

FIND Request: 3 N.Y.3d 64

Court of Appeals of New York.
John N. ZEGARELLI et al., Respondents,
v.
Gregory D. HUGHES, Appellant.

July 1, 2004.


Background: Accident victim brought personal injury action against motorist. The Supreme Court, Oneida County, Parker, J., granted judgment for plaintiff, and defendant appealed. The Supreme Court, Appellate Division, 303 A.D.2d 916, 756 N.Y.S.2d 674, affirmed, and appeal was taken.

Holdings: The Court of Appeals, R.S. Smith, J., held that:

- (1) defendant complied with statute requiring "full disclosure" of any films, photographs, video tapes or audio tapes showing the activities of a party to litigation when he provided plaintiff's counsel with VHS copy of eight-millimeter tape showing plaintiff shoveling snow;
- (2) videographer's testimony was sufficient to authenticate the videotape; and
- (3) error in excluding the tape was not harmless.

Reversed.


West Headnotes

[1] Pretrial Procedure 307A  **383**307A Pretrial Procedure307AII Depositions and Discovery307AII(E) Production of Documents and Things and Entry on Land307AII(E)3 Particular Documents or Things

307Ak383 k. Photographs; X Rays; Sound Recordings. Most Cited Cases


"Full disclosure" required by statute governing production of any films, photographs, video tapes, or

audio tapes showing the activities of a party to litigation is simply the disclosure normally required for relevant, non-privileged materials. McKinney's CPLR 3101(i).

[2] Pretrial Procedure 307A  **383**307A Pretrial Procedure307AII Depositions and Discovery307AII(E) Production of Documents and Things and Entry on Land307AII(E)3 Particular Documents or Things


307Ak383 k. Photographs; X Rays; Sound Recordings. Most Cited Cases

Defendant in personal injury case complied with statute requiring "full disclosure" of any films, photographs, video tapes, or audio tapes showing the activities of a party to litigation when he provided plaintiff's counsel with VHS copy of eight-millimeter tape showing plaintiff shoveling snow; production of original tape was not required as precondition to its admissibility, since plaintiff had an opportunity to examine the original if he chose to do so. McKinney's CPLR 3101(i).

[3] Evidence 157  **380**157 Evidence157X Documentary Evidence157X(D) Production, Authentication, and Effect157k369 Preliminary Evidence for Authentication

157k380 k. Photographs and Other Pictures; Sound Records and Pictures. Most Cited Cases

Testimony from videographer that he took video of plaintiff shoveling snow, that it correctly reflected what he saw, and that it had not been altered or edited was sufficient to authenticate the videotape in personal injury action.

[4] Evidence 157  **380**157 Evidence

157X Documentary Evidence157X(D) Production, Authentication, and Effect157k369 Preliminary Evidence for Authentication157k380 k. Photographs and Other Pictures; Sound Records and Pictures. Most Cited Cases

Where the videographer is not called as witness, testimony, expert or otherwise, may establish that a videotape truly and accurately represents what was before the camera.

5 Appeal and Error 30 1056.1(10)30 Appeal and Error30XVI Review30XVI(J) Harmless Error30XVI(J)11 Exclusion of Evidence30k1056 Prejudicial Effect30k1056.1 In General30k1056.1(4) Particular Actions

or Issues

30k1056.1(10) k. Negligence and Torts in General. Most Cited Cases

Error in excluding videotape of plaintiff shoveling snow for about three minutes without obvious discomfort was not harmless in personal injury action; tape was inconsistent with plaintiff's testimony that he "took two or three swipes" and "cleared off the little debris that was on the first step" and could have been used to attack credibility of plaintiff's statement that he shoveled snow "very, very rarely."

***488 *65 **795 Sugarman Law Firm, LLP, Syracuse (Sherry R. Bruce of counsel), for appellants.

***489 *66 **796 Brindisi, Murad & Brindisi-Pearlman, LLP, Utica (Stephanie A. Palmer of counsel), for respondents.

OPINION OF THE COURT

R.S. SMITH, J.

