

ORIGINAL

IN THE SUPREME COURT OF OHIO

HENRY SMITH,

CASE NO. 2013-2008

Plaintiff-Appellee

FILED

vs.

AUG 04 2014

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

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

CLERK OF COURT

SUPREME COURT OF OHIO

Defendants-Appellants.

Case No. 12AP-1027

**BRIEF OF AMICUS CURIAE
OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF
APPELLEE HENRY SMITH**

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

I. STATEMENT OF INTEREST 1

II. INTRODUCTION AND SUMMARY OF ARGUMENT 2

III. STATEMENT OF FACTS AND THE CASE 4

IV. LAW AND ARGUMENT..... 4

Proposition of Law: Surveillance videos made to dispute the existence or extent of an injury or disability, or the credibility of witness, are not protected “work product”; they are ordinary evidence that must be produced in response to applicable discovery requests.

A. Video Evidence of a Party’s Activities Is Not the Type of “Work Product” Civil Rule 26(B)(3) Is Intended to Protect 4

 1. An Attorney’s Decision to Record the Opposing Party’s Conduct on Video Does Not Change the Nature of the Conduct or the Recording as Evidence in a Lawsuit..... 4

 2. To the Extent an Attorney-Directed Surveillance Video Constitutes “Work Product,” the Evidentiary Value of Such a Recording Outweighs Any Interest the Surveilling Party Has in Withholding It..... 6

B. There Is No Legitimate Basis for a Party to Withhold Evidence Tending to Prove or Disprove Damages Until After the Opposing Party’s Deposition or Trial Testimony..... 7

 1. The Civil Rules Do Not Provide for the Withholding of Some Discovery Until After Other Discovery Takes Place..... 9

 2. Surprise Is Not a Legitimate Reason to Withhold Evidence..... 10

C. Requiring the Timely Production of Substantive Evidence by All Parties Serves the Purpose of the Civil Rules and the Strong Public Interest in the Efficient Resolution of Legal Claims. 13

V. CONCLUSION 14

Certificate of Service 15

TABLE OF AUTHORITIES

Cases

<i>Hickman v. Taylor</i> (1946), 329 U.S. 495	4, 12
<i>Jackson v. Greger</i> , 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487	3, 7
<i>Jerome v. A-Best Prods. Co.</i> (8th Dist.), 2002-Ohio-1824	4, 7
<i>Jones v. Murphy</i> (1984), 12 Ohio St. 3d 84, 465 N.E.2d 444	13
<i>Poulos v. Parker Sweeper Co.</i> (1989), 44 Ohio St. 3d 124, 541 N.E.2d 1031	3, 13
<i>Smith v. Chen</i> (10 th Dist.), 2013-Ohio-4931	8
<i>Smith v. Diamond Offshore Drilling, Inc.</i> (S.D.Tex. 1996), 168 F.R.D. 582	10
<i>Stanfield v. United States Steel Corp.</i> (9 th Dist.), 2013-Ohio-2378	3, 8
<i>Varga v. Rockwell International Corp.</i> (6 th Cir. 2001), 242 F.3d 693	3, 11

Statutes and Rules

Ohio Rule of Civil Procedure 26(B)(3)	<i>passim</i>
Ohio Rule of Civil Procedure 26(D)	9

I. STATEMENT OF INTEREST

As an organization focused on protecting the interests of workers who suffer adverse employment actions or physical or emotional injuries due to unsafe or discriminatory working conditions, the Ohio Employment Lawyers Association has an interest in ensuring that employees who bring damages claims against their employers are not subjected to either discovery or trial by “ambush.” In employment litigation (particularly in workers’ compensation, disability discrimination, and Family Medical Leave Act litigation, where the use of surveillance video has become increasingly prevalent) surveillance videos like those at issue here and surreptitious recordings made by a plaintiff or witness bear on not only damages and credibility, but the core issues of liability, such as a party’s discriminatory motive or the existence of a disability or medical condition. Permitting parties to withhold documents and tangible evidence bearing on a party’s damages, liability, or credibility in order to preserve the element of surprise will make litigation longer, less predictable, and less fair. OELA files this amicus brief to call attention to the legal and practical implications of this decision for employment cases.

