

IN THE SUPREME COURT OF OHIO

HENRY SMITH, :  
 : Case No. 2013-2008  
Plaintiff-Appellee, :  
 : On Appeal from the  
-v- : Franklin County Court of Appeals  
 : Case No. 12AP-1027  
YING H. CHEN, D.O., ET AL., :  
 :  
Defendants-Appellants. :

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MEMORANDUM OF APPELLEE HENRY SMITH  
IN OPPOSITION TO JURISDICTION

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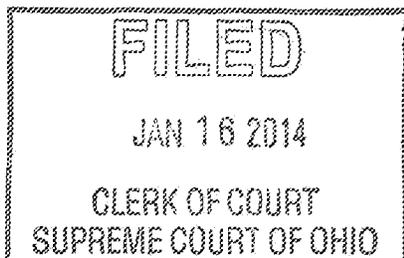


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## I. INTRODUCTION

This case asks whether a personal injury plaintiff is entitled to pretrial discovery of a surveillance video prepared by the defendant for use at trial. The trial court, exercising its discretionary authority to control the discovery process, granted Appellee Henry Smith's motion to compel production of the video, reasoning that a surprise presentation of the video at trial did not serve the interests of justice. Applying Civ.R. 26(B)(3) and related case law to the question, the Tenth District Court of Appeals affirmed the trial court's ruling, holding that Appellee appropriately had supported his motion to compel with valid argument that the video was both directly relevant to issues in the case and that the evidence could not be obtained elsewhere. Thus, the appellate court found the video was exempt from the attorney work-product privilege because Appellee had shown good cause for obtaining discovery, and therefore must be produced.

Although Ohio precedent on this question is virtually non-existent, both the trial court and the appellate court were persuaded by other jurisdictional authority indicating that such a video, even if prepared for impeachment purposes, is discoverable substantive evidence, not subject to privilege, and is properly provided to the plaintiff prior to trial. Therefore, the court of appeals correctly affirmed the trial court's decision to grant the motion to compel and to require Appellant to produce the video before trial.

Appellant now asks this Court to take jurisdiction of this case, and to rule that such a surveillance video should be subject to an absolute privilege, regardless of the existence of factors that exempt it from the work product privilege, and despite compelling argument to the contrary.

**II. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST, AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.**

Appellee contends that the Court of Appeals decision should be left undisturbed, and that it is not necessary for this Court to review the ruling. The clear weight of authority on this issue balances in Appellee's favor.

**III. STATEMENT OF THE CASE AND FACTS**

Appellee Henry Smith brought this medical negligence action against Defendant Ying H. Chen, D.O., and his practice group, OrthoNeuro, after spinal fusion surgery to repair Smith's lumbar stenosis resulted in a cervical spinal cord injury due to his positioning during the back surgery. This injury has resulted in an ataxic gait, loss of some fine motor skills in his hands, and loss of strength in his hip flexor muscles. Appellee alleges that his cervical spine condition should have been resolved surgically prior to the surgery on his back, because it was the positioning of his neck during the back surgery that caused him to suffer the injuries of which he now complains. In fact, his neck damage was so severe that he woke from surgery paralyzed. He has made a remarkable recovery since that time, but he still has some deficits.

On March 12, 2012, Appellants filed their Final Pretrial Statement in which they identified Jeanne Knable and Jeremy A. Grimes as witnesses who would "testify as to the activity of Henry Smith." On June 18, 2012, Plaintiff served upon Dr. Chen and OrthoNeuro a request for production of documents seeking "complete copies of any and all investigative reports, videotapes, audiotapes, witness statements, etc., that were prepared by Boerger Investigative Service, Jeanne Knable or Jeremy Grimes, concerning Henry Smith's activities or disabilities intended for use in the above matter." Despite repeated requests that this discovery be answered, Appellants did not respond until October 29, 2012, at which time defense counsel

raised the objection that this evidence was privileged as attorney work product, and is material to be used to impeach Smith during cross-examination at trial.

On November 8, 2012, Smith filed a motion to compel the production of this video surveillance evidence, alternately asking for an order in limine preventing the defense from introducing the video at trial if it was not produced. Dr. Chen and OrthoNeuro responded by arguing that the video was protected as attorney work product, and so was not discoverable. They further asserted that the video was evidence to be used for impeachment only and so did not need to be produced pursuant to local rule.

