

No. 2013-2008

In the Supreme Court of Ohio

**APPEAL FROM THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO
CASE No. 12AP-001027**

HENRY SMITH,

Plaintiff-Appellee,

v.

YING H. CHEN, D.O., et al.,

Defendants-Appellants.

**MERIT BRIEF OF DEFENDANTS-APPELLANTS
YING H. CHEN, D.O. AND ORTHONEURO**

DAVID I. SHROYER (0024099)
dshroyer@csalawfirm.com
Colley Shroyer & Abraham, LPA
536 S. High Street
Columbus, OH 43215
Phone: 614-228-6453
Fax: 614-228-7122

*Counsel for Plaintiff-Appellee,
Henry Smith*

DOUGLAS G. LEAK (0045554)
(COUNSEL OF RECORD)
dleak@ralaw.com
Roetzel & Andress, LPA
One Cleveland Center, Ninth Floor
1375 East Ninth Street
Cleveland, OH 44114
Phone: (216) 623-0150/Fax: (216) 623-0134

FREDERICK A. SEWARDS (0046647)
fsewards@hswlawyers.com
Hammond Swards & Williams
556 E. Town Street
Columbus, OH 43215
Phone: 614-228-6061/Fax: 614-228-5883

*Counsel for Defendants-Appellants,
Ying H. Chen, D.O. and OrthoNeuro*

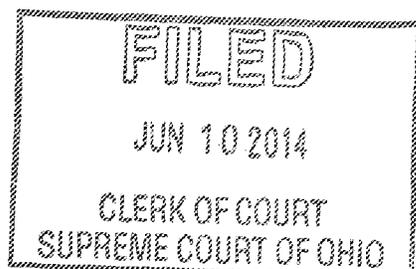


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I. STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

The Tenth District Court of Appeals' holding that a surveillance video prepared for litigation must be produced during the course of discovery creates a real danger that parties will not be able to adequately prepare their cases for trial if their work-product materials are to be ultimately produced to the opposing party. Pursuant to the Tenth District's Decision, it is now conceivable that in all types of cases, video surveillance materials are automatically discoverable before trial. For example, even in workers' compensation cases where the credibility of a recipient of benefits is at issue, surveillance videos used to investigate fraud would have to be produced to the recipient before the materials can be used to establish a fraudulent claim. The ramifications of the Tenth District's Decision are far reaching beyond this case and will affect all types of cases – civil, administrative and criminal.

In Ohio, the work-product doctrine is paramount, but the Tenth District's Decision is nothing more than a judicial elimination of a party's privileged work-product protection. The Tenth District's evisceration of Ohio's attorney work-product doctrine puts litigants in an impossible position. On the one hand, the Tenth District recognized that the preparation for trial demands that an attorney work with a certain degree of privacy, free from the unnecessary intrusion by opposing parties. On the other hand, the Tenth District has now held that surveillance videos prepared solely in anticipation of litigation for impeachment purposes at trial is not protected by the attorney work-product privilege. This Court should ensure that trial attorney work-product is properly protected. The error in the Tenth District's Decision violates the fundamental principles of the attorney work-product doctrine and, consequently, litigants' materials and information pertaining to impeachment evidence are no longer protected. There

can be no question that the Tenth District's Decision constitutes a legal divergence from Ohio's long and well-established attorney work-product doctrine. Now with the real danger that their impeachment evidence, like surveillance videos, will be disseminated before trial, litigants will be discouraged from fully and adequately preparing their cases for trial. If the Tenth District's Decision is allowed to stand, the impeachment value of surveillance videos will be prejudicially diminished, if not completely lost, through the production of such impeachment evidence. Undoubtedly, if a party is given a surveillance video before trial, that party will be able to unfairly prepare prior to trial to lessen the impact of such impeachment evidence.

B. PROCEDURAL HISTORY¹

Plaintiff-Appellee Henry Smith filed this medical malpractice action on December 10, 2010 against Defendants-Appellants Ying H. Chen, D.O. and his medical group OrthoNeuro. (Index No. 4)² Plaintiff alleged that Dr. Chen negligently performed a neurological spine surgery on January 15, 2007. Plaintiff further alleged that as a result of the surgery, he suffered from weakness and pain in his neck which required additional surgery. Plaintiff now claims that he suffers from progressing pain, discomfort and weakness in his neck and back.

During the course of discovery, on June 18, 2012, Plaintiff served Defendants a Request for Production of Documents requesting “complete copies of any and all investigative reports, videotapes, audiotapes, witness statements, etc. that were prepared by Boerger Investigative Services, Jean Knable or Jeremy Grimes, concerning Henry Smith’s activities or disabilities intended for use in the above matter.” (*Id.*, No. 70) On October 29, 2012, Defendants formally objected to Plaintiff’s Request for Production on the basis that the requested materials

¹ The underlying facts of the events of the alleged medical malpractice are not pertinent to the procedural issues that are the subject of this appeal.

² Index number is from the Common Pleas Court Index filed with this Court.

constituted privileged attorney work-product which Defendants intended to use solely as impeachment evidence.