OELA is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA and OELA strive to protect the rights of their members’ clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The reasoning of the Tenth District Court of Appeals and the trial court in this matter, though it stopped short of the Defendants' more extreme position here, still missed the point. There is no need in this case to examine the work product rule or to consider whether the evidence is "impeachment" evidence, "substantive" evidence, or some combination. A surreptitious recording of the words or conduct of a party to a lawsuit, if it bears on the questions at issue in the lawsuit (including damages, liability, or credibility), is evidence, plain and simple, and should be subject to discovery like any other evidence. In fact, because of the powerful effect of such recordings on factfinders and the danger that such recordings may be improperly manipulated or selectively edited to enhance that effect, it is even more important than usual that this type of evidence be produced promptly. The fact that an attorney directed an investigator to collect the evidence should make no difference in its treatment by the parties or the court.

The work product rule, Ohio Rule of Civil Procedure 26(B)(3), is primarily a means of protecting items that contain the mental processes and legal theories of an attorney. The rule provides lesser protection to other documents and things created for the purposes of litigation. The contents of an audio or video recording of a party's conduct are neither. The party's conduct was not "prepared" by an attorney or a party, and the recording is simply a means of collecting evidence of this conduct. Pieces of evidence that are found or collected do not deserve the same protection as investigative reports, memos, models, or other items typically treated as "work product." This is true regardless of who collected the evidence. There is no reason to treat an attorney-directed surveillance video differently from security camera footage, or from photographs or videos taken by third-party witnesses.

Even to the extent such a video could be considered “work product” in any sense, it falls well short of the “opinion work product” that receives the strongest protection under the rule. “Ordinary fact work product,” such as witness statements, are subject to a basic showing of good cause—a showing that the evidence is “relevant and otherwise unavailable.” *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487. Surreptitious video footage of a party that sheds light on issues of the party’s credibility or his or her claims of liability or damages easily meets this test. Beyond the recording’s relevance and unavailability to the recorded party, the party must be granted access in order to alleviate the risk of improper manipulation and allow the party to contest the meaning of what appears on the video. A brief videotaped glimpse of a party’s conduct may or may not reveal the true extent of the party’s injuries when it is placed in the proper context. See, e.g., *Stanfield v. United States Steel Corp.* (9th Dist.), 2013-Ohio-2378, at ¶ 26 (acknowledging that video recording may not reflect how strenuous an activity is).

For these reasons, it is particularly important that surreptitious recordings not only be produced in discovery, but produced immediately upon request. Although other courts have accepted the practice of withholding such recordings until after a party’s deposition testimony in order to preserve the supposed “impeachment value” of the evidence, there is no basis in Ohio law for this practice. What parties actually mean when they cite “impeachment value” is their interest in surprising opposing parties. In the modern system of discovery, surprise is not a virtue to be protected; it is a harm to be eliminated. *Poulos v. Parker Sweeper Co.* (1989), 44 Ohio St. 3d 124, 126, 541 N.E.2d 1031. Even in federal court, outside the context of surveillance videos, it would be unthinkable for parties to claim they are permitted to withhold evidence in order to spring it on the opposing party later. See *Varga v. Rockwell International Corp.* (6th Cir. 2001), 242 F.3d 693, 697 (calling this proposition “patently wrong”).

Given that an impactful video could easily result in early settlement or dismissal, permitting parties to conceal such relevant evidence as to liability, damages, or credibility until a more advantageous or more dramatic moment runs contrary to both basic principles of fairness and the strong interest of both the public and the judiciary in the speedy resolution of claims.

III. STATEMENT OF FACTS AND THE CASE

Amicus curiae OELA adopts the Appellee's Statement of Facts and the Case.

IV. LAW AND ARGUMENT

PROPOSITION OF LAW I: Surveillance videos made to dispute the existence or extent of an injury or disability, or the credibility of witness, are not protected “work product”; they are ordinary evidence that must be produced in response to applicable discovery requests.

