

Better Than Testimony:

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In today's digital age,
juries want more
than testimony.

Trying The Trucking Case With Digital And Other Objective Evidence To Tell Your Best Story

It has always been known that eyewitness testimony is not the best evidence. Memories can be unreliable. They can be manipulated. They fade over time. Over the years, we have seen cases where false memories have been implanted through leading and suggestive language. In truck accident cases, key evidence provided by witnesses regarding time and distance is often wrong. Even truck drivers who are involved in an accident get the details mixed up.

In today's digital age, juries want more than testimony. They want to see a presentation that is lively and engaging. Since the advent of smartphones, the average human attention span has dramatically decreased. Because we have become visual learners, digital evidence and other objective data can be used to create engineering animations and recreations that will captivate a jury. Objective evidence, presented clearly, also helps convey complex facts into an easy to digest manner. Repetition is also important. Photographs or videos shown many times during a trial can help improve the memory of the jury. Non-testimonial evidence is reliable, dynamic, and can have a profound effect on a jury.

To present digital and other objective evidence at trial, many times the best witness is an expert witness. Accident

Reconstruction experts are masters at incorporating all of the physical evidence into an easy-to-understand story of how a collision occurred. They are vitally important in cases where fact witnesses are missing, including the truck driver involved in the accident who becomes difficult to locate. Accident Reconstruction experts are also helpful when a truck driver cannot fully explain the incident due to uncertainty of the events leading up to a collision. Accident Reconstruction experts bolster the testimony of nervous drivers, or those who struggle with a language barrier, when explaining the details of an accident at trial.

Evidence preservation at the accident scene is vital in providing the foundation of the physical evidence and objective data to reconstruct a collision. Photographs and/or videos from the accident site are valuable to document items such as roadway signage, weather conditions, visibility, points of rest of vehicles, location of collision debris, and skid/gouge marks. Vehicle damage photos can be used to show paint transfers and points of impact on the vehicles. In some cases, video surveillance is available that may show the accident or at least the circumstance surrounding the occurrence.

Digital Evidence has become crucial to trucking accident cases. While a picture is said to be "worth a thousand words," video



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evidence is the entire book and not just a single chapter. Video evidence is often the best source to establish what occurred in a collision. Dash camera videos can capture the events leading up to the accident. The Engine Control Module (ECM) within a truck typically contains an event data recorder (EDR), or a “Black Box,” that can provide information as to the pre-impact speed, braking, and acceleration data of the truck. Telematics systems provide GPS data to further track the speed and location of a vehicle. Electronic logs, maintained with the assistance of a GPS device, not only provide information about a truck driver’s hours of service, but also information on pre-trip inspections and maintenance. Crash Avoidance Technology, which is becoming more and more prevalent within commercial vehicles, can add further details surrounding the occurrence of a collision. Other vehicles involved in an accident, including passenger vehicles, should be examined as well for digital evidence. The infotainment system in a passenger vehicle can provide information as to vehicle location, speed, lane keeping, and call logs. Also, nearly all vehicles manufactured in the United States since 2013 contain an EDR capable of recording five seconds of pre-crash data.

When all the data is collected, many experts consider the use of animations, based on a fundamentally sound engineering analysis of the available data, to help explain the collision to the jury. While once cost-prohibitive and used only in catastrophic accidents, animations today are cost-effective and practical. They can provide the “wow” factor needed to persuade a jury that the truck was not responsible for the accident.

While digital and other objective evidence are persuasive and can tell the best story, it is all meaningless if the evidence cannot be admitted at trial. All trucking practitioners need to understand the laws in their jurisdictions on the admissibility challenges to digital evidence. Animations can be particularly troublesome if they incorporate facts not in evidence. This article discusses various case law that addresses objective evidence and how to get it admitted into evidence at trial.

