

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wasylyk et al. v. The Corporation of the County of Simcoe

BEFORE: The Hon. Madam Justice A.A. Casullo

COUNSEL: Mr. D. Romaine, Mr. T. Boland, Mr. M. Hanton, for the Plaintiffs
Mr. J. de Vries, Mr. A. Neaves, Mr. S. Kirwin, for the Defendant

ENDORSEMENT

- [1] The trial of this action commenced on May 17, 2021 before McKelvey J. At the outset of trial, counsel for the defence challenged the admissibility of the photographs which the plaintiff's engineer had clarified and enhanced. Following a *voir dire*, an adjournment was granted to the plaintiffs, on terms, to permit the plaintiffs to obtain enhanced and/or clarified images from a better qualified expert.
- [2] The issue of the admissibility of enhanced photographs was to be dealt with in motions court prior to the trial commencing on September 20, 2021. Despite the best intentions of counsel, that did not come to pass. Hence, today, at the outset of the trial, I heard the admissibility motion. At the conclusion I advised counsel I would reserve – what follows are my reasons.

Background

- [3] In this action, the plaintiffs allege the County of Simcoe was negligent in relation to its winter maintenance operations on County Road 88, a Class 1 roadway, which resulted in the collision in which Ms. Wasylyk was catastrophically injured. The collision occurred at approximately 10:30 p.m. on January 12, 2011.
- [4] Suffice it to say, the condition of the roadway is a central issue to the litigation.
- [5] PC Williamson attended the scene and took photographs. The parties have agreed that the digital files from PC Williamson's camera are admissible, and they form part of the Joint Document Brief. Many of the photographs are so dark that very little is visible in the foreground. Others have a well-lit foreground but a black or near-black background.
- [6] The plaintiffs retained Ret. First Lieutenant D. Eric Johnson, a certified forensic photographer. Mr. Johnson's mandate was to brighten the photographs to reveal detail in the dark areas, and to provide a report, which he adopted under oath through his affidavit filed with the court. Mr. Johnson carried out his mandate in accordance with the guidelines set out by the Scientific Workgroup on Imaging Technologies ("SWGIT"). Mr. Johnson testified on the motion.

- [7] The defence also retained an expert, Eric Plaxton, a certified forensic video analyst. Mr. Plaxton's mandate, *inter alia*, was to opine on whether the images adjusted by Mr. Johnson achieved the stated purpose of "clarifying the content in the dark areas of those images." Mr. Plaxton did not testify on the motion.
- [8] For each photograph he enhanced, Mr. Johnson followed the same four-step procedure. Step 1 depicts the original image. Step 2 depicts the original image with noise reduction and sharpening. Step 3 depicts a sharpened image from Step 2 with shadow areas brightened as much as possible without amplifying noise. In Step 4 the process of non-linear brightening was applied to the darkest areas within each image to reveal additional detail.
- [9] In his report, Mr. Johnson confirms that all adjustments were done for the purpose of clarifying the content in the dark areas within the SWGIT's guidelines. Most importantly, the content of the images was not changed.

Discussion

- [10] In *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 (S.C.C.), the Supreme Court of Canada considered the admissibility of video camera footage, which was the only evidence upon which the court relied to identify and convict Mr. Nikolovski for robbing a grocery store.
- [11] The court held, at para. 22:

So long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on the issue of identity. Indeed, it may be the only evidence available. For example, in the course of a robbery, every eyewitness may be killed yet the video camera will steadfastly continue to impassively record the robber and the actions of the robbers. Should a trier of fact be denied the use of the videotape because there is no intermediary in the form of a human witness to make some identification of the accused? Such a conclusion would be contrary to common sense and a totally unacceptable result. It would deny the trier of fact the use of clear, accurate and convincing evidence readily available by modern technology. The powerful and probative record provided by the videotape should not be excluded when it can provide such valuable assistance in the search for truth. In the course of their deliberations, triers of fact will make their assessment of the weight that should be accorded the evidence of the videotape just as they assess the weight of the evidence given by *viva voce* testimony.

- [12] *R. v. Nikolovski* was decided in 1996, where the court described videotape evidence as a developing field. Technology has advanced by leaps and bounds in the ensuing 25 years.

- [13] More recently, the court in *R. v. Andalib-Goortani*, 2014 ONSC 4690 set out the principles upon which the admissibility of photographs, videos and other visual evidence should be governed (at para. 28):
- (a) Proof that the visual evidence is accurate, and truly representing the facts;
 - (b) That the visual evidence be fair, and not contain any intention to mislead; and
 - (c) That the visual evidence be verified under oath by a witness capable of doing so.
- [14] The court in *Andalib-Goortani* also held that, given the powerful effect of photographs, courts should be mindful of the risks posed by alterations to photographs. The question of accuracy should be fully considered at the admissibility stage, and not treated as a matter of weight. However, in *Andalib-Goortani*, the photograph at issue was culled from the internet, with no known author. Thus no one, not even the experts retained by Crown and defence, could confirm that the image had not been altered in some fashion. The court held the photograph taken from the video was not admissible.
- [15] In the case at bar the opposite is true. We know the identity of the photographer. We know that the photographs have been enhanced. We know that nothing has been added to the photographs. The content brought into focus by the enhancement process was already in the picture – the enhancements have revealed the detail which was captured by the camera’s sensor. According to Mr. Johnson, the original photographs were simply underexposed.
- [16] Defence submits that the alterations appear to make the surface of the roadway more reflective, which might lead one to suspect that the roadway was covered in ice. For example, I concede that the roadway in photograph DSC_2500, in its enhanced state, shows a bright surface that could be ice. However, photograph DSC_2531, also in its enhanced state, but taken from the opposite direction, does not depict a similarly bright surface.
- [17] Mr. Johnson’s mandate was not to make the road surface more visible, nor was it to identify objects or the condition of the road surface. Indeed, Mr. Plaxton concedes that Mr. Johnson achieved the “stated purpose of clarifying the content in the dark areas of the images.” In Mr. Plaxton’s opinion, Mr. Johnson did this without obscuring details in other areas, including the highlights.
- [18] While the defence argued that the prejudicial value of the enhanced photographs outweighs their probative value, I have been provided with no evidence that this is the case. It was open to the defendant to call Mr. Plaxton to speak to this issue.
- [19] The evidence at trial may contradict or support the condition of the roadway as being icy. But it is upon that evidence that a determination will be made, not on the basis of a photograph which has been brightened, and in which the sheen of headlights may be interpreted as depicting an icy surface.
- [20] I fail to see how the plaintiffs would gain an unfair advantage by admitting the photographs.

- [21] I am satisfied that the enhanced photographs are accurate, fair, and not misleading. Further, the photographs have been verified under oath by Mr. Johnson, who is capable of doing so.
- [22] Accordingly, the plaintiffs' motion is granted, and the enhanced photographs are admissible at trial.



CASULLO J.

Date: September 20, 2021