

NO. 69203-8

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

BRENT STROBECK,

Appellant,

v.

DAVID BROCK,

Respondent

APPELLANT'S REPLY BRIEF

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A. The Video At Issue Was Covered by Interrogatory No. 21.

The threshold question in this appeal is whether the video at issue was covered under Mr. Strobeck's written discovery requests. Mr. Brock argues that the video was not covered by interrogatory no. 21,¹ which asks the defense to list any videos depicting any injuries relating to the subject incident. According to Mr. Brock, the video "depicts Mr. Strobeck walking with a seemingly normal gait free from any injury or impairment." Resp. Br., at p. 10. Mr. Brock further maintains because the video depicts what the defense determined to be a "non-injury," the video is not covered under the discovery request, and, therefore, Mr. Brock was not required to supplement his response to interrogatory no. 21 under CR 26(e) by providing the requested information pertaining to the video. *Id.*

Mr. Brock's extremely narrow interpretation of the interrogatory cannot be reconciled with the spirit and intent of discovery rules, which

¹ Interrogatory No. 21 states as follows:

List any and all photographs, motion pictures, videos, slides, drawings, diagrams, maps, or other graphic or electronic representations depicting the **INCIDENT** scene, the vehicles, any property damage, or any injuries. For each such item state the name, address and telephone number of the custodian of the item, the date it was created, and who created the item.

are designed to promote full disclosure of the issues and facts before trial. *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388, 91 L.Ed. 451 (1947). By any fair reading, interrogatory no. 21 required Mr. Brock to apprise Mr. Strobeck about the existence of the video.

Applying Mr. Brock's logic, so long as the video demonstrated even the slightest degree of impairment or injury, then the video would be covered under interrogatory no. 21, and Mr. Brock would be required to either disclose the video along with the additional information requested pertaining to the video, or move for a protective order pursuant to CR 26(c). The obvious problem with Mr. Brock's reasoning is that the defense is solely responsible for determining whether or not the video depicts an injury. Such an approach where the defense makes the unilateral determination as to whether the video depicts an injury is patently unfair and contrary to the spirit and intent of the discovery rules.

It was not up to Mr. Brock to unilaterally determine whether or not the video depicted an injury. Mr. Brock's remedy, if any, was to seek a protective order pursuant to CR 26(c). *See Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 281, 686 P.2d 1102 (1984) (defendant improperly withheld accident reports based on defendant's unilateral determination whether the accident reports were relevant to plaintiff's claims).

Moreover, it cannot be disputed the video is directly related to the issue of Mr. Strobeck's injuries. Indeed, Mr. Brock sought to admit the video into evidence to refute Mr. Strobeck's claims that the injuries to his foot impaired his ability to walk. Accordingly, even under a very restrictive interpretation of interrogatory no. 21 as Mr. Brock asks this Court to apply, the video was clearly covered under the scope of the interrogatory. As our Supreme Court made abundantly clear in the *Fisons* case, evasive tactics and obfuscation in the discovery process will not be tolerated by Washington courts. *Washington State Physicians Insurance Exchange & Ass'n. v. Fisons*, 122 Wn.2d 299, 354-5, 858 P.2d 1054 (1993).

B. A Party May Not Knowingly Conceal Evidence Requested In Discovery and Be Permitted to Use the Evidence at Trial.

Mr. Brock's arguments that the video was admissible as either rebuttal evidence or impeachment evidence do not address the core issue presented in this appeal whether a party can knowingly conceal evidence requested in discovery, including impeachment or rebuttal evidence, and then be permitted to use the evidence at trial. Resp. Br. at p. 11 – 17.

None of the cases cited by Mr. Brock involves a situation where, as in the instant case, the rebuttal or impeachment evidence was requested in discovery. For example, *Kremer v. Audette*, 35 Wn.App. 643, 668 P.2d

1315 (1983), addressed the issue of whether the trial court erred in excluding certain testimony offered by the plaintiff as rebuttal evidence on the ground that evidence was not relevant. There is nothing in the opinion to suggest that the testimony at issue was the subject of a written discovery request.

Likewise, *Tamburello v. Department of Labor and Industries*, 14 Wn.App. 827, 545 P.2d 570 (1976), is clearly distinguishable from the instant case. The surveillance video of the worker's compensation claimant which was admitted as impeachment evidence over claimant's objection in *Tamburello* was not covered by a discovery request. *Id.*, at 828-9.