On December 5, 2012, a few days before trial, the trial court granted Smith's Motion to Compel, resting its decision upon a finding that Smith properly requested the video through a discovery request, and that justice required that Appellee be given the opportunity to view the video prior to trial so as to avoid surprise. The court also emphasized that, because Smith's deposition already had occurred, his sworn testimony was frozen in time, thus preserving any impeachment value of the video regardless of whether Smith were permitted to view it before trial. In fact, Mr. Smith has been deposed twice.

Dr. Chen and OrthoNeuro then appealed to the Tenth District, which, on November 7, 2013, affirmed the trial court's ruling. After first ruling that the trial court's conclusions relating to Franklin County Common Pleas Loc.R. 41.04 did not constitute a final appealable order, the appellate court went on to hold that Appellee had sufficiently demonstrated that the video qualified as an exception to the attorney work-product privilege. This was because the video constitutes substantive evidence on damages, because Appellee's interest in obtaining and reviewing the video prior to trial outweighed Appellant's interest in concealing it, because the video was in the sole control of the Appellants and so could not be obtained other than through

discovery, and because allowing discovery of the video after Appellee had been deposed adequately protects the interests of both sides. Thus, the appellate court found Appellee had established good cause for discovery of the video and so the trial court did not abuse its discretion in granting the motion to compel.

Appellant now seeks review by this Court for the alleged reason that the Tenth District acted without prior guidance from this Court or other Ohio precedent, that its holding will now render all video surveillance materials automatically discoverable before trial, and that the appellate ruling constitutes a “judicial elimination of a party’s privileged work-product protection.”

However, the Tenth District was well-aware of the potential impact of its decision, and thoughtfully considered the arguments of both sides, as well as persuasive precedent from other jurisdictions, before concluding that because justice precludes “trial by ambush” tactics, surveillance video evidence, under these precise conditions, is not privileged. The relevant law, under these specific conditions, fully supports the Tenth District’s decision, and so Appellee urges this Court to deny the motion for jurisdiction and allow the appellate court ruling to stand.

#### **IV. LAW AND ARGUMENT**

The trial court did not err in granting Appellee’s motion to compel the production of Appellants’ surveillance video recording because the video is discoverable pursuant to Civ.R. 26, because Appellee properly requested the video during discovery, because no claim of privilege applies to prevent its production, because even if the video is deemed attorney work product this circumstance merits an exception to that privilege, and because any impeachment value to the video is preserved even if Appellee is permitted to view the video prior to trial.

## APPELLEE'S PROPOSITION OF LAW:

The Tenth District Correctly Held that a Defendant's Surveillance Video Evidence, Allegedly Prepared for Impeachment Purposes, is Discoverable where the Plaintiff Demonstrates that the Substance of the Video is Central to Issues at Stake in the Litigation, and that the Evidence Cannot Be Obtained in Another Way.

### **A. Standard of Review**

#### *1. Standard of Review for Trial Court Rulings Concerning Discovery.*

In considering a trial court's disposition of discovery issues, reviewing courts must affirm absent an abuse of discretion, which is defined as a decision that is unreasonable, arbitrary, or unconscionable. *Harpster v. Advanced Elastomer Systems, L.P.*, 9<sup>th</sup> Dist. No. 22684, 2005-Ohio-6919, at paragraph 6, citing *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329, 692 N.E.2d 198 (1998); and *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App.3d 28, 36, 2003-Ohio-2750 (8th Dist.). Further, the admission or exclusion of relevant evidence is entrusted to the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987).

#### *2. Standard of Review for Trial Court Rulings Concerning Assertions of Privilege.*

Although discovery orders involving questions of privilege are reviewed de novo, it is only where the asserted privilege involves interpretations of law, rather than fact, that de novo review is appropriate. *MA Equipment Leasing I, LLC v. Tilton*, 10<sup>th</sup> Dist. Nos. 12AP-564, 12AP-586, 2012-Ohio-4668, at paragraph 17. In addressing questions of fact, the reviewing court must apply the abuse of discretion standard. *Id.* at paragraph 18.

### **B. Appellee Properly Requested the Surveillance Video as Discoverable Evidence Pursuant to Civ.R. 26(B).**

Civ.R. 26(B) allows parties to obtain discovery regarding any unprivileged matter that is relevant to the subject of the action. If the party seeking discovery shows good cause for

obtaining evidence that is directly at issue in the case, that it cannot be obtained elsewhere, and that the need is compelling, the reviewing court properly permits discovery of what otherwise would be deemed privileged work product. *Sutton v. Stevens Painton Corp.*, 193 Ohio App.3d 68, 2011-Ohio-841, 951 N.E.2d 91 (8<sup>th</sup> Dist.), at paragraphs 26, 29, citing *Squire, Sanders & Dempsey, LLP v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533.