Admissibility of ECM/SDM/Black-Box Data

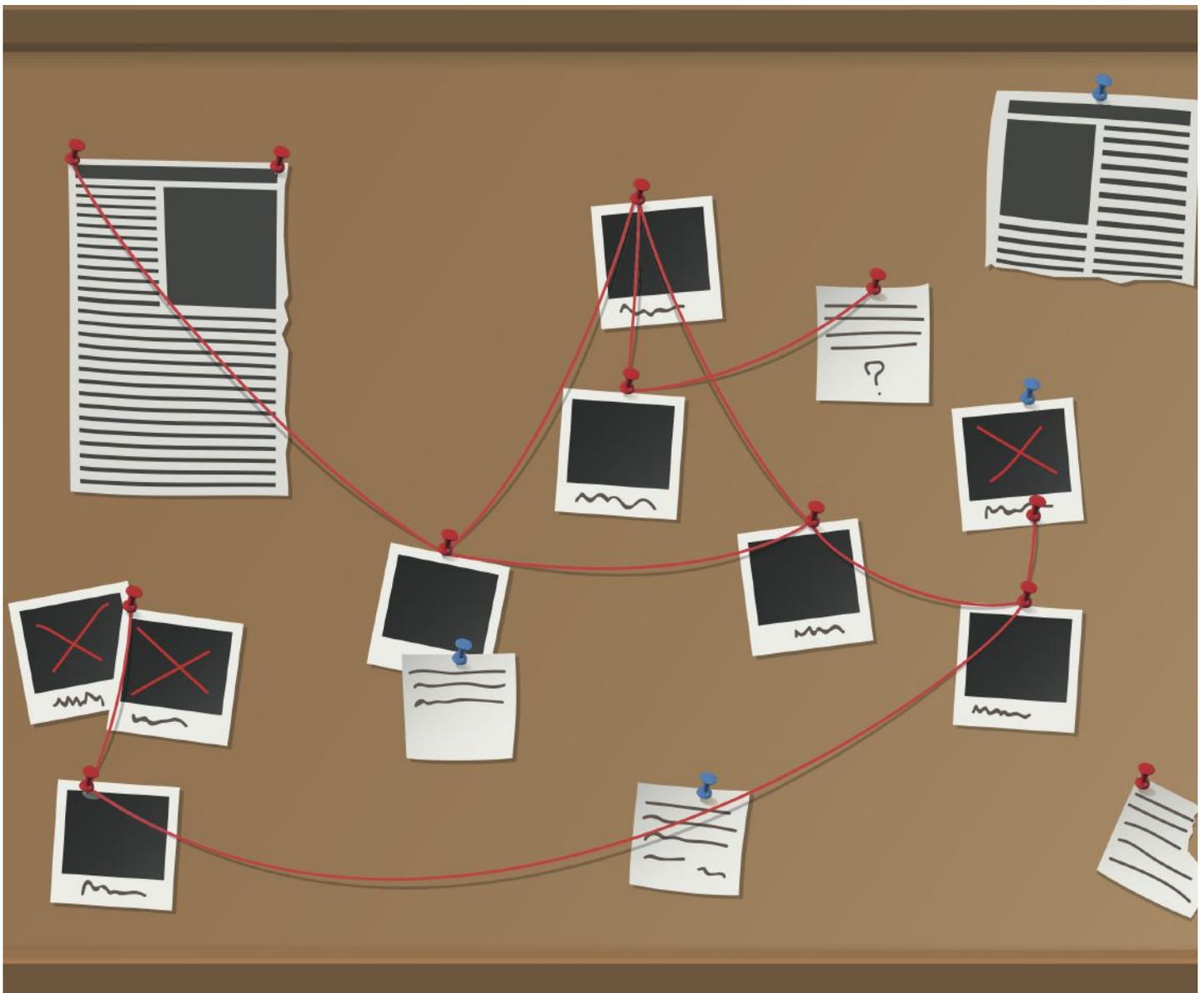
Last year, the Court of Appeals of Texas, Fourth District, San Antonio, held that “introducing black box evidence in a collision case...is not new or novel.” *Vitela v. State*, Nos. 04-19-00737-CR, 04-19-00738-CR 2021 Tex. App. LEXIS 10090, at *8 (Tex. App. Dec. 22, 2021). In *Vitela*, defendant was driving with two passengers when they lost control of the car while speeding around a curve. *Id.* at 1. Police “obtained a search warrant to recover [. . .] black box event data recorder from [defendant’s] car. *Id.* at 2. Officers downloaded the data from the ‘black box’ to “gain information on the car’s speed at and before the time of the crash.” *Id.*