[1] CPLR 3101(i) provides that "[t]here shall be full disclosure of any films, photographs, video tapes or audio tapes" showing the activities of a party to litigation. We hold here that the "full disclosure" required by this statute is simply the disclosure normally required by the CPLR for relevant, non-

privileged materials. More specifically, we hold that defendant here complied with his obligation to disclose a videotape by delivering a complete copy of the tape to plaintiff's counsel well in advance of trial. Defendant was not required, as a precondition to the tape's admissibility, to furnish plaintiff with the original; it is sufficient that plaintiff had an opportunity to examine the original if he chose to do so.

This is an automobile accident case in which plaintiff John Zegarelli (plaintiff) ^{FN*} sought recovery on the basis of a back injury that allegedly caused him significant pain and limited his daily activities. Plaintiff served demands for discovery requesting production, among other things, of "any and all video tapes ... purporting to depict the Plaintiff's activities." Subsequently, an investigator employed by defendant's counsel videotaped plaintiff while he was shoveling snow. The taping was done with a handheld eight-millimeter camera. The investigator copied the eight-millimeter tape onto a VHS tape, which is convenient for display on a television screen.

^{FN*} Mr. Zegarelli's wife brought a derivative claim that is not relevant to this appeal.

On August 18, 2000, defendant's counsel sent a VHS copy of the tape to plaintiff's counsel, with a cover letter saying: "Enclosed*67 herewith please find a copy of a videotape depicting the plaintiff in the above matter which I recently received." So far as the record shows, there was no more communication about this tape between the parties until the trial, which began more than a year later, on August 21, 2001.

At the trial, plaintiff testified about the limits on his activity resulting from his injury. He testified that after the accident he shoveled snow "very, very rarely." Specifically asked by his counsel about "one occasion," reflected on "a video," he said: "I took two or three swipes of our parking area where we park our car, and I got out and I got the shovel, and I cleared off the little debris that was on the first step."

Defendant called the investigator, who testified that he had observed plaintiff; that the exhibit shown to him was a copy of a videotape he had made of the observation; that the tape fairly and accurately showed what he had observed; and that the tape had not been edited at all. Plaintiff's counsel objected to

the tape's admissibility, saying: "I don't know if the 8-millimeter correctly reflects what is on this tape because I haven't had an opportunity to see it." He admitted that he had seen the VHS copy of the tape.

Supreme Court sustained the objection on the ground that "[t]he original tape was not made available to the plaintiff by the defendant in anticipation of trial or during the discovery period." Plaintiff later took advantage of this ruling, asking the jury in closing argument: "Where's this phantom video? It's not here, is it? What did that tell you?" The jury returned a verdict for plaintiff including a \$55,000 award for pain ***490 **797 and suffering, and judgment was entered accordingly.

The Appellate Division, one Justice dissenting, affirmed, stating that Supreme Court had "properly granted" preclusion of the videotape on the ground "that the original eight-millimeter surveillance tape of plaintiff had not been disclosed." (303 A.D.2d 916, 917, 756 N.Y.S.2d 674 [2003].) The Appellate Division also concluded that, if the exclusion of the videotape was error, the error was harmless. We granted leave to appeal, and now reverse.

CPLR 3101(i) provides:

"In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision*68 (a) of this section [i.e., a party or a party's officer, director, member, agent or employee]. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officers law."

This statute was enacted in response to our decision in *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1, 604 N.E.2d 63 [1992]. The issue in *DiMichel* was whether surveillance videotapes obtained in anticipation of trial constituted trial preparation materials subject to a qualified privilege under CPLR 3101(d)(2). We held that the statutory protection did attach, and approved Appellate Divi-

sion holdings that the parties making the tapes need disclose "only those tapes which they planned to use at trial" (*id.* at 190, 590 N.Y.S.2d 1, 604 N.E.2d 63). We also held it appropriate to provide "that surveillance films should be turned over only after a plaintiff has been deposed" (*id.* at 197, 590 N.Y.S.2d 1, 604 N.E.2d 63).

