

**IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA**

██████████ as Surviving Spouse
of ██████████ Deceased; and ██████████
██████████ as Administrator of the
estate of ██████████

Plaintiffs,

v.

NIKIA CHERRY,

Defendant.

Civil Action No.: ██████████

**BENCH BRIEF REGARDING
ADMISSIBILITY OF DEFENDANT’S RECORDED STATEMENT**

Defendant provided a recorded statement to GEICO insurance company in connection with the subject collision.¹ The recorded statement should be admitted as evidence for three reasons. First, the recorded statement is authentic because it was produced by Defendant in discovery and because its contents prove its authenticity. Second, the recorded statement is not hearsay because it is a statement of a party opponent pursuant to Rule 801(d)(2). Third, the recorded statement is relevant and there is no reason under Rule 403 to exclude it. Therefore, it is admissible.

1. The recorded statement is authentic.

The recorded statement was produced by Defendant in response to Plaintiff’s Interrogatories:

¹ A transcript of the recorded statement is attached as Exhibit A.

26.

Identify all witness statements (whether written or oral) obtained from any person about any information relevant to any issue in this lawsuit, including but not limited to liability or damages. This request specifically excludes attorney work product, but includes any investigations made in the ordinary course of business or investigations conducted by non-attorneys.

RESPONSE: Cherry objects to this interrogatory to the extent that it is vague, overly broad, not reasonably limited in scope, not reasonably calculated to lead to admissible evidence, and seeks information or communications protected by the attorney-client privilege, the work product doctrine, or that were gathered in anticipation of litigation. Cherry objects to this interrogatory to the extent that it seeks the legal theories, conclusions, mental impressions, and/or work product of Cherry's agents and/or attorneys. *See Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 790, 218 S.E.2d 921, 924 (1975). Subject to and without waiving the foregoing objections, Cherry responds that she does not possess any written or recorded statements of the Plaintiff. Answering further, see the recorded statement made to GEICO produced simultaneously herewith. Discovery is ongoing, and Cherry reserves the right to supplement this response.

Defendant's Response to Plaintiff's First Interrogatories, dated 04/16/21 (attached as Exhibit B).

Evidence that has been produced in discovery is generally authentic. As the Court of Appeals has written, "[p]roduction of a document by a party during discovery, along with other circumstantial evidence, is evidence of authenticity, particularly when the party who produced the document never claims it is not authentic or genuine." *Koules v. SP5 Atl. Retail Ventures, LLC*, 330 Ga. App. 282, 286–87 (2014) (reversing trial court's holding that document was not authenticated). Here, Defendant provided the recorded statement in connection with the subject collision, was represented by her former counsel at the time she provided the statement, and produced the statement to the undersigned. It is authentic.

The recorded statement can be further authenticated by its contents. *See* O.C.G.A. § 24-9-901(b)(4) (permitting authentication based on “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances”). In the recorded statement, Defendant identifies herself by name and provides her address and date of birth.² These characteristics of the recorded statement itself are sufficient to support a finding that the recorded statement is, in fact, a statement by Defendant herself. The evidence code recognizes a wide variety of means by which a party may authenticate a writing, including the use of circumstantial evidence. O.C.G.A. § 24-9-901(b) (listing “[b]y way of illustration only, and not by way of limitation,” ten means of authentication or identification conforming with the requirements of the section).

2. The recorded statement is not hearsay.

The recorded statement is not hearsay because it is an admission of a party opponent. *See* O.C.G.A. § 24-8-801(d)(2)(A) (excluding “[t]he [opposing] party’s own statement” from the definition of hearsay). Plaintiffs are offering the recorded statement against Defendant, and it is Defendant’s own statement made in her individual capacity. *See id.* Because the requirements of Rule 801(d)(2) are satisfied, the recorded statement is not hearsay. *See, e.g., Wright v. Farmers Co-Op of Arkansas and Oklahoma*, 681 F.2d 549, 552-3 (8th Cir. 1982) (holding that defendant’s recorded statement to insurance adjuster was not hearsay); *Hillery v. Allstate Indem. Co.*, 705 F. Supp. 2d 1343, 1350 (S.D. Ala. 2010) (“Plaintiffs’ own recorded statements are not

² The full version of the recorded statement is Plaintiffs’ Trial Exhibit 11. Plaintiffs created another version of the statement that excludes Defendant’s personal identifying information and any mention of the word “insurance,” and that ‘redacted’ version is Plaintiffs’ Trial Exhibit 11.1.

due to be stricken as hearsay when Allstate seeks to use them against plaintiffs.”).

3. The recorded statement is relevant.

The recorded statement is relevant, and there is no reason under Rule 403 to exclude it. Defendant’s own account of how the collision happened is relevant to the issue of liability. Given that Defendant has refused to testify to her own account of how the collision happened, The recorded statement is clearly relevant under Rule 401’s low bar.

Further, there is no reason to exclude the recorded statement under Rule 403. Defendant should not be permitted to complain of prejudice when her own out-of-court statements are repeated in-court. Even if there were some risk of unfair prejudice, Rule 403 is an extraordinary remedy that should be used only sparingly. *Whited v. State*, 315 Ga. 598, 605 (2023) (upholding admission of defendant’s recorded jail call in murder trial).

4. The recording is not inadmissible because it was made to an insurer.

The fact that the recording statement was given to an insurer does not render it inadmissible for three reasons.

First, the only mention of the word “insurance” in the recorded statement has been redacted from Plaintiff’s Trial Exhibit 11.1, which is the version that Plaintiffs tender. (Defendant’s address and date of birth has also been redacted from Exhibit 11.1.)

Second, the mention of the word “insurance” or the introduction of the concept of insurance is not prohibited at trial in all circumstances. Although evidence of the existence of liability insurance is generally impermissible, the involvement of an insurance company may be

disclosed to the jury when evidence is admissible for another purpose. *Pavamani v. Cole*, 215 Ga. App. 594, 594 (1994) (permitting cross-examination on witness's affiliation with insurance company which was separate from defendant's liability insurer). In fact, courts have held that recorded statements made by parties to insurers are admissible. *See, e.g., Wright v. Farmers Co-Op of Arkansas and Oklahoma*, 681 F.2d 549, 552-53 (8th Cir. 1982) (holding that defendant's recorded statement to insurance adjuster was not hearsay and was properly admissible).³ The disclosure of liability insurance only requires a mistrial or reversal if the disclosure is "so obviously prejudicial in nature that its adverse effect cannot be eradicated from the minds of the jury or its consequences avoided by proper cautionary instructions from the court," usually where the disclosure is "deviously injected by plaintiffs or plaintiffs' attorney." *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 881 (1983).

Third, the prohibition against mentioning insurance generally applies to the *Defendant's liability* insurer, but the insurer recording the statement was the *decedent's underinsured motorist* insurer, GEICO. *See id.* (discussion of liability insurer impermissible). Plaintiffs' claims against GEICO have been resolved and GEICO is no longer a part of the case. *See* Consent Order, 08/30/2021 (dismissing GEICO).

5. Conclusion

Plaintiffs respectfully request that the Court admit Defendant's recorded statement into evidence.

³ In considering the post-2013 evidence code, Georgia courts look to decisions of the federal appellate courts construing and applying the federal rules of evidence. *Chrysler Group, LLC v. Walden*, 303 Ga. 358, 361 (2018).

Respectfully submitted this ____ day of October, 2023.

BUTLER | KAHN

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