Defendant argued that: (1) the police violated his Fourth Amendment rights when they obtained the ‘black box’ and its information; and (2) “the black box evidence associated with his car was unreliable because the black box police discovered on the passenger seat of his car was not of the same make as his car, the data itself showed many errors, and it was unclear how the data related to [defendant’s] crash.” *Id.* at 6. As to the admission of black box data, the court found that under the Daubert standard, “evidence is usually accepted in relevant scientific fields which are not new or novel” *Id.* at 8. The court noted that the ‘black box’ evidence is not extraordinary and “[s]uch evidence may be subjected to rigorous cross-examination at trial.” *Id.* The court also observed that any objections to the reliability of black box data, “will most likely go to the weight of the evidence rather than to its admissibility.” *Id.*

In 2019, the United States District Court for the Middle District of Florida, Ocala Division, held that “the work product doctrine does not attach to the data [recovered] from [an] ECM module.” *Torres-Torres v. KW Int’l Inc.*, No: 5:18-cv-164-Oc-30PRL2019 U.S. Dist. LEXIS 71636, at *6 (M.D. Fla. Apr. 29, 2019). In *Torres-Torres*, a personal injury case, the defendant argued that (1) the “data sought by [the] [p]laintiff was not relevant based on its recent admission of liability”; and (2) that the ECM data requested by [the] [p]laintiff is protected by the work product privilege doctrine. *Id.* at 4-5. De-

fendant further argued that because the ECM data is a work product, the data is not discoverable absent showing of undue hardship.” *Id.* at 5. The court rejected the defendant’s position finding that “[i]n most cases . . . evidence describing the details of an accident is logically relevant and admissible, even where liability has been admitted [. . .].” *Id.* The court further noted that in diversity cases “[t]he work product doctrine is governed by federal law.” *Id.* at 5. Because plaintiff was “not requesting any interpretation of the data” the court was “unpersuaded that [the] work product [privilege] attache[d] to data generated through the truck’s electronic systems in the normal course of operation.” *Id.* at 5-6. By order, the court directed the defendant to provide the ECM data within ten (10) days. *Id.* at 6.

In 2021, the Superior Court of Delaware, addressed the importance of black box data and held that an “adverse inference instruction is appropriate and necessary to avoid unduly prejudicing [the] [p]laintiff,” when “a corporation that frequently receives preservation letters takes absolutely no steps to preserve critical evidence, [the ECM Data], in response to a timely preservation letter and offers no explanation for its failure.” *Tighe v. Castillo*, 2021 Del. Super. LEXIS 38, at *13 (Super. Ct. Jan. 14, 2021). In *Tighe v. Castillo*, a personal injury case, defendant was operating a “tractor-trailer [. . .] when he struck [the] [p]laintiff’s vehicle, which had become disabled as a result of an earlier collision.” *Id.* at 1. Shortly after the accident and several months before “filing the [instant complaint], plaintiff sent defendant a request to preserve evidence, including the tractor-trailer’s engine control module (ECM).” *Id.* at 1-2. While defendant conceded to receiving the preservation letter, “it,” it took no steps to preserve the ECM or its data,” despite having possession of the truck and the ECM. *Id.* at 2. After learning in discovery that defendant had not preserved the ECM data, the plaintiff filed a motion for sanctions. *Id.* at 3. Citing, among other things, the relevance of ECM data, the court found that preservation demands cannot be ignored and found in favor of an adverse inference ruling.