On November 8, 2012, Plaintiff filed a Motion to Compel the production of Defendants' surveillance video materials. (*Id.*, No. 72) On November 12, 2012, Defendants filed their Memorandum Contra Plaintiff's Motion to Compel. (*Id.*, No. 73) Defendants argued that since the surveillance video materials were explicitly prepared in anticipation of trial, they were privileged and protected by the attorney work-product doctrine. Defendants further argued that pursuant to Loc. R. 41.04, they were not required to produce impeachment exhibits.³

On December 5, 2012, the Trial Court issued its Decision and Entry granting Plaintiff's Motion to Compel. (*Id.*, No. 89) In its Decision and Entry, the Trial Court erroneously applied a balancing test in favor of Plaintiff at the expense of Ohio's attorney work-product doctrine as set forth in Civ. R. 26(B)(3) – "The surprise and unfairness to Plaintiff outweighs the considerations of attorney work-product privilege offered by Defendants." (Trial Court Decision and Entry at 4).

Since the Trial Court ordered the production of privileged attorney work-product materials, on December 6, 2012, Defendant pursued an interlocutory appeal to the Tenth District. (*Id.*, No. 90) Upon appeal, Defendants argued that the Trial Court, as a matter of law, erred in granting Plaintiff's Motion to Compel the discovery of their surveillance video since it constituted privileged and protected attorney work-product. On November 7, 2013, the Tenth District erroneously affirmed the Trial Court's Decision and Entry ordering the production of Defendants' privileged surveillance video. (Appx. at 4-16).

³ The Tenth District held that the issues pertaining to Loc. R. 41.04 were not properly before the Court since they did not involve privileged issues (Appx at 11).

With respect to the Tenth District's Decision, it is worth noting at the outset that the Tenth District acknowledged that this case was one of first impression with respect to the production of video surveillance materials during the course of discovery where the attorney work-product is asserted:

... We note that while our independent research does not reveal an Ohio case which has directly considered the issue before this court, regarding discovery of a surveillance video prepared by a defendant in anticipation of litigation in a personal injury action, our research reveals several federal courts which have considered the issue ...

(Appx at 12)(Emphasis Added).

Not only did the Tenth District recognize that its Decision was one of first impression in Ohio, the Tenth District has effectively provided for the automatic production of video surveillance materials during the course of discovery, even though such materials constitute privileged attorney work-product prepared solely for trial impeachment purposes. (Appx 11-14). The Tenth District set forth an unfounded statement of law and created a conflict with respect to the protections that are guaranteed to parties pursuant to Ohio's attorney work-product doctrine in Civ. R. 26(B)(3). The Tenth District effectively abrogated Ohio's attorney work-product doctrine.

This Court should accept jurisdiction over this matter in order to address the Tenth District's abrogation of Ohio's attorney work-product doctrine.

II. LAW AND ARGUMENT

PROPOSITION OF LAW: The Tenth District's Decision Is One Of First Impression In That It Has Allowed During The Course of Discovery For The Production Of Surveillance Videotapes To Be Used For Impeachment Purposes In Direct Violation Of Ohio's Work-Product Doctrine As Set Forth In Civ. R. 26(B)(3)

The Tenth District erroneously affirmed the Trial Court's ordering of the production of the video surveillance where it clearly constituted privileged and protected attorney work-product and Plaintiff could not show good cause for the production of the contents of the video. The Tenth District adopted the Trial Court's legally flawed use of a balancing test to determine whether the video should be produced when it held "The surprise and unfairness to Plaintiff outweighs the consideration of attorney work-product privilege offered by Defendants." (Trial Court Decision & Entry at 4). This was not the correct standard that Plaintiff had to meet to overcome the attorney work-product privilege and, therefore, the Tenth District has set forth an improper statement of law.

Civil Rule 26(B)(1) permits parties to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." This Court has stated that a discovery issue that involves the assertion of an alleged privilege is reviewed de novo. See *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212; 2010-Ohio-6275, N.E.2d 514, ¶13; *Roe v. Planned Parenthood S.W. Ohio Region*, 122 Ohio St.3d 399; 2009-Ohio-2973 912 N.E.2d 61, ¶29. This Court has also held that the determination of whether materials are protected by the work-product doctrine and the determination of "good cause" under Civ. R. 26(B)(3) are "discretionary determinations to be made by the trial court." *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo*, 6 Ohio St.3d 270, 271, 452 N.E. 2d 1314 (1983). It is an abuse of discretion if the court's ruling is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1149 (1983).

Civil Rule 26(B) provides in relevant part:

(3) Trial preparation: materials. Subject to the provisions of subdivision (B)(5) of this rule, a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another

party or by or for that other party's representative (including his attorney, consultant surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor....

(6) Claims of Privilege or Protection of Trial-Preparation Materials.

(a) Information Withheld. When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

The purpose of the work-product rule is “to prevent an attorney from taking undue advantage of his adversary’s industry or efforts.” *Jackson v. Greger*, 110 Ohio St.3d 488, 491, 2006-Ohio-4968, 854 N.E.2d 487. Civil Rule 26(B)(3) places the “burden on the party seeking discovery to demonstrate good cause for the sought after materials.” *Id.* “A showing of good cause under Civ. R. 26(B)(3) requires demonstration of a need for the materials – i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable.” *Id.* “[A]ttorney work-product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered upon a showing of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere.” *Squire, Sanders & Dempsey, L.L.P. v. Givavdan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶60.

