ORIGINAL

IN THE SUPREME COURT OF OHIO

HENRY SMITH, Appellee vs. YING H. CHEN, D.O., ET AL., Appellants	CASE NO. 2013-2008 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 12AP-1027

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BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF APPELLEE, HENRY SMITH

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The Ohio Association for Justice ("OAJ") is Ohio's largest victims' rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The OAJ is devoted to strengthening the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable.

IV. LAW AND ARGUMENT

Appellants' 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).

Amicus OAJ's Counter-Proposition of Law:

> The fact that evidence may be used for impeachment purposes does not mean that the evidence is exempt from disclosure in discovery. The disclosure of claimed attorney work product evidence is evaluated under the "good cause" standard of Civil Rule 26 regardless of whether the evidence may be used for impeachment.

A. Introduction

Appellants Ying H. Chen and Orthoneuro have tendered a proposition of law that is both functionally flawed and incorrect. It is functionally flawed because Supreme Court Rule of Practice 16.02(B)(4) requires the appellant to state the proposition of law as a rule of law that could be adopted as the syllabus if the appellant

prevails. See also *Drake v. Bucher,* 5 Ohio St.2d 37, 39 (1966). If Appellants' Proposition of Law were to be adopted by the Court, it would be meaningless.

Appellants' Proposition of Law is also incorrect, because the Tenth District applied well-settled law in a non-controversial way to reach the correct result. What Appellants ask for is a return to Ohio's pre-civil rules conception of work product – that anything in an attorney's file can be unilaterally designated as impeachment evidence, regardless of its nature or origin, and is thereby exempt from disclosure. But the form of work product privilege adopted under the Civil Rules is not so broad. It does not allow a party to refuse to produce substantive evidence in discovery just because that evidence may also be used for impeachment. In order to illustrate this point, a review of the historical underpinnings of the work-product privilege, as set forth in Civ.R. 26, is in order.

B. Ohio law on the work-product privilege pre-Civil Rules.

In *Ex parte Schoepf,* 74 Ohio St. 1, 77 N.E. 276 (1906), this Court was presented with a case where the claims agent for a trolley company was deposed, and refused to turn over certain documents and answer certain questions. The claims agent refused to turn over accident reports made by employees of the trolley company related to a personal injury incident. By standing rule of the company, those reports were made in anticipation of litigation and held by the claims agent until suit was brought. But in response to questions, the claims agent also refused to even identify the trolley

conductor, motorman, and any other witness to the incident, along with a responsible company official.

In considering whether the claims agent could be compelled to release the names of witnesses and involved employees, this Court reasoned that this line of questioning would do nothing but "disclose to the plaintiff the names of witnesses for or against her adversary," and that "it is elementary that a party cannot be required to aid his opponent in that way."[1] *Id.* at 12. The Court found that it was inappropriate "to compel the defendant in the suit to disclose before the trial the sources of its information in regard to the case and the names of its possible witnesses." *Id.* at 13.

In making this decision, this Court developed a distinction that thankfully has not survived to the modern day. Syllabus two of *Schoepf* expressed that, in seeking discovery in support of a case from the adverse party, "a party is entitled to a discovery of such facts or documents in his adversary's possession . . . but that this right does not extend to a discovery of the manner in which the adverse party's case is to be established, nor to evidence which relates exclusively to the adverse party's case." *Id.* The *Schoepf* Court's formulation of work product proved to be troublesome, as evidenced by this Court's partial overruling in *Ex parte Martin* 141 Ohio St. 87, 47

[1] Although this section of the *Schoepf* case does not expressly mention privilege, this Court has remarked "[w]e think that a careful study of the Jennings and Schoepf cases will disclose that they were decided upon the question of *privilege* and not upon the question of relevancy, competency or materiality of testimony. *Ex parte Martin,* 141 Ohio St. 87, 95, 47 N.E.2d 388, 392 (1943) (emphasis in the original).

N.E.2d 388 (1943), syllabus 4; *see also In re Story* (1953), 159 Ohio St. 144, 148, 111 N.E.2d 385, 387 (describing *Schoepf* as a "controversial case").

C. The Federal Court's conception of the work-product privilege.

In 1947, the U.S. Supreme Court explored the limits of the work-product doctrine as encapsulated in Fed.R.Civ.P. 26, in relation to a tugboat accident where several men drowned. *Hickman v. Taylor,* 329 U.S. 495 (1947). As with *Schoepf,* the case concerned the collection of evidence by the underwriters of a corporate defendant in anticipation of litigation. The question was whether a defendant could be compelled to release witness statements collected prior to litigation to the plaintiff.