Admissibility of Dash Camera Video

Dash camera video can be admitted into evidence so long as “the reliability and accuracy of the motion picture [...] may be established by [] testimony that the motion picture accurately reproduces [the events as they were] perceived by the witness.” *Johnson v. Lexmar Distribution*, W.C.A.B. No. ADJ14203968 2021 Cal. Wrk. Comp. P.D. LEXIS 289. In *Lexmar*, an altercation occurred between Johnson and police officers. *Id.* at 3. The entire altercation was captured on dash cam video. *Id.* Johnson objected to the admissibility of the dash cam video “on the ground of lack of authentication.” *Id.* at 5 The Workers Compensation Judge (“WCJ”) sustained the objection “on the grounds that defendant

did not list a witness [...] who can testify as to the videos’ chain of custody, how the films were prepared, what equipment was used to film, and whether there has been any editing, splicing, or alteration of the film.” *Id.* at 5-6. Further, the WCJ disallowed the calling of Ines Guzman “to authenticate the dash cam videos because she was not listed as a witness in the Pre-Trial Conference Statement.” *Id.* at 1 The Workers’ Compensation Appeals Board (“WCAB”) reversed and held that the “WCJ applied the incorrect standard because the [dash cam] videos could [have been] authenticated by applicant’s testimony, circumstantial evidence, content and location, or any means provided by law.” *Id.* at 2.

Admissibility of Damage Photographs of a Motor Vehicle to Argue Injury Severity

In 2006, the New Jersey Supreme Court allowed admission of photographs depicting minor damage to a motor vehicle for the purpose of allowing the jury to determine if the alleged injury was obtained in the collision that caused the photographed damage without accompanying expert testimony. *Brenman v. Demello*, 191 N.J. 18. (2006). The Supreme Court of New Jersey rejected a per se rule “that require[d] expert testimony as to the link between vehicle damage and the occupant’s injuries.” *Id.* At 28.

Following the decision in *Brenman*, New Jersey adopted a Model Jury Charge

permitting a party to argue, without an expert, that the minor damage depicted in accident photographs can be used by the jury to conclude that the accident was not the cause of a plaintiff's injuries. Expert testimony is not required.

Admissibility of GPS Data

Recently, the Superior Court of Pennsylvania, as a matter of first impression, held that "GPS data automatically generated by a computer, free from interference by any person, does not constitute a statement, and therefore, cannot qualify as hearsay." *Commonwealth v. Wallace*, 244 A.3d 1261, 1266 (Pa. Super. 2021). In *Wallace*, a criminal case, the defendant asserted that his co-defendant's GPS ankle monitoring device, which implicated his involvement in an assault, constituted hearsay. *Id.* at 1268, 1270. However, the court noted that the Pennsylvania Rules of Evidence "expressly define a 'statement' for purposes of hearsay as the written or oral assertion of a person." *Id.* at 1272 (emphasis in original). Because the court noted that the Rules of Evidence are interpreted on its face in a "plain and ordinary meaning," the court declined to change the definition of a statement under the Pennsylvania Rules of Evidence, holding that GPS data does not constitute hearsay. *Id.* Petitioner appealed, and on December 29, 2021, the Supreme Court of Pennsylvania granted the Petition for Allowance of Appeal in deciding whether the Pennsylvania Superior Court erred in determining whether GPS records are not hearsay statements as a matter of first impression. *Commonwealth v. Wallace*, 2021 Pa. LEXIS 4383 (Pa. 2021). A decision is expected sometime in 2022.

In *Howze v. Western Express*, the Alabama Northern District Court held that when there are issues as to the accuracy and reliability of GPS data, it is to "be tested before the jury with the familiar tools of the 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" (internal citations omitted). *Howze v. W. Express, Inc.*, No. 7:14-CV-01407-RDP, 2016 U.S. Dist. LEXIS 103935, at *27 (N.D. Ala. Aug. 8, 2016). There, a semi-truck left the scene of an accident after striking a motorcyclist. The issue in the

case was whether one of the defendant's trucks struck the plaintiff. The defendant presented GPS evidence that it did not have any equipment traveling on the roadway within a 25-mile radius of the accident during the six-hour period surrounding the accident. Despite the GPS evidence, the court denied summary judgment, finding that there was some testimonial evidence to the contrary as to one of the defendant's trucks being involved in the accident. The court found that a jury should measure and assess the discrepancies between the eyewitness testimony and the GPS data at trial.

