

**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 COMPUTER-GENERATED ANIMATION**

The animation marked as Plaintiffs' Exhibit 2 is admissible for demonstrative purposes because it "illustrate[s] [Dr. Earnhart's] opinions as to how the accident occurred." Milich, Ga. Rules of Evidence § 10:2 (Ex. A). Specifically, the animation is admissible for demonstrative purposes upon Dr. Earnhart's testimony that the animation is fair and accurate (in his opinion) and that it accurately illustrates his opinions. *Id.*; Milich, Courtroom Handbook on Ga. Evidence, D1, "Demonstrative Exhibits" (Ex. B). Moreover, the best practice, which Plaintiffs intend to follow here, is to clarify for the jury that the animation does not purport to be "a repeat of the actual event" but is instead "an illustration of [Dr. Earnhart's] opinion of what happened." *Hinkle v. City of Clarkesburg*, 81 F.3d 416, 425 (4th Cir. 1996). To the extent that Defendant disagrees with what the animation shows, "any inaccuracies in the animation [can] be brought out upon cross-examination" or in the testimony of Defendant's reconstructionist, Shelly Weed.

J.B. Hunt Transp., Inc. v. Brown, 236 Ga. App. 634, 635–36 (1999).¹

1. Animations illustrating an expert’s opinion are admissible.

Georgia law has long held that an animation is admissible as demonstrative evidence if it is “an accurate representation of the expert's opinion as to how the collision occurred.”

Cleveland v. Bryant, 236 Ga. 459, 460 (1999). *Accord J.B. Hunt*, 236 Ga. App. at 636 (“In this case, because the videotape contained computerized, animated models which accurately illustrated the expert’s opinion of how events transpired, and because any inaccuracies in the animation could be brought out upon cross-examination of the expert, we hold that the trial court did not abuse its discretion in allowing the tape to be played to illustrate the expert's testimony.”). An animation merely serves “as a means of ‘pictorial communication’ during a trial to illustrate a witness’s testimony.” *J.B. Hunt*, 236 Ga. App. at 635.

This standard from *Cleveland* remains valid under Georgia’s post-2013 evidence code because the federal evidence code upon which Georgia’s “new” rules are based² also permits the admission of animations that “allow the jury to conceptualize and appreciate the expert’s opinion as to what happened.” *Datskow v. Teledyne Cont’l Motors Aircraft Prod.*, 826 F. Supp. 677, 685–86 (W.D.N.Y. 1993). *Accord Hinkle*, 81 F.3d at 425 (animation admissible where it was “not meant to be an exact recreation of what happened during the shooting, but rather it represents [an expert’s] evaluation of the evidence presented.”); *Robinson v. Missouri Pac. R. Co.*, 16 F.3d 1083, 1086-88 (10th Cir. 1994) (upholding admission of “the animation as

¹ *Disapproved of on other grounds by Rockdale Hosp., LLC v. Evans*, 306 Ga. 847 (2019).

² *Chrysler Group, LLC v. Walden*, 303 Ga. 358, 361 (2018) (federal law is persuasive as to post-2013 evidence code).

illustrative of the expert's testimonial theory of the accident”); *Altman v. Bobcat Co.*, 349 F. App’x 758, 763-64 (3d Cir. 2009) (animation admissible where it “clearly illustrates [an expert’s] testimony”). Animations that also show what the expert believes would have happened if something had been different – such as the subject animation, which shows what Dr. Earnhart believes would have happened if Defendant Cherry had driven the speed limit – are likewise admissible for the same “illustrative purpose” of communicating the expert’s opinion to the jury. *Robinson*, 16 F.3d at 1087-88. That is particularly true where, as here, the opposing party has an expert who can “clearly explain[] to the jury [her] opinion” if that opinion differs from what the animation shows. *Id.* (In this case, however, both parties’ experts agree that the collision was avoidable if Defendant Cherry had driven the speed limit. Weed Dep. 31:1-5.) In sum, animations constitute permissible “pictorial communication[s]” of expert opinions. *J.B. Hunt*, 236 Ga. App. at 635.

As to animations, “perfection is not the standard” because the animation need only “provide a fair comparison of the general conditions in which the accident occurred, based on the facts and data that [the expert] acquired.” *Kim v. Am. Honda Motor Co.*, No. 4:19-CV-00332, 2022 WL 16752142, at *21–22 (E.D. Tex. Nov. 7, 2022). If the opposing party chooses to dispute the content of the animation, the opposing party may do so through cross-examination, through the testimony of the opposing party’s expert, or through a competing animation. *Id.* (referring to “cross-examination regarding the animations”); *Robinson*, 16 F.3d at 1088 (referring to “the opportunity for vigorous cross-examination” and the opposing expert); *Altman*, 349 Fed. App’x at 763 (“prejudice or confusion could be mitigated by cross-examination”); *J.B. Hunt*, 236 Ga. App. at 636 (“any inaccuracies in the animation could be brought out upon cross-

examination of the expert”).

2. The best practice is to clarify that the animation is an illustration of an opinion.

The permissibility of animations like Plaintiffs’ Exhibit 2 is especially clear where “a jury understand[s] that they are seeing an illustration of [an expert’s] opinion of what happened” rather than a video of the actual event. *Hinkle*, 81 F.3d at 425. *Accord Rickman v. State*, 304 Ga. App. 61, 65 (2018) (“Both the officer who testified and the trial court made it clear that the photographs did not show what actually happened, but only a theory as to how it could have happened.”); *U.S. v. Ferguson*, 212 F. App’x 873, 876 (11th Cir. 2006); *Altman*, 349 Fed. App’x at 763-64; *Daskow*, 826 F. Supp. at 685-86.

Plaintiffs intend to follow this best practice by clarifying for the jury that the animation is an illustration of Dr. Earnhart’s opinions, not a video of the subject collision. Since the animation is animated, rather than a video of real events, the distinction should be clear.

3. Animations and simulations are different.

As noted above, an *animation* is an illustration of an expert’s opinion. *J.B. Hunt*, 236 Ga. App. at 635 (an animation is “a means of ‘pictorial communication’ during a trial to illustrate a witness’s testimony.”). Animations are generally admissible if they accurately illustrate an expert’s opinion. *Cleveland*, 236 Ga. at 459. A *simulation* is a computer-based recreation of an event in which a computer program applies the laws of physics to specified objects with specified inputs and purports to determine exactly what happened. *Milich*, Ga. Rules of Evidence § 10:2 (“Computer generated simulations go beyond illustration and use the computer

to extrapolate, using mathematics and the laws of nature, how the event could have happened.”) (Ex. A). The standard for admissibility of a simulation is typically higher and “the expert must be prepared to reveal and defend every step in the analysis.” *Id.*

Plaintiffs’ Exhibit 2 is an animation, not a simulation. Plaintiffs intend to be clear with the jury that it is an illustration of Dr. Earnhart’s opinions, not a simulation in which a computer applied the laws of physics to the subject vehicles.

4. Conclusion

For the reasons above, Plaintiffs respectfully request that Plaintiffs’ Exhibit 2 be admitted as demonstrative evidence.

Respectfully submitted this ____ day of October 2023.

BUTLER | KAHN

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