

ORIGINAL

No. 2013-2008

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In the Supreme Court of Ohio

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

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**HENRY SMITH**

Plaintiff-Appellee

v.

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

Defendants-Appellants

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

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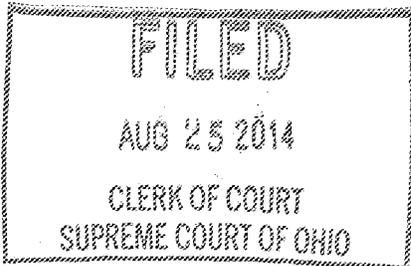
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## I. INTRODUCTION

Plaintiff-Appellee Henry Smith wants this Court to adopt the erroneous rulings of the Trial Court and the Tenth District that unjustifiably eviscerated Ohio's attorney work-product doctrine. The Trial Court issued an erroneous and prejudicial ruling that undoubtedly will discourage all litigants from fully and adequately preparing their cases for trial since impeachment evidence, including surveillance videos, will be disseminated before trial. Then, the Tenth District issued a Decision that inappropriately adopted the Trial Court's error. Now, neither Appellee's nor Amicus Curiae's Merit Briefs present this Court with any legally or factually sound reason upon which the Tenth District's Decision should be allowed to stand. In fact, Appellee and Amicus Curiae raise several meritless legal and factual arguments in an attempt to convince this Court that the Tenth District's erroneous Decision should not be disturbed.

If the Tenth District's Decision is not reversed by this Court, Civ. R. 26 (B)(3), Ohio's work-product privilege, will be rendered meaningless. More specifically, Ohio Courts and litigants need this Court to restore the proper guidance with respect to the preservation of Ohio's work-product doctrine and restore the impeachment value of surveillance videos.

This Court should reverse the Tenth District's Decision in order to reinstate the proper application of Ohio's work-product doctrine. Not only will a reversal of the Tenth District's Decision provide proper guidance for Courts and litigants throughout all of Ohio, a reversal will enable litigants to adequately prepare their cases for trial.

## II. LAW AND ARGUMENT

**PROPOSITION OF LAW: Appellee Presents Both Factually And Legally Flawed Arguments That Do Not Adequately Address The Tenth District's Usurpation Of Ohio's Work-Product Doctrine In Ordering The Production Of Surveillance Videotapes Intended To Be Used For Impeachment Purposes.**

Appellee and Amicus Curiae in their Merit Briefs desperately attempt to avoid the importance of impeachment evidence, like surveillance videos, that is designed to challenge the credibility of the claimant. The crux of this appeal is that an attorney's privileged work-product surveillance video used solely for the purpose of impeachment must be protected. By requiring defendants to produce surveillance videos would undoubtedly prejudice defendants' ability to defend themselves at trial.

A surveillance video is used to impeach a party's testimony. The production of a surveillance video prior to trial would completely destroy the impeachment value of the surveillance videos. By producing a surveillance video material prior to trial, a witness will have advanced notice of this evidence. Consequently, the witness will be able to prepare accordingly and either lessen or completely eliminate the effect of the impeachment evidence on the trier of fact.

The demeanor of a witness is a crucial aspect of any trial. If this Court was to accept Appellee and Amicus Curiae's position, a party will be completely precluded from challenging or attacking a witness's demeanor with the use of a surveillance video. By requiring a party to produce a surveillance video over counsel's work-product objection would unfairly prejudice that party's ability to effectively cross-examine the opposing party. Production of a surveillance video intended solely for impeachment purposes would allow the other party to tailor his/her testimony. If the Tenth District's Decision is allowed to stand, the purpose of the work-product doctrine with respect to the use of surveillance videos as impeachment evidence would be completely eliminated.

With respect to the production of impeachment evidence, it speaks volumes that Loc. R. 41.04 of the Franklin County Court of Common Pleas does not require the listing of exhibits to

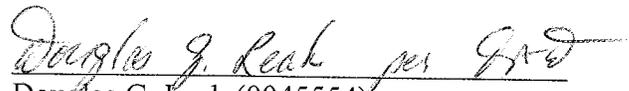
be used for impeachment purposes in the pretrial statement. See, also *Thrope v. Rozen* 1<sup>st</sup> Dist. No. C-960143, 1997 WL 610630 (Oct. 3, 1997), (the surveillance video contradicting the medical malpractice plaintiff's testimony did not have to be produced). Both Franklin County's local rule and the First District in the *Thrope* case recognize the privileged nature of impeachment evidence like surveillance videos. Likewise, this Court should hold that a party's work-product surveillance video should be protected if intended to be used as impeachment evidence.

### III. CONCLUSION

Appellee and Amicus Curiae fail to adequately refute the fact that not only is the Tenth District's decision erroneous, it goes far beyond common sense with respect to Ohio's work-product doctrine. It is illogical to conclude that a party's work-product surveillance video to be used solely for impeachment purposes should be produced prior to trial.

By reversing the Tenth District Decision, this Court can provide the proper guidance needed with respect to protecting a party's work-product. This Court should hold that a surveillance video obtained for the sole purpose of impeaching an opposing party's credibility is protected under Ohio's work-product doctrine. Accordingly, the Tenth District's Decision should be reversed and the Trial Court's order compelling the production of the surveillance video should be vacated.

Respectfully submitted,

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**PROOF OF SERVICE**

A copy of the foregoing was served on August 25, 2014 pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

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