Admissibility and Authentication of Text Messages

In 2011, *Commonwealth v. Koch* was faced with the issue of what is required to authenticate a text message. The court noted that "[a]uthentication is a prerequisite to admissibility." *Commonwealth v. Koch*, 39 A.3d 996, 1005 (Pa. Super. 2011). It held that the "authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required." *Id.* At 1005. In its reasoning, the court stated:

A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationery can be copied or stolen. Concluding that electronic communications, such as e-mail and instant messages, can be authenticated within the framework of Pa. R. Evid. 901 and Pennsylvania case law, the Superior Court of Pennsylvania has declined to create new rules governing the admissibility of such evidence. Such evidence is to be evaluated on a case-by-case basis as any other document to determine whether there has been an adequate foundational showing of its relevance and authenticity.

Id. at 1003.

Furthermore, text messages constitute hearsay, as the "evidentiary value of the text messages depended entirely on the truth of their content." *Id.* at 1006. The Supreme Court of Pennsylvania then affirmed the Superior Court's decision,

noting that circumstantial evidence is available to authenticate text messages. The Supreme Court commented:

The authentication inquiry will, by necessity, be fact-bound and case-by-case, but, like courts in many other states, we believe that authorship is relevant to authentication, particularly in the context of text messages proffered by the government as proof of guilt in a criminal prosecution. This is not an elevated "*prima facie* plus" standard or imposition of an additional requirement. Rather, it is a reasonable contemporary means of satisfying the core requirement of Rule 901 when a text message is the evidence the Commonwealth seeks to admit against a defendant; the Commonwealth must still show that the message is what the Commonwealth claims it to be, and authorship can be a valid (and even crucial) aspect of the determination. *Commonwealth v. Koch*, 630 Pa. 374, 389 (Pa. 2014).

The Supreme Court of Pennsylvania additionally noted that whether text messages are hearsay is determined on a case-by-case basis. *Id.* at 389. Specifically, in *Koch*,

"the panel decided that the text messages were also inadmissible as hearsay that was not offered for any reason other than to show the truth of the matter asserted by the Commonwealth as to the content of the messages – that appellee used her phone to conduct drug sales and therefore possessed marijuana with the intent to deliver it and not merely for personal use." *Id.* at 383.

Admissibility and Authentication of Social Media Records

In *Mangel*, the Pennsylvania Superior Court, as another matter of first impression, was faced with the issue of "what proof is necessary to authenticate social media evidence, such as Facebook postings and communications." *Commonwealth v. Mangel*, 181 A.3d 1154, 1159 (Pa. Super. 2018). The court, in deciding the requirements to authenticate social media evidence, looked to how courts

in Pennsylvania treat various types of electronic communication. *Id.*

The court recognized that while there are authorship concerns with social media platforms, electronic mail, and instant messages, “social media records and communications can be properly authenticated within the existing framework of Pa.R.E. 901 and Pennsylvania case law, similar to the manner in which text messages and instant messages can be authenticated.” *Id.* at 1162. The court noted that the authentication of evidence involving social media is to be evaluated on a contingent basis to determine “whether or not there has been an adequate foundational showing of its relevance and authenticity.” *Id.* The party introducing social media evidence should “present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question . . . or contextual clues in the communication tending to reveal the identity of the sender.” *Id.* The proponent needs to authenticate the author of the communication— it is not enough to assert that “an electronic communication, on its face, purports to originate from a certain person’s social networking account.” *Id.* Only then are social media records admissible. *Id.*

While there can be challenges to the admissibility of objective accident evidence, the evidence rules are favorable.

