ONTARIO COURT (GENERAL DIVISION)

COPY

NEELTJE SMIT,KIMBERLY BRISTOW, RUDI SMIT, SUSANNA SMIT,JOSEPHIENE SMIT a minor by her Litigation Guardian NEELTJE SMIT and COLIN BRISTOW, a minor by his Litigation Guardian NEELTJE SMIT

Plaintiffs

and

ALBERTO DELGUIDICE

Defendant

BEFORE THE HONOURABLE MR.JUSTICE J.R. MacKINNON

on Friday September 13, 1996

at BARRIE, Ontario

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APPEARANCES:

R. Oatley Esq. and — Counsel for Plaintiff

D. Edgell Esq.

P. Trebus Esq., — Counsel for the Defendant

R U L I N G :

THE COURT: The Plaintiff seeks to have declared admissible a computer generated animation video of the accident scene and to have it used as an evidenciary aid by the Plaintiff's Accident Reconstruction expert, Mr. David Bender- not as original stand alone evidence, but as an illustrative aid to Mr. Bender's evidence.

The Court on a Voir Dire heard evidence from Mr. Bender, Mr. Gary Huett, a computer generated video re-enactment expert for the Plaintiff, and from Mr. David Robson, a computer generated video re-enactment expert for the Defendant. No expert report as signed and dated under Rule 53.03, no expert curriculum vitae setting out his qualifications, and no synopsis of his testimony was served by the Plaintiff on the Defendant as to the evidence of Mr. Huett. Mr. Huett's Curriculum Vitae was filed and served only today, that is as Exhibit 'B' on this Voir Dire.

In addition to the evidence of the witnesses that I have identified on the Voir Dire, the Court heard no other testimony but considered evidence

contained in five exhibits considered along with the submissions of counsel. Although a predecessor of the Number #2 Draft video was shown to the Defendant on or about July 11, 1996 the Number #2 Draft video which the Court viewed yesterday after the conclusion of Court proceedings and at the joint request of counsel for both parties, was served on the Defendant first on Monday of this week, September 9. Jury selection in this case had occurred I believe August 26 1996. Evidence was led and counsel's opening to the Jury occurred I believe yesterday, September 12, 1996.

The XYZ co-ordinates of the Plaintiff's witness, Huett, the XYZ location data printouts, are contained in a volume marked as Exhibit 'A' on this Voir Dire and were first served on the Defendants September 11, 1996. The nature of the software used by the Witness, Huett, in the creation of the video was first disclosed to the Defendant September 12, 1996, or perhaps a day or two earlier.

All counsel were aware that this case was on a list of cases to be heard at the four week sittings

which commenced August 26, 1996 at Barrie. This sittings had been advertised in the Ontario Reports by Notice from the Chief Justice of Ontario. All counsel not ready for the sittings had an opportunity in May of this year to appear before the Central East Regional Senior Justice to attempt to obtain an adjournment. There was no evidence that that occurred or that an attempt was made.

A CD ROM disk was first delivered to the Defendant only last night, following the Court day- that is containing the information said to have been fed by Mr. Huett onto the computer. At 5:30 p.m. last night Plaintiff's counsel was first advised that the animation contained in video Draft 2, which the Court viewed yesterday, was in fact defective. That was the video that was first delivered September 9, 1996 to the Defendant. Plaintiff's counsel submits candidly, as is his custom, and I accept that

(1) The Defendant was first told in December 1995 of the intention of the Plaintiff to seek permission of the Court to use the video, and,

(2) The defective video first served September 9, 1996 and had the potential to mislead the Jury.

Plaintiff's counsel submits that a corrected version will not be available in Toronto until 3:15 today; as I look at my watch it is now 3:15 and the plane is probably landing. I directed that the Jury be told at 1:00 o'clock this afternoon that as they arrived at the Court at 1:30 that their presence in Court would not be required as a result of a gross time misstatement by counsel and that the Jury were to re-attend next Monday.

Counsel initially estimated this case to take five to seven days for trial; I am now informed that it will likely take at least nine days in total.

The factors that the Court considers on this matter are as follows:

(1) Is the evidence admissible? That is considering the factors of relevance, accuracy, and whether or not the video has the capacity to, and does mislead.

(2) Can the facts be verified by persons capable of doing so?

(3) Thirdly, is the video necessary to assist the Jury in understanding Mr. Bender's evidence?

