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TRANSAMERICA BUILDING COMPANY, :
INC., :

Case No. 2013-00349

Plaintiff/Counter Defendant :

Judge McGrath

v. :

Referee Wampler

OHIO SCHOOL FACILITIES :
COMMISSION, nka Ohio Facilities :
Construction Commission, :

Defendant/Counter Plaintiff/ :
Third-Party Plaintiff/Counter :
Defendant :

v. :

LEND LEASE (US) CONSTRUCTION, :
INC., :

Third-Party Defendant/Counter :
Plaintiff/Fourth-Party Plaintiff :

and :

STEED HAMMOND PAUL INC., etc., :

Third-Party Defendant/Fourth- :
Party Plaintiff :

v. :

BERARDI PARTNERS, INC., et al., :

Fourth-Party Defendants. :

BENCH MEMORANDUM ON ADMISSIBILITY OF
COMPUTER-GENERATED ANIMATIONS

1. **TransAmerica's Computer-Generated Animations are proper demonstrative exhibits and should be admitted as substantive evidence at trial.**

A computer-generated animation should be admitted at trial as substantive evidence when the usual foundational requirements applicable to all forms of evidence are shown—

authentication, relevance, fairness, accuracy in representation, and the probative value exceeds possible prejudice. Indeed, it is a widely-accepted rule that where these key foundational requirements are met with respect to a particular computer-generated animation, a trial court should readily admit that animation at trial over objections opposing its introduction.¹ As computer animations become more prevalent in Ohio courts, this rule will continue to further two fundamental purposes of trial: (1) come to reasonable and justifiable conclusions of fact based on evidence available at trial; and (2) do so in an equitable and efficient manner. Because both of these fundamental goals would be directly served here by admitting TransAmerica's computer animations into evidence, the Court should admit TransAmerica's computer-generated animations without reservation.

LAW AND ARGUMENT

As with any other evidence and testimony at trial, a trial court **“has broad discretion in whether to admit a computer animation, and its decision will be overturned only for an abuse of discretion.”**²

¹ For just a few example cases, see *Commonwealth v. Serge*, 2001 Pa. Dist. & Cnty. Dec. LEXIS 339, 31 (Pa. County Ct. 2001) (“a computer-generated animation is admissible under Pennsylvania law to demonstrate the opinion of an expert witness provided that it is duly authenticated ‘by evidence sufficient to support a finding that the matter in question is what its proponent claims.’”); *People v. Duenas*, 55 Cal. 4th 1, 20 (Cal. 2012) (“A computer animation is admissible if “it is a fair and accurate representation of the evidence to which it relates”)(citation omitted); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 559 (D. Md. 2007) (“Courts generally have allowed the admission of computer animations if authenticated by testimony of a witness with personal knowledge of the content of the animation, upon a showing that it fairly and adequately portrays the facts and that it will help to illustrate the testimony given in the case. This usually is the sponsoring witness.”)(citation omitted); *Pierce v. State*, 718 So. 2d 806, 809 (Fla. Dist. Ct. App. 4th Dist. 1997) (“**A computer is not a gimmick and the court should not be shy about its use, when proper.**”)(citation omitted); *Bledsoe v. Salt River Valley Water Users' Ass'n.*, 179 Ariz. 469, 880 P.2d 689 (Ct. App. Div. 2 1994)(same); *Commercial Union Ins. Co. v. Boston Edison Co.*, 412 Mass. 545, 591 N.E.2d 165 (Mass. 1992)(same); *People v. Cauley*, 32 P.3d 602 (Colo. Ct. App. 2001), cert. denied, (Oct. 15, 2001)(same).

² *Clark v. Cantrell*, 339 S.C. 369, 385, 529 S.E.2d 528 (S.C. 2000) (emphasis added) (citations omitted). See also *Branch v. Cleveland Clinic Found.*, 134 Ohio St. 3d 114, 117 (Ohio 2012) (“trial court is in the best position to make evidentiary rulings and . . . an appellate court should not substitute its judgment for that of the trial judge absent an abuse of discretion.”)(citing *Vogel v. Wells*, 57 Ohio St.3d 91, 95, 566 N.E.2d 154 (1991)).

Though Ohio law is presently silent on the subject, in the numerous states where the issue has been raised, the general rule has been adopted that computer-generated animations may be used to the same extent as other evidence.³ Like other evidence, the question of whether a particular computer animation should be admitted depends on direct evidence (including witness testimony and other direct evidence) necessary to establish a proper foundation. Namely, as with any other piece of evidence, a proponent of a computer animation must establish: authentication, relevance, fairness, accuracy in representation, and that the probative value of the animation exceeds possible prejudice.

The purpose of demonstrative evidence (e.g. computer animations) is to streamline otherwise extensive witness testimony into an easily-accessible format. Consistent with the principle that “a picture is worth a thousand words,” computer animations save the parties and, more importantly, the Court, valuable resources in terms of time, energy, and finances. At the same time, computer-generated animations apprise the fact-finder of information that may have otherwise been lost in the onerous task of wading through the minutiae of weeks of witness testimony.