Plaintiff’s argument for good cause for the production of the surveillance video was that Plaintiff had no knowledge of what might be on the video and that he had not had an opportunity to ascertain the quality or accuracy of what the video portrays. Plaintiff’s argument did not

satisfy the requirements of good cause for the production of this video and, therefore, the Tenth District has set for a legally flawed precedent with respect to the production of surveillance video materials protected by the attorney work-product doctrine.

Plaintiff's claim against Defendants is for medical malpractice. "In order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct result of such doing or failure to do some one or more of such particular things." *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131, 346 N.E.2d 673 (1976). Proof of the recognized standards must be established through expert testimony. *Id.* at 131-132. In effect, proof of malpractice requires first, evidence as to the recognized standard of the medical community in the particular kind of case and, second, a showing that the physician negligently departed from the standard in his treatment of the plaintiff. *Id.* at 131.

Before the Trial Court could order the production of Defendants' surveillance video, it was required to establish that the information contained on the video was directly at issue in this lawsuit and the need for the information was compelling for Plaintiff to establish his claims of medical malpractice. The surveillance video provides no evidence as to the recognized standard of medical care required by Defendants in this case, nor does it provide any evidence concerning whether Defendants negligently departed from the standard of care in the treatment of the Plaintiff. Therefore, Plaintiff was unable to show good cause for the production of Defendants'

surveillance videotape and, thus, the Tenth District incorrectly affirmed the ordering of its production. The information on the video was not central to or relevant to whether the alleged medical malpractice was committed. Furthermore, the video was not necessary or compelling for Plaintiff to establish his damages. Plaintiff can still establish his damages through his own testimony, medical records, the testimony of his experts and other witnesses.

The present case materially differs from those cases that have ordered the production of surveillance videos over a work-product objection. For example, in *Sutton v. Steven Painton Corporation*, 193 Ohio App. 3d 68, 2011-Ohio-841, 951 N.E.2d 91, the court ordered production of a surveillance video where the plaintiff's claims of invasion of privacy and intentional infliction of emotional distress against the defendant were directly related to defendant's involvement in the investigation and surveillance of the plaintiff. The court found that the information sought, that being the video, was directly at issue in the lawsuit and was necessary for the plaintiff to establish his claims of invasion of privacy and intentional infliction of emotional distress. Such is not the case here.

The Tenth District's concern in this case that if the video was not produced that Plaintiff would have no opportunity to determine if the video had been manipulated or if the person on the video was unwarranted. Such concern does not form a basis as an exception to the work-product privilege. In *Ranft v. Lyons* (1991), 163 Wis.2d 282, 471 N.W.2d 254, the court addressed this issue and ruled this was not a sufficient reason to compel pretrial disclosure of the privileged work-product surveillance video. The *Ranft* court noted that a "lawyer's strategic decision to invest a client's resources on photographic or video surveillance is protected work-product." *Id.* at 301. The court found that "[D]isclosure of the fact of surveillance and a description of the material recorded would impinge on the very core of the work-product doctrine." *Id.* at 302.

The court further observed that “as a general proposition that is not intended to reflect on any party or lawyer in this case, concern that surveillance material exists might very well advance, rather than impede, the quest for the truth.” *Id.* at 302. Finally, the court pointed with approval to the trial court’s reasoning that “any surveillance materials would have no ‘probative value’ if Mrs. Ranft ‘testifies in conformity with the facts as they are and answers truthfully in all respects.’” *Id.* at 303. In this case, Plaintiff should have no concern about Defendants’ surveillance video if he simply provides truthful testimony.

The Tenth District also believed, incorrectly, that the impeachment value of the contents of the video would somehow be maintained because the production would occur after Plaintiff’s deposition and his sworn testimony had been “frozen.” This does not recognize the reality of trial as the impeachment value of the video will certainly be diminished, if not totally lost, through its production. Having advance notice of impeachment evidence that will be used on his cross-examination, Plaintiff will be able to prepare accordingly to lessen the impact of this evidence on the trier of fact.

Credibility is dependent upon the willingness of the witness to tell the truth and upon his ability to accurately describe the events recounted. “If the court finds the witness otherwise properly qualified, the witness should be allowed to testify and the defendant given ample opportunity to impeach his or her perceptions and recollections.” *United States v. Roach*, 590 F.2d 181, 186 (5th Cir. 1979). In assessing the credibility of a witness, the trier of fact looks not only to the content of the witness’ testimony on direct examination and his answers to questions asked on cross-examination, the trier of fact also assesses the demeanor of the witness throughout. “A witness’ demeanor on the stand is an element of importance in the solution of the always difficult problem of determining the truthfulness of his testimony. The demeanor of a

witness is always assumed to be in evidence.” *The William J. Riddle*, 102 F.Supp. 884, 887 (S.D.N.Y.), aff’d 200 F.2d 608 (2d Cir. 1952).

