



# On Camera

The Texas Supreme Court solidifies strategic use of surveillance.

BY GARRETH A. DEVOE AND JEFFREY S. VALLIERE

If “a picture is worth a thousand words, then a video is worth exponentially more.”<sup>1</sup> Thus stated the Texas Supreme Court in its recent seminal holding in *Diamond Offshore Servs. v. Williams*. In personal injury lawsuits, a defendant’s most useful litigation tool is often video surveillance. Unlike witness testimony, video evidence allows a jury to see for themselves how a plaintiff acts in his or her post-injury daily life. Indeed, the issue of the admissibility of surveillance video of injured plaintiffs has become so prevalent that the Texas Supreme Court recently held that, but for rare exceptions, trial court judges must review relevant video evidence proffered in personal injury cases before deciding whether to exclude same.<sup>2</sup>

## Diamond Offshore Servs. v. Williams

In *Diamond Offshore Servs. v. Williams*, the Texas Supreme Court overturned an approximately \$10 million jury award because the district judge failed to review video footage of the purportedly injured plaintiff prior to excluding the video.<sup>3</sup> There, Diamond Offshore Services Limited and Diamond Offshore Services Company (collectively, “Diamond Offshore”) employed Willie David Williams as a senior mechanic.<sup>4</sup> In January 2008, while working on an offshore drilling rig owned by Diamond Offshore, Williams allegedly hurt his back on a large piece of equipment.<sup>5</sup> After two subsequent back surgeries, Williams alleged that he continued to suffer back pain and neurological problems with his foot and toes.<sup>6</sup> Further, his treating physician declared him “totally disabled[.]”<sup>7</sup> Williams never returned to work.<sup>8</sup>

In May 2011, Williams filed Jones Act negligence and unseaworthiness claims against Diamond Offshore.<sup>9</sup> He also underwent a functional capacity evaluation, or FCE, the author of which concluded that his pain questionnaire responses were “‘consistent’ with patients who are ‘exaggerating their symptoms,’” and that he could perform medium-level physical labor with certain physical restrictions.<sup>10</sup>

During discovery, Diamond Offshore retained a surveillance investigator, and on the first day of surveillance, for 27 minutes, the investigator videotaped Williams using a mini-excavator to clear away a dilapidated mobile home and bending over 34 times over a four-minute period.<sup>11</sup> On the second day, for

28 minutes, the investigator videotaped Williams sitting on a stool while occasionally gathering tools and materials and using his body to maneuver a large “monster wheel” onto his truck.<sup>12</sup>

At the plaintiff’s motion in limine hearing on the video, the district court judge, after stating that she had not watched the video, ruled that Diamond Offshore could only use the video for impeachment purposes and if Williams “opens the door[.]”<sup>13</sup> At trial, Williams testified that he was unable to hold any job because of his constant back pain and physical restrictions, and his treating physician disagreed with the FCE’s conclusion as outdated.<sup>14</sup> Although Diamond Offshore proffered the surveillance video on three separate occasions during trial to counter this evidence and corroborate the FCE, the district court judge continued to exclude the video.<sup>15</sup>

Subsequently, the jury returned a verdict in Williams’ favor, awarding him nearly \$10 million in damages, nearly \$4 million of which was awarded specifically for pain and suffering.<sup>16</sup> In a split decision, the court of appeals affirmed the verdict, determining that the district court did not abuse its discretion in excluding the video.<sup>17</sup>

The Texas Supreme Court held that (1) the district court abused its discretion by not watching the video prior to determining its admissibility; (2) the video should not have been excluded from the evidence; and (3) the district court’s exclusion of the video constituted a harmful error.<sup>18</sup> The court found that the district judge had abused her discretion based on the district judge’s statement that she had not watched the video.<sup>19</sup> The court held that trial courts must view video evidence before ruling on its admissibility where the video’s contents are at issue, unless (a) it is “obvious” that the potential prejudice of the video substantially outweighs any probative value the video might have;<sup>20</sup> (b) the video evidence is a video deposition in which no party is objecting to a visual aspect of the deposition; and/or (c) the proffering party offers a lengthy video too close to trial.<sup>21</sup> The court found that the video in this case satisfied none of the exceptions and that the district judge should have viewed the video herself to determine its admissibility.<sup>22</sup>

