

SUPREME COURT OF LOUISIANA

No. 95-C-0053

BURTON OLIVIER ET UX

Versus

PATRICK D. LEJEUNE AND STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF ST. MARTIN, STATE OF LOUISIANA

JOHNSON, Justice, dissenting

I respectfully dissent.

Extrinsic evidence is evidence obtained from a source other than the direct questioning of the witness. The use of extrinsic evidence, including videotapes, for impeachment purposes is governed by La. Code E. art. 607 D which provides as follows:

Attacking credibility extrinsically. Except as otherwise provided by legislation:

- (1) Extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness.
- (2) Other extrinsic evidence, including prior inconsistent statements and evidence contradicting the witness' testimony, is admissible when offered solely to attack the credibility of a witness unless the court determines that the probative value is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice.

However, before extrinsic evidence to impeach a witness can be introduced, a proper foundation must be laid pursuant to La. Code E. art. 613 which provides as follows:

Except as the interests of justice otherwise require, extrinsic evidence of bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects or of capacity is admissible after the proponent has first fairly directed the witness' attention to the statement, act or matter alleged, and the witness has been given the opportunity to admit the fact and has failed distinctly to do so.

(emphasis added).

Under art. 613, if after being confronted with the fact, the witness admits the fact, the evidence is not probative of the witness's credibility. That is, upon admission by the witness, the evidence does not challenge his truthfulness and, consequently, it is not impeachment evidence admissible under arts. 607 and 613.

The use of videotapes in litigation has burgeoned in recent years. Ashley S. Lipson, Art of Advocacy - Demonstrative Evidence, § 13.02[2] (1995). Frequently, defense attorneys hire private investigators to film surveillance videotapes capturing the plaintiff participating in physical activities inconsistent with his claimed injuries and limitations. Lipson, at §13.02[3]ii. Discovering the truth, such as indications of pain by the plaintiff or the need for medication or rest after physical exertion, is rarely the aim of a surveillance videotape. Where the goal and job is to find damaging evidence, a great potential for abuse exists. That is, surveillance videotapes provide manifold opportunities for fabrication and misrepresentation. For instance, an injured plaintiff may be filmed picking up a large object with ease. The camera would fail to show whether the object was relatively light or whether, afterwards, the plaintiff experienced debilitating pain and was unable to engage in further physical activities. Thus, a surveillance videotape is naturally suspect. Although videotapes are intended to give the impression of an objective reality, they are, in fact, merely a product of the point of view of the video camera operator. The video camera operator can create a false impression through selectively choosing when to turn the camera on and off. Nonetheless, once a videotape is introduced into evidence, it somehow takes on the aura of objective truth. Moreover, videotapes make a lasting impression on a jury. Not surprisingly, the danger for undue prejudice is immense. Id. §13.01-.06.

The admissibility of videotapes is largely within the discretion of the trial court. LaFleur v. John Deere Co., 491 So. 2d 624 (La. 1986). Nonetheless, this court has previously noted that "evidence in the form of moving pictures or videotapes must be approached with great caution because they show only intervals of the activities of the subject, they do not show rest periods, and do not reflect whether the subject is suffering pain during or after the activity." Orgeron v. Tri-State Road Boring, Inc., 434 So. 2d 65 (La. 1983).

After reviewing Mr. Olivier's testimony and the videotape, I believe that the videotape did not contradict or discredit Mr. Olivier's testimony. Thus, the evidence did not challenge his truthfulness. Accordingly, I believe that the court of appeal correctly concluded that the

videotape was inadmissible as impeachment evidence under arts. 607 and 613.

In addition to being inadmissible as impeachment evidence, I regard the videotape as being inadmissible as direct evidence on the issue of quantum presented to the jury. Generally, relevant evidence is admissible. La. Code E. art. 402. However, even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." La. Code E. art. 403. After viewing the videotape, I consider its probative value as being far outweighed by its prejudicial nature. The videotape provided no assistance to the jury to resolve the only issue before it, the assessment of damages. In fact, the videotape was somewhat misleading when viewed. Although the time and dates are revealed on the screen for the viewer, the viewer's focus is naturally on the activities that take place. Due to editing, the tape is only 30 minutes long and, during this 30 minute period, the viewer is left with the sensation that Mr. Olivier engages in a great deal of non-stop activity. In reality, his tasks were performed over a three day period and were not performed successively. Reviewing the record, it is unquestionable that the tape dominated the evidence regarding Mr. Olivier's physical condition. As noted by the trial judge in his reasons for judgment on the motion for judgment notwithstanding the jury verdict and, alternatively, motion for new trial, "[o]bviously the jury was impressed with this evidence." Clearly, the probative value of the videotape was outweighed by its prejudicial effect and, thus, I consider correct the court of appeal's conclusion that the trial judge abused his discretion in admitting the videotape and that the videotape was inadmissible.

When a trial court makes a consequential and erroneous ruling in the exclusion or admission of evidence the "manifestly erroneous" or "clearly wrong" standard should not be used by the court of appeal to review the jury's decision. McLean v. Hunter, 495 So. 2d 1298, 1304 (La. 1986). The manifestly erroneous or clearly wrong standard assumes that consequential evidentiary rulings were correct and proper. Thus, the manifestly erroneous or clearly wrong standard of appellate review applies only to a jury verdict resulting from a properly conducted trial, not verdicts tainted by consequential erroneous evidentiary rulings. In such instances, no weight should be accorded the trial court judgment which adopts the jury's verdict. Rather, the court of appeal should review the entire record and decide the issues presented de novo. Id.; see also Gonzales v. Xerox Corp., 320 So. 2d 163 (La. 1975). Here, the jury's verdict was tainted by the trial court's consequential error in admitting the surveillance videotape. Thus, I believe that

the court of appeal correctly conducted a de novo review of the record to assess damages.

Moreover, I find that the record fully supports the court of appeal's quantum award. Accordingly, contrary to the decision by the majority, I would affirm the court of appeal's judgment in favor of Mr. and Mrs. Olivier.