Within a year of *DiMichel*, the Legislature enacted CPLR 3101(i). That statute's provision for disclosure of "all portions of such material, including out-takes, rather than only those portions a party intends to use" expressly overruled *DiMichel*'s holding on that subject. We held in *Tai Tran v. New Rochelle Hosp. Med. Ctr.*, 99 N.Y.2d 383, 387-388, 756 N.Y.S.2d 509, 786 N.E.2d 444 [2003] that CPLR 3101(i) also overruled "that aspect of *DiMichel* which allows defendants to withhold surveillance tapes until after a plaintiff has been deposed." *Tran* made clear that the provision in CPLR 3101(i) for "full disclosure" of surveillance tapes removed them from the protection of CPLR 3101(d)(2), and put them on the same footing with other material discoverable under CPLR 3101(a). Indeed, subdivision (i) tracks the language of subdivision (a), which states: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action...."

Section 3101 (i) went no further than this, however. It did not require parties making disclosure of surveillance tapes to be more forthcoming than they would with any ordinary discovery material. In the case of "documents and things"-a term that includes videotapes-a party's obligation is "to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph" the items *69 produced (CPLR 3120 [1] [i]). This section may be satisfied by telling the party seeking the discovery where the materials are and providing a reasonable opportunity for that party to look at them and make copies; but it is often more convenient, and very common, for counsel for the producing party to ***491 **798 make copies and send them to the other side. Where that is done, it is understood that the originals must be available for inspection on request.

[2] Here, defendant's counsel followed this customary procedure when he sent a copy of the tape to plaintiff's counsel. His cover letter expressly dis-

closed that it was a “copy”-though in any event the recipient would be unlikely to assume that he was being sent the original. Plaintiff has not shown that the difference in format between the eight-millimeter original and the VHS copy was of any significance; but if plaintiff's counsel wanted to see the original, he had only to ask, and he had plenty of time-more than a year-to do so before trial. Defendant thus complied with his obligation to make “full disclosure” of the videotape, and Supreme Court and the Appellate Division erred in holding otherwise.

[3][4] Plaintiff argues, in the alternative, that the tape was rightly excluded because defendant failed to authenticate it properly. As we read the record, the courts below did not base their rulings on that ground, but if they did, they erred, for there was nothing wrong with the authentication. Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape. Where the videographer is not called “[t]estimony, expert or otherwise, may also establish that a videotape ‘truly and accurately represents what was before the camera’ ” (*People v. Patterson*, 93 N.Y.2d 80, 84, 688 N.Y.S.2d 101, 710 N.E.2d 665 [1999], quoting *People v. Byrnes*, 33 N.Y.2d 343, 349, 352 N.Y.S.2d 913, 308 N.E.2d 435 [1974]). If there was (as Supreme Court suggested) any discrepancy between the tape and the videographer's description in a written report of what he saw, that would have been a proper matter for cross-examination.

[5] Nor do we agree with the Appellate Division that the error in excluding the videotape was harmless. The tape shows plaintiff shoveling for about three minutes without obvious discomfort, though for much of that time he uses one hand to shovel, perhaps favoring his back. The tape may not be inconsistent with the existence of back pain, but it is flatly inconsistent with plaintiff's testimony that he “took two or three swipes ... and ... cleared off the little debris that was on the first *70 step.” Admission of the tape also would have enabled defendant to attack the credibility of plaintiff's statement that he shoveled snow “very, very rarely”-i.e., that his doing so the day he was videotaped was a coincidence. And even apart from the tape's relevance to plaintiff's credibility, its exclusion harmed defendant by enabling plaintiff's counsel to ask rhetorically, in closing argument: “Where's this phantom video?” In short, we cannot

conclude with confidence that plaintiff would have obtained the same verdict if the tape had been admitted into evidence.

Accordingly, the order of the Appellate Division should be reversed, with costs, and a new trial ordered.

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT, GRAFFEO and READ concur.

Order reversed, etc.

N.Y.,2004.

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