In this case, there is no question that the surveillance video is relevant to the subject matter of this action, because the video contains images of Smith that Appellants allege refute his claims of limited physical disability. Because the video is probative of Smith's physical condition, it may constitute relevant, admissible, substantive evidence that, barring applicable privilege, is discoverable under Civ.R. 26(B). *See, e.g., Shields v. Burlington Northern & Santa Fe Rwy. Co.*, 353 Ill. App.3d 506, 509, 818 N.E.2d 851 (Ill. Ct. App. 2004), citing *Wegner v. Cliff Viessman, Inc.*, 153 F.R.D. 154, 159 (N.D. Iowa 1994)(surveillance information is probative of a critical issue in a personal injury case—the physical condition of the plaintiff); *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5<sup>th</sup> Cir. 1993)(the severity of plaintiff's pain and the extent to which plaintiff has lost the enjoyment of normal activity are among the key issues a jury must decide in calculating plaintiff's damages); *Cabral v. Arruda*, 556 A.2d 47, 50 (S.Ct. of Rhode Island 1989)(the existence and extent of injury is the very essence of plaintiff's claim; surveillance tape places at issue whether and to what extent the plaintiff was injured).

Because surveillance video intended to refute a plaintiff's claim of injury goes to the heart of the personal injury action, courts repeatedly have held such evidence to be substantive, and not subject to a claim of privilege. *Shields, supra*, citing Annotation, W. Wakefield,

*Photographs of Civil Litigant Realized by Opponent's Surveillance As Subject to Pretrial Discovery*, 19 A.L.R. 4<sup>th</sup> 1236 (1983). In fact, the trial court in this case recognized as much when it stated, on page 4 of the decision granting the motion to compel, that "the video surveillance may affect the substantive issues of damages and may go to the heart of whether Plaintiff is injured as claimed." Appellee has pre-existing injury as a result of a bad back, back surgery, and cervical surgery to fuse his neck. These injuries are not the subject of the lawsuit. Dr. Carole Miller, Appellee's expert, separated these pre-existing injuries from the cervical spinal cord injury which includes his ataxic gait, hand motor skill loss, and hip strength loss. The video may or may not show injuries relevant to this lawsuit. Counsel has indicated that a portion of the tape shows Henry Smith putting groceries in the back seat of a car. That activity is not related to the type of injury claimed in this case.

Appellants essentially argue the only evidence Smith is entitled to discover is evidence relating to what he must prove at trial, namely medical negligence and damages. They further claim that because the video did not address the recognized standard of medical care and because Smith can establish his damages through his own testimony, Smith cannot show the good cause that would allow him to overcome the work product privilege. This is an overly simplistic, even confused, interpretation of the work product privilege. As discussed in the above-cited cases, the central issue in any personal injury case is the nature and degree of injury suffered by the plaintiff. The surveillance video obviously is intended to address that issue or it would not possess any impeachment value to Appellants or have any relevance to this litigation. Moreover, at least one court has determined that the nondisclosure itself constitutes an undue hardship sufficient to overcome a claim of work product privilege and renders the video surveillance evidence discoverable. *Cabral, supra*, at 50.

**C. Even if the Video is Subject to Attorney Work Product Privilege, Appellee's Showing of Good Cause Under These Circumstances Merits an Exception to that Privilege.**

Other jurisdictions have recognized the need for a defendant to notify the court and parties well in advance of trial whether the defendant intends to introduce surveillance evidence, because doing so will prevent the plaintiff from being “ambushed on the eve of trial.” *Williams v. Picker International, Inc.*, E.D. Pa. Case No. 99-3035, 1999 U.S. Dist. LEXIS 19107 (Dec. 2, 1999), citing *Gibson v. National Railroad Passenger Corp.*, 170 F.R.D. 408, 409-410 (E.D. Pa. 1997). The majority view recognizes a trend toward more open discovery, acknowledging that the purpose of pre-trial discovery—to discover and obtain facts relevant to the litigation—is thwarted by a policy of secrecy and concealment that would allow a defendant to withhold production of a surveillance video. *See, e.g., Wolford v. Joellen Smith Psychiatric Hosp.*, 693 So.2d 1164, 1166 (S.Ct. La. 1997). In fact, *Ranft v. Lyons*, 163 Wis. 2d 282, 471 N.W.2d 254 (Ct. App. Wis. 1991), relied upon by Appellants to support the notion that the work product privilege may not be overcome by assertions that the video images may have been manipulated, does not represent the majority view, which, instead, holds that modern discovery rules require the production of surveillance videos in advance of trial. Habert, “*Day in the Life*” and *Surveillance Videos: Discovery of Videotaped Evidence in Personal Injury Suits*, 97 Dick. L.Rev. 305, 313, 315.