A. Video Evidence of a Party's Activities Is Not the Type of “Work Product” Civil Rule 26(B)(3) Is Intended to Protect.

1. *An Attorney's Decision to Record the Opposing Party's Conduct on Video Does Not Change the Nature of the Conduct or the Recording as Evidence in a Lawsuit.*

Ohio Rule of Civil Procedure 26(B)(3), the “work product” rule, protects certain trial preparation materials from discovery, absent a showing of “good cause” for disclosure. The purpose of this rule is well-known. It exists primarily to protect the “mental impressions, legal theories and conclusions of a lawyer or party involved in a case,” while providing “lesser protection” to “[o]rdinary fact or ‘unprivileged fact’ work product, such as witness statements and underlying facts.” *Jerome v. A-Best Prods. Co.* (8th Dist.), 2002-Ohio-1824, at ¶¶ 20-21 (quoting *Hickman v. Taylor* (1946), 329 U.S. 495, 507, for the principle that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

The purported “work product” at issue here, surveillance video of a party to a lawsuit, apparently taken by a private investigator at the direction of the opposing party's counsel, is

plainly not “opinion work product,” as it has no bearing on the mental impressions of a lawyer or party to the case. In fact, it is not truly “work product” at all.

The evidence the Defendants seek to present to the jury is the fact of Henry Smith’s conduct after being injured. Neither party “prepared” Mr. Smith’s conduct “in anticipation of litigation or for trial.” Civ. R. 26(B)(3). If Mr. Smith were asked in a deposition or at trial about that conduct (including his conduct at the precise time he was being surreptitiously recorded), he would obviously have to answer the question. So would a bystander subpoenaed to testify about any observations of the Plaintiff at the relevant time. And so would a private investigator hired to follow Mr. Smith around and record his activities. The same events are not treated differently because they were purposely witnessed at the direction of one party or the other.

Nor does the fact that the investigator videotaped his observations of Mr. Smith change this analysis. The video recording is simply a different form of evidence, besides Mr. Smith’s own recollections or those of others who observed him, of what he did at a particular time and place. Except to the extent it has been edited by the Defendants or their counsel (making prompt disclosure even more important), video footage is not truly prepared—it is collected.

Consider an analogous scenario in which a personal injury defendant suspects the plaintiff has not truly hurt his legs. The defendant discovers that the plaintiff has just run in a charity race. If the investigator digs through the plaintiff’s wastebasket and finds his entry form for the race, the entry form is not work product. Nor is a photo of the form in the wastebasket. It is just evidence the investigator found; its status is not changed because the purpose of this snooping was to prepare for litigation. If the plaintiff snaps a “selfie” at the finish line, that would surely be discoverable evidence. If the investigator takes a photo or video of the exact same conduct, why would it be any less discoverable? Under the Defendants’ proposition of

law, the same photos or videos, of the same conduct, with the same evidentiary value, would be treated differently simply because they were made for different subjective reasons, despite showing the exact same images and facts without containing any information concerning an attorney's mental processes.

The same is true in a typical scenario from the opposite perspective. An employee is about to be fired by her employer, and surreptitiously tape-records the firing meeting because she plans to sue her employer and believes the meeting may shed light on the employer's discriminatory motive. She also finds a key memo on her computer that contradicts the employer's claimed reason for her firing. There is no reason to treat the memo or the recording as anything other than ordinary, discoverable evidence, despite the fact that the recording was made "in anticipation of litigation" and the memo was collected for the same purpose. But according to the Defendants' analysis here, the memo would be discoverable, while the recording would apparently be protected work product.

Notably, such a recording, if made at the specific direction of the employee's attorney, would raise at least some concern under Ohio's Rules of Professional Conduct. An attorney or attorney's agent cannot eavesdrop on a third-party conversation without consent. See Op. 2012-1 (concluding that surreptitious recording of a conversation directly by an attorney is not a "per se" violation of Prof. Cond. R. 8.4(c), but imposing limitations, including the requirement that at least one participant in the conversation must consent). Yet the Defendants believe attorney-directed surreptitious *video* recording is not only minimally permissible, but should actually be encouraged by a rule promoting such videos, engendering surprise at depositions and trial, and permitting the purposeful concealment of relevant evidence.

The only way to give effect to the legitimate goals of fairness and efficiency reflected in the Civil Rules is to treat video or audio recordings made by one party of another party's conduct not as work product prepared for litigation, but as ordinary, discoverable evidence. Any other treatment would elevate form over substance by focusing on the reason the evidence was collected instead of the nature of the evidence.

