



Jul 06, 2023

Categories:

[E-Discovery: Legal
Decisions and Court
Rules](#)

A Dangerous Game of Hide the Ball: District Court Grants Sanctions and Reopens Discovery for Failure to Disclose Photographs and Videos of Accident Scene

A recent decision from the District of New Jersey reminded attorneys and litigants of the importance of complying with discovery obligations under [Federal Rule of Civil Procedure 26](#). Indeed, the court imposed sanctions, just short of dismissal, on the plaintiff and his counsel for failure to produce nearly 100 photographs and videos of the accident scene at the center of the litigation.

In [Reilly v. The Home Depot U.S.A., Inc.](#), a product liability action, the defendants sought dismissal of the complaint as a discovery sanction for the plaintiff's late production of 81 photos and three videos that the plaintiff's counsel took in July 2020 of the house where the plaintiff fell and the ladder that was the subject of the lawsuit. Throughout discovery, the plaintiff did not produce the photos and videos and he did not include any reference to them in a privilege log. Moreover, the plaintiff implicitly represented in discovery responses that no such additional photos or videos even existed.

The defendants did not learn of the photos and videos until the plaintiff's counsel took the deposition of a fact witness and presented the witness with a photo – one that was not produced in discovery – of the interior of the home where the accident occurred, and the witness testified that the photos presented “showed a ‘completely different’ scene” than when the plaintiff fell years earlier. The defendants asserted that the witness's deposition testimony raised questions and concerns regarding the condition of the room where the accident occurred and how the conditions of the room differed at the time of the accident. Thereafter, the defendants served supplemental discovery requests seeking

further information of the changes to the accident scene. The plaintiff responded by asserting work product claims, but again, did not identify the existence of the 81 photos and three videos or produce a privilege log.

After oral argument on the issue, the court ordered the plaintiff to produce the photos and videos taken by the plaintiff's counsel in July 2020. The court did not make a specific finding regarding the claim of work product, but reasoned that even if the photos and videos were work product, the defendants "had a substantial need for the documents and could not obtain their substantial equivalent by other means without undue hardship." The defendants asserted – and the plaintiff did not dispute – that the 81 photos and three videos showed the interior of the house in a "much different condition" than the photos presented during the depositions of the plaintiff and the fact witness. The photos also showed the actual ladder at issue in the case, not the exemplar ladder that defense counsel had.

On the defendants' motion for sanctions, in which they specifically sought the ultimate sanction of dismissal of the claims, the court first found that the plaintiff's failure to disclose the photo used at the fact witness's deposition constituted a violation of Rule 26(a). The court further explained that even if the plaintiff did not intend to use the photo at the time he served his initial disclosures, he was obligated to supplement the disclosures, pursuant to Rule 26(e), once he intended to use the photo at the deposition. The court also found that the plaintiff violated Rule 26(b)(5) – that a party "describe the nature" of withheld materials "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim" – by failing to disclose that he withheld 81 photos and three videos as work product. Likewise, the court found that the plaintiff failed to comply with [Rule 34](#), which, since its amendment in December 2015, requires "a party who objects to a document request to 'state whether any responsive materials are being withheld on the basis of that objection.'"

After finding that the plaintiff violated Rules 26 and 34, the court next considered appropriate sanctions. The court concluded that

sanctions were warranted under [Rule 37\(c\)](#) and the court's inherent authority to impose sanctions. The court explained that, "[r]ather than acknowledging the existence of the photographs and videos and providing a privilege log, plaintiff's counsel's conduct resulted in concealment of the existence of the documents. The plaintiff's counsel fails to proffer any justification – let alone substantial justification – for failing to disclose the existence of these documents through a privilege log."

Next, the court considered six factors – those outlined in the Third Circuit's decision in [Poulis v. State Farm Fire & Cas. Co.](#) – to determine whether the sanction of dismissal, as sought by the defendants, was appropriate under the circumstances. In its analysis, the court concluded that the defendants were "prejudiced by the delayed production in that depositions were conducted without the benefit of photographs and videos taken closer in time to the underlying incident." After considering all the *Poulis* factors, and despite specifically concluding that the plaintiff's counsel engaged in bad faith conduct, the court determined that dismissal was not an appropriate sanction, and found that reopening discovery was a "less drastic sanction that [would] alleviate the prejudice to Defendants." Thus, the court allowed the defendants to re-depose the plaintiff and the fact witness "on the issues raised by the 81 photographs and three videos previously withheld on work product grounds."

The court further ordered that, pursuant to Rule 37(c)(1), the plaintiff's counsel was required to pay all of the defendants' reasonable expenses, including reasonable attorneys' fees and costs, incurred in connection with the limited depositions. Notably, the court made clear that the plaintiff himself did not appear to know about the photos or videos since the pictures were taken on counsel's cell phone while the plaintiff was not present during the site inspection. Thus, it was the plaintiff's *counsel's* conduct that caused the defendants' prejudice, and therefore it was plaintiff's counsel that was responsible for paying the reasonable fees and expenses for the reopening of discovery.

Lastly, the court addressed the defendants' request to compel the production of the metadata – such as the date and time –

associated with the photos and videos and the deposition of the plaintiff's counsel. The defendants sought the metadata claiming that it was necessary to understand the order in which the photos and videos were taken and whether and how the accident scene was manipulated. After reviewing the photos and videos, the court found that the metadata associated with the photos and videos constituted relevant discovery and ordered their production. However, the court declined to allow the defendants' request to depose the plaintiff's counsel, but permitted the defendants to serve written discovery requests with respect to the site inspection. The court also allowed another witness, other than the plaintiff's counsel, who was present at the site inspection to be deposed.

The *Reilly* decision exemplifies a party's basic – and important – discovery obligations, which continue throughout the litigation. Indeed, litigants and attorneys must maintain “the spirit of open discovery,” which as the court described, is “a hallmark of the principles set forth in the Federal Rules of Civil Procedure.” Rules 26 and 34 require that relevant discovery, including material over which a party may claim privilege or work product immunity, must be clearly identified and requesting party must specifically be told when such information is being withheld and why. Finally, *Reilly* is yet another opinion that warns counsel that discovery responsibilities are a shared obligation between counsel and their client and they are at risk for sanctions for failures in this regard. It is imperative that parties, and their counsel, identify and/or produce all documents that they intend to use in their case or that are properly called for in discovery. Failure to do so will cost you — in time, money, and even the ability to prevail in your case.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.