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Appellate Lawyer of the Week: Houston Lawyer Secures Reversal of \$10M Award, Arguing Jury Should Have Seen Video Evidence

BY JOHN COUNCIL

Video recordings are often the most effective and persuasive evidence a lawyer can offer at trial.

And Houston lawyer Connie Pfeiffer recently convinced the Texas Supreme Court that a jury should have been allowed to see a defense surveillance video of a plaintiff who allegedly had exaggerated the extent of his injuries.

Pfeiffer's victory reverses a \$10 million jury verdict and orders a new trial for her client after a trial judge refused to admit the video evidence. But the decision she won also serves as a guide on how to handle video evidence in an age when its become prolific because of the wide use of security cameras and cell-phone recordings.

"It gives a ton of guidance for lawyers and litigants for what to do in this type of situation,"

said Pfeiffer, a partner in Beck Redden, of the decision in *Diamond Offshore Services v. Williams*.

"We think that the correctness of the trial the first time depends on the evidence and getting all of the evidence before a jury to get to the truth," she said. "The jury in this trial didn't have all of the evidence."

Pfeiffer represents Diamond Offshore, an energy company that was sued in 2011 by employee Willie David Williams, who alleges he was hurt while working on a large piece of machinery and sustained back injuries that rendered him totally disabled.

Shortly after filing the suit, Williams underwent tests to assess his physical abilities, which concluded that his responses were consistent with patients who are exaggerating their symptoms.



Connie Pfeiffer of Beck Redden.

Diamond Offshore pursued a defensive theory that Williams was overstating his pain and downplaying his ability to return to some form of work. To support their theory, Diamond Offshore had an investigator record Williams for about an hour over two consecutive days.

The video showed Williams operating a mini-excavator to clear away a run-down mobile home, working on his

lifted truck and at one point, maneuvering a large “monster wheel” onto his vehicle.

At trial, Williams testified he still had constant pain in his back and was unable to hold any sort of job. He also testified that he would attempt to do activities he enjoyed such as using the mini-excavator and working on his vehicle but could not engage in those activities for long before his injuries hurt him.

Diamond Offshore offered the surveillance at trial to corroborate the test of Williams’ abilities, but he admitted he could engage in the activities portrayed, just not for an extended period of time. He also argued the video was not a fair representation of his disabilities and showed nothing of the copious amounts of pain medication he must take before performing those activities and should be excluded under Texas Rules of Evidence 403 as unfairly prejudicial and misleading.

The trial judge considered the admissibility of the video, and after stating that she had not watched it, that Diamond Offshore could hold the video in its “reserve bank for impeachment, and that’s it.” Diamond Offshore offered

the video on three separate occasions, both for impeachment and as substantive evidence, but each time the judge refused its admission as evidence.

The jury later return a \$10 million verdict for Williams for his lost earning capacity, medical expenses, pain and suffering and physical impairment. Houston’s First Court of Appeal affirmed Williams’ win in a split decision after determining that the trial court had not abused its discretion in excluding the video — a ruling Diamond Offshore appealed to the Texas Supreme Court.

In its decision, the high court reversed and remanded the case for a new trial after determining that the judge should have watched the video tape before excluding it as evidence.

“We hold that, as a general rule, a trial court judge should view video evidence before ruling on admissibility when the contents of the video are at issue,” wrote Justice Eva Guzman in a unanimous decision by the court.

Guzman also noted that Williams’ concerns about the unfairness of the video did not outweigh its probative value

and should not have been excluded under Rule 403.

“We perceive no significant risk of the video misleading the jury,” Guzman wrote. “The video’s probative value is significant, and concerns about cumulativeness, unfair prejudice, and misleading the jury do not substantially outweigh this value. Williams and his witnesses were available to provide any necessary context about information not shown on the video. The video could not have been excluded under Rule 403.”

Pfeiffer believes the decision will have a significant impact on how trial judges admit significant evidence in civil disputes.

“I think this opinion helps both sides of the Bar. This isn’t about defendants, this is about the neutral playing field of the trial,” Pfeiffer said. “By going beyond just the threshold of failing to view the video, the court was able to give a lot of guidance about why this particular evidence in the context of this record was not unfairly prejudicial.”

Jeff Oldham, a partner in Houston’s Bracewell who represented Williams on appeal, did not return a call for comment.