Plaintiff’s demeanor on the stand not only during direct examination, but on cross-examination when his testimony is being impeached by the use of the surveillance video, is an important element for the trier of fact when assessing Plaintiff’s credibility. By requiring Defendants to produce the surveillance video over counsel’s work-product objection, when Plaintiff cannot show good cause, would unfairly prejudice Defendants’ ability to defend themselves in this action. Any concerns that Plaintiff would somehow be surprised as to the contents of the surveillance video are without merit. Clearly, a party should know his/her own conduct and activities and, therefore, would not be surprised by the contents of what is depicted on the surveillance video. In effect, a surveillance video is used to impeach a party’s testimony and its use is equivalent to a party giving or making a prior inconsistent statement. A party knows or should know exactly what he/she has done. Production of a surveillance video intended solely for impeachment purposes would allow a party to tailor his/her testimony in order to avoid the truth. Simply put, the production of a surveillance video intended to be used solely for impeachment purposes would forever taint the unfettered and independent recollection of the party shown on the video.

If the Tenth District’s Decision is allowed to stand, surveillance video materials prepared for impeachment purpose will be automatically discoverable. As such, there will no longer exist any impeachment value to the use of surveillance videos.

The Tenth District’s Decision completely defeats the purpose of the attorney work-product doctrine and completely eliminates the proper use of impeachment evidence. The Tenth

District's disregard of Ohio's attorney work-product privilege neither serves a public interest nor protects the rights of parties to adequately prepare their cases for trial.

IV. CONCLUSION

The Tenth District's Decision goes far beyond common sense with respect to Ohio's attorney work-product privilege and the proper use of impeachment evidence. The Tenth District has effectively guaranteed that litigants in all types of cases (civil, administrative and criminal) are automatically entitled to obtain during the course of discovery video surveillance materials that were specifically prepared in anticipation of trial and solely for impeachment purposes. The Tenth District has effectively eliminated a litigant's ability to adequately prepare a case before trial by improperly creating a judicial elimination of Ohio's attorney work-product privilege. Consequently, all Ohio litigants' right to fully prepare their case for trial is no longer paramount in Ohio. Under the Tenth District's Decision, there now exists new legal authority creating a real danger that video surveillance materials will no longer be a means of impeaching opposing parties or witnesses at trial.

This Court should resolve the confusion created by the Tenth District by providing Ohio Courts with the proper guidance needed with respect to Ohio's attorney work-product doctrine, i.e., this Court should reverse the Tenth District's Decision and remand this matter to the Trial Court with instructions to deny Plaintiff's Motion to Compel the Production of Evidence, or, Alternatively, Motion *In Limine* to Exclude Such Evidence From Being Presented At Trial.

Respectfully submitted,

Douglas G. Leak by [Signature] 0081158

Douglas G. Leak (0045554)
(COUNSEL OF RECORD)

Roetzel & Andress, LPA
One Cleveland Center, Ninth Floor
1375 East Ninth Street
Cleveland, OH 44114
Telephone: 216.623.0150
Fax: 216.623.0134

FREDERICK A. SEWARDS (0046647)
fsewards@hswlawyers.com
Hammond Sowards & Williams
556 E. Town Street
Columbus, OH 43215
Phone: 614-228-6061/Fax: 614-228-5883

*Counsel for Defendants-Appellants,
Ying H. Chen, D.O. and OrthoNeuro*

PROOF OF SERVICE

A copy of the foregoing was served on June 10, 2014 pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

David I. Shroyer, Esq.
Colley Shroyer & Abraham, LPA
536 S. High Street
Columbus, OH 43215
dshroyer@csalawfirm.com

*Attorneys for Plaintiff-Appellee
Henry Smith*


Douglas G. Leak
Frederick Sowards

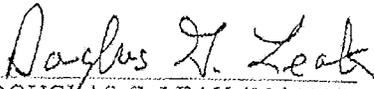
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Notice of Appeal of Defendants-Appellants
Ying H. Chen, D.O. and OrthoNeuro

Defendants-Appellants Ying H. Chen, D.O. and OrthoNeuro hereby give notice of appeal to the Supreme Court of Ohio from the decision rendered by the Franklin County Court of Appeals, Tenth District, entered in Court of Appeals Case No. 12AP-001027 on November 7, 2013.

This case is one of public and great general interest that warrants a review by the Ohio Supreme Court. A Memorandum in Support of Jurisdiction is being filed contemporaneously with this Notice of Appeal.