2. *To the Extent an Attorney-Directed Surveillance Video Constitutes "Work Product," the Evidentiary Value of Such a Recording Outweighs Any Interest the Surveilling Party Has in Withholding It.*

The Tenth District Court of Appeals assumed, as did the trial court, that the surveillance video was "work product," but upheld its production anyway based on a showing of "good cause" under Rule 26(B)(3). While OELA disagrees that a video of this sort is work product at all, the lower courts' analysis of "good cause" was correct. As stated above, the protection of Rule 26 applies most strongly to "opinion work product," and much less strongly to "ordinary fact work product." As a simple video recording sheds no light at all on an the mental processes of an attorney or party, the only question under the work product rule is whether the requesting party has shown, in essence, "that the materials, or the information they contain, are relevant and otherwise unavailable." *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, at ¶ 16. The trial court's finding of good cause is subject to review only for abuse of discretion. *Jerome*, 2002-Ohio-1824, at ¶ 22.

Unless a party is under constant video surveillance from publicly available sources (or routinely records his or her own conduct), the sort of evidence here will nearly always meet the test for "good cause." The only possible source of the video evidence is the recording party's copy of the video, and if the video shows conduct pertinent to liability, damages, or credibility, having access to it is just as important to the requesting party's preparation of the case as access

to any other piece of similarly substantive evidence. As the Tenth District panel noted, there are also particular questions arising from video recordings that may not apply to other types of evidence—such as the danger that the recording party has edited or doctored the video in some way. *Smith v. Chen* (10th Dist.), 2013-Ohio-4931, at ¶ 26.

In fact, the questions accompanying such a video go beyond the obvious question of whether the video has been improperly manipulated. A plaintiff whose activities have been recorded with an eye toward disproving his claims must have the same ability to inquire into this evidence as with any other type of evidence. How many hours of recording did it take to identify a single instance in which the plaintiff purportedly acted inconsistent with the claimed injuries? Is there also video of the plaintiff acting in a manner that could only be explained by the injuries? Did the plaintiff's conduct change over time (i.e., was the plaintiff faking the pain entirely, or merely exaggerating how long it persisted)? Is there eyewitness or expert medical testimony that might explain or reject a viewer's knee-jerk reaction to what is being shown in the video? See, e.g., *Stanfield v. United States Steel Corp.* (9th Dist.), 2013-Ohio-2378, at ¶ 26 (noting that surveillance video showing activities that appear to be strenuous do not necessarily disprove severity of injury, where there are questions as to “the degree to which this activity was physically taxing”). These questions are inherent when an injury victim is being surveilled, just as the employer whose words were surreptitiously recorded in the scenario described above would always be entitled raise questions about whether the recording was manipulated, cherry-picked, or taken out of context.

In short, the Defendants' proposed rule, under which “gotcha” video footage will be sprung upon an unsuspecting party at the time of trial (or equally damaging, at the time of the party's deposition), with no opportunity to conduct discovery into even the authenticity of the

video, much less to raise any contextual questions or witness testimony diminishing the video's effect, would be incredibly unjust. Regardless of whether such video is considered work product, the requesting party's need to contest the authenticity and evidentiary weight of the video easily satisfies the Rule 26(B)(3) "good cause" standard.

B. There Is No Legitimate Basis for a Party to Withhold Evidence Tending to Prove or Disprove Damages Until After the Opposing Party's Deposition or Trial Testimony.

1. The Civil Rules Do Not Provide for the Withholding of Some Discovery Until After Other Discovery Takes Place

A substantial body of federal case law, cited in the lower courts' opinions and the parties' briefs to this Court, has required disclosure of surveillance recordings prior to trial but after the deposition of the party being recorded, in order to "strike a balance" between the surveilling party's interest in the "impeachment value" of the surveillance video and the opposing party's interest in avoiding unfair surprise at trial. This is the same balance the trial court and the Tenth District Court of Appeals struck here. But with due respect to the courts that have attempted to find a middle ground in these disputes, the justification for temporarily withholding of surveillance videos is no stronger than the justification for withholding it entirely. This Court should clarify that there is no special protection for "impeachment evidence" under the Ohio Rules of Civil Procedure, and accordingly, no legitimate reason to withhold any evidence pertinent to damages, liability, or credibility until after an opposing party's deposition.