Computer animations not only streamline witness testimony, animations also condense, simplify, and graphically present information stored in voluminous records. Computer-generated animations bring otherwise inanimate data to life. Demonstrative exhibits are particularly useful where, as is the case here, the sole purpose of the evidence is to replicate information taken from thousands of pages of authenticated voluminous records into a simple and easily-digestible form. Without a demonstrative exhibit, the Court would be tasked with sifting through thousands of pages on its own, only to come to the same conclusion that could have otherwise been drawn in a matter of minutes. By drastically speeding-up the time it takes a court to review voluminous

³ See e.g. *supra*, f.n. 1.

records, computer-generated animations preserve important judicial resources and lead to a quicker, and more justifiable, final judgment.

As with any evidence, computer animations are susceptible to well-established (but perhaps over-used) objections that they (1) misrepresent actual evidence, (2) are not sufficiently reliable, or (3) interpose unfair prejudice on a party opposed to such evidence. It is admittedly the proponent's burden to overcome such objections. However, once such objections are overcome, and a proper foundation is laid, trial courts should readily admit computer animations proofs into evidence.⁴ In short, a computer animation should be admitted at trial as substantive evidence when the proponent of the animation shows it (1) is authentic; (2) is relevant; (3) is a fair and accurate representation of the evidence to which it relates⁵; and (4) has probative value in aiding the trier of fact in understanding the related issue and does not confuse the issues, or mislead the fact-finder.⁶

Here, TransAmerica's animations fairly and accurately depict the evidence underlying this case. That is, the animations are "authentic."

- The animations rely extensively on Project records produced by the OSFC through its formal responses to TransAmerica's discovery and public records requests. The animations are based on (1) schedule updates released by Lend Lease during the course of the Project and (2) on as-built records constructed by TransAmerica's scheduling expert from Project records.

⁴ The same analysis applies for all of TransAmerica's demonstrative exhibits, including both animations and its other graphic representations of the evidence. TransAmerica's demonstrative exhibits, including its several computer animations and other graphic representations of evidence should be admitted at trial once appropriate foundations are laid by witnesses.

⁵ Demonstrative evidence need not be exact in every detail, but the important elements must be identical or very similar to the scene as described in other testimony and evidence presented by the animation's proponent in order to constitute a fair and accurate representation. The fact the animation is inconsistent with testimony or evidence presented by the opposing party should not necessarily lead to its exclusion, provided it fairly and accurately portrays the proponent's version of events. *Clark v. Cantrell*, 339 S.C. 369, 386, 529 S.E.2d 528 (S.C. 2000).

⁶ *Clark*, 339 S.C. at 384-385. See also *State v. Howard*, 2011-Ohio-27, ¶27 (Ohio Ct. App., Montgomery County Jan. 7, 2011) (citing *State v. Abner*, Montgomery App. No. 20661, 2006 Ohio 4510, ¶99). ("Demonstrative evidence 'is admissible if relevant, if substantially similar to the object or occurrence it is intended to represent, and if it does not confuse the issues or mislead the jury.'").

- The OSFC has stipulated to the authenticity of many of the Project records underlying the computer-generated animations, including all of the Lend Lease-issued schedule updates.
- The animations accurately depict the as-planned sequencing based on Lend Lease's project schedule updates, as established at trial through witness testimony including that of Joshua Wilhelm and Don McCarthy.
- The animations accurately depict the as-built schedules constructed by TransAmerica's scheduling expert, also as established at trial through witness testimony by Don McCarthy.

The animations are also "relevant" for a number of reasons, any one of which is sufficient to admit the animations as evidence. The animations will graphically depict the expected testimony of the TransAmerica's witnesses, including that of Josh Wilhelm and that of TransAmerica's scheduling expert, Don McCarthy. In conjunction with the animations, Mr. McCarthy's testimony will reveal the substantial differences between the schedules proposed in the OSFC's original bid documents, and how the Project actually progressed during construction. The animations will aid the Court in appreciating: (1) not only Mr. McCarthy's testimony, but the testimony of other witnesses; (2) how the OSFC (and how TransAmerica in its bid) planned to build the Project at bid time, incorporating both the planned sequence and planned duration of construction; and (3) how the Project was actually built, incorporating both the actual sequence and actual duration of the construction. The computer animations will also help the Court digest the voluminous evidence from which the animation is derived. The animations will summarize information found in the detailed schedule updates issued by the OSFC and will reveal how the Project was "designed on the fly" throughout construction.

Testimony at trial will also prove that the animations accurately depict what they purport to show: the difference between the as-built and the as-planned scheduling and sequencing of the work. While this information will also be collected from the testimony of TransAmerica's witnesses, including Josh Wilhelm and TransAmerica's expert, Don McCarthy, the animations

will summarize that testimony into an easily-accessible form. Acting in its capacity of fact-finder, the Court can use TransAmerica's animations as a tool to assess the delay caused by the numerous schedule updates on TransAmerica's work.

Finally, the probative value of the animations outweighs by far any potential unfair prejudice or surprise the animations place on the OSFC. Again, the animations are derived from Project records and Mr. McCarthy's expert report which have been available to both TransAmerica and the OSFC for many months. The animations simply summarize that data, and compare and contrast the as-built versus the as-planned schedule and sequencing of the work. As this information goes to the heart of this dispute, the probative value of TransAmerica's animations cannot be over-stated.

CONCLUSION

For the reasons stated above and at trial, if any, this Court should exercise its discretion to admit TransAmerica's computer-generated animations into evidence and should consider these animations in the Court's role as fact-finder in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BENCH MEMORANDUM ON ADMISSIBILITY OF COMPUTER-GENERATED ANIMATIONS was sent via e-mail and by regular U.S. mail, postage prepaid, this 26th day of May, 2015 to:

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