ORIGINAL

IN THE SUPREME COURT OF OHIO

HENRY SMITH, Plaintiff-Appellee, v. YING H. CHEN, D.O., et al., Defendant-Appellants.	)	Case No. 2013-2008 On Appeal from the Tenth Appellate District Case No. 12AP-001027

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF DEFENDANT-APPELLANTS, YING H. CHEN, D.O. AND ORTHONEURO

DOUGLAS G. LEAK (0045554)
Email: 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)
Email: fsewards@hswlawyers.com
Hammond Sewards & Williams
556 East Town Street
Columbus, OH 43215
Phone: (614) 228-6061
Fax: (614) 228-5883

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

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

Counsel for Plaintiff-Appellee, Henry Smith

RICHARD M. GARNER (0061734)
(Counsel of Record)
Email: rgarner@davisyoung.com
BRIAN J. BRADIGAN (0017180)
Email: bbradigan@davisyoung.com
GARY C. SAFIR (0090749)
Email: gsafir@davisyoung.com
Davis & Young, LPA
140 Commerce Park Drive, Suite C
Westerville, OH 43082
Phone: (614) 901-9600
Fax: (614) 901-2723

Counsel for Amicus Curiae Ohio Association of Civil Trial Attorneys

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INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is an organization of attorneys, corporate executives, and managers who devote a substantial portion of their time to the defense of civil lawsuits and the management of claims against individuals, corporations, and governmental entities.

OACTA's membership is composed of trial lawyers who are frequently confronted with the issue of surveillance as a proactive investigative technique for seeking and maintaining accountability with regard to the factual integrity of litigating parties. Further, as trial lawyers, OACTA's membership has an interest in maintaining the very structures which have been designed over centuries to ensure fair, efficient, and honest trial practice and litigation. Among these structures are the work-product doctrine and the use of impeachment evidence for testing the credibility of a witness' testimony

STATEMENT OF THE CASE AND FACTS

OACTA adopts the statement of the case and facts set forth in the Merit Brief of Appellants.

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).

I. Introduction

Civil and criminal cases that are not resolved by motion or negotiated resolution are resolved by trial, at which time the trier of fact judges the credibility of the evidence presented by the parties. In order to give the parties the ability to appropriately prepare for the trial, both civil and criminal cases allow for discovery of anticipated evidence and related information. Civ. R. 26; Crim. R. 16.

Not surprisingly, the scope of discovery for criminal and civil cases varies for a variety of reasons, but both Civ. R. 26(B)(3) and Crim. 16(C)-(J) expressly protect discovery of work product. The purpose of such protection is fairly simple: (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable, but the unfavorable aspects of such cases; and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, at ¶57; *Hickman v. Taylor*, 329 U.S. 495, 510-512, 67 S.Ct. 385 (1947). The scope of the privilege extends to agents of the attorney, including investigators. *U.S. v. Nobles*, 422 U.S. 225, 238-239, 95 S.Ct. 2160 (1975); *Sutton v. Stevens Painton Corp.*, 192 Ohio App.3d 68, 2011-Ohio-841, at ¶¶24-30. While the privilege is considered "qualified," it exists because it is "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interest." *Nobles*, 422 U.S. at 237. Thus, it is not to be lightly abandoned. The rule this Court makes in this case will likely influence a broad range of civil and criminal cases involving the work-product privilege.

In this case, there is no dispute between the parties (nor could there be) that the surveillance video is within the work-product privilege. *Smith v. Chen*, 10th Dist. No. 12AP-1027, 2013-Ohio-4931, at ¶17 (the parties "do not dispute that the surveillance video is attorney work-product," they "simply dispute the court's finding that plaintiff established good cause for the surveillance video"). Accordingly, the question for consideration is whether the trial court and the Tenth Appellate District properly addressed discovery of the surveillance video in this case.

