to obtain the substantial equivalent.<sup>157</sup> The *Porter* court stated that to the extent *Flynn* and *McMillian* were inconsistent with the new Missouri Rule of Civil Procedure, they were not to be followed.<sup>158</sup> The similarities between the facts of *Flynn* and *Porter* leads to the conclusion that *Flynn* would have been decided differently under the new work product provision, which allowed the work product protection to be overcome by a showing of substantial need and inability to obtain the substantial equivalent.<sup>159</sup> It is unclear, however, if *McMillian's* result would have been different under the new rule.<sup>160</sup>

The *McMillian* case, in contrast to *Flynn* and *Porter*, did not involve photos of the scene of the accident; rather, it involved surveillance photographs taken of the plaintiff away from the scene of the accident.<sup>161</sup> The

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150. *Id.*

151. *Id.* at 66.

152. *Id.*

153. *Id.* at 64, 66.

154. *Id.* at 66.

155. *Id.* at 64-66. *See supra* note 126 and accompanying text.

156. *See supra* note 149 and accompanying text.

157. *Porter*, 615 S.W.2d at 66.

158. *Id.* at 65.

159. On the other hand, unusual circumstances surrounding the *Porter* case, including the lack of witnesses, a long time lapse between the accident and litigation, the defendant's inability to testify, and the plaintiff's inability to testify, may be such that the substantial need was present in *Porter* but would not have been found in *Flynn*.

160. *See infra* note 161 and accompanying text.

161. *McMillian*, 351 S.W.2d at 26.

*McMillian* court stated, "We are dealing here with a rather limited class of photographs, those sometimes called 'surveillance' photographs. Our decision is confined to the specific issues presented here."<sup>162</sup>

Because the *McMillian* court did not address the substantial need of the plaintiff, it cannot be assumed the court would not have found such need.<sup>163</sup> However, the court in *McMillian* may have indicated no such need existed when it stated, "[n]o legitimate purpose of discovery is served by inquiries which merely pry into an adversary's preparation for trial; and the discovery procedure has not been formulated for the benefit of a litigant who is already in possession of all the facts."<sup>164</sup> Given the lack of guidance as to what is necessary to meet the required showing of need and hardship, any prediction as to whether the work product protection is overcome in a typical surveillance situation, such as *McMillian*, is difficult at best.<sup>165</sup>

### C. Missouri Amendment Opens Door for New Argument

In 1990 the Missouri work product rule, 56.01(b)(3) was amended.<sup>166</sup> This amendment provides an opportunity for a new argument for the discovery of surveillance materials. A "statement previously made" by the party "concerning the action or its subject matter" may be obtained by that party "without the required showing."<sup>167</sup> A statement previously made has been

162. *Id.*

163. See *supra* notes 111-36 and accompanying text.

164. *McMillian*, 351 S.W.2d at 26.

165. See *supra* notes 90-91 and accompanying text; see also *infra* notes 292-312 and accompanying text.

166. Rule 56.01(b)(3) originally read:

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Mo. R. Civ. P. 56.01(b)(3) (Vernon 1975).

The amendment changed the last sentence of this subdivision to read:

For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, audio, video, motion picture or other recording, or a transcription thereof, of the party or of a statement made by the party and contemporaneously recorded.

Mo. R. Civ. P. 56.01(b)(3).

167. Mo. R. Civ. P. 56.01(b)(3).

amended to include "audio, video, motion picture or other recording . . . of the party."<sup>168</sup> Therefore, it may be argued that the intent of the legislature was to allow for the discovery of surveillance as a video or motion picture statement of the party.

A similar argument was made successfully in a New York state case, *Saccente v. Toterhi*.<sup>169</sup> In *Saccente*, the plaintiff sought to discover photographs taken by the defendants' insurance carrier a short time after the accident and before the infant plaintiff had retained an attorney.<sup>170</sup> The court held that photographs taken as surveillance "properly fall within the terms . . . which provide: 'A party may obtain a copy of his own statement.'<sup>171</sup> It is important to note, however, that the plaintiff had granted the defendant permission to take the photographs.<sup>172</sup>

Recently, a Missouri appellate court refused to interpret a workers' compensation statute allowing a party to discover his own statement to include a silent surveillance film of the worker.<sup>173</sup> In *Erbschloe v. General Motors Corp.*, the employee was denied his claim for workers' compensation for his back injury.<sup>174</sup> The employee testified that he still experienced severe and constant pain in his back and that he could not stand, sit or walk for extended periods of time.<sup>175</sup> The employee further testified that he could not bend over or raise his arms above his head.<sup>176</sup> The employer then produced a

168. *Id.*

169. 314 N.Y.S.2d 593 (App. Div. 1970).

170. *Id.* at 594.

171. *Id.*

172. *Id.* The granting of permission for the photographs makes them appear more like a traditional "statement of the party" than covert surveillance photographs.

173. *Erbschloe v. General Motors Corp.*, 823 S.W.2d 117, 119 (Mo. Ct. App. 1992). The statutory language interpreted in *Erbschloe* was a workers' compensation statute. MO. REV. STAT. § 287.215 (1986). Section 287.215 provides:

No statement in writing made or given by an injured employee, whether taken and transcribed by a stenographer, signed or unsigned by the injured employee, or any statement which is mechanically or electronically recorded, or taken in writing by another person, or otherwise preserved, shall be admissible in evidence, used or referred to in any manner at any hearing or action to recover benefits under this law unless a copy thereof is given or furnished the employee, or his dependents in case of death, or their attorney, within fifteen days after written request for it by the injured employee, his dependents in case of death, or by their attorney. The request shall be directed to the employer or its insurer by certified mail.