The criminal cases cited by Mr. Brock: *State v. Bashor*, 175 Wash. 230, 27 P.2d 121 (1933); *State v. White*, 74 Wn.2d 386, 444 P.2d 661 (1968); and *State v. Falk*, 17 Wn.App. 905, 567 P.2d 235 (1977), merely stand for the proposition that under the *criminal* discovery rules a prosecuting attorney is not required to anticipate and search out the identity of rebuttal witnesses or other rebuttal evidence for purposes of disclosure to the defense prior to trial. *See* CrR 4.7(a). These criminal cases and the criminal discovery rules, however, have no bearing on a party's obligations under the civil discovery rules to provide all

information requested in discovery regardless of whether the information may be used as rebuttal or impeachment evidence.

Mr. Brock seeks to distinguish the cases cited by Mr. Strobeck which hold that a defendant is prohibited from using surveillance video if the video was not disclosed in response to a discovery request on the ground that Mr. Strobeck's written discovery did not cover the video at issue. Resp. Br., at p. 18. However, as set forth above, interrogatory no. 21 does in fact cover the video. Therefore, the reasoning in *Papadrakis v. CSX Transp., Inc.*, 233 F.R.D. 227, 228 (D. Mass. 2006), *Wegner v. Viessman, Inc.*, 153 F.R.D. 154, 156 (N.D. Iowa 1994), and *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993) fully applies in the instant case.

Mr. Brock further argues that even if the video was covered by interrogatory no. 21, these cases do not reflect the law in Washington. According to Mr. Brock, *Tamburello v. Department of Labor and Industries*, 14 Wn.App. 827, 545 P.2d 570 (1976), states the law in Washington regarding the disclosure of surveillance video prior to trial. Resp. Br., at 18. However, as stated above, *Tamburello* is easily distinguishable because the video in *Tamburello* was not the subject of a discovery request.

C. The Trial Court's Abuse of Discretion Was Not Harmless Error.

Mr. Brock asserts that even if the trial court's failure to exclude the video based on the defense's knowing concealment was an abuse of discretion, the error was harmless. According to Mr. Brock, because the jury found no liability, the trial court's error in admitting the video into evidence, which Mr. Brock maintains is solely related to the issue of damages, was harmless. Br. of Resp., at 19.

Mr. Strobeck addressed the issue of harmless error in the context of a defendant's failure to respond to discovery in his opening brief citing *Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 686 P.2d 1102 (1984), and *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513(5th Cir. 1993) (failure to disclose surveillance video in response to discovery request was not harmless error). App. Br., at 16-17. As this Court observed in *Gammon*, it is not possible to know for certain whether the defense's knowing concealment of the video had an impact on the outcome of the case. Therefore, a new trial is required. *Gammon*, at 282 ("It is precisely because we cannot know what impact full compliance would have had, that we must grant a new trial").

Moreover, although it cannot be stated with certainty whether Mr. Brock's failure to disclose the video would have changed the result in this

case, a litigant who has engaged in misconduct should not be allowed to benefit from his actions. *Gammon*, at 282. As stated by the Court in *Fisons*: “[m]isconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.” *Fisons*, 122 Wn.2d at 335.

Mr. Brock does not even address the *Gammon* case or attempt to distinguish it from the facts presented here in his reply brief. Instead, Mr. Brock relies on *American Oil Co. v. Columbia Oil Co., Inc.*, 88 Wn.2d 835, 567 P.2d 637 (1977), and *Kramer v. J.I. Case Manufacturing Co.*, 62 Wn.App. 544, 815 P.2d 798 (1991), for the proposition that an error relating to the issue of damages is harmless if the verdict reflects nonliability. Resp. Br., at p. 19. However, both cases are easily distinguishable from *Gammon* and the instant case.

The trial court error at issue in *American Oil* and *Kramer* did not involve a party’s non-compliance with the discovery rules. *American Oil Co. v. Columbia Oil Co., Inc.*, 88 Wn.2d at 841-42 (trial court error in excluding evidence of certain damages was harmless where verdict reflected a finding of no liability); *Kramer v. J.I. Case Manufacturing Co.* 62 Wn.App. 544, 549 (1991) (error in application of Tort Reform Act damage allocation provision was harmless given jury’s finding of no liability).

In sum, the importance of the video in this case is obvious. The defense used the video in an attempt to discredit Mr. Strobeck's testimony on both liability and damages. It is impossible to know what impact the defense's misconduct had on the outcome of the case, or whether the timely disclosure of the video could have resulted in a settlement. Accordingly, the trial court's error in failing to exclude the video was not harmless error.

D. Conclusion.

By any fair reading, interrogatory no. 21 required Mr. Brock to apprise Mr. Strobeck about the existence of the video. The trial court's error in failing to exclude the video was not harmless error. Accordingly, Mr. Strobeck respectfully requests this Court to vacate the judgment and to remand the case for a new trial.

RESPECTFULLY SUBMITTED this 18th day of January, 2013

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By:

A handwritten signature in black ink, appearing to read "Robert F. Kehoe", written over a horizontal line.

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