Respectfully submitted,


DOUGLAS G. LEAK (0045554) *KFO*
dleak@ralaw.com
Roetzel & Andress, LPA
One Cleveland Center, Ninth Floor
1375 East Ninth Street
Cleveland, OH 44114
Telephone: (216) 623-0150
Fax: (216) 623-0134

FREDERICK A. SEWARDS (0046647)
fsewards@hswlawyers.com
Hammond Swards & Williams
556 E. Town Street
Columbus, OH 43215
Telephone: 614-228-6061
Fax: 614-228-5883

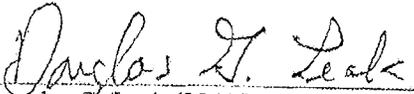
Counsel for Defendants-Appellants

PROOF OF SERVICE

This is to certify that a true copy of the foregoing was mailed by regular U.S. Mail this
20th day of December, 2013 to the following:

DAVID I. SHROYER (0024099)
Colley Shroyer & Abraham, LPA
536 S. High Street
Columbus, OH 43215
Phone: 614-228-6453
Fax: 614-228-7122

Counsel for Plaintiff-Appellee



Douglas G. Leak (0045554) *DL*
Frederick A. Sowards (0046647)

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Henry Smith,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-1027
v.	:	(C.P.C. No. 10CVA-12-18058)
	:	
Ying H. Chen, D.O., et al,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellants.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 7, 2013, appellants' assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Cost shall be assessed against appellants.

CONNOR, J., SADLER and McCORMAC, JJ.

/s/

Judge John A. Connor

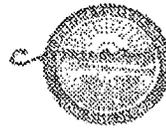
McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the Ohio Constitution, Article IV, Section 6(C).

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Nov 07 2:18 PM-12AP001027

Tenth District Court of Appeals

Date: 11-07-2013
Case Title: HENRY SMITH -VS- DR YING H CHEN DO
Case Number: 12AP001027
Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge John A. Connor

Electronically signed on 2013-Nov-07 page 2 of 2

[Cite as *Smith v. Chen*, 2013-Ohio-4931.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Henry Smith,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-1027 (C.P.C. No. 10CVA-12-18058)
Ying H. Chen, D.O. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on November 7, 2013

Colley Shroyer & Abraham Co., LPA, and *David I. Shroyer*,
for appellee.

Hammond Sowards & Williams, and *Frederick A. Sowards*,
for appellants.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendants-appellants, Ying H. Chen, D.O., and OrthoNeuro (collectively "defendants"), appeal from a judgment of the Franklin County Court of Common Pleas granting the motion to compel discovery of plaintiff-appellee, Henry Smith ("plaintiff"). Because plaintiff established good cause for production of surveillance video, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On December 10, 2010, plaintiff filed a medical malpractice complaint against defendants. Plaintiff alleged that on January 15, 2007, Dr. Chen, a neurological spine surgeon employed by OrthoNeuro, performed surgery on plaintiff's back. Plaintiff claimed that following the surgery he suffered from weakness and pain in his neck and

back, which he believed was the result of "intraoperative spinal coed ischemia caused by the surgery procedure." (Complaint, ¶ 15.) Plaintiff had an additional surgery on June 9, 2007 to relieve his weakness and pain. Plaintiff alleged that he now suffers from cervical spondylosis, constantly experiences progressing pain, discomfort, and weakness in his neck and back, and has entered into chronic pain management and is on chronic disability. Plaintiff asserted that he has incurred permanent medical expenses, "loss of enjoyment of life, inability to do usual functions, lost wages, and a lost earning capacity." (Complaint, ¶ 24.)

{¶ 3} Defendants filed an answer to the complaint, and the parties proceeded with discovery. Plaintiff was deposed on January 6, 2012. On March 12, 2012, defendants filed their final pre-trial statement, identifying Jeanne Knable and Jeremy Grimes as two individuals who would testify for the defense regarding plaintiff's activities.

{¶ 4} On June 18, 2012, plaintiff filed a request for production of documents, requesting copies of " 'any and all investigative reports, videotapes, audiotapes, witness statements, etc., that were prepared by Boerger Investigative Services, Jeanne Knable or Jeremy Grimes, concerning Henry Smith's activities or disabilities intended for use in the above matter.' " (Motion to Compel, 2.) Defendants objected to the request, asserting that any such video surveillance materials were privileged attorney work-product, which defendants intended to use solely as impeachment evidence.

{¶ 5} On November 8, 2012, plaintiff filed a motion to compel the production of the surveillance evidence, or, alternatively, a motion in limine to prevent defendants from introducing the surveillance evidence during trial. Plaintiff noted that he had no knowledge of what might be on the surveillance video and asserted that if the video were not produced he would have "no opportunity to ascertain the quality or accuracy of what the video portrays" or whether "the video images ha[d] somehow been manipulated or if the person in the video [was] even, actually, Plaintiff." (Motion to Compel, 4.)

{¶ 6} Defendants filed their memorandum contra plaintiff's motion to compel on November 12, 2012. Defendants asserted in the motion that, Franklin County Court of Common Pleas Local Rule ("Loc.R.") 41.04 provided that parties need not disclose impeachment exhibits in their pre-trial statement, Loc.R. 41.04 recognized the privileged

nature of impeachment evidence. Defendants further asserted that, as they prepared the video for trial, it was attorney work-product and plaintiff had not established good cause for its production.

{¶ 7} On December 5, 2012, the court issued a decision and entry granting the motion to compel. The court determined that Loc.R. 41.04 had limited applicability, as the rule only pertained to whether a party was required to disclose the existence of certain types of evidence to the opposing party before trial. The court found that plaintiff had a compelling need to view the video prior to trial, in order to ascertain whether defendants had manipulated the video. Because defendants had already taken plaintiff's deposition, the court found that even "if the contents of the video are shown to Plaintiff, the impeachment value claimed by Defendants still stands," as plaintiff's "sworn testimony [was] 'frozen.'" (Decision and Entry, 4.) The court concluded that the "surprise and unfairness to Plaintiff outweigh[ed] the considerations of attorney work product privilege offered by Defendants." (Decision and Entry, 4.) Defendants timely filed an appeal from the court's decision.

