

**Rose Marie SAMPLES, Appellant,**

**v.**

**Vincent Louis MITCHELL, Respondent.**

**No. 2747**

**Supreme Court of New State**

**Submitted Oct. 8, YR-2.**

**Decided Nov. 3, YR-2.**

Motorist who was struck from behind in rear-end collision sued following motorist, who admitted liability. After refusing to exclude from evidence defendant's surveillance videotape of plaintiff engaging in physical activity, which defendant had failed to disclose during discovery, the Circuit Court, entered judgment on jury verdict for defendant. Plaintiff appealed, and the Supreme Court held that: (1) videotape was relevant and discoverable, and (2) trial court's sanction of refusing to allow defendant's investigator to comment on videotape was inadequate and warranted new trial.

Reversed and remanded.

**[1] APPEAL AND ERROR 30k205**

Making motion in limine to exclude evidence at beginning of trial does not preserve issue for review, because motion in limine is not a formal determination, and moving party must therefore make contemporaneous objection when evidence is introduced.

**[2] APPEAL AND ERROR 30k205**

Motion to exclude videotape from evidence was sufficient to preserve issue of videotape's admissibility for review, even though trial court termed motion, which it denied, as motion in limine, where ruling was

made on motion during trial and immediately prior to introduction of videotape, and no opportunity existed for court to change its ruling.

**[3] PRETRIAL PROCEDURE 307Ak383**

Surveillance videotape of personal injury plaintiff engaging in physical activities which had been made by defendant was relevant and discoverable in action, in which liability was admitted but damages were contested; even if applicable, work product rule would not bar discovery, since rules require that nature of evidence be disclosed prior to any claim of privilege, so that applicability of privilege can be assessed. Rules Civ. Proc., Rule 26.

**[4] PRETRIAL PROCEDURE 307Ak27.1**

Scope of discovery is very broad, and objection on relevance grounds is likely to limit only the most excessive discovery request.

**[4] PRETRIAL PROCEDURE 307Ak31**

Scope of discovery is very broad, and objection on relevance grounds is likely to limit only the most excessive discovery request.

**[5] PRETRIAL PROCEDURE 307Ak309**

In deciding what sanction to impose for failure to disclose evidence during discovery process, trial court should weigh nature of interrogatories, discovery posture of case, willfulness, and degree of prejudice.

**[6] PRETRIAL PROCEDURE 307Ak434**

Trial court's sanction for discovery violation by defendant in personal injury action, who had failed to disclose existence of surveillance videotape of plaintiff engaging in physical activities when responding to standard interrogatories, of refusing to allow defendant's investigator to interpret

videotape, was not meaningful enough to protect discovery rights, and thus was an abuse of discretion warranting new trial. Rules Civ. Proc., Rule 26.

**[7] COURTS 106k26**

Failure to exercise discretion amounts to an abuse of that discretion.

**[8] PRETRIAL PROCEDURE 307Ak15**

Entire thrust of discovery rules involves full and fair disclosure to prevent a trial from becoming guessing game or one surprise for either party. Rules Civ. Proc., Rule 26.

**[9] PRETRIAL PROCEDURE 307Ak16**

Essentially, rights of discovery provided by rules give trial lawyer means to prepare for trial, and when rights are not accorded, prejudice must be presumed. Rules Civ. Proc., Rule 26.

**[10] APPEAL AND ERROR 30kl043(6)**

Unless party who has failed to submit to discovery can show lack of prejudice, reversal is required. Rules Civ. Proc., Rule 26.

**[11] PRETRIAL PROCEDURE 307Ak44.1**

Even though imposition of sanctions for discovery violation is usually left to sound discretion of trial judge, whatever sanction judge imposes should serve to protect the rights of discovery provided by Rules of Civil Procedure. Rules Civ. Proc., Rule 26.

**[12] PRETRIAL PROCEDURE 307Ak44.1**

Overly lenient sanctions for discovery violations are to be avoided where they result in inadequate protection of discovery. Rules Civ. Proc., Rule 26.