In the lower courts, Plaintiff-Appellee Henry Smith ("Smith") only advanced generalized allegations that: (1) he had not yet seen the video surveillance; (2) he had no opportunity to

ascertain the quality or accuracy of what the video portrays; and (3) he had no opportunity to determine if the video had been manipulated. *Smith*, 2013-Ohio-4931, at ¶7. The record does not disclose that Smith attempted any additional discovery regarding the video surveillance or that the lower courts conducted an *in camera* inspection of the video surveillance prior to ordering its disclosure. Instead, the lower courts simply made generalizations about video surveillance. As explained below, such generalizations may be easy to apply, but should not constitute "good cause" under Civ. R. 26(B)(3). For these reasons, and for all of the reasons in the Merit Brief of Defendant-Appellants Ying H. Chen and OrthoNeuro (collectively "Chen/OrthoNeuro"), this matter should be reversed and remanded to the trial court for further proceedings consistent with the foregoing arguments.

II. There is Generally No "Good Cause" for Pre-Trial Discovery of Impeachment Material Protected by the Work-Product Privilege.

Chen/OrthoNeuro advised Smith and the trial court that they only intended to introduce the video surveillance as impeachment evidence. *Smith*, 2013-Ohio-4931, at ¶4. While there are times when surveillance video may constitute substantive evidence, *see e.g. Sutton*, 2011-Ohio-841, at ¶¶25-30 (finding that plaintiff's claims of invasion of privacy and intentional infliction of emotional distress caused by surveillance video justified production of documents related to surveillance video), most often such evidence is procured in order to impeach a claimant who testifies that he or she is unable to perform certain physical activities that are shown in the surveillance. Generally, such evidence is only used when: (1) the claimant's alleged injuries are subjective in nature (shooting pain, numbness, inhibited motion, etc.); and (2) the video

surveillance clearly and unequivocally captures the claimant engaged in activities that are inconsistent with assertions of physical limitations.[1]

Such evidence is correctly characterized as impeachment evidence designed to challenge the credibility of the claimant. *Thrope v. Rozen*, 1st Dist. Nos. C-960143/A-9403710, 1997 WL 610630, at *4-5. This is particularly true in this case because Smith's claims against Chen/OrthoNeuro are medical malpractice claims that require expert testimony to prove duty, breach, causation, and damages. *Taylor v. McCullough-Hyde Memorial Hospital*, 116 Ohio App.3d 595, 599, 688 N.E.2d 1078 (12th Dist. 1996). Thus, neither Smith nor Chen/OrthoNeuro could introduce the video surveillance for substantive purposes without accompanying expert testimony. *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415, 2010-Ohio-282, at ¶26 (explaining that investigator reports were impeachment evidence, rather than substantive evidence, that could only be used to impeach the credibility of a crime victim at trial).[2]

Normally, impeachment evidence need not be disclosed prior to trial.[3] *Thrope*, at *4 (explaining local rule that did not require production of impeachment evidence prior to trial); *Smith*, 2013-Ohio-4931, at ¶¶18-20 (explaining that Loc. R. 41.04 did not require production of "exhibits to be used only for impeachment"). This is consistent with the Rules of Evidence. In this regard, Evid. R. 613 permits a witness to be impeached by a prior statement and "the statement need not be shown nor its contents disclosed to the witness at that time." Evid. R. 613 also provides

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[1] In this case, Smith claims, in part, "progressing pain, discomfort and weakness in his neck and back . . . loss of enjoyment of life, inability to do usual functions . . . and a lost earning capacity." *Smith*, 2013-Ohio-4931, at ¶2.

[2] Inexplicably, the Tenth Appellate District supported its decision on the basis that "the video will also constitute substantive evidence on damages." *Smith*, 2013-Ohio-4931, at ¶25.

[3] It is important to note that the Tenth Appellate District did not address the discovery of the *existence* of impeachment evidence, specifically surveillance video. Thus, that issue is not before this Court.

that extrinsic evidence of inconsistent ***conduct***, such as performing activities that the claimant testifies cannot be performed, can be introduced at trial if: (1) offered for impeachment; and (2) offered for a reason under Evid. R. 613(B)(2) (which includes proving a defect in capacity, ability, or opportunity to observe, remember, or relate—which is almost always applicable to surveillance video). Evid. R. 613(C).