In 2017, the Court of Criminal Appeals of Tennessee at Knoxville in *State v. Linzy*, held that so long as the probative value of evidence obtained from social media is not substantially outweighed by the danger of unfair prejudice, and it is properly authenticated, it is admissible. *State v. Linzy*, 2017 No. E2016-01052-CCA-R3-CD Tenn. Crim. App. LEXIS 737, at *5 (Crim. App. Aug. 18,

2017). “[D]etermining whether social media evidence has been authenticated requires a fact specific analysis.” *Id.* at 37. In so ruling, the court cited the following cases:

In re F.P., 2005 PA Super 220, 878 A.2d 91 (Pa. 2005) (holding that transcripts of instant messages between the defendant and the victim were properly authenticated after considering the following facts: the defendant identified himself by first name and threatened physical violence against the victim in the transcripts, the victim reported the threats to school authorities, staff at the school met with the defendant regarding the threats, the defendant sent another instant message regarding that school meeting, and the defendant’s brother testified that he saw the defendant assault the victim); *Commonwealth v. Purdy*, 459 Mass. 442, 945 N.E.2d 372 (Mass. 2011) (holding that email exchanges initiated from the defendant’s email account, containing the defendant’s name, found on the hard drive of the defendant’s computer were properly authenticated); *People v. Clevestine*, 68 A.D.3d 1448, 891 N.Y.S.2d 511, 514

(N.Y. App. Div. 2009) (holding that sexually explicit MySpace instant message communications between the defendant and the victims were properly authenticated when both victims testified they had discussed sexually explicit topics via MySpace with the defendant, police recovered copies of these conversations from the hard drive of one of the victim’s computers, the defendant’s wife testified that she found such conversations on the defendant’s MySpace account, and a representative from MySpace testified that the accounts in question were created by the victims and the defendant); *Tienda v. State*, 358 S.W.3d 633, 642-45 (Tex. Crim. App. 2012) (holding circumstantial evidence was sufficient to authenticate evidence from MySpace postings). *Id.* at 38.

In *State v. Hannah*, the New Jersey Appellate Division was challenged with the issue

of how to authenticate twitter messages. The court held that “[a]uthenticity can be established by direct proof [] but direct proof is not required – a prima facie showing may be made circumstantially.” *State v. Hannah*, 448 N.J. Super. 78, 90 (App. Div. 2016). The court further held that a social media post may be authenticated by: (1) direct proof – testimony by the author admitting authenticity; (2) demonstrating that the statement “divulged intimate knowledge of information which one would expect only the person alleged to have been the writer or participant to have;” or (3) “circumstantial evidence that it was sent in reply to a previous communication.” *Id.*

Hannah also noted that “a new test for social media postings” is not necessary because “the rules of evidence already in place for determining authenticity are at least generally adequate to the task.” *Id.* at 88-89. (Internal quotations omitted). In response to defendant’s argument that a tweet can easily be forged, the court stated that, “so can a letter or any other kind of writing[.] [t]he simple fact that a tweet is created on the Internet does not set it apart from other writings.” *Id.* at 89.

Admissibility of Computer-Generated Animation

In the trucking industry, computer generated animations (“CGA”) are popular demonstrative exhibits in showing the jury how an accident occurred, especially if dash camera footage is missing or unavailable. The Pennsylvania Superior Court has held that CGA is admissible evidence, and that CGA evidence must be weighed by the same criteria of admissibility, namely, probative value versus prejudicial effect to which all other evidence is subject. “Notably, certain concerns prior to admission carry more weight and deserve closer scrutiny when admitting CGA evidence than more traditional forms of evidence.” *Commonwealth v. Serge*, 586 Pa. 671, 680 (2006).

CGAs are a form of demonstrative evidence that are admissible if they: “(1) [are] properly authenticated pursuant to Pa.R.E. 901 as a fair and accurate representation of the evidence it purports to portray; (2) [are] relevant pursuant to Pa.R.E. 401 and 402; and (3) [have] a probative value that is not outweighed by

the danger of unfair prejudice pursuant to Pa.R.E. 403.” *Id.* at 685. Furthermore, Pennsylvania Rule of Evidence 702 allows experts to use demonstrative evidence to support expert testimony. *Id.* at 691. Thus, CGAs are admissible to use at the time of trial to accurately depict one’s case.

Michigan addressed the admissibility of animations at trial in *People v. Samphere*, No. 283711, 2009 Mich. App. LEXIS 2345 (Ct. App. Nov. 10, 2009). There, “the prosecution [used] the animation as a three-dimensional illustration of [their experts’] testimony.” *Id.* at 14. The trial court in *Samphere*, “permitted the prosecution to present the video animation as demonstrative evidence.” *Id.* at 15. In so ruling, the court found the reasoning of the trial court insightful which stated:

[D]emonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case.” *See People v. Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). “(W)hen evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert’s testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event.” *Id.* “Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court’s decision to admit demonstrative evidence.” *People v. Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). However, “(a)s with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice.” *Id.* *Id.* at 15.

