

**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
USING EXPERT WITNESS AS CONDUIT FOR HEARSAY**

Although an expert may rely on inadmissible evidence (such as hearsay) in forming her opinions, “the inadmissible facts and data upon which an expert relies are not rendered admissible simply because an expert has relied upon them.” *Raines v. Maughan*, 312 Ga. App. 303, 306-07 (2011). In other words, “[a]lthough a testifying expert can base his or her opinion in part on hearsay, an expert cannot be used as a conduit to introduce inadmissible hearsay evidence.” *O’Connell v. State*, 294 Ga. 379, 382 (2014).

Plaintiffs prepare this bench brief in anticipation of an attempt by Defendant to introduce inadmissible hearsay through their accident reconstruction expert, Ms. Shelly Weed. While Ms. Weed could consider hearsay (such as witness statements) in forming her opinions, she is *not* permitted to disclose inadmissible hearsay to the jury. In other words, Ms. Weed “cannot be used as a conduit to introduce inadmissible hearsay evidence.” *Id.*

1. Law

The relevant rule is O.C.G.A. § 24-7-703, which states in its entirety:

The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. *Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.*

(Emphasis added).¹

As noted above, both the Georgia Supreme Court and the Georgia Court of Appeals have held that a party cannot circumvent the hearsay rule by supplying inadmissible evidence to that party's expert, then asking the expert to present that inadmissible evidence to the jury.

O'Connell, 294 Ga. at 382 (“an expert cannot be used as a conduit to introduce inadmissible hearsay evidence”); *Raines*, 312 Ga. App. at 306-07 (“the inadmissible facts and data upon which an expert relies are not rendered admissible simply because an expert has relied upon them”). *Accord Cobb v. State*, 283 Ga. 388, 390-91 (2008) (“[a] testifying expert is not to serve as a conduit for the opinions of others”).

Because the corresponding federal rule is substantively identical, federal cases are persuasive. *See* Fed. R. Evid. 703 (“But if the facts or data [on which the expert relies] would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their

¹ Section 24-7-703 is in pertinent part a recodification of former O.C.G.A. § 24-9-67.1, which said the same thing. *See Raines*, 312 Ga. App. at 306-07 (quoting identical language from former code section); *O'Connell*, 294 Ga. at 382 n.6 (discussing new code section).

prejudicial effect.”); *Harris v. State*, 314 Ga. 238, 264 (2022) (“Because each of these Georgia evidence rules is modeled on its counterpart in the Federal Rules of Evidence, we may look to federal appellate precedents interpreting the pertinent federal rule for guidance in applying the state provision.”). Like Georgia’s appellate courts, federal courts have held that although an expert may rely on hearsay or other inadmissible materials in forming her opinion, that hearsay or other inadmissible material may not generally be disclosed to the jury. *Vondrak v. City of Las Cruces*, No. CIV 05-0172 JBLFG, 2007 WL 2219449, at *3 n.4 (D.N.M. May 14, 2007) (“[R]ule 703 of the Federal Rules of Evidence allows an expert to rely on inadmissible facts in reaching an opinion or inference, but does not allow the proponent of the expert testimony to use the expert as a conduit for a party to get in otherwise inadmissible evidence.”).² Phrased differently, an expert may not “merely serv[e] as a conduit through which hearsay is brought before the jury.” *United States v. Stone*, 222 F.R.D. 334, 341 (E.D. Tenn. 2004).³ *Accord United States v. Chase*, No. 2:04-CR-135, 2005 WL 6733654, at *21 (D. Vt. Sept. 16, 2005) (“[T]he expert may not testify in a manner that discloses the underlying hearsay evidence to the jury unless the Court makes a determination that the probative value of the testimony outweighs its prejudicial effect. In effect, Rule 703 places restrictions on the defense's use of an expert as a conduit for the hearsay testimony of the defendant.”).

2. Analysis

The rules of evidence do not permit Defendant to circumvent the prohibition against hearsay by supplying hearsay evidence to Defendant’s retained expert, then asking her to repeat

² Aff’d in part, rev’d in part on different grounds, dismissed in part, 535 F.3d 1198 (10th Cir. 2008).

³ Aff’d 432 F.3d 651 (6th Cir. 2005).

it to the jury. Specifically, although it was permissible for Defendant to send the hearsay statements of scene witnesses (such as Pamela Rushing or Terrance Williams) to Ms. Weed, and was even permissible for Ms. Weed to rely upon those statements in forming her opinions, Ms. Weed is not permitted to present those witnesses' statements to the jury. § 24-7-703 ("facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect"). In other words, Ms. Weed "cannot be used as a conduit to introduce inadmissible hearsay evidence." *O'Connell*, 294 Ga. at 382.⁴ In sum, Ms. Weed is not permitted to repeat the hearsay statements of Rushing, Williams, or others to the jury.

The only circumstance in which Ms. Weed would be permitted to present hearsay statements to the jury is if the Court were to make a finding that "their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." § 24-7-703. Such a finding would be inappropriate here. Importantly, the "probative value" at issue in Rule 703 is *not* the probative value of the hearsay statement to the case overall, but instead only the probative value "in assisting the jury to evaluate the expert's opinion." This case is not complex, and the jury will be able to "evaluate the expert's opinion" without Ms. Weed serving as a conduit for the hearsay of scene witnesses. Ms. Weed can state her opinions, and the jury will be competent to evaluate them. Therefore, the value of permitting Ms. Weed to repeat inadmissible hearsay is minimal. On the other hand, if Ms. Weed were permitted to serve as a conduit for inadmissible hearsay, Plaintiffs would be deprived of the opportunity to cross-

⁴ *Accord Raines*, 312 Ga. App. at 306-07; *Vondrak*, No. CIV 05-0172, 2007 WL 2219449, at *3 n.4; *Chase*, No. 2:04-CR-135, 2005 WL 6733654, at *21; *Stone*, 222 F.R.D. at 341.

examine those scene witnesses at the time that their opinions were presented. Therefore, the prejudice associated with the presentation of this hearsay would be significant. In sum, the “probative value” of permitting Ms. Weed to repeat the hearsay statements of others to the jury does not “substantially outweigh[]” its prejudicial effect. Therefore, Ms. Weed should not be permitted to present hearsay to the jury.

3. **Conclusion**

Plaintiffs respectfully request that the Court not allow Ms. Weed to present hearsay to the jury.

Respectfully submitted this ____ day of October, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this date, I have served the foregoing *Bench Brief*
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