However, Evid. R. 607 provides that the "credibility of a witness may be attacked by any party," but that "a questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact." When using a surveillance video to impeach the credibility of a personal injury claimant, the relevance of the video is conditioned upon the claimant testifying that he or she cannot engage in a physical activity that is depicted in the video. To have a reasonable basis to ask the predicate questions for admission of the video for impeachment purposes at trial, the claimant must first testify at trial in a manner that is inconsistent with the activity recorded on the video, i.e., the "impeaching fact(s)." This is true even if the personal injury claimant has been previously deposed, because such deposition testimony is generally not a substitute for live testimony before the trier of fact, and testimony may change as the claimant is prepared for trial, testifies, and is cross-examined.[4] It is only when the personal injury claimant testifies at trial in a manner that is inconsistent with the video surveillance that the relevance predicate for Evid. R. 607 and Evid. R. 613 is laid under Evid. R. 104(B). At that time, the defense must decide whether it will waive its work-product privilege and present the video surveillance and related evidence. *State v. Lorraine*, 66 Ohio St.3d 414, 423, 613 N.E.2d 212 (1993)(finding that prosecutor was not required to disclose rebuttal witnesses in discovery where

[4] A lengthy discourse on the rules of hearsay and use of deposition testimony at trial is not necessary here.

the prosecutor did not know if such witnesses would be used until defendant's witnesses testified); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, at ¶¶134-135 (same). It is not reasonable to presume that the personal injury claimant will give inaccurate testimony about his or her physical limitations to the trier of fact. Accordingly, the introduction of video surveillance as impeachment evidence cannot be reasonably anticipated by the defense until such time as the claimant testifies before the trier of fact.

Once introduced, Smith and his lawyer would have a right to fully examine the surveillance video, question witnesses regarding the same, and introduce other evidence regarding the same because Chen/OrthoNeuro would have "waived" the privilege by introducing the evidence at trial. *Nobles*, 422 U.S. at 239-240 ("Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony.") The video surveillance would have to be properly authenticated. Evid. R. 901 *et seq.* If Chen/OrthoNeuro edited the video surveillance, Smith would have a right to have the complete original introduced. Evid. R. 106; Evid. R. 1001-1008. If Chen/OrthoNeuro "tampered with" or "doctored" the video surveillance, as discussed below in greater detail, there were ample options available to Smith and the trial court to remedy the situation. However, until Chen/OrthoNeuro waived the privilege by introducing the evidence, there was no "good cause" to compel discovery for this impeachment evidence. To hold otherwise strikes at the central pillar of the work-product privilege.

In this regard, in *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, at ¶¶16-18, this Court held that a showing of "good cause" requires that discovery protected by the privilege be "relevant and otherwise unavailable."

Smith's credibility could be relevant to this case because of the subjective nature of some of his claims of injury. In this regard, Ohio's Jury Instruction on credibility (CV 207.11 Credibility) provide:

> 1. JUDGES OF THE FACTS. You are the judges of the facts, the (credibility) (believability) of the witnesses, and the weight of the evidence.
>
> 2. WEIGHT. To (weigh) (determine the greater weight of) the evidence, you must consider the (credibility) (believability) of the witnesses. You will use the tests of truthfulness that you use in your daily lives.
>
> 3. TESTS. These tests include the appearance of each witness upon the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things about which the witness testified; and the witness' accuracy of memory, frankness or lack of it, intelligence, interest, and bias, if any, together with all the facts and circumstances surrounding the testimony. Use these tests and assign to each witness' testimony such weight as you think proper.
>
> 4. ALL OR PART. You are not required to believe the testimony of any witness simply because the witness was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your duty to decide what testimony to believe and what testimony not to believe. The testimony of one witness if believed by you is sufficient to prove any disputed fact.

Thus, the trier of fact's determination of Smith's credibility could be relevant to whether, or to what extent, he suffered the subjective injuries he claims. However, as trial impeachment evidence, the video surveillance itself is relevant only to the extent that it is inconsistent with Smith's trial testimony. That relevance is only established at trial. Accordingly, prior to trial, the video surveillance would not be "relevant to the subject matter involved in the pending action," and therefore would not be subject to pretrial discovery under Civ. R. 26(B)(1) or Civ. R. 26(B)(3).