In 2012, the Supreme Court of California held that an animated recreation of an event that is founded on the opinions of an expert who developed those opinions based on what “the physical evidence showed,” is admissible. *People v. Duenas*, 281 P.3d 887, 902 (2012). In *Duenas*, a criminal case, defendant objected to an animation

used by the Prosecution to demonstrate the sequence of events that 1 of 2 experts opined on. *Id.* at 902. Defendant argued that the animation videos were speculative and thus inadmissible. The court rejected the argument reasoning that because “[a]nimations do not draw conclusions; they attempt to recreate a scene or process, thus they are treated like demonstrative aids.” *Id.* at 900. The court further reasoned that the experts, the court itself, and the prosecutor “all made clear to the jury that the animation did not recreate the shooting precisely.” *Id.* at 903.

In 2020, California again addressed video recreations and assessed whether to admit a demonstrative video created by “assembl[ing] and synchroniz[ing] [] businesses’ surveillance systems and bystanders’ cell phone footage.” *People v. Tran*, 50 Cal. App. 5th 171, (2020). In *Tran*, the Prosecution used an expert who synchronized hotel surveillance video and mobile phone footage, to create a digital recreation of the incident. The expert used color coded arrows to identify people across different camera angles. *Id.* at 177.

Defendant argued that the court “erroneously admitted into evidence ‘doctored’ videos. *Id.* at 173. The court rejected the claim, noting that “‘doctored’ connotes that [plaintiff’s expert] somehow manipulated or falsified the video[.]..” *Id.* At 177. The court reasoned that “adjust[ing] the height and width ratio on a video, synchroniz[ing] multiple videos, correct[ing] the blurring of a video, and use[ing] color-coded arrows to identify certain individuals on the videos” does not constitute doctoring of a video. *Id.* at 178. In allowing the videos, the court commented that although plaintiff’s expert witness’s “work may have involved sophisticated software, technical jargon, and years of experience, there was no risk that the jurors would be left confused or misled.” *Id.* at 190. There was nothing sensational about the testimony or videos. *Id.* Testimony and enhancement of the videos simply helped the jury observe what the videos showed[.] [. . .] on one screen.” *Id.*

Admissibility of Expert Testimony as to Accident Reconstruction Experts

The importance of an accident reconstruction expert only using the facts

present in a case was examined by the New Jersey Supreme Court in *Townsend v. Pierre*, 221 N.J. 36 (2015). There, the defendant approached a stop sign, stopped, “edged forward” to get a better view, stopped again, and when “her view of oncoming traffic was unimpeded,” she proceeded to make a left turn. *Id.* at 42. The turn led to a motor-vehicle collision that caused the death of a motorcyclist. *Id.* at 45. The estate of the decedent (“The Estate”) brought wrongful death and survival actions. *Id.* When the Estate submitted a report from an accident reconstruction expert, the defendants moved to strike it as a net opinion as the expert analyzed the impact of shrubbery at the accident location. *Id.* at 48-49. Because no party to the case provided any evidence that shrubbery was an issue, the court struck the report finding that the expert’s opinion was not supported by the record. *Id.* at 56-58.

Conclusion

Because digital and other objective evidence tells the best story, it is imperative to gather all the objective evidence from an accident, including the traditional evidence such as photographs of the accident scene, vehicles at rest, collision debris, skid or roadway marks, and roadway signage. If available, electronic evidence needs to be garnered including ECM and black box downloads, dash camera footage, and the not so traditional video recordings, collision avoidance systems information, GPS data from telematics, cell phone or text messages and social media posts. This objective data will wow the jury and make your case. While there can be challenges to the admissibility of objective accident evidence, the evidence rules are favorable. It is a must to know the laws of your jurisdiction to get the information admitted.

