

IN THE STATE COURT OF FULTON COUNTY  
STATE OF GEORGIA

[REDACTED] as administrator of  
the estate of [REDACTED] and as  
guardian of [REDACTED]

*Plaintiff,*

v.

MARTIN-ROBBINS FENCE COMPANY,  
GEORGIA DEPARTMENT OF  
TRANSPORTATION, ARCADIS U.S.,  
INC. and JOHN DOES 1-10,

*Defendants.*

Civil Action File No.: [REDACTED]

[REDACTED] and [REDACTED]

*Plaintiffs,*

v.

GEORGIA DEPARTMENT OF  
TRANSPORTATION, MARTIN-  
ROBBINS FENCE COMPANY, and  
ARCADIS U.S., INC.

*Defendants.*

Civil Action File No.: [REDACTED]

**ORDER DENYING DEFENDANT GEORGIA DEPARTMENT OF  
TRANSPORTATION'S MOTION TO EXCLUDE NICHOLAS EARNHART, Ph.D.**

This case comes before the Court on Defendant Georgia Department of Transportation's Motion to Exclude Nicholas Earnhart, Ph.D. Specifically, Georgia Department of Transportation ("GDOT") seeks to exclude Plaintiff's demonstrative reconstruction animation and Dr. Earnhart's testimony regarding the animation. After due consideration, and with the benefit of a hearing on

May 17, 2022, the Court DENIES the Motion for two independent reasons. First, Plaintiff's animation is admissible demonstrative evidence because it is relevant, the probative value is not substantially outweighed by the danger of unfair prejudice, and the animation has been authenticated. *See* O.C.G.A. §§ 24-4-401-403; *see also* O.C.G.A. § 24-9-901. Second, Dr. Earnhart satisfies the requirements of O.C.G.A. § 24-7-702.

The Court also notes that during the hearing on May 17, 2022, GDOT conceded that its challenges to the animation should probably be addressed later, rather than as a motion under Rule 702.

## I. LEGAL STANDARDS

### A. Admissibility of Demonstrative Evidence

To be admissible, demonstrative evidence must be relevant. O.C.G.A. § 24-4-401, 402. “The standard for relevant evidence is a ‘liberal one,’ and such evidence is generally admissible even if it has only slight probative value.” *Thrift v. State*, 310 Ga. 499, 506–07 (2020) (citations omitted). “Decisions regarding relevance are committed to the sound discretion of the trial court.” *Id.* (citations omitted).

Relevant evidence is permissible unless “its probative value is substantially outweighed by the danger of unfair prejudice.” O.C.G.A. § 24-4-403. “Rule 403 guards against unfair prejudice, mandating that judges consider the balance between how useful or ‘probative’ the evidence is and how likely it is that the evidence will cause a factfinder to decide a case on the wrong grounds.” *Chrysler Grp., LLC v. Walden*, 303 Ga. 358, 362 (2018). Exclusion under Rule 403 “is an extraordinary remedy which should be used only sparingly.” *Id.* (citation omitted).

Finally, the evidence must be authenticated. O.C.G.A. § 24-9-901. Evidence can be authenticated by “[t]estimony of a witness with knowledge that a matter is what it is claimed to

be.” *Id.* To authenticate a computer-generated animation, all that is required is testimony that the animation “appears to be an accurate representation of the expert’s opinion as to how the collision occurred.” *Cleveland v. Bryant*, 236 Ga. App. 459, 460 (1999).<sup>1</sup>

### **B. Admissibility of Expert Testimony**

Code Section 24-7-702 and *Daubert v. Merrell Dow Pharmaceuticals, Incorporated*, 509 U.S. 579 (1993), govern the admissibility of expert testimony.<sup>2</sup> The purpose of the inquiry under Rule 702 “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

The admissibility standards of Rule 702 are not, however, a substitute for the adversarial process. Instead, cross-examination and the introduction of contrary evidence are the “appropriate means” of attempting to attack expert evidence. *Daubert*, 509 U.S. at 596. “Where the expert’s testimony has a reasonable factual basis, a court should not exclude it. Rather, it is for opposing counsel to inquire into the expert’s factual basis.” *United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1040 (11th Cir. 1988). That is why the “case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.” *Kilgore v. Reckitt Benckiser, Inc.*, 917 F. Supp. 2d 1288, 1293 (N.D. Ga. 2013) (quoting Fed. R. Evid. 702 advisory committee’s note to

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<sup>1</sup> Evidence need not be authenticated until it is introduced, but the Court addresses the issue here because the parties addressed it in the briefing.