II. ASSIGNMENT OF ERROR

{¶ 8} Defendants sole assignment of error asserts as follows:

The trial court erred, as a matter of law, when it granted Plaintiff's Motion to Compel Discovery of Defendants' Surveillance Videotape since its purpose was to be used by Defendants for impeachment purposes only and it constitutes Defendants' counsel's work product.

III. MOTION TO COMPEL PROPERLY GRANTED

{¶ 9} Defendants assert the trial court erred in granting plaintiff's motion to compel, as the surveillance video is privileged attorney work-product and defendants will only use the video as impeachment evidence at trial.

{¶ 10} Before addressing the merits of the case, we note that appellate courts can only "review and affirm, modify, or reverse judgments or final orders." Ohio Constitution, Article IV, Section 3(B)(2). A judgment that leaves issues unresolved and contemplates further action by the court is not a final appealable order. *Briggs v. Mt. Carmel Health Sys.*, 10th Dist. No. 07AP-251, 2007-Ohio-5558, ¶ 7. Thus, discovery orders are generally

interlocutory orders which are not immediately appealable. *Legg v. Hallet*, 10th Dist. No. 07AP-170, 2007-Ohio-6595, ¶ 15.

{¶ 11} While general discovery orders remain interlocutory, "orders requiring the disclosure of privileged information are final and appealable." *Id.* at ¶ 16. R.C. 2505.02(B)(4) specifies that an order granting or denying a provisional remedy is final and subject to review if the order (1) "in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy," and (2) "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." A "provisional remedy" is "a proceeding ancillary to an action, including, but not limited to, a proceeding for * * * discovery of privileged matter." R.C. 2505.02(A)(3). The "work-product doctrine provides a *qualified* privilege protecting the attorney's mental processes in preparation of litigation." (Emphasis sic.) *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, ¶ 55. As the order at issue determined that the surveillance video was attorney work-product subject to discovery for good cause, it is a final appealable order which this court may properly review.

{¶ 12} "A trial court enjoys broad discretion in the regulation of discovery, and an appellate court will not reverse a trial court's decision to sustain or overrule a motion to compel discovery absent an abuse of discretion." *Stark v. Govt. Accounting Solutions, Inc.*, 10th Dist. No. 08AP-987, 2009-Ohio-5201, ¶ 14. Generally, whether "information sought in discovery is confidential and privileged 'is a question of law that is reviewed de novo.'" *MA Equip. Leasing I, L.L.C. v. Tilton*, 10th Dist. No. 12AP-564, 2012-Ohio-4668, ¶ 13, quoting *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13. However, "Ohio courts do not review all issues surrounding privilege de novo." *Id.* at ¶ 16. Whether materials are protected by the attorney work-product privilege, and the determination of the good-cause exception to that privilege, are not characterized as "questions of law, but as 'discretionary determinations to be made by the trial court.'" *Id.*, quoting *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo*, 6 Ohio St.3d 270, 271 (1983). *See id.* at ¶ 18 (noting that the appropriate standard of review "ultimately

depends upon whether an appellate court is reviewing a question of law or a question of fact"). Accordingly, we review the trial court's determination of good cause for an abuse of discretion.

{¶ 13} "The scope of pretrial discovery is broad and parties may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter." *Legg* at ¶ 15, citing Civ.R. 26(B)(1). The work-product doctrine provides for a limited privilege which protects documents, electronically stored information and other tangible things "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." Civ.R. 26(B)(3).

{¶ 14} The work-product doctrine emanates from the United States Supreme Court decision in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), in which the Supreme Court recognized that proper case preparation demands that an attorney "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510. If an attorney's work-product prepared in anticipation of litigation were "open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. * * * Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." *Id.* at 511. The *Hickman* court acknowledged, however, that "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." *Id.*

{¶ 15} Thus, the work-product doctrine provides " 'a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary.' " *Squires, Sanders & Dempsey* at ¶ 55, quoting *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir.2006). *See also* Civ.R. 26(A). The doctrine is " 'an intensely practical one, grounded in the realities of litigation in our adversary system,' and the privilege afforded by the work-product doctrine is not absolute." *Id.*, quoting *United States v. Nobles*, 422 U.S. 225, 238-39 (1975).

{¶ 16} Civ.R. 26(B)(3) thus provides that an attorney's materials prepared in anticipation of litigation are discoverable "only upon a showing of good cause therefor." The party seeking discovery carries the burden of demonstrating good cause for the

sought-after materials. *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, ¶ 16. "[A] showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials—i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable." *Id.* More recently, the Supreme Court of Ohio has explained that "attorney work product, * * * may be discovered upon a showing of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere." *Squire, Sanders & Dempsey* at ¶ 60.

