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**Gallagher Sharp Shop Talk: Workers' Compensation**

**Question: Are communications between defense counsel and a private surveillance firm discoverable in a suit for invasion of privacy?**

Many Ohio employers use surveillance as a way to uncover malingering or fraud in workers' compensation cases. This surveillance is often arranged by defense counsel, with the belief that communications with defense counsel are usually protected by the attorney work-product doctrine and/or attorney-client privilege. The Eighth District Court of Appeals was recently presented with an invasion of privacy case which brought into question the application of those privileges.

In *Sutton v. Stevens Painton Corp*, 2011-Ohio-841, Plaintiff was injured when he fell from an aerial lift at work. He brought suit against the manufacturer and his employer, alleging negligence, product liability, and employer intentional tort. The manufacturer hired defense counsel, who hired a private investigator to conduct surveillance on the plaintiff. This surveillance allegedly included videotaping from a hidden location, going on to plaintiff's property, and soliciting personal information under the guise of a business transaction. After defense counsel received the surveillance materials from the investigator, it produced the materials to the plaintiff. Plaintiff settled the personal injury claims, then amended the complaint to assert claims of invasion of privacy and intentional infliction of emotional distress against the manufacturer's defense counsel, and the investigator. In discovery, Plaintiff sought all communications between the law firm and the investigators regarding the investigation and surveillance, some of which involved the employer. Defense counsel withheld several documents, claiming they were privileged and/or work product. The trial court conducted an *in camera* review, and found some of the documents discoverable with redactions or discoverable in full, prompting an appeal by defense counsel.

The Eighth District quickly determined that the communications between defense counsel and its client were clearly privileged, and therefore not discoverable. The court rejected arguments that the "crime-fraud" exception to the attorney-client privilege applied, as the surveillance had already occurred and the exception would not apply to past misconduct. However, when reviewing the communications between defense counsel and the surveillance firm, the court found the documents were made "in anticipation of litigation," and therefore subject to the much weaker "attorney work-product doctrine." The court determined that the "good cause" exception applied to at least some of the material because the material sought was directly related to the plaintiffs' claims and there was no other way for the plaintiff to obtain the information. The information was central to whether the alleged torts were even committed, and without the disclosure, the plaintiff would be unlikely to establish his claim. Therefore, some of the information was deemed discoverable.

This case demonstrates that the "attorney work-product doctrine" is different than attorney-client privilege, and material that would normally be protected can be disclosed if "good cause" requires. When dealing with surveillance firms, employers should err on the side of caution and

permit the defense firm to take the lead. If you have any specific questions, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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