Even if relevance could be established prior to trial (which is doubtful), the information in the video surveillance is not "otherwise unavailable" to the personal injury claimant. Except in the most unusual circumstances (not present in this case), once shown the video surveillance at trial, a claimant like Smith would know what he or she was doing at that time and location of the

video surveillance. Once the privilege was waived, Smith would be entitled to inquire whether the video surveillance was the full video or whether it was an edited version, and to introduce the "full version" if he believed it helped his case. The only remaining issues would be the editing process and whether the video had been "tampered with" or "doctored." These issues could be addressed at trial or, if supported by a good faith basis, a continuance could be requested to have the video reviewed by Smith's experts. The unsubstantiated claims that the video surveillance may have been altered are abstractions that Smith never attempted to test and for which he has no good faith basis to challenge the claim of privilege in this case. With all due respect to the lower courts, unsubstantiated, unparticularized allegations should not have been a consideration upon which discovery rested. *Hunter*, 2011-Ohio-6524, at ¶136 (refusing to seal prosecutor's file in criminal based upon unsubstantiated allegations that "the prosecutor *may* have withheld exculpatory evidence. Such a claim is purely speculative.")(emphasis in original). In any event, an *in camera* inspection may have alleviated some of these concerns—but none was undertaken.[5]

Finally, when considering the pre-trial discovery of such video surveillance in personal injury cases, this Court should keep the legal landscape of subjective injury claims in mind. Ohio has wrestled with the difficulty of jurors evaluating subjective injury claims. Based upon history and experience, the General Assembly deemed it was necessary to impose non-economic damage caps on such cases. R. C. 2315.18; R. C. 2323.43. Likewise, legislation was promulgated to mandate bifurcation of punitive damages for, among other reasons, the express purpose of protecting non-economic damage awards from inflation due to contemporaneous consideration of punitive damages issues. R. C. 2315.21; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-

[5] If needed, the trial court could employ its own experts to analyze such issues—presumably paid for by the parties.

Ohio-6948, at ¶¶53-58, 67-72, 100-102. When video surveillance is undertaken for impeachment purposes in personal injury cases, it advances the same strong public policy interests as this important tort reform legislation--providing more certainty to subjective claims that are inherently uncertain.

This Court should also remember that the truth seeking process of a trial can be undermined when a personal injury claimant is given advance copies of impeachment evidence. The Tenth Appellate District gave short shrift to these arguments in its decision by summarily pronouncing that, so long as the claimant has been deposed, pre-trial production of impeachment materials will not impact credibility. *Smith*, 2013-Ohio-4931, at ¶28. Every member of this Court has trial experience and four members of this Court are former trial court judges who have personally observed hundreds, if not thousands, of witnesses testify. With all due respect to the lower courts, the notion that impeachment evidence has the same impact if disclosed prior to trial as it does when first presented at trial is unsupported by common experience. Indeed, as pointed out above, Ohio's Jury Instructions specifically admonish jurors that credibility takes into account much more than testimonial words, including:

> the appearance of each witness upon the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things about which the witness testified; and the witness' accuracy of memory, frankness or lack of it, intelligence, interest, and bias, if any, together with all the facts and circumstances surrounding the testimony.

CV 207.11(3). Words on a deposition transcript page are not the same as live testimony. The trier of fact is deprived of a whole host of tools used to test the credibility of a witness when the witness does not testify live. Similarly, if the witness is provided impeachment evidence in advance of testimony, the witness can be coached to avoid hesitation, fear, anger, surprise, or a host of other

non-verbal indicators of credibility, thereby depriving the trier of fact of important tools to determine a case.

It may be conceivable, from a purely hypothetical standpoint, that there may be cases where impeachment evidence can or should be produced in advance of trial. However, this case is certainly not one of them. Defendants should not be required to disclose the surveillance video in this case on the basis of concerns for a hypothetical situation not presented here and not before this Court. Smith has presented the slimmest of reeds to compel production of impeachment evidence protected by the work-product privilege. He did not show good cause therefore, and the lower courts abused their discretion by holding otherwise.