CONNOR, Judge:

Rose Marie Samples moved for a new trial after she received an unfavorable verdict. The trial court denied her motion. She appeals. We reverse and remand for a new trial.

**FACTS**

Vincent Louis Mitchell rear-ended Samples in April YR-12. Mitchell admitted negligence, but contested proximate cause and damages. On April 12 and 15, YR-9, Mitchell's investigator filmed a video which showed Samples removing laundry from a clothesline, watching a ball game, and using her left hand to open a gate.

Two months later, on June 10, YR-9, Samples served Mitchell with standard interrogatories. Mitchell's attorney first answered the interrogatories on July 13, YR-9, and subsequently sent a second set of answers on November 17, YR-9. In neither did she disclose the existence of the video tape nor the name of the investigator as a potential witness.

On October 24, YR-7, a week before trial, Mitchell's lawyer deposed Samples' mother, June Marie Moser, de bene esse, because she would not be available at trial. Mitchell's attorney specifically questioned Moser about Samples' ability to hang clothes, to attend her children's sporting events, and to use the left side of her body. Immediately after the deposition, Mitchell's lawyer told Samples' lawyer about the video. That afternoon she sent him a copy.

At trial, Samples' lawyer offered Moser's deposition into evidence. Subsequently, Mitchell's attorney offered the video tape, and Samples' attorney objected. The trial judge allowed the video tape over Samples' objection, but refused to allow the investigator to interpret it.

## ANALYSIS

Mitchell argues in a footnote that Samples failed to preserve her argument concerning the video because her counsel failed to object immediately prior to the introduction of the video tape.

[1] Making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.

[2] Despite the fact the judge in this case called the motion one in limine, he ruled on it during the trial, immediately prior to the introduction of the evidence in question.

Our court has held: Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion in limine. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal. [FNI]

FNI. We also note the trial judge's statement that "the evidence will come in over the objection of the plaintiff," as further indication the proceedings are more accurately characterized as a contemporaneous objection and ruling, not a motion in limine. Here no opportunity existed for the court to change its ruling. Therefore, the issue was properly preserved for review.

[3] We next inquire whether or not the surveillance video was discoverable evidence. Mitchell first claims the video was not discoverable because the standard interrogatory asked for photographs, not video tapes. The New State Rules of Evidence clearly define photographs in evidentiary matters to include video tapes. Rule 1001(2), NSRE ("Photographs' include still photographs, X-ray films, video tapes, motion pictures or other similar methods of recording information."). These rules became effective September 3, YR-7. Rule 1103(b), NSRE. Therefore, they were clearly in effect when this case was tried on October 30-31, YR-7. [FN2]

FN2. The court is aware the definition applies to Article X of the Rules of Evidence. We point to the rule, however, as persuasive authority the terms "video tape" and "photograph" are understood to be synonymous in the trial arena.

[4] Mitchell's lawyer further alleges she did not have to disclose the tape because she did not believe it related to Mitchell's defense. If the tape is related to the claim, Mitchell had a duty to at least disclose the existence of it. Rule 26 (b)(1), NSRCP. In New State the scope of discovery is very broad and an objection on relevance grounds is likely to limit only the most excessive discovery request.

Although the specific question of the discovery of surveillance videos has never been raised in New State, it has been dealt with elsewhere. Professor Moore comments: This question seems to arise most often when the defendant in a personal injury case has videotaped or collected some other visual evidence of the plaintiff on the extent of his or her injuries. Discovery of the evidence is generally permitted. 6 James Wm. Moore et

al., Moore's Federal Practice, § 26.41 [4] [b] (3d ed. YR-5).

Many states that have wrestled with the question have held at least the existence of the video tape must be revealed in response to discovery requests. Florida has held "upon request a party must reveal the existence of any surveillance information he possesses whether or not it is intended to be presented at trial." *Dodson v. Persell*, 390 So.2d 704 (Fla.YR-22). Similarly, the Supreme Court of Appeals of West Virginia reasoned, "[knowledge of the mere existence of this tape would have substantially contributed to the quality of the plaintiffs' trial strategy and their specific preparation of their star witness..... *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788. 796 n. 9 (YR-7).