The Court examined in depth the policies underlying what they called the "deposition-discovery rules" of what was then the fairly new Federal Rules of Civil Procedure. The Court noted that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation," and that "either party may compel the other to disgorge whatever facts he has in his possession." *Id.* at 507. The purpose of early disclosure is to advance the point in time where this disclosure takes place to a time preceding trial, to reduce the possibility of surprise. *Id.* The *Hickman* Court, however, did find that there were limitations upon the free flow of information, such as the use of discovery as a weapon of bad faith or oppression. *Id.* at 508.

The *Hickman* Court also found that discovery into the mental impressions and strategies of the opposing lawyer were a limit upon discovery. The Court reasoned that

"[p]roper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 511. The Court found that thought processes of a lawyer are reflected in such things as "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.*

However, the *Hickman* Court drew a distinction between those items which may disclose an attorney's thought processes, and those items of substantive evidence which may reside in an attorney's file. The Court specifically noted that not all materials "obtained or prepared by" an adversary's counsel were free from disclosure: "Where 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.* at 511. Those facts from the attorney's file may be admissible themselves, may give clues to further facts, or "might be useful for purposes of impeachment or corroboration." *Id.*

Balancing the need for privacy against the potential abuses of hiding relevant evidence in attorney files, the *Hickman* Court repeated the "good cause" standard set forth in the Federal Rules of Civil Procedure, supporting the notion that the trial court had the discretion to determine when cause exists to compel an opponent's attorney to turn over evidence in his or her possession. *Id.* at 512. While the *Hickman* Court

ultimately denied the plaintiff's effort to obtain the subject witness statements, it made a distinction that is of supreme importance in this case – the thoughts and impressions of an attorney are the matter that is to be protected by the work-product privilege, not substantive evidence resting in the attorney's files.

This distinction between substantive evidence and material reflecting the attorney's thought processes has been described, in cases interpreting and applying *Hickman*, as a distinction between "opinion" work product (mental impressions and legal theories of the attorney), where disclosure is only permitted if the attorney has engaged in crime or fraud and "ordinary fact" work product (substantive evidence in the possession of a lawyer), which is afforded much less protection. *Baker v. Gen. Motors Corp.* 209 F.3d 1051, 1054 (8th Cir. 2000); *Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986). The subject at issue in this appeal – a videotape of the plaintiff – is clearly "ordinary fact" work product, subject to disclosure upon good cause.

D. Ohio adopts the *Hickman* standard.

In 1970, when this Court was considering the adoption of the Civil Rules, it considered the two different conceptions of the work product doctrine. On the one hand, there was the archaic and criticized *Schoepf* standard, which essentially designated anything collected by an attorney or an insurer to be work product and absolutely privileged from disclosure. On the other hand, the much more liberal *Hickman* standard drew a distinction between those materials containing an attorney's

mental impressions, and the "ordinary facts" collected by him or her, allowing disclosure of the latter upon a showing of good cause.

The Staff Notes to the 1970 enactment of Civil Rule 26 address both conceptions of work product. As to the *Schoepf* formulation, the Staff Notes flat out state that new "Rule 26(B) rejects *Schoepf*." Explaining the use of the term "privileged" in Rule 26, the Staff Notes say that it does not incorporate the *Schoepf* privilege since such an interpretation would "drastically limit the intended scope of discovery." *Id.*

Rejecting the *Schoepf* concept of privilege, the Staff Notes instead expressly indicated this Court's intent to adopt the *Hickman* concept of privilege and good cause. The Staff Notes express the intent to afford higher protection "against disclosure of lawyers' mental impressions and legal theories." The Notes cite to *Hickman* in setting forth the elements of good cause, such as "the importance of the materials sought to the party seeking them in the preparation of his case and the difficulty he will have obtaining them by other means." *Id.* This echoes the test applied by the Tenth District in this case. *Smith v. Chen*, 10th Dist. No. 12AP–1027, 2013-Ohio-4931, at ¶16 (evaluating whether the need for the information was compelling and whether the evidence could be obtained elsewhere).

This Court has reaffirmed its adoption of the *Hickman* concept of work-product recently. In *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161, 2010-Ohio-4469, 937 N.E.2d 533, at ¶55, this Court cited to *Hickman* and federal

authority interpreting *Hickman* to explain that "the work-product doctrine provides a *qualified* privilege protecting the attorney's mental processes in preparation of litigation" (emphasis added). In support of this point, this Court cited to several authorities that recognize or apply the distinction between opinion work product and ordinary fact work product. *Id.* at ¶59, *citing Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (C.A.9, 1992) *et al.* The discovery of factual evidence, whether designated as impeachment evidence or not, should be afforded less protection from discovery than memoranda or notes capturing the thought processes of a parties' lawyer.