Civil Rule 26(D) states, quite clearly, that "methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery." Ohio has no rule regarding "priority of discovery," and it is black-letter law that a party cannot premise its refusal to provide discovery on the other party's delay or refusal to provide its discovery responses first. Nor does the work-

product rule, Rule 26(B)(3), provide that a party's work product may be withheld, despite a showing of "good cause," until some later stage of discovery.

Despite these ordinary discovery principles, the lower courts and the out-of-state authorities cited in this case have espoused the view that parties can permissibly withhold discovery of one type (surveillance videos) until after their opponents provide discovery of another type (the party's deposition testimony). In this case of first impression, before this Court adopts an approach that so sharply diverges from the ordinary treatment of evidence, it should scrutinize these other courts' stated reason for having done so.

2. *Surprise Is Not a Legitimate Reason to Withhold Evidence*

The reasoning provided in the post-deposition production cases, to the extent there is reasoning, is very simple: producing the surveillance video prior to the recorded party's deposition would erode the "impeachment value" of the evidence. *See, e.g., Smith v. Diamond Offshore Drilling, Inc.* (S.D.Tex. 1996), 168 F.R.D. 582, 587 (holding that the existence of surveillance videos must be disclosed prior to the deposition, but the contents of the videos may be withheld "because of the potential for surveillance films to provide compelling impeachment evidence"). But there is little, if any, discussion in these cases of why the "impeachment value" of evidence is a value a court should respect.

In fact, outside the context of surveillance videos of injured plaintiffs, it is difficult to imagine a court permitting the withholding of otherwise relevant evidence based on its supposed impeachment value. A prosecutor, for instance, could not withhold a jailhouse recording of a criminal defendant from discovery in order to preserve the "impeachment value" of the defendant's statements about his or her whereabouts on the date of the crime. Even under the Federal Rules of Civil Procedure, which provide that evidence to be used solely for impeachment

need not be produced as part of a party's initial disclosures, evidence cannot be withheld in response to a specific discovery request simply because of its "impeachment value." For instance, in *Varga v. Rockwell International Corporation*, the Sixth Circuit Court of Appeals soundly rejected this proposition:

At oral argument, counsel for Rockwell was asked to explain the absence of cases supporting his rule that a party served with specific discovery requests may withhold otherwise relevant evidence if that party unilaterally concludes that the only useful purpose for the evidence at trial is impeachment. Counsel responded that the lack of published cases suggests that Rockwell's rule is one that is universally accepted among all trial lawyers and judges alike. That response was a fine debate technique, but it is nonsense. The reason there are no cases to support Rockwell's evidentiary proposition is that it is patently wrong. We take this occasion to emphasize what Rule 26(b) makes perfectly clear: the recipient of a properly propounded document request must produce all responsive, non-privileged documents without regard to the recipient's view of how that information might be used at trial. A party may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence at trial.

(6th Cir. 2001), 242 F.3d 693, 697 (adding, in a footnote, that reliance on the initial disclosure rules for the same proposition "is disingenuous at best").

The *Varga* court, in passing, expressed exactly the concern that the courts examining surveillance videos have largely ignored: "impeachment value" is really synonymous with "surprise value." A party that claims evidence will lose its impeachment value if the other party has access to it before testifying is simply admitting that the evidence will be more powerful if it comes as a surprise to the testifying party.

There is no question this is true. A witness or party who does not know a piece of evidence exists or has not seen it before testifying will be at a tremendous disadvantage when asked, on the spot, to explain it. More cynically, a party or witness inclined to testify

untruthfully will do so more readily without knowing there is contradictory evidence in his or her opponent's possession. But that would be true of virtually any evidence supporting either party's case, whether it is a video, a document in a personnel file, or the testimony of another witness.

If the interest in springing new evidence on the opposing party after a deposition were credited by this Court, it would justify the withholding of all of these types of evidence, not just surveillance videos. In employment cases, employee plaintiffs could withhold documents (or even witness affidavits) contradicting the employer's pretextual explanation of a termination until after the employer testified. In a car accident case, one party could withhold photos of the accident scene, in hopes that the other party will describe it incorrectly. In police misconduct cases, officers could withhold cruiser video footage of an incident until after the plaintiff's deposition, then accuse the plaintiff of misstating or exaggerating the details of the incident. In each such scenario, the withholding party would surely benefit from preserving the "impeachment value" of the evidence—but it is extremely unlikely that any court would grant such a party the right to purposely withhold evidence for that purpose.