The court also found that the video should not have been excluded because its depiction of Williams performing physical activities was probative as to the issues of his pain and suffering and loss of earning capacity.<sup>23</sup> Further, the video was not automatically unduly cumulative because a visual representation allows a jury to see signs of discomfort in an injured party that testimony alone cannot demonstrate.<sup>24</sup>

The court also found that the admission of the video did not constitute unfair prejudice because viewing the video would not encourage the jury to decide on an improper basis. Finally, the court found that the video was not misleading because (a) the investigator recorded Williams for two consecutive days for 30-minute periods, (b) Williams did not allege that Diamond Offshore omitted any video footage, and (c) Williams did not allege that Diamond Offshore altered any video footage.<sup>25</sup>

In finding that the district court's exclusion of the video constituted a harmful error, the court reasoned that if testimony from the plaintiff and his witnesses about his physical activities was important, then providing the jury an opportunity to actually witness some of those activities was just as important.<sup>26</sup> Further, the video could have supported the FCE's conclusions, as well as undercut Williams' overall credibility as to the liability of the defendant.<sup>27</sup> Thus, the court overturned the jury award and remanded the case for a new trial, in which the video must be admitted.<sup>28</sup>

### Analysis and Recommendations

In personal injury lawsuits, both defense counsel and plaintiffs' counsel should take several steps to bolster their respective sides.

Defense counsel should first attempt to obtain a sufficient amount of footage each day on consecutive days. Doing so will help defeat plaintiffs' counsel's inevitable arguments that the video is misleading or merely a "snapshot" of the plaintiffs' post-injury life. Second, defense counsel should instruct their investigators to only film the purportedly injured plaintiff while performing tasks he or she claims an inability to perform so as to avoid plaintiffs' counsel's argument that an omission from the video renders such video misleading and inadmissible. Thus, defense counsel should not retain any investigative service that involves a remote-controlled camera that films for an extended period of time, e.g., a camouflaged unmanned camera set up outside an injured plaintiffs' residence.

Third, defense counsel should submit surveillance video as evidence well in advance of trial to give the district judge sufficient time to view, but not so far in advance as to elicit plaintiffs' counsel's argument that such video is outdated. Finally, defense counsel should ensure that all surveillance video has clear date and time stamps on the video itself.

On the other hand, plaintiffs' counsel should not completely abandon the "snapshot" argument. In general, plaintiffs' counsel should always request that defense counsel produce all video surveillance taken with the intent to videotape the plaintiff, regardless of whether or not the plaintiff actually appears on the video. Doing so will bolster plaintiffs' counsel's unfair prejudice argument to the court, particularly when

defense counsel uses unmanned cameras that capture extensive periods of video. Further, if the surveillance video does capture the plaintiff performing an activity that he or she has alleged is difficult to perform, then plaintiffs' counsel should emphasize to the court that video not taken on consecutive days is unfairly prejudicial because it does not show the harmful effect that the physical activity may have had on the plaintiff on subsequent days.

### Conclusion

*Diamond Offshore* ratifies the strategy of obtaining surveillance video of a personal injury plaintiff. While the decision does not ensure that surveillance video will be admissible, a trial judge is now essentially required to review the film before ruling on its admissibility. Finally, plaintiffs' counsel must now be prepared in more cases to controvert the substance of surveillance video in front of a jury rather than arguing to exclude it in front of a judge. **TBJ**

### Notes

1. *Diamond Offshore Servs v. Williams*, 2018 LEXIS 186, 2 (Tex. Mar. 2, 2018).
2. *Id.* at 3.
3. *Id.* at 3, 6.
4. *Id.* at 3.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 4.
12. *Id.*
13. *Id.* at 7.
14. *Id.* at 4.
15. *Id.* at 5.
16. *Id.* at 2, 6.
17. *Id.* at 6.
18. *Id.* at 6, 11-12, 17.
19. *Id.* at 9.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 17.
24. *Id.*
25. *Id.* at 14-15.
26. *Id.* at 17.
27. *Id.* at 17-18.
28. *Id.* at 19.



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