E. As applied to this case.

Dr. Chen argues that he should be permitted to withhold a videotape from discovery in order to maximize its impeachment impact at trial. (Appellants' Brief, p. 2). In making this argument, Dr. Chen conflates opinion work product and ordinary fact work product. Dr. Chen cites to cases concerning discovery of an attorney's "mental impressions, theories, and legal conclusions," as opposed to the discovery of substantive evidence that rests in an attorney's file. (Appellants' Brief, p. 6, *quoting Squire, Sanders* at ¶55).

There can be no doubt that a surveillance video documenting an injury plaintiff's post-injury capabilities is "ordinary fact" substantive evidence, despite Dr. Chen's efforts to avoid this point. Dr. Chen points to the medical malpractice standard of care at page 7 of his Brief, but omits any discussion of whether a video showing a plaintiff's

capabilities is relevant to the issue of **damages.** Amicus Ohio Association of Civil Trial Attorneys, at page 4 of its Brief, and without relevant citation[2] claim that such a video could only be used as substantive evidence of damages if accompanied by expert testimony. Both of these positions lack merit.

Photographic and videotape evidence of the condition of a person, so long as properly authenticated and relevant, is admissible without any expert testimony, and may be evidence of the extent of damages suffered by a plaintiff. The citations are legion. *See Brokamp v. Mercy Hosp. Anderson* 132 Ohio App. 3d 850, 867, 726 N.E.2d 594, 606 (1999), (surveillance video admitted without expert testimony to challenge the extent of a medical malpractice plaintiff's injury); *Weidner v. Blazic* 98 Ohio App. 3d 321, 334, 648 N.E.2d 565, 573 (1994), (photographic slides showing extent of damage to medical malpractice plaintiff's jawbone admitted); *Hyams v. Cleveland Clinic Found.*, 976 N.E.2d 297, 2012-Ohio-3945, at ¶44 (videotape of medical malpractice plaintiff taken during treatment admitted to demonstrate physical condition); *Watkins v. Cleveland Clinic Found.*, 130 Ohio App. 3d 262, 282, 719 N.E.2d 1052, 1066 (1998), (videotape of medical malpractice tape admissible to demonstrate condition).

Videotape evidence of the condition of a person is substantive evidence, and the fact that it may have an impeachment purpose as well does not change that. But even if the sole nature of surveillance videotape was for impeachment purposes, under the

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[2] *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415, 2010-Ohio-282 is not a medical malpractice case, and it does not involve a videotape, or expert witnesses.

Hickman conception of work-product, it is **still** subject to disclosure in discovery. As noted by the *Hickman* court, evidence from an attorney's file which "might be useful for purposes of impeachment or corroboration" is potentially discoverable. *Hickman* at 511. There is nothing magic about impeachment evidence which makes it undiscoverable in response to well-crafted discovery requests.

What Dr. Chen and OACTA essentially advocate for is a return to the *Schoepf* concept of work-product, where the contents of an attorney's file are inviolate. Once an item of evidence was placed in the attorney's file, it becomes "evidence which relates exclusively to the adverse party's case," and it was exempt from disclosure to the opponent. *Schoepf,* 74 Ohio St. 1 at 13. This conception of work-product, as detailed above, has been rejected by this Court.

F. The Tenth District's Decision

There is nothing controversial in the Tenth District's decision. The Tenth District applied this Court's three part test from *Squires, Sanders & Dempsey* at ¶ 60, reviewing whether the work product is relevant, whether there is a compelling need for the information, and whether the information can be found elsewhere. *Smith,* 2013-Ohio-4931, at ¶22. The Tenth District did not adopt a new rule of law, it applied the law as announced by this Court just three years prior.

What Dr. Chen really complains of is the Tenth District's refusal to embrace his claim that impeachment evidence has some special status that protects it against

disclosure. The Tenth District evaluated the authority supporting Dr. Chen's argument and rejected it for good reason. The local rule cited by Dr. Chen only applied to material expected to be listed in pretrial statements. *Smith* at ¶18. And the case Dr. Chen cited fared no better, in that the plaintiff therein did not make any discovery requests which would have obligated the defendant to disclose the claimed impeachment evidence. *Smith* at ¶20, citing *Thrope v. Rozen*, 1st Dist. Nos. C-960143, A-9403710, 1997 WL 610630 (Oct. 3, 1997).