*Id.*

174. *Erbschloe*, 823 S.W.2d at 118.

175. *Id.*

176. *Id.*

surveillance videotape that directly contradicted the employee's contentions.<sup>177</sup> Prior to the hearing, the employee requested production of all statements and other evidence pursuant to the workers' compensation statute providing for discovery of a party's own statement.<sup>178</sup> The employer did not produce the videotape at that time and attempted to admit the surveillance only after the employee testified.<sup>179</sup> The trial judge admitted the surveillance over the employee's objections.<sup>180</sup> The court of appeals held that the surveillance tape did not properly fall within the workers' compensation statute, which allowed discovery of a party's own statement.<sup>181</sup>

Although there are substantial differences in the language of the workers' compensation statute and the general discovery provision of 56.01,<sup>182</sup> the court in *Erbschloe* stated there was no authority that videotaped surveillance, with no audio portion, constituted a statement.<sup>183</sup> The *Erbschloe* court also mentioned that the videotaped surveillance was valuable in determining the credibility of the witness,<sup>184</sup> and the surveillance was admissible to impeach the employee's testimony and reduce his recovery.<sup>185</sup> The concurring opinion in *Erbschloe* offers some insight into the approach a court may take concerning Rule 56.01(b)(3).<sup>186</sup> The concurring judge relied on *Black's Law Dictionary*, which defined "statement" as "[a]n oral or written assertion, or nonverbal conduct of a person, if it is intended by him as an assertion."<sup>187</sup> The concurring judge in *Erbschloe* thought the surveillance failed to meet this definition because the employee was not aware the surveillance was being conducted; therefore, the employee could not have intended such conduct to be an assertion.<sup>188</sup>

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177. *Id.*

178. *Id.* See *supra* note 5.

179. *Erbschloe*, 823 S.W.2d at 118.

180. *Id.*

181. *Id.* at 119.

182. Missouri Revised Statute § 287.215 (1986) does not specifically mention video or motion picture statements of the party. Missouri Rule of Civil Procedure 56.01(b)(3) expressly defines a statement previously made as including video and motion pictures of the party or of a statement made by the party. See *supra* notes 53, 173.

If § 287.215 had contained language specifically defining a party's statement to include video or motion picture statements of the party, the court may have decided the case differently.

183. *Erbschloe*, 823 S.W.2d at 119.

184. *Id.*

185. *Id.* See *supra* note 18 and accompanying text.

186. *Erbschloe*, 823 S.W.2d at 119.

187. BLACK'S LAW DICTIONARY 1408 (6th ed. 1990).

188. *Erbschloe*, 823 S.W.2d at 119.

Those opposed to the discovery of surveillance will argue that the legislature did not intend for the new amendment to allow discovery of surveillance. They will argue the amendment was intended solely as a technological update, allowing a party to obtain a statement that he made, which could have been written, but instead was recorded via video. Although legislative history is not recorded in Missouri, this view is supported by the cover of Senate Bill 161, the bill that contained the amendment to Rule 56.01.<sup>189</sup> The language, "mechanically reproduced records,"<sup>190</sup> indicates the legislature probably did not intend to increase the scope of the statute except to allow for a technological update.

This interpretation, however, is not supported by a literal reading of the new language in the statute. The amendment specifically provides that a statement previously made is a "video . . . of the party" or a "video . . . of a statement made by the party and contemporaneously recorded."<sup>191</sup> A "video . . . of a statement made by the party and contemporaneously recorded"<sup>192</sup> is clearly a technological update. Therefore, the language a "video . . . of the party"<sup>193</sup> must mean something other than a technological update.

#### IV. OTHER JURISDICTIONS' TREATMENT OF SURVEILLANCE

Courts have differed in their classification of surveillance with regard to the work product doctrine. Some courts hold surveillance is not work product at all and is freely discoverable.<sup>194</sup> Other courts classify surveillance as work product, but the protection is overcome by the plaintiff's showing of substantial need and undue hardship in obtaining the substantial equivalent.<sup>195</sup> Still other courts, including Missouri, classify surveillance materials as work product, but do not find the required showing of substantial need and undue hardship to overcome the protection.<sup>196</sup>

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189. The cover reads, "To repeal section 510.030, RSMO 1986, and enact in lieu thereof one new section and to amend supreme court rule 56.01 for the purpose of allowing certain mechanically reproduced records to be used in courts of law."

190. *See supra* note 189 (emphasis added).

191. Mo. R. Civ. P. 56.01(b)(3).

192. *Id.*

193. *Id.*

194. *See supra* note 20 and accompanying text; *infra* note 197 and accompanying text.

195. *See supra* note 21 and accompanying text; *infra* note 211 and accompanying text.

196. *See supra* note 117 and accompanying text; *infra* note 265 and accompanying text.