Given the broad interpretation of relevance by our courts, a defendant's surveillance video of the plaintiff was clearly relevant to a personal injury claim in which negligence was admitted and damages were contested. A review of the record makes it clear that Mitchell's counsel found the video useful in drafting her questions to Moser, yet she denied this benefit to Samples' counsel. Furthermore, in this case, Mitchell failed to disclose even the existence of the video tape, thereby providing an inaccurate response to Samples' interrogatories. [FN3]

FN3. Cf. Rule 26(g), NSRCP ("The signature of the attorney or party constitutes a certification in accordance with Rule 11"); Rule 11, SCRCPP ("If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction.

Some states have discussed whether or not surveillance tapes, which will not be

introduced at trial, constitute work product. 6 James Wm. Moore et. al., Moore's Federal Practice, § 26.41 [4] [b] (3d Ed. YR-5). The tape in this case, however, was admitted into evidence, and Mitchell has never claimed protection under the work product rule.

Furthermore, the work product rule would not excuse the failure to disclose the existence of the video tape here. If Mitchell's attorney believed Samples had no right to this evidence, either because of relevancy or because of the work product rule, she should have either objected to the interrogatory or disclosed the existence, but not the content, of the evidence and moved for a protective order. [FN4] Rule 33 (a), NSRCP; Rule 26(c), NSRCP. [FN5]

FN4. Mitchell argues admitting the video into evidence was necessary to avoid allowing the statements of Moser to go uncontradicted. According to Mitchell, this promoted discovery's goal of reaching the truth. At the heart of this argument is the question of whether or not the contents of a surveillance video should be protected from discovery until the witness has been deposed in order to safeguard the defendant's ability to impeach the witness on cross-examination. That question is not properly before us. Because Mitchell's attorney failed to disclose the video's existence and move for a protective order covering its contents under this theory, the trial judge was never afforded an opportunity to rule on this issue.

FN5. The New State Rules of Civil Procedure were amended in YR-6 to expressly require the disclosure of the nature of evidence prior to any claim of privilege so other parties may assess the applicability of the privilege or protection. Rule 26(b)(5), NSRCP. This rule was not in effect at the time of this trial. However, reading rules 26, 33 and 11 together as they were at the time of

the trial, this court is convinced the rules never permitted an attorney to deny the existence of evidence deemed privileged.

Having determined Mitchell's conduct was sanctionable, we must now decide if the trial judge abused his discretion in choosing a sanction.

[5] In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice.

[6][7] Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors. A failure to exercise discretion amounts to an abuse of that discretion. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.

Mitchell argues that trial judge's decision to limit the testimony of the investigator evidences discretion. This decision in and of itself does not show the judge exercised discretion, especially where the Supreme Court has articulated the legal analysis which should be utilized. The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised. A more meaningful sanction was required in this case.

Samples' attorney served standard interrogatories, not a complex series of questions making compliance difficult. At a minimum, the existence of the tape should

have been disclosed in the original answers to Samples' interrogatories, as the tape obviously related to Samples' personal injury claim. Instead, Mitchell's lawyer knew about the video tape when the interrogatories were received, yet willfully failed to reveal it to Samples or the court for some two and a half years. At the least, Mitchell's lawyer should have known the video was relevant when Moser was added as a witness and should have disclosed the video's existence to Samples' attorney prior to Moser's deposition.

[8][9][10] The entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is required.

[11][12] Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes should serve to protect the rights of discovery provided by the Rules. Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery.

Few litigants would reveal the existence of video surveillance evidence if the alternative were simply having the testimony of the investigator who filmed the video limited at trial.

In summary, in failing to exercise discretion, the trial judge abused that discretion. Furthermore, the sanction he imposed was not meaningful enough to protect the rights of discovery provided by the Rules.

Samples also appeals the trial court's refusal to grant a new trial based on the inflammatory closing argument of Mitchell. We need not reach this issue.

**REVERSED AND REMANDED**