Dr. Chen cites nothing further in this appeal to support the contention that impeachment evidence has some sort of special status or protection from disclosure. OACTA cites two more items in support of this supposed rule – a collection of evidence rules (OACTA Brief, p. 5-6) and two cases concerning the obligation of prosecutors to identify rebuttal witnesses in criminal cases (OACTA Brief, p. 6). Of course, the rules of evidence do not control what is discoverable, the obligation to produce evidence is much broader than what is admissible. And the two criminal cases cited by OACTA do not support the contention that impeachment or rebuttal evidence is sacrosanct, in that both cases held that prosecutors must identify any witnesses that they reasonably should have anticipated they were likely to call, "regardless of whether during its case in chief **or in rebuttal**." *State v. Lorraine*, 66 Ohio St. 3d 414, 423, 613 N.E.2d 212, 220 (1993), (emphasis added); *State v. Hunter*, 131 Ohio St. 3d 67, 2011-Ohio-6524, 960 N.E.2d 955, at ¶134. Of course, in this case, Dr. Chen fully expected to use the videotape in

rebuttal, in that Dr. Chen identified the investigators who shot the video as witnesses. Accordingly, OACTA' s citations do not support Dr. Chen's position.

Once the reader sets aside the rule proposed by Dr. Chen – that impeachment evidence has a special status that protects it from civil discovery requests – the Tenth District's decision is a mundane application of well-defined law.

G. The potential consequences of affirming the Tenth District's Decision

Dr. Chen claims the decision of the Tenth District sets an automatic rule of disclosure of all surveillance videos in all circumstances. (Dr. Chen's Brief at p. 1). Dr. Chen and his Amicus claims many harms will result if decision in this matter is allowed to stand – everything from defendants being unmotivated to work up their cases (Dr. Chen's Brief at p. 2) to the truth-seeking process being "undermined" (OACTA's Brief at p.9).

But as detailed above, that is not what the Tenth District held, and the proposed ramifications are overstated. All evidence is disclosed to the other party, eventually. "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." *Hickman*, 329 U.S. at 507. Reducing surprises at trial allows for a more orderly administration of justice, a reduction of side disputes at trial and the need for sidebars and continuances to resolve them. Surprises also lead to trial court errors, which lead to mistrials and reversals and a further burden upon the courts.

What Dr. Chen and its Amicus seek is a rule allowing a party to surprise its opponent at trial to maximize the impact of any impeachment evidence. But most cases settle or are resolved without a trial. Scholarly surveys estimate that between 97% and 98.2% of cases are resolved by means other than trial. Barkai, J. (2006), *A Profile of Settlement.* Court Review: The Journal of the American Judges Association, 42:3-4 (2006), pp. 34-39; Galanter, M. (2004), *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts.* Journal of Empirical Legal Studies, 1: 459–570. Endorsing the position that impeachment evidence is exempt from disclosure would force a trial for a party to gain the benefit of the rule. But having all of the information available to all of the parties early in the litigation process allows both parties to realistically evaluate the prospects of success or failure of the suit, and is therefore a policy promoting settlement and should be favored by this Court.

H. The potential consequences of reversing the Tenth District's Decision.

If Appellants' proposed rule is adopted, parties will be free to designate certain evidence as "impeachment evidence" and exempt it from disclosure, even when the evidence is also substantive evidence. It will not take long for parties on both sides to imagine why most of their substantive evidence also has an impeachment purpose, and therefore refuse to provide it in discovery. This will mark a return to the *Schoepf* standard – where the contents of an attorney's file are nearly absolutely privileged, regardless of the origin of the evidence or the substantive nature of the evidence

contained in that file. The *Schoepf* conception of work product was expressly rejected in the adoption of the Civil Rules in 1970, and has not been applied by this Court since.

Accordingly, adoption of the rule proposed by Dr. Chen will change Ohio practice, returning to the prospect of trial by ambush, and requiring further court involvement in pre-trial motion practice and conducting in camera reviews of purported impeachment evidence on behalf of those parties seeking to avoid ambush. Adopting the rule proposed by Appellants will increase the burden upon the courts, and reduce the prospect of settlement.

V. CONCLUSION

"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman*, 329 U.S. at 507. Adopting the rule proposed by Dr. Chen and his Amicus would be a significant step back from this principal, and would replace the forthright exchange of information and resolving claims upon their merit with a system of gamesmanship, dependent upon Perry Mason-like surprises at trial. While such a system may make for interesting trials, it does not advance the goal of the orderly administration of justice.

As a result, Amicus OAJ urges the Court to reject Appellants' call for this Court to adopt a rule that would allow any party to designate certain materials as "impeachment evidence," regardless of whether or not it is also substantive evidence, and hide that evidence in its attorney's file for a dramatic moment in a trial that the

statistics say is unlikely to ever happen. Such a rule would disrupt the concept of discovery and privilege expressly adopted by this Court's enactment of the Civil Rules more than forty years ago, and set new, unworkable paradigms going forward.

Accordingly, this Court should find that the Tenth District properly applied well-established rules for the discovery of claimed work product materials, and AFFIRM the Tenth District in all respects.

Respectfully submitted,

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VI. CERTIFICATE OF SERVICE

THIS CERTIFIES THAT a copy of the foregoing was served on August 1, 2014 upon the following by regular, U.S. Mail:

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