A. *Surveillance Not Work Product*

Several jurisdictions afford surveillance materials no work product protection at all and allow discovery of both the existence and contents of the surveillance freely.<sup>197</sup>

The "not work product" classification is best illustrated by an Arizona case, *Zimmerman v. Superior Court*.<sup>198</sup> In holding that surveillance did not constitute work product, the *Zimmerman* court held surveillance would not fall within Arizona's definition of work product,<sup>199</sup> which included "memoranda, briefs and writings prepared by counsel for his own use."<sup>200</sup> The *Zimmerman* court distinguished its holding from Missouri's most current case on surveillance, *McMillian*,<sup>201</sup> when it noted Missouri defined work product more broadly than Arizona.<sup>202</sup> The court stated Missouri included "diagrams, maps and drawings" as work product and that Arizona did not include such items in its definition.<sup>203</sup> The court likened the surveillance to state-

197. For a detailed discussion on Missouri's current case law, see part III; see also *Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160 (S.D.N.Y. 1986) (right to depose before disclosure); *Zimmerman v. Superior Ct.*, 402 P.2d 212 (Ariz. 1965); *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. 1973); *Olszewski v. Howell*, 253 A.2d 77 (Del. 1969) (must show good cause to discover surveillance); *Williams v. Dixie Elec. Power Ass'n*, 514 So. 2d 332 (Miss. 1987); *McGee v. Burlington N. Inc.*, 571 P.2d 784 (Mont. 1977). *But see* *Prewitt v. Beverly-50th St. Corp.*, 546 N.Y.S.2d 815 (Sup. Ct. 1989) (existence of surveillance always discoverable and contents protected as work product but inherently overcome due to undue hardship in obtaining the substantial equivalent).

The *Zimmerman* case is the only one of these cases which discusses the reason surveillance is not classified as work product. The other listed cases decide surveillance is not work product summarily without discussion.

198. 402 P.2d 212 (Ariz. 1965).

199. *Id.* at 215. The Arizona definition of work product in *Zimmerman* was "memoranda, briefs and writings prepared by counsel for his own use, as well as related writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." *Id.* at 214 (citing *Dean v. Superior Ct.*, 324 P.2d 764, 769 (Ariz. 1958)).

200. *Id.*

201. See *supra* note 115 and accompanying text. *McMillian* held surveillance was classified as work product. *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 25 (Mo. 1961).

202. *Zimmerman*, 402 P.2d at 215. Missouri has continued to define work product broadly. Even documents prepared for one case have been afforded work product status in a later case. *State ex rel. Day v. Patterson*, 773 S.W.2d 224, 228 (Mo. Ct. App. 1989).

203. *Zimmerman*, 402 P.2d at 215.

ments of witnesses obtained by the attorney or to other exhibits prepared by the attorney that are not classified as work product in Arizona.<sup>204</sup>

A similar conclusion was reached by a Delaware court in *Olszewski v. Howell*.<sup>205</sup> The court cited several factors that influenced its refusal to afford surveillance work product protection.<sup>206</sup> First, the court held the surveillance was unique and could not be reproduced.<sup>207</sup> Second, the court noted the potential for misleading surveillance due to the many variables involved.<sup>208</sup> Third, the court noted the policy of pretrial disclosure is based on a search for truth and justice.<sup>209</sup> Finally, the court held that disclosure would expedite the case and encourage settlement.<sup>210</sup>

### B. Surveillance as Work Product and Discoverable

Several courts classify surveillance as work product, but find the protection has been overcome by a showing of substantial need and undue hardship in obtaining the substantial equivalent.<sup>211</sup> Within the classification "work product and discoverable" there are three categories.

#### 1. Category One

The first category holds: 1) the existence of surveillance is protected as work product, but the protection is overcome due to the plaintiff's substantial need and undue hardship;<sup>212</sup> 2) the contents of surveillance are protected as work product but the protection is overcome if the surveillance is to be used as evidence for any purpose;<sup>213</sup> and 3) the right to depose the plaintiff as to his injuries is allowed before the defendant is required to turn the contents of the surveillance over to the plaintiff.<sup>214</sup>

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204. *Id.*

205. 253 A.2d 77 (Del. 1969). The *Olszewski* factual background was somewhat unique in that the plaintiff made no claims that she could not engage in certain activities, only that certain activities caused her pain. *Id.* at 78.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* But see *infra* note 273 and accompanying text.

211. See *supra* note 21 and accompanying text.

212. See *infra* note 215 and accompanying text.

213. *Id.*

214. *Id.*

The courts within this category find the substantial need to discover the existence of surveillance material overcomes the work product protection.<sup>215</sup> The courts base their decisions on the unique nature of surveillance films and the likelihood of unfair surprise.<sup>216</sup> In discussing the need of the plaintiff to know whether surveillance existed, the United States District Court for the Eastern District of Pennsylvania in *Snead v. American Export-Isbrandtsen Lines, Inc.* stated:

Of course, surveillance motion pictures are not available except from the one who took them. While in theory, the plaintiff may tell his attorney about his physical limitations and demonstrate what he can and cannot do, obviously such descriptions would be of fragmentary help in trying to know what a hidden camera had recorded at some unknown time. A man may know he cannot bend over without pain and therefore feel he is telling the truth when he says he never reaches down to touch the floor. Nonetheless, under some particular circumstances he may have done so and this may be the very incident which the camera has recorded.<sup>217</sup>

The court balanced the plaintiff's need to know against the defendant's need to keep the surveillance's existence hidden.<sup>218</sup> The court acknowledged that the only time there was a substantial need to know about the existence of surveillance materials was when there was a major discrepancy between the injuries alleged and those depicted,<sup>219</sup> and that the same circumstance was the only instance in which the defendant would have a substantial need to withhold the information.<sup>220</sup> If the discrepancies were the result of an

215. *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973); *Davis v. Daddona*, No. CV89 0102503 S., 1990 WL 288643 (Conn. Super. Ct. Apr. 4, 1990); *Sires v. National Serv. Corp.*, 560 So. 2d 448 (La. Ct. App. 1990); *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); *Prewitt v. Beverly-50th St. Corp.*, 546 N.Y.S.2d 815 (Sup. Ct. 1989).