(4) Does the video contain editorial comment?

(5) Will it shorten the trial?

The evidence considered by this Court dealt, in effect, with whether this aide, that is the video, was in fact a demonstrably scientifically created verifiable form of demonstrative evidence. Mr. Bender, an expert in accident reconstruction told the Court that he supervised the gathering of information and forwarded it to Mr. Huett in Indianapolis and that he, Mr. Bender, also supervised the checking of the information on its return to him. Mr. Bender's expert engineering opinion was that there was a variance to his opinion but that the tape was accurate within the variance of the analysis of motor vehicle accident reconstruction generally.

Plaintiff's counsel did serve an expert report from Mr. Bender pursuant to the rules, but takes the position that he was not required to do so with respect to the evidence of Mr. Huett. I disagree. Mr. Huett was designated by me for the purpose of this Voir Dire as an expert. His knowledge of computer software and graphics is, I find, vastly superior to that of Mr. Bender whose knowledge I find was, in comparison to that of Mr. Huett,

ranging from minimal to non-existent, that is his knowledge of computer software and computer graphics. Mr. Bender told the Court that he didn't verify the video against the XYZ printout numbers, rather he verified the numbers. Mr. Huett takes responsibility, as I apprehended his evidence, for the error referred to by counsel and in these reasons.

The Plaintiff should have delivered expert reports pursuant to the Rules, not only from the engineer, Mr. Bender, but also from the animator Mr. Huett. The interaction of the software, the hardware, the input data, and the entire video creation process, together with the engineering opinion are all relevant to the Court's analysis on admissibility, i.e. on the issues of relevance, accuracy and whether the video is misleading or not. The Defence was not provided with sufficient advance notice and production details dealing with the interaction of all expert specialties, in connection with the creation of the video.

Plaintiff's counsel now seeks leave, pursuant to s.53.03(2) and 53.08 of the Ontario Rules of Civil

Procedure. I am of the opinion that leave should not be granted for two reasons:

(1) Prejudice will, in my view, be caused to the Defendant. They have had no reasonable ability to verify the integrity of the process. It is unreasonable to expect them to complete such a procedure over this weekend, in spite of the Plaintiff's belated offer to now make the entire process detail available and to pay for the re-attendance on Monday next of the Defendant's expert. The defendant has the right, in my view, in an unhurried fashion to verify the software as proven and accepted, or otherwise it is unreasonable to expect them to complete those procedures over the weekend and be ready to go first thing Monday morning next, as suggested by the Plaintiff.

(2) In addition, it is my view that if leave is granted, that undue delay will be caused in the conduct of this trial. This Jury has been on call now for approximately three weeks; the parties have already exceeded their initial time estimates as to the length of time for trial; the Jury was inconvenienced today, lost

their day at work, or to be with their families; and other cases will necessarily be delayed in their start times as a result of the mis-estimate of counsel.

The Defendant has, and I accept the evidence of Mr. Robson on point, not been able in spite of an Internet search and a review process of contacting US agencies to locate the SHADE software used by the Plaintiff in their program.

Mr. Huett testified that he has used that program hundreds of times and I accept his evidence on that point, but that is not the issue before this Court, rather a fair trial is. Mr. Huett cannot say of the SHADE software was critically reviewed in any published trade journal opinions, or whether SHADE itself has been specifically accepted by a Court other than generically as a Computer Assisted Device process. I am not satisfied that the SHADE software has been proven to this Court as a reliable software function to generally accepted computer industry standards.

In answer to the questions that I posed initially then,

(1) is the evidence admissible, bearing in mind relevancy, accuracy and the misleading capacity or not, the answer is no, it is not admissible.

(2) Can the facts be verified by persons capable of doing so? My answer is no, not reasonably.

(3) Is the video necessary to assist the Jury in understanding Mr. Bender's evidence? My answer is it is not necessarily necessary, but it is possibly helpful if it was admissible, and if it were verifiable.

(4) Does the video contain editorial comment? The answer is no, not as far as is proven before me.

(5) Will it shorten the trial? The answer, possibly, likely, if in fact it were admissible, but in fact it is not at this hearing.

CERTIFICATION

I HEREBY CERTIFY THE FOREGOING to be a true and accurate transcription of the tapes as approved.

D. Elaine Husband

D. Elaine Husband C.C.R.

CERTIFIED COURT REPORTER