<sup>2</sup> Courts applying O.C.G.A. § 24-7-702 in civil cases “may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.” O.C.G.A. § 24-7-702(f) (emphasis added).

2000 amendments).

To be admissible, an expert's opinions generally must meet three requirements: (1) the expert must be qualified to give his or her opinions; (2) the opinions must be reliable; and (3) the opinions must be helpful to the jury. *See Kilgore*, 917 F. Supp. 2d at 1292 (citing *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F. 3d 548, 562-63 (11th Cir. 1998)); *see also* O.C.G.A. § 24-7-702.

## II. DISCUSSION

### A. **The animation is admissible demonstrative evidence.**

The Court finds that the animation is admissible as demonstrative evidence for three reasons. First, the animation is relevant to Plaintiff's claims and Dr. Earnhart's testimony because it shows how the subject wreck occurred and what, in Dr. Earnhart's view would have happened had the subject guardrail been in a functional condition. O.C.G.A. §§ 24-4-401, 402. Therefore, it is probative. GDOT does not challenge the animation's relevance.

Second, the probative value of the animation is not substantially outweighed by any risk of prejudice. *See* O.C.G.A. § 24-4-403. The risk of prejudice is insignificant. The Court of Appeals has held that demonstrative models, including animations are "generally *not confusable* with real evidence, and are admissible simply on the basis of testimony that they are substantially accurate representations of what the witness is endeavoring to describe." *J.B. Trans., Inc. v. Brown*, 236 Ga. App. 634, 636 (1999) (quoting 2 McCormick on Evidence, § 213, pp. 12-13) (emphasis added). Dr. Earnhart has testified that the animation "accurately reflects the series of events in this collision."<sup>3</sup> Even the accident reconstructionist retained by GDOT has conceded that "the collision phase [of the animation], in general, follows what I believe happened."<sup>4</sup> To the extent

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<sup>3</sup> *See* Earnhart 07/01/21 Dep., 20:23-21:2.

<sup>4</sup> Kent Dep., 13:7-14:11

Defendants would like to critique specific portions of the animation, that is proper on the direct examination of GDOT's expert and cross-examination of Dr. Earnhart. *Brown*, 236 Ga. App. at 636 (“[A]ny inaccuracies in the animation could be brought out upon cross-examination of the expert . . .”). The extraordinary remedy of exclusion under Rule 403 is not appropriate in this case. *See Barrett v. Burnette*, 348 Ga. App. 838, 840 (2019) (“Rule 403 is an extraordinary remedy which the courts should invoke sparingly, and the balance should be struck in favor of admissibility.”).

Third, the animation was properly authenticated because competent evidence shows that the animation accurately reflects the collision.<sup>5</sup> Therefore, the animation has been properly authenticated. *See* O.C.G.A. § 24-9-901(b)(1); *see also Brown*, 236 Ga. App. at 636. Georgia law is clear: “photographs, drawings, blackboards, diagrams, charts, and models—may be used as a means of ‘pictorial communication’ during a trial to illustrate a witness’s testimony.” *Brown*, 236 Ga. App. at 635. “When the materials are not introduced into evidence but are used solely to illustrate the testimony of a witness, minimal authentication is generally required.” *Id.* For that reason, “a computer-generated animation is admissible if it is a fair and accurate representation of the scene sought to be depicted.” *Cleveland*, 236 Ga. App. at 460. That standard is satisfied here.

*Brown* controls. 236 Ga. App. 634. In *Brown*, the trial court allowed the plaintiff to show the jury a computer-generated animation “illustrating the expert’s opinion of how the accident happened.” 236 Ga. App. at 635. Notably, just like in this case, the animation “was not admitted as substantive evidence,” rather, “[i]t was used solely to illustrate the expert’s opinion of how the accident occurred.” *Id.* The defendants appealed, making the same argument that GDOT makes now – i.e., that the animation did not fairly and accurately represent the way the accident actually

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<sup>5</sup> Earnhart 07/01/21 Dep., 20:23-21:2.