216. See, e.g., *Snead*, 59 F.R.D. at 151; *Davis*, 1990 WL 299643 at \*1; *Sires*, 560 So. 2d at 449; *Collins*, 551 So. 2d at 44; *Shenk*, 587 A.2d at 551; *Prewitt*, 546 N.Y.S.2d at 816.

217. *Snead*, 59 F.R.D. at 150-51. In this case the plaintiff asked through interrogatories whether the surveillance existed, and if so, all the details surrounding them. *Id.* at 149. The *Snead* case is the pioneer case within this category and has been adopted in conclusory fashion by most of the other cases within this category. See, e.g., *Davis*, 1990 WL 288643 at \*1; *Sires*, 560 So. 2d at 449; *Collins*, 551 So. 2d at 44; *Shenk*, 587 A.2d at 551; *Prewitt*, 546 N.Y.S.2d at 816.

218. *Snead*, 59 F.R.D. at 151.

219. *Id.* But see *McGee v. Burlington N. Inc.*, 571 P.2d 784, 791-92 (Mont. 1977).

220. *Snead*, 59 F.R.D. at 151. But see *McGee*, 571 P.2d at 791-92.

untruthful plaintiff, the substantial need of the plaintiff would not justify overcoming the work product protection.<sup>221</sup> If, on the other hand, the discrepancies were the result of misleading photography, the substantial need of the plaintiff would overcome the work product protection.<sup>222</sup> Recognizing the conflicting interests of the plaintiff and defendant, and realizing that it was not possible to predict the reasons for the discrepancies, the court relied on the major objectives of discovery, which were to obtain a just and speedy determination of cases.<sup>223</sup> The *Snead* court thought these objectives were best achieved by allowing discovery of the existence of surveillance.<sup>224</sup> The contents of the surveillance must be disclosed only if the defendant decides to use the films at trial.<sup>225</sup> Although the holding was conclusory,<sup>226</sup> it is likely the court reasoned that if the surveillance was not to be used at trial, the need of the plaintiff to discover the surveillance is not present.

The *Snead* court was one of the first to make the right to depose the plaintiff as to his injuries a condition before the defendant was required to acknowledge the existence of the surveillance.<sup>227</sup> This right to depose has been followed in a number of jurisdictions.<sup>228</sup>

## 2. Category Two

The second category within the "work product and discoverable" category holds: 1) the existence of surveillance is freely discoverable and not work product;<sup>229</sup> 2) the contents of surveillance are protected as work product, but the protection is overcome due to the plaintiff's substantial need and undue hardship;<sup>230</sup> and 3) the right to depose the plaintiff as to his injuries is permitted before the defendant is required to turn over the contents of the

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221. *Snead*, 59 F.R.D. at 151.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* For an extension of this right to depose the plaintiff, see, e.g., *Blyther v. Northern Lines, Inc.*, 61 F.R.D. 610, 611-12 (E.D. Pa. 1973) (the right to depose extends beyond the plaintiff to anyone whose deposition would furnish a reasonable degree of protection for the defendant as to the certainty of the events depicted in the surveillance).

228. *See supra* note 22.

229. *See infra* note 232 and accompanying text.

230. *Id.*

surveillance.<sup>231</sup>

This approach is best represented by the New Jersey case *Jenkins v. Rainer*.<sup>232</sup> The court found a substantial need to discover the contents was present because the surprise that resulted from distortion or misidentification was inherently unfair.<sup>233</sup> If the surveillance was unleashed at trial, the plaintiff would not have an opportunity to avoid the irreparable resulting damage.<sup>234</sup> The court rejected the defendant's contention that the plaintiff had no substantial need to view the surveillance because she knew the extent of her injuries better than anyone else.<sup>235</sup> It stated that the defendant's evidence was not the "exclusive repository of truth and virtue."<sup>236</sup> The court recognized the needs of the defendant to use the surveillance to counter the plaintiff's alleged injuries.<sup>237</sup> If the plaintiff lied, however, the court thought the use of depositions to memorialize her testimony as to the extent of her injuries would suffice in keeping the plaintiff from salvaging her case.<sup>238</sup>

In finding the necessary undue hardship, the court held that surveillance was unique and could not be recreated.<sup>239</sup> The court stated that because the surveillance was unique and a party could not copy or otherwise recreate it, the hardship in obtaining the substantial equivalent was manifest.<sup>240</sup> The court ruled out the use of any substitutes to the surveillance film because there was no substitute for the tremendous impact of the movie.<sup>241</sup>

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231. *Id.* See also *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Atchison, Topeka & Santa Fe Ry. v. Superior Ct.*, 25 Cal. Rptr. 54 (Dist. Ct. App. 1962); *Jenkins v. Rainer*, 350 A.2d 473 (N.J. 1976); *Cabral v. Arruda*, 556 A.2d 47 (R.I. 1989).

232. 350 A.2d 473 (N.J. 1976). For other cases with similar holdings under this category, see *Martin*, 63 F.R.D. 53; *Cabral*, 556 A.2d 47. *Cabral* differs from this holding somewhat in that it held that if the surveillance materials were created solely for the attorney's own use, the qualified work product protection was not inherently overcome. *Id.* at 50-51; see also *Suezaki v. Superior Ct.*, 373 P.2d 432, 438-39 (Cal. 1962) (the court classified only the contents as work product and allowed the trial court discretion to determine if the necessary showing was made); *Atchison, Topeka & Santa Fe Ry.*, 25 Cal. Rptr. at 57 (trial court did not abuse its discretion in ordering the discovery of the contents of the surveillance).