Both lower courts agreed that Smith would be ambushed by having to view the video for the first time at the same time the jury sees it. Further, Smith would have no opportunity to determine in advance if the video images had somehow been manipulated or if the person in the video is actually Smith. Video imaging has been recognized as “a medium that is especially susceptible to manipulation and distortion,” and the images portrayed may not be reliable and

may be taken out of context. *Wolford, supra*. Trial should not become a “guessing game” in which the goal is to surprise the other party. *Samples v. Mitchell*, 393 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. S.C. 1997).

In this case, due to the type of injury sustained, it would not be obvious what is or is not related to the “cervical spinal cord compression.” Expert testimony would need to establish exactly what types of activities are affected or impeded by Henry Smith’s deficits. Because expert testimony would be necessary, the production of such video, if it will be used at trial, would need to be commented on by Appellee’s expert witnesses at trial.

It also must be recognized that a surveillance video only reveals a partial picture of the plaintiff’s condition—it may be edited to exaggerate the frequency with which a plaintiff is able to perform certain tasks, or may not demonstrate that tasks are being performed without pain or to the degree the plaintiff formerly was able to perform them. *See, e.g., Chaisson, supra*, at pages 517-518 (tape taken at a distance with no sound component, while it showed plaintiff undertaking daily activities, did not prove she did those activities without pain). As this Court has observed in concluding that a finding of permanent total disability does not require a workers’ compensation recipient to remain virtually housebound:

“[g]roceries must be purchased and meals cooked. Errands must be run and appointments kept. The yard must be tended and the dog walked. Where children are involved, there may be significant chauffeur time. For some, family and friends shoulder much of the burden. Others, on the other hand, lack such support, leaving the onus of these chores on the [\*\*\*] claimant.” *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, 817 N.E.2d 880, at paragraph 20.

The mere fact that an injured person can perform certain tasks does not automatically negate the nature or extent of the injury, or the claimed pain or disability. In this case, in particular, the

injuries relevant to the negligence would be difficult for a jury to understand from watching a video without assistance from an expert.

Significantly, Appellee has alleged, and his experts have testified, that his damages arise out of specific physical limitations that include gait ataxia, and that not all physical activities are impacted by his injuries or comprise the basis for his claim of disability. The surveillance video may not relate to his actual claimed injury. A surprise presentation of such a video does not allow counsel to prepare further direct questioning that might mitigate the prejudicial effects of the video, including questioning expert witnesses as to the relationship between the activities recorded on the video and the activities that Henry Smith asserts are no longer possible for him. Appellants will argue that surprise is precisely the point of withholding such evidence, but such an ambush does not comport with the letter and spirit of the civil rules or satisfy the interests of justice.

**D. Any Impeachment or Substantive Value to the Video is Preserved Even if Appellee is Permitted to View the Video Prior to Trial.**

Appellants claim that because this video is to be used for impeachment, they are not required to identify it. Nevertheless, their pretrial statement identified two witnesses whose purpose in testifying would be to present and discuss the video surveillance. Based upon this identification, Smith properly sought discovery of the video. The court thus concluded that this wasn't a matter of applying the local rule but rather a discovery issue. On that basis, the trial court distinguished the case heavily relied upon by Appellants, *Thrope v. Rozen*, 1<sup>st</sup> Dist. No. C-960143, 1997 Ohio App. LEXIS 4447, which held that Hamilton County Loc.R. 15(B)(2)(e) did not require that defendant to provide a surveillance tape that had been prepared for impeachment purposes.