{¶ 17} The parties do not dispute that the surveillance video was prepared at the direction of defendants' counsel in anticipation of litigation. Thus, they do not dispute that the surveillance video is attorney work-product. Accordingly, the parties simply dispute the court's finding that plaintiff established good cause for the production of the surveillance video.

{¶ 18} Defendants assert that Loc.R. 41.04 recognizes the "privileged nature of [impeachment] evidence." (Defendants' brief, 4.) Loc.R. 41.04 states, in pertinent part, that a party must list in their pre-trial statement "all evidence expected to be offered into evidence, except exhibits to be used only for impeachment." Loc.R. 41.04 simply details what information must be contained in a party's pre-trial statement. The rule does not state that evidence is privileged solely because a party intends to use such evidence for impeachment purposes. Rather, the general rules of discovery would apply to such evidence. *See* Civ.R. 26(B)(1).

{¶ 19} As noted above, this court reviews only final appealable orders. Thus, "the privilege issue is the only part of the trial court's order that comports with the definition of 'final order' under R.C. 2505.02(B)." *Garcia v. O'Rourke*, 4th Dist. No. 02CA16, 2003-Ohio-2780, ¶ 11. Defendants' contentions regarding Loc.R. 41.04, and the trial court's ruling on the same, are thus not properly before this court. Rather, the only issue properly before this court is whether the surveillance video is privileged attorney work-product subject to production for good cause.

{¶ 20} Defendants' reliance on *Thrope v. Rozen*, 1st Dist. No. C-960143 (Oct. 3, 1997) is similarly misplaced, as *Thrope* does not concern discovery of attorney work-product. In *Thrope*, the defense introduced a surveillance video during its case-in-chief,

"which contradicted [the plaintiff's] earlier testimony concerning the extent of his disabilities." *Id.* The plaintiff argued on appeal that the trial court erred in allowing the defendant to introduce the video, as the defendant had not produced the video in discovery. The court noted, however, that the plaintiff had not made a discovery request which would have obligated the defendant to produce the video. Moreover, in *Thrope*, the defendant did provide the plaintiff with "both the edited and the unedited versions of the tape the day before the tape was used at trial." *Id.* As *Thrope* does not concern the work-product privilege, and as the defendant in *Thrope* voluntarily produced the surveillance video to the plaintiff before trial, *Thrope* is inapplicable in the instant case.

{¶ 21} Defendants assert that the trial court employed the incorrect standard to determine whether plaintiff established good cause. Defendants note that the trial court "used a balancing test to determine whether the video should be produced at trial when it held '[t]he surprise and unfairness to Plaintiff outweighs the consideration of attorney work product privilege offered by Defendants.'" (Appellants' brief, 6.)

{¶ 22} As noted above, under Civ.R. 26(B)(3), a party may establish good cause by demonstrating: (1) that the work-product is directly at issue in the case, (2) there is a compelling need for the information, and (3) the evidence cannot be obtained elsewhere. *Squires, Sanders & Dempsey* at ¶ 60. We note that, while our independent research does not reveal an Ohio case which has directly considered the issue before this court, regarding discovery of a surveillance video prepared by a defendant in anticipation of litigation in a personal injury action, our research reveals several federal courts which have considered the issue. *See First Bank of Marietta v. Mascrote, Inc.*, 79 Ohio St.3d 503, 508 (1997) (noting that while "federal [case] law is not controlling with regard to interpretation of the Ohio Rules of Civil Procedure, it can be instructive where, as here, the rules are similar"); Fed.R.Civ.P 26(b)(3) (providing that attorney work-product is discoverable if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means").

{¶ 23} The trial court found that the video was directly at issue in the case, noting that the video "may affect the substantive issue of damages and may go to the heart of

whether Plaintiff is injured as claimed." (Decision and Entry, 4.) Defendants assert that the video is not directly at issue, as it does not provide evidence regarding the applicable standard of care or breach. See *Korreckt v. Ohio Health*, 10th Dist. No. 10AP-819, 2011-Ohio-3082, ¶ 11, citing *Adams v. Kurz*, 10th Dist. No. 09AP-1081, 2010-Ohio-2776, ¶ 11 (stating the elements of medical malpractice claim). Defendants further assert that the video is not "necessary or compelling for the Plaintiff to establish his damages," as plaintiff can establish his damages "through his own testimony, medical records, the testimony of his experts and other witnesses he has identified that he will call at trial." (Defendants' brief, 9.)

{¶ 24} The court's conclusion that the surveillance video will affect the substantive issue of damages was not an abuse of discretion. Plaintiff claimed in his complaint that he suffered a loss of enjoyment of life and an inability to engage in daily activities as a result of his injuries. Thus, the surveillance video will help to establish or negate the extent of plaintiff's damages. See *Snead v. Am. Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa.1973) (noting that surveillance films in a personal injury case "which would tend to show a plaintiff's physical condition, how he moves, and the restrictions which are his, are highly relevant—perhaps they will establish the most important facts in the entire case"); *Papadakis v. CSX Transp., Inc.*, 233 F.R.D. 227, 228 (D.Mass.2006) (noting that "[i]n personal injury cases, surveillance materials are evidence of whether and to what extent a claimant was injured," and because the "existence and extent of injury is the very essence of Plaintiff's claims * * * the surveillance tapes need to be produced"); *Chaisson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir.1993) (finding that surveillance evidence was properly subject to discovery, as "the severity of [the plaintiff's] pain and the extent to which she has lost the enjoyment of normal activity are among the key issues a jury must decide in calculating her damages," thus the surveillance "[e]vidence which would tend to prove or disprove such losses must be considered 'substantive' "). Compare *Sutton v. Stevens Painton Corp.*, 193 Ohio App.3d 68, 2011-Ohio-841, ¶ 27 (8th Dist.). Because the video at issue goes to the ultimate issue of damages, the trial court did not err in determining that the video was directly at issue in the case.