233. *Jenkins*, 350 A.2d at 477.

234. *Id.*

235. *Id.* at 476-77.

236. *Id.* at 477.

237. *Id.*

238. *Id.* See also *Martin v. Long Island R.R.*, 63 F.R.D. 53, 55 (E.D.N.Y. 1974).

239. *Jenkins*, 350 A.2d at 477.

240. *Id.*

241. *Id.*

In exchange for making the surveillance film available to the plaintiff, the court allowed the defendant to depose the plaintiff, but limited the deposition to the issue of injuries.<sup>242</sup> The court held that where possible, any demand for surveillance by the plaintiff should be accompanied by a consent to be deposed after the surveillance was finished but before answering the discovery request.<sup>243</sup> The court recognized that deviations from this procedure would be necessary, and it allowed the trial court discretion to deal with these situations.<sup>244</sup>

### 3. Category Three

The final category within this classification uses an entirely different means to reach a similar end. It holds: 1) the existence of surveillance is not work product and is always discoverable;<sup>245</sup> 2) the contents of surveillance are classified as work product, but this classification ceases if the surveillance is used as evidence for any purpose;<sup>246</sup> 3) if the contents of the surveillance are not used as evidence, the work product protection remains and is overcome only upon a showing of substantial need and undue hardship;<sup>247</sup> and 4) the trial court has the discretion to allow the defendant to depose the plaintiff as to her injuries before disclosing the contents of the surveillance.<sup>248</sup>

This approach is best represented in the Florida case of *Dodson v. Persell*.<sup>249</sup> The *Dodson* court held that the existence of surveillance was

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242. *Id.* at 478.

243. *Id.* The timing of the deposition of the plaintiff and the disclosure of the existence of surveillance is critical, but rarely discussed, in cases granting the defendant the right to depose the plaintiff. This case is the only one which attempted to delineate an order for the events to occur. *Id.* Ultimately, even this court left the ordering of events up to the discretion of the trial court. *Id.*

The order of the following events is critical: 1) the initial discovery request; 2) the consent to be deposed; 3) the deposition of the plaintiff as to her injuries; 4) the acknowledgement of the existence of the surveillance; 5) the production of the contents of the surveillance; and 6) the date the surveillance begins and ends in relation to the above events. No court has yet attempted to develop a uniform system for the administration of these events. See *infra* notes 313-20 and accompanying text.

244. *Jenkins*, 350 A.2d at 478.

245. See *infra* note 249 and accompanying text.

246. *Id.*

247. *Id.*

248. *Id.*

249. 390 So. 2d 704 (Fla. 1980). For a case with a similar holding within this category, see *Alamo Rent-A-Car v. Loomis*, 432 So. 2d 747 (Fla. Ct. App. 1983).

freely discoverable and was not classified as work product.<sup>250</sup> The court stated that the surveillance, as relevant evidence, could not be allowed to be hidden from the court.<sup>251</sup> The court thought that before a judge could determine whether the contents are privileged, the surveillance's existence must be acknowledged.<sup>252</sup> The court stated the free discovery of the existence of surveillance was in accord with the general policy behind discovery.<sup>253</sup> This policy was to facilitate a search for truth and justice, and it could only be accomplished when all relevant facts were before the court.<sup>254</sup>

The *Dodson* court stated that the surveillance contents' work product protection "ceases once the materials or testimony are intended for trial use."<sup>255</sup> The court indicated the classification of the contents of the surveillance as work product was entirely dependent on the intended use of the materials.<sup>256</sup> If the surveillance contents were to be used only to assist the attorney in trying the case, they remain classified as work product.<sup>257</sup> However, if the surveillance contents were to be used as evidence, they ceased to be work product and were subject to free discovery.<sup>258</sup>

Unlike other variations within this category, which hold the work product protection is inherently overcome when the surveillance materials are used as evidence,<sup>259</sup> the *Dodson* court said the work product classification simply disappears when the materials are used as evidence.<sup>260</sup> The *Dodson* court's view that the work product classification disappears is equivalent to other courts' findings of inherent substantial need and undue hardship.<sup>261</sup> Even if the surveillance is not used as evidence for any purpose, the *Dodson* court said it would likely find exceptional circumstances overcoming the work

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250. *Dodson*, 390 So. 2d at 707.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* ("More simply, if the materials are only to aid counsel in trying the case, they are work product. But, if they will be used as evidence, the materials, including films, cease to be work product and become subject to an adversary's discovery.")

257. *Id.*

258. *Id.*

259. See *supra* note 212 and accompanying text.

260. *Dodson*, 390 So. 2d at 707.