occurred. *Id.* However, the Court of Appeals affirmed the trial court's ruling, finding that the animation "accurately illustrated the expert's opinion of how events transpired." *Id.* at 636. Importantly, the court held that "any inaccuracies in the animation could be brought out upon cross-examination of the expert." *Id.*

Here, just as in *Brown*, the evidence shows that the animation fairly and accurately depicts how the wreck happened. Plaintiff's reconstruction expert testified that the animation "accurately reflect[s] the series of events in this collision." Earnhart 07/01/21 Dep., 20:23-21:2. GDOT's expert also agreed that the animation was accurate and generally reflects what happened. Kent Dep., 13:7-14:11. Therefore, the animation has been authenticated. Similar to the Court's analysis in *Brown*, any purported critiques by the defense expert can (and should) be brought out on cross-examination. *See Brown*, 236 Ga. App. at 636.

#### **B. Dr. Earnhart satisfies Rule 702.**

Code Section 24-7-702 imposes three requirements. Dr. Earnhart satisfies each of them. First, Dr. Earnhart is eminently qualified. Dr. Earnhart received his Bachelor of Science in Mechanical Engineering from Purdue University.<sup>6</sup> Thereafter, he received a Master of Science and a Doctorate in Mechanical Engineering from Georgia Tech.<sup>7</sup> Dr. Earnhart specializes in the investigation and reconstruction of motor vehicle collisions.<sup>8</sup> His expertise includes areas such as crash testing, impact analysis, and crash simulation.<sup>9</sup>

Second, Dr. Earnhart's accident reconstruction analysis was reliable. The accident reconstruction expert retained by Defendant Martin Robbins admitted that he had no basis to dispute

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<sup>6</sup> Earnhart CV (Ex. I).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

“Dr. Earnhart’s calculations related to the geometry of the Incident.”<sup>10</sup> GDOT’s expert also generally agreed with Dr. Earnhart’s analysis, testifying, “I think my analysis and [Dr. Earnhart’s] analysis arrived at a lot of the same results in a number of areas.”<sup>11</sup> As to the animation, GDOT’s expert testified that “the collision phase, in general, follows what I believe happened.”<sup>12</sup> A close reading of GDOT’s motion shows that it has no real critique of Dr. Earnhart’s analysis or methodology. Rather, Defendants appear to critique specific details of the animation. Defendants may challenge the animation through cross-examination, by eliciting contrary testimony from other witnesses, or during closing argument, but Defendants’ present challenges to the animation are not the proper basis for a Rule 702 motion.<sup>13</sup> *Brown*, 236 Ga. App. at 636 (“[A]ny inaccuracies in the animation could be brought out upon cross-examination of the expert.”).

Third, the demonstrative animation will help the jury understand Dr. Earnhart’s testimony about how the wreck happened and what would have happened if the guardrail had been reasonably functional. *See Datskow v. Teledyne Cont’l Motors Aircraft Prod., a Div. of Teledyne Indus., Inc.*, 826 F. Supp. 677, 685 (W.D.N.Y. 1993) (“If audio or visual presentation is calculated to assist the jury, the court should not discourage the use of it.”). Any of Defendant’s criticisms go to the weight of the animation, not its admissibility. *Id.* (“[T]he various differences between what was shown on the tape and the actual conditions of the flight went only to weight to be given to the animation, not to its admissibility.”).

### **III. CONCLUSION**

For the foregoing reasons, Defendant Georgia Department of Transportation’s Motion to Exclude Dr. Earnhart is DENIED.

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<sup>10</sup> Martin Robbins’ Suppl. Resp to Pl.’s First ROGs, No. 17 (Ex. J).

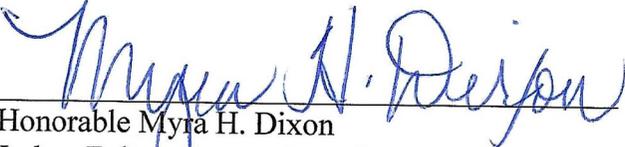
<sup>11</sup> Kent Dep., 31:22-25.

<sup>12</sup> Kent Dep., 13:7-14:11

<sup>13</sup> GDOT essentially conceded as much during the hearing on May 17, 2022.

So ordered, in the above styled cases (19E003857 and 20EV001537) this 14<sup>th</sup> day of

July 2022.

  
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Honorable Myra H. Dixon  
Judge, Fulton County State Court

Proposed Order prepared at the request of the Court by:

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