Against the argument that only surprise will protect the judicial process from fraud, courts have concluded that a preproduction deposition protects the defendant from an untruthful plaintiff, and is said to “freeze” the plaintiff’s testimony, preventing him from changing his story. See, e.g., Cabral, *supra* at page 50; *Wightman v. Reassure America Life Ins. Co.*, S.D. Ohio, W.D. Case No. 3:05-cv-204, 2006 WL 3483962 (Nov. 30, 2006), at pages 3-4. As the trial court in this case observed at page 4, because Smith was deposed, he is “locked into the testimony he swore to in his deposition and the alleged impeachment value” of the video is still present even if the video is provided to Smith before trial. The Court of Appeals agreed, stating that “if plaintiff’s trial testimony differs from his deposition testimony, taken before plaintiff had a chance to view the video, defendants will be able to impeach plaintiff with his deposition testimony. If plaintiff’s trial and deposition testimony are the same, then the video will either impeach plaintiff’s testimony, or it will not, because plaintiff’s testimony will align with the images on the video.” Decision at paragraph 28. The appellate court was persuaded by federal precedent recognizing that producing the video after deposition strikes the appropriate balance between the competing interests, and satisfies the need to avoid surprise at trial. *Id.* at paragraph 29. Because this conclusion was well-supported both by reason and by persuasive precedent, Appellant is hard put to show how either the court of appeals or the trial court went astray in reaching it.

**E. Appellants’ Cited Authority is Inapposite to the Facts and Circumstances Present in this Case, is Not Persuasive, and Appropriately was Rejected by the Court of Appeals.**

Appellants primarily rely upon *Thrope v. Rozen*, *supra*, a case which held that a Hamilton County Common Pleas Court Local Rule could not be read to require the disclosure of exhibits used solely for impeachment. The *Thrope* court further noted that the plaintiffs, in fact, were

given the edited and unedited versions of the subject tape the day before trial. As an older case from another appellate district applying a local rule in a completely different factual scenario, *Thrope* is neither applicable nor persuasive. The trial court found as much at page 3 of its decision when it observed that *Thrope* never addressed whether a surveillance video is discoverable through a discovery request.

Appellants' arguments about their need to impeach Smith's credibility were properly acknowledged and rejected by both lower courts on the basis that even if Smith obtained the video before trial, its impeachment value remains because "Plaintiff is locked into the testimony he swore to in his deposition." Trial Court Decision at page 4. Once again, considerations of surprise and unfairness to Appellee outweighed any prejudice claimed by Appellants.

**F. The Tenth District Decision Narrowly Held that Under These Circumstances, Appellee Demonstrated Good Cause for Discovery of the Surveillance Video, thus Meriting an Exception to the Limited Privilege of Attorney Work Product.**

Appellants allege that the Tenth District gutted the work-product privilege, that no defendant now will be able to use video surveillance evidence for impeachment, and that the decision essentially invites plaintiffs to pursue fraudulent damage claims.

A close reading of the Tenth District decision, however, does not support this extreme view of the court's intent, or the actual effect of its ruling. Instead, the court carefully considered the competing interests of both sides, and narrowly limited its holding to a precise situation in which:

- The plaintiff specifically sought the video during the pre-trial discovery phase of the litigation (Paragraphs 4, 5);
- The defendant revealed the intention of using the video for impeachment purposes, but it also has an important substantive aspect (Paragraph 25);

- The defendant refused to allow discovery of the video and the plaintiff had no other way of knowing what images were contained on the video, and no other way of obtaining the discovery (Paragraphs 26, 27, 30);
- The current state of technology makes it easy for video images to be manipulated, to the extreme detriment of the plaintiff (Paragraphs 26, 27);
- The decision discusses only video surveillance evidence, and not all evidence that could be used to impeach the plaintiff (Passim);
- The video surveillance evidence directly relates to the substantive and central issue of the degree of injury and resultant damages in the case (Paragraphs 24, 25);
- The plaintiff had been deposed (in this case, twice), thus limiting his ability to alter his testimony once he learns the content of the video (Paragraphs 28, 29);
- Justice and the spirit of the discovery rules militate in favor of open discovery and the avoidance of surprise (Paragraph 29).

#### IV. CONCLUSION

For these reasons, Appellee Henry Smith respectfully asks this Court to deny Appellants' jurisdictional motion, and to allow the judgment of the Tenth District Court of Appeals affirming the Franklin County Common Pleas Court to stand. The only proper conclusion compels production of this surveillance video under these circumstances, there is no reason for this Court to accept jurisdiction, there is no basis upon which this Court may conclude the Tenth District ruled incorrectly, and there is no need for this Court to provide guidance to the Ohio judiciary on this issue as there has been no showing that judges of this state are not able to review the circumstances and engage in the appropriate analysis in order to balance the needs of both sides.

Respectfully submitted,



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