261. See *supra* note 215 and accompanying text. Apparently the *Dodson* court is essentially performing a "substantial need and undue hardship" analysis and, instead of "overcoming the work product protection," the *Dodson* court concludes the work product status disappears. *Dodson*, 390 So. 2d at 707.

product protection if the surveillance was "unique and otherwise unavailable, and materially relevant to the cause's issues."<sup>262</sup>

The court recognized that there was some merit in the defendant's argument that the use of surveillance prevented fraud and overstated injuries by the plaintiff.<sup>263</sup> With an eye toward fairness, the court held that the decision about the right to depose the plaintiff as to his injuries was within the trial court's discretion.<sup>264</sup>

### C. Surveillance as Work Product and Not Discoverable

A limited number of jurisdictions have held surveillance protected as work product and not discoverable.<sup>265</sup> The "work product and not discoverable" classification holds both the existence and contents of surveillance protected as work product, and the protection is not overcome by a showing of substantial need and undue hardship.<sup>266</sup> This classification reflects current case law in Missouri.<sup>267</sup> Only a few other jurisdictions have adopted this approach.<sup>268</sup>

This was the approach taken by the United States District Court in *Hikel v. Abousy*.<sup>269</sup> In *Hikel*, the injured plaintiff did not contend she was entitled to discover the contents of the surveillance.<sup>270</sup> She only sought discovery of the existence of surveillance.<sup>271</sup> The court balanced the plaintiff's need to know of the existence of the surveillance against the defendant's potential uses of the surveillance and held the existence nondiscoverable.<sup>272</sup> The court dismissed the plaintiff's contention that potential for settlement would

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262. *Dodson*, 390 So. 2d at 707. An example the court gave was photographs of the scene of the accident, with the scene now changed and not reproducible. *Id.* These "exceptional circumstances" are likely the *Dodson* court's equivalent of substantial need and undue hardship.

263. *Id.* at 708.

264. *Id.*

265. See *infra* note 268.

266. See *infra* note 268 and accompanying text.

267. See *supra* note 117 and Part III.

268. See, e.g., *Macivor v. Southern Pac. Transp. Co.*, No. 87-6424-E, 1988 WL 156743 (D. Or. June 9, 1988); *Hikel v. Abousy*, 41 F.R.D. 152 (D. Md. 1966); *Kriskey v. Chestnut Hill Bus Co.*, No. CV87 0090900 S, 1990 WL 284343 (Conn. Super. Ct. May 9, 1990). But see *Davis v. Daddona*, No. CV89 0102503 S, 1990 WL 288643 (Conn. Super. Ct. Apr. 4, 1990) (finding surveillance discoverable).

269. 41 F.R.D. 152 (D. Md. 1966).

270. *Id.* at 154.

271. *Id.*

272. *Id.* at 155.



be enhanced if the surveillance's existence was acknowledged, and stated that if the injuries were genuine, the plaintiffs would not be concerned about photos that confirmed their claims.<sup>273</sup> The court further held that if the surveillance's nonexistence was acknowledged, it would give the plaintiff "free rein in testifying without fear of impeachment" by surveillance.<sup>274</sup> The court reasoned that in those cases where knowledge of the existence would influence the plaintiff's testimony, the nondiscovery of the existence would likely make the plaintiff more careful in her testimony.<sup>275</sup> In those cases where the knowledge of the existence would not influence the plaintiff's testimony, the information would have little value.<sup>276</sup> A major criticism of this decision is that the court, by refusing discovery requests for the existence of surveillance, eliminated the plaintiff's opportunity to explore the possibility that the surveillance contents could be misleading or distorted.<sup>277</sup>

#### V. SUGGESTED TREATMENT OF SURVEILLANCE UNDER MISSOURI'S NEW DISCOVERY PROVISIONS

Both the existence and contents of surveillance materials should be afforded work product protection as trial preparation material in Missouri. Surveillance materials clearly meet the four requirements necessary to be classified as work product.<sup>278</sup> First, the surveillance film is a tangible item.<sup>279</sup> Second, other privileges have generally been unsuccessful in protecting surveillance from discovery; therefore, surveillance is otherwise discoverable.<sup>280</sup> Third, the surveillance is prepared by a representative of the party.<sup>281</sup> Fourth, the surveillance is prepared in anticipation of trial.<sup>282</sup> Two factors support the proposition that surveillance is prepared in anticipation of trial. First, surveillance materials generally do not have a business purpose other than assisting the defendant in litigation or preparation for trial.<sup>283</sup> Second, surveillance is not typically begun until the personal injury

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273. *Id.* at 154 n.1.

274. *Id.* at 154-55 n.1.

275. *Id.* at 155.

276. *Id.*

277. *Id.*

278. *See supra* notes 58-62 and accompanying text.

279. *See supra* note 59.

280. *See supra* notes 17, 18 and 60 and accompanying text.

281. *See supra* notes 45 and 61 and accompanying text.

282. *See supra* note 62 and accompanying text.

283. *See supra* note 86 and accompanying text.

suit has been filed.<sup>284</sup> Thus, surveillance generally occurs a significant time after the liability-causing event.<sup>285</sup>

*McMillian* held both the existence and contents of surveillance to be work product.<sup>286</sup> When *McMillian* was decided, work product was defined as any writing prepared or obtained in anticipation of litigation or in preparation for trial by the adverse party's attorney, surety, indemnitor or agent.<sup>287</sup> The definition is substantially the same under today's work product provision, section 56.01(b)(3).<sup>288</sup> Therefore, under the modern work product rules<sup>289</sup> and Missouri precedent,<sup>290</sup> the existence and contents of surveillance should be classified as work product.<sup>291</sup>

The work product protections should, however, be overcome by a showing of substantial need and undue hardship in obtaining the substantial equivalent.<sup>292</sup> This conclusion is supported by several factors.<sup>293</sup>

The most significant factor is the plaintiff's ability to actually remember the extent of every activity he has participated in.<sup>294</sup> The only available substitute for the surveillance materials is the plaintiff's memory and

284. See *supra* notes 87 and 89 and accompanying text; *infra* note 300 and accompanying text.

285. See *infra* note 300 and accompanying text.

286. See *supra* note 117 and accompanying text.

287. *Halford v. Yandell*, 558 S.W.2d 400, 406 (Mo. Ct. App. 1977) (quoting from the old Mo. R. Civ. P. 57.01(b)). See *supra* note 112 and accompanying text.