{¶ 25} We also note that while defendants claim they intend to use the video as impeachment evidence only, if the video refutes plaintiff's claims regarding the extent of his injuries, the video will also constitute substantive evidence on damages. *See* 8 Wright, Miller & Marcus, *Federal Practice and Procedure*, Section 2015 (3d Ed.2009) (noting that "surveillance evidence or evidence of prior injuries is useful for impeachment but it also has an important substantive aspect since it goes directly to the issue of the extent of plaintiff's injury").

{¶ 26} The trial court also found that plaintiff demonstrated a compelling need for the video. The court relied on *Snead* to support its finding that plaintiff's interest in obtaining the video before trial was greater than defendants' interest in concealing the video. In *Snead*, the court found that a plaintiff in a personal injury action was entitled to discover a surveillance video prepared by the defendant. The *Snead* court observed that a camera "may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. * * * The editing and splicing of films may change the chronology of events." *Id.* at 150. The *Snead* court concluded that the defense should be required "to disclose the existence of surveillance films or be barred from showing them at trial." *Id.* at 151.

{¶ 27} The *Snead* court's observation, regarding a party's ability to manipulate film images, is perhaps more true today than at the time *Snead* was decided. Today, digital cameras and computer programs permit even the novice photographer to easily edit, enhance, and manipulate digital images. Accordingly, the trial court's conclusion that plaintiff had a compelling need to view the video prior to trial, to ascertain "in advance if the video images have somehow been manipulated, or if the person on the video is actually Plaintiff," was an accurate conclusion. (Decision and Entry, 4.)

{¶ 28} Defendants further assert that the trial court erred in finding that plaintiff's prior deposition testimony protected the impeaching value of the surveillance video. Defendants contend that production will destroy the impeaching value of the evidence, as plaintiff will be able to prepare his trial testimony to conform to the images on the video. While plaintiff may so structure his trial testimony, 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.

{¶ 29} Moreover, federal courts which have considered the issue conclude that discovery of a surveillance video following the plaintiff's deposition strikes the appropriate balance between the plaintiff's interest in seeing the video before trial and the defendant's interest in retaining the impeaching value of such evidence. *See Wightman v. Reassure Am. Life Ins. Co.*, S.D. Ohio No. 3:05-cv-204 (Nov. 30, 2006) (finding that the "case law on point unanimously supports Defendant's position," that defendant need not produce the surveillance evidence until after plaintiff was deposed); *Donovan v. AXA Equitable Life Ins. Co.*, 252 F.R.D. 82 (D.Mass.2008) (while the court noted that "[m]ost courts, both federal and state, have held that video surveillance tapes, if they plan to be used at trial, must be produced in discovery," the court would not order the surveillance tapes produced until after "the completion of Mr. Donovan's deposition"); *Ward v. CSX Transp., Inc.*, 161 F.R.D. 38, 41 (E.D.N.C.1995) (concluding that "allowing discovery of surveillance materials after the deposition of the plaintiff, but before trial, best meets the ends of justice and the spirit of the discovery rules to avoid surprise at trial").

{¶ 30} Lastly, we note that the tape is under the sole control of defendants. As such, the evidence cannot be obtained elsewhere. *See Bryant v. Trexler Trucking*, D.S.C. No. 4:11-cv-2254-RBH (Jan. 18, 2012), quoting *Tripp v. Severe*, D.Md. No. L-99-1478 (Feb. 8, 2000) (where a party intends to use surveillance footage at trial, " 'courts generally find that the work product privilege is waived given the plaintiff's * * * inability to obtain the substantial equivalent of this record of plaintiff's condition at a particular time and place' ").

{¶ 31} Under the specific facts presented in this case, we find the trial court did not abuse its discretion in granting plaintiff's motion to compel, as plaintiff established good cause for discovery of the surveillance video. The substance of the video may reveal the extent of plaintiff's injuries, which are directly at issue in the case. As defendants have indicated that they may display the video at trial, plaintiff has a compelling interest in

viewing the video to ascertain the video's quality and accuracy. *Compare Ward v. AT Sys. Inc.*, E.D. Pa. No. 07-4249 (Sept. 8, 2008). As defendants have sole control of the video, plaintiff is unable to obtain the video elsewhere.

IV. DISPOSITION

{¶ 32} Based on the foregoing, defendants' sole assignment of error is overruled. Having overruled defendants' assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the Ohio Constitution, Article IV, Section 6(C).