III. Litigants and Trial Courts Have a Host of Options to Remedy Introduction of Doctored Video Surveillance.

Despite the fact that Smith had no good faith basis to assert that the video surveillance in this case might be doctored, the Tenth Appellate District spent two paragraphs of its decision abstracting about how "a camera 'may be an instrument of deception'" and how a claimant has "a compelling need to view a 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.'" *Smith*, 2013-Ohio-4931, at ¶¶26-27. As pointed out above, however, this is inaccurate.

As a preliminary matter, this approach ignores the fact that Ohio law presumes that a properly licensed attorney will execute his or her duties in an ethical and competent manner. *State v. Smith*, 36 Ohio App.3d 162, 163, 521 N.E.2d 1112, 1113 (8th Dist.1987). Lawyers have an ethical obligation to not falsify or submit misleading evidence. Prof. Con. R. 3.3; Prof. Con. R. 3.4(b). Ohio law presumes that lawyers will comply with such rules absent evidence to the contrary. *Hunter*, 2011-Ohio-6524, at ¶136 (refusing to assume a prosecutor's file may contain improperly undisclosed exculpatory evidence without actual evidence of the same).

If Chen/OrthoNeuro, or any personal injury defendant, were foolish enough to introduce "manipulated" surveillance evidence, there are a host of options available to Smith and the trial court to remedy the situation once it was caught, including, but not limited to:

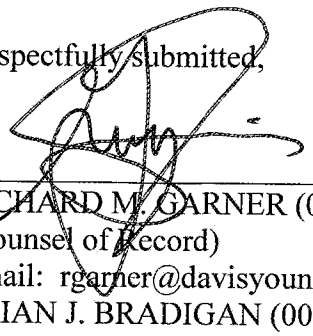
- Excluding the evidence.
- Granting a mistrial or new trial.
- Entering judgment against Chen/OrthoNeuro.
- Instructing the jury that it can draw an adverse inference from the conduct.
- Holding Chen/OrthoNeuro and its lawyers in contempt.
- Referring Chen/OrthoNeuro's lawyers to disciplinary counsel.
- Referring Chen/OrthoNeuro's lawyers for criminal prosecution.

The notion that compelling Chen/OrthoNeuro to produce materials protected by the work-product privilege in advance of trial is reasonable in order to prevent the hypothetical introduction of "manipulated" evidence is undermined by the foregoing.

CONCLUSION

This Court should reverse the lower courts and reject Smith's arguments to obtain video surveillance work-product prior to trial because this position is improperly premised upon a presumption of unethical conduct of defendants and a hypothetical scenario that has already been afforded safeguards and remedies under existing Ohio law. This Court should find in favor of protecting the truth-seeking practices protected by the work-product doctrine, and preserve the efficacy of impeachment evidence for presenting the full spectrum of a testifying witness' credibility before a jury.

Respectfully submitted,



RICHARD M. GARNER (0061734)
(Counsel of Record)
Email: rgarner@davisyoung.com
BRIAN J. BRADIGAN (0017180)
Email: bbradigan@davisyoung.com
GARY C. SAFIR (0090749)
Email: gsafir@davisyoung.com
Davis & Young, LPA
140 Commerce Park Drive, Suite C
Westerville, OH 43082
Phone: (614) 901-9600
Fax: (614) 901-2723

Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

A copy of the foregoing was served on June 13, 2014, by electronic mail upon the following counsel of record:

Douglas G. Leak, Esq.
(Counsel of Record)
dleak@ralaw.com
Roetzel & Andress, LPA
One Cleveland Center, Ninth Floor
1375 East Ninth Street
Cleveland, OH 44114
Counsel for Defendants-Appellants, Ying H.Chen, D.O. and OrthoNeuro

Frederick A. Sewards, Esq.
fsewards@hswlawyers.com
Hammond Sewards & Williams
556 East Town Street
Columbus, OH 43215
Counsel for Defendants-Appellants, Ying H.Chen, D.O. and OrthoNeuro

David I. Shroyer, Esq.
dshroyer@csalawfirm.com
Colley Shroyer & Abraham, LPA
536 South High Street
Columbus, OH 43215
Counsel for Plaintiff-Appellee, Henry Smith

RICHARD M. GARNER (0061734)
BRIAN J. BRADIGAN (0017180)
GARY C. SAFIR (0090749)