288. Mo. R. Civ. P. 56.01(b)(3). Work product is currently defined as "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer, or agent . . ." *Id.*

289. See *supra* notes 278-85 and accompanying text.

290. See, e.g., *Porter v. Gottschall, Inc.*, 615 S.W.2d 63, 65-66 (Mo. 1981) (photos of scene of accident classified as work product, although protection overcome by need and hardship); *McMillian*, 351 S.W.2d at 25 (existence and contents of surveillance classified as work product).

291. *But see McMullen & Foster*, *supra* note 38, at 575. The authors suggest that since Rule 56.01(b)(1) allows parties to discover the existence of documents related to the lawsuit, the existence is not properly classified as work product. *Id.* This logic is incorrect. All materials classified as work product under 56.01(b)(3) must be "otherwise discoverable under subdivision (b)(1) of this Rule 56.01." Mo. R. Civ. P. 56.01(b)(3). Therefore, the fact that the existence of the materials are discoverable under (b)(1) is a necessary element in order for the existence to be classified as work product, and not the reason it cannot be classified as work product as the authors seem to suggest.

292. See *supra* notes 106-10 and accompanying text.

293. *Id.*

294. See *supra* note 106 and accompanying text.

individual account of every physical activity he has engaged in since the liability-creating event, or at least since the filing of the lawsuit.<sup>295</sup> It is unrealistic to think that the plaintiff's memory is a fair substitute for the film.<sup>296</sup> The plaintiff or the plaintiff's attorney undoubtedly had the *opportunity* to discover the same information as depicted in the surveillance, but it is not realistic to expect a party to conduct 24-hour surveillance on himself to record any surveillance the other party may have obtained. The surveillance is unique and its contents can only be discovered by viewing the recording of the surveillance.<sup>297</sup> The likelihood that the plaintiff will not be able to remember every event depicted in the surveillance film favors a finding of substantial need for the surveillance materials and an undue hardship in obtaining the substantial equivalent.<sup>298</sup> A significant number of jurisdictions have so held.<sup>299</sup>

A second factor is time lapse between the liability-causing event and the surveillance. Personal injury surveillance is typically not begun until a lawsuit is filed and the plaintiff makes his alleged injuries known to the defendant. Generally, surveillance occurs a substantial period of time after the liability-creating incident occurred.<sup>300</sup> Additionally, there is typically a significant length of time between the filing of the complaint and the trial date, thus giving the defendant a large window of time in which to conduct surveillance.<sup>301</sup> These time lapses between the event giving rise to the injury and the trial date increase the hardship on the injured plaintiff to recall every activity in which he may have participated.<sup>302</sup>

A third factor is the likelihood surveillance will be misleading or distorted if introduced at trial.<sup>303</sup> The surveillance may depict the plaintiff participating in an activity contrary to the plaintiff's alleged injuries, but fail to depict the pain the plaintiff experienced.<sup>304</sup> Additionally, the surveillance

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295. See *supra* note 217 and accompanying text.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. See, e.g., E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1062 (1989). Typical products liability or other tort cases may not be brought until years after the liability-creating event occurs. *Id.*

301. Irving R. Kaufman, *Reform For A System In Crisis: Alternative Dispute Resolution In The Federal Courts*, 59 FORDHAM L. REV. 1, 2 (1990).

302. See *supra* note 108 and accompanying text.

303. See *supra* notes 9-11 and accompanying text.

304. See *supra* note 217 and accompanying text.

may distort activities through camera angles, lighting, and film speed.<sup>305</sup> Without the opportunity to examine the film's contents and the photographer's credentials, the plaintiff could not discover any distortions.<sup>306</sup>

Finally, the policy behind pre-trial discovery supports overcoming the work product protection.<sup>307</sup> The purposes of pre-trial discovery are three-fold: 1) to eliminate concealment and surprise;<sup>308</sup> 2) to aid the litigants in determining the facts prior to trial;<sup>309</sup> and 3) to provide the litigants with access to proper information to develop their case.<sup>310</sup> In personal injury suits, surveillance may be the most persuasive evidence available.<sup>311</sup> The discovery of surveillance materials prior to trial by the plaintiff expressly meets these purposes.<sup>312</sup>

If Missouri courts conclude the plaintiff has the right to obtain discovery of surveillance, the defendant should be allowed to depose the plaintiff<sup>313</sup> before acknowledging the existence of surveillance.<sup>314</sup> Any request by the plaintiff concerning surveillance should be accompanied with the plaintiff's consent to be deposed as to the extent of injuries before the defendant is required to acknowledge the surveillance's existence.<sup>315</sup> After receiving the plaintiff's consent to be deposed, the defendant should be given a thirty-day

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305. See *supra* notes 9-10 and accompanying text.

306. See *supra* note 11 and accompanying text.

307. See *supra* note 209 and accompanying text.

308. *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. Ct. App. 1985) (citing *Combellick v. Rooks*, 401 S.W.2d 460, 464 (Mo. 1966)).

309. *Id.* (citing *Bethell v. Porter*, 595 S.W.2d 369, 377 (Mo. Ct. App. 1980)).