In fact, one of the core purposes of the civil rules is to avoid the kind of surprise tactics the Defendants ask this Court to uphold. In the very case that established the "work product" rule, *Hickman v. Taylor*, the U.S. Supreme Court stated, "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise." 329 U.S. at 507. This Court has applied the same reasoning with respect to Ohio's Civil Rules: "One of the purposes of the Rules of Civil Procedure is to eliminate surprise. This is accomplished by way of a

discovery procedure which mandates a free flow of accessible information between the parties upon request, and which imposes sanctions for failure to timely respond to reasonable inquiries.” *Jones v. Murphy* (1984), 12 Ohio St. 3d 84, 86, 465 N.E.2d 444. See also *Poulos v. Parker Sweeper Co.* (1989), 44 Ohio St. 3d 124, 126, 541 N.E.2d 1031 (stating that the purpose of the reform of the civil discovery process “was to place the respective litigants in parity, avoid ‘surprise,’ and encourage settlement of controversies prior to trial.”).

Nothing about these core principles of civil discovery are altered by a document’s purported status as either ordinary fact work product or impeachment evidence. The fact that one party has gathered evidence with the clear intention of using it to surprise the other party does not make surprise a more legitimate goal. Nor does the fact that one party believes the other party will exaggerate or testify falsely about the core issues of liability or damages make it legitimate to “set a trap” by withholding evidence in response to a discovery request. There is no reason for this Court to create a special rule protecting the “impeachment” or “surprise” value of surveillance videos. It should simply treat surveillance video footage gathered by a party just like all other relevant evidence that must be turned over in response to a valid discovery request.

C. Requiring the Timely Production of Substantive Evidence by All Parties Serves a Strong Public Interest in Fair and Efficient Resolution of Claims.

The analysis above addresses two of the three core purposes acknowledged by this Court for the open discovery required by the Civil Rules: to promote fairness and avoid surprise. In a case involving the withholding of supposed “impeachment evidence,” these interests obviously apply, and they both strongly support the production of surreptitious video recordings one party takes of the other. But there is a third purpose at stake as well: to “encourage settlement of controversies prior to trial.” *Poulos*, 44 Ohio St. 3d at 126.

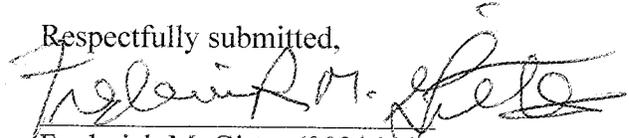
The evidence at issue here, in the Defendants' view, is intended to be used to disprove or contest the extent of Mr. Smith's damages. In a malpractice, personal injury, or disability case, it is hard to imagine any piece of evidence that would more profoundly impact a party's settlement position than a video demonstrating that the party has exaggerated or even faked the pain or injury for which the party is seeking compensation. If the video has not been selectively edited or manipulated improperly, the early production of such evidence is essential to ensure that the time and expense of conducting depositions and a trial are not wasted. The rule proposed by the Defendants would, in their own view, allow cases with little merit to proceed all the way to trial without the production of the single piece of evidence most likely to lead to settlement or voluntary dismissal of a claim. Even the rule adopted by the lower courts would provide for extensive, time-consuming discovery (including the preparation of the parties and witnesses for depositions and the hiring of court reporters) before the production of this evidence.

The sudden moment of courtroom drama imagined by the Defendants, where their opponent has been surprised and humiliated by evidence destroying the value of his claim and proving he has misled the jury, will have followed a year or more of intensive litigation, motions practice, and the consumption of untold judicial resources, all of which could have been avoided by simply disclosing the video along with every other piece of discoverable evidence. Even without considering the unfairness of permitting the withholding of relevant evidence, the public interest will surely be served by requiring the earliest possible disclosure of this evidence.

V. Conclusion

For the reasons stated above, *amicus curiae* OELA urges this Court to affirm the decision of the Tenth District Court of Appeals requiring the Defendants to produce their surveillance video of the Plaintiff in response to a specific discovery request.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2014, a copy of the Brief of Amicus Curiae the Ohio Employment Lawyers Association in Support of Appellee Henry Smith was served by postage-paid U.S. Mail upon the following:

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