310. *Id.*

311. See *Jenkins v. Rainer*, 350 A.2d 473, 477 (N.J. 1976); LaMarca, *supra* note 1, at 1.

312. See *supra* note 209 and accompanying text.

313. This right should be extended to include any other person whose deposition would furnish a reasonable degree of protection to the defendant as to the certainty of the injuries depicted in the surveillance. For example, any witnesses to the plaintiff's actions depicted in the surveillance could be deposed. See *Blyther v. Northern Lines, Inc.*, 61 F.R.D. 610, 611-12 (E.D. Pa. 1973).

314. See *supra* note 22 and accompanying text.

315. See *supra* note 243 and accompanying text. Additionally, an interrogatory asking for the identity of "persons with knowledge concerning discoverable facts" would likely include any investigators conducting surveillance, and acknowledgement of their existence would be the same as acknowledging the existence of the surveillance itself. See *supra* note 5. Therefore, the defendant should be allowed to answer the interrogatory: "Any possible additional persons with knowledge of discoverable facts would concern surveillance and acknowledgment of their existence or non-existence is conditional on consent to depose the plaintiff prior to acknowledgment." See also *Jenkins*, 350 A.2d at 478.

period to depose the plaintiff<sup>316</sup> before the defendant must acknowledge the existence of the surveillance materials and produce them.

If the defendant acknowledges the nonexistence of surveillance after memorializing the plaintiff's injuries through deposition, and the defendant then conducts surveillance on the plaintiff, the defendant has a duty to update her responses to prior interrogatories and requests from the plaintiff.<sup>317</sup> The defendant should be given thirty days from the commencement of the surveillance (or forty-five days prior to the scheduled trial date if sooner) to supplement her answers to the plaintiff's previous interrogatories or requests.<sup>318</sup> At that time, the defendant should be required to acknowledge the existence and disclose the contents of any surveillance accumulated to date.<sup>319</sup> No surveillance should be allowed to be conducted within forty-five days of the scheduled trial date in order to provide some assurance to the plaintiff that no last-minute surprises will arise.<sup>320</sup>

The proper way to implement these proposals would be through an amendment, specifically dealing with surveillance materials, to Missouri Rule of Civil Procedure 56. This amendment could provide that a party may obtain discovery of the existence and contents of surveillance materials conducted on the party seeking discovery, provided that the party seeking discovery consents

316. *See supra* note 243. This 30-day period should be sufficient to arrange for the plaintiff's deposition, especially considering the plaintiff has motivation to expedite his deposition in order to discover whether surveillance exists or not.

317. FED. R. CIV. P. 26(e); MO. R. CIV. P. 56.01(e).

318. This should be a sufficient period for the defendant to capture any activities in which the plaintiff might be participating that are contrary to his alleged injuries. Because the plaintiff will not know this surveillance has begun until 30 days after its commencement, the defendant should be provided with candid photo opportunities.

319. The practical result of this is that if the defendant is considering conducting surveillance when the plaintiff consents to a deposition, the defendant should conduct this deposition in order to have the deposition available to impeach the plaintiff after the subsequent surveillance is conducted.

320. To illustrate the most extreme possibility for the plaintiff under this scheme, consider the following scenario: The plaintiff propounds interrogatories and requests for production concerning surveillance, accompanied with a consent to be deposed, at an early date in the trial preparation. The defendant deposes the plaintiff as to his injuries 30 days later, and on the same date, responds that no surveillance exists. Some time later, 75 days prior to the scheduled trial date, the defendant decides to conduct surveillance on the plaintiff. The defendant has 30 days to update her responses to the prior interrogatories and requests and conducts surveillance during this entire period. Forty-five days prior to the trial, the defendant updates her responses to the plaintiff's interrogatories and produces the surveillance. The plaintiff then has 45 days to examine the surveillance and prepare arguments pertaining to its use. No surveillance can be conducted by the defendant during the 45 days prior to the scheduled trial date.

to be deposed by the party upon whom the discovery request has been made. The deposition is limited to the activities that might be depicted in the surveillance of the party seeking discovery. The trial court has the discretion to exclude statements in this deposition that are outside this limitation. After receiving consent to be deposed from the party seeking discovery, the party upon whom the discovery request has been made has 30 days to depose the party seeking discovery. After the 30 days have expired, the party upon whom the discovery request has been made must acknowledge the existence or nonexistence of the surveillance and disclose the contents of such surveillance. If, at any time thereafter, the party upon whom the discovery request has been made conducts any surveillance on the party who requested discovery of surveillance, the party upon whom the initial discovery request was made has a duty to update the responses to the previous discovery request within 30 days of the commencement of the surveillance, or within 45 days of the scheduled trial date, whichever is sooner. No surveillance shall be admissible as evidence if it has taken place within 45 days of the commencement of the trial.

## VI. CONCLUSION

The discoverability of surveillance materials is not uniform from jurisdiction to jurisdiction.<sup>321</sup> Surveillance has a legitimate purpose in the search for truth in personal injury suits.<sup>322</sup> However, it can be abused and create unfair prejudice against the plaintiff.<sup>323</sup> Many of the jurisdictions that allow for the discovery of surveillance render the surveillance's effectiveness impotent. Missouri has yet to allow the discovery of surveillance materials.<sup>324</sup> By adopting the suggested treatment of surveillance materials, Missouri can maintain the surveillance's effectiveness while curbing abuses that may prejudice the defendant.

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321. *See supra* notes 19-23 and accompanying text.

322. *See supra* notes 12-15 and accompanying text.

323. *See supra* notes 9-11 and accompanying text.

324. *See supra* note 117 and accompanying text.

