State Court of Fulton County
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Civil Division

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

███████████, as administrator of the estate of ████████████ and as guardian of J.H. and T.H., *Plaintiff,* v. MARTIN-ROBBINS FENCE COMPANY, GEORGIA DEPARTMENT OF TRANSPORTATION, ARCADIS U.S., INC., and JOHN DOES 1-10, *Defendants.*	Civil Action No.: ████████
████████████ and █████ ████████ *Plaintiffs,* v. GEORGIA DEPARTMENT OF TRANSPORTATION and MARTIN-ROBBINS FENCE COMPANY, and ARCADIS U.S., INC. *Defendants.*	Civil Action No.: ████████

DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION'S
MOTION TO EXCLUDE PORTIONS OF THE TESTIMONY OF PLAINTIFFS'
EXPERT WITNESS NICHOLAS EARNHART, Ph.D.
AND BRIEF IN SUPPORT THEREOF

COMES NOW Defendant Georgia Department of Transportation ("GDOT") and files

this motion and brief in support to exclude portions of the expected testimony and opinions of

Nicholas Earnhart, Ph.D., pursuant to O.C.G.A. §§ 24-4-403, 24-7-702, and 24-9-901, because

Plaintiffs have not met their burden of proving that Earnhart's opinions concerning an animation

video meet the reliability and relevance standards of Georgia law and *Daubert* standards concerning admission of expert testimony.[1] In addition, Plaintiffs have not met their burden of proving that the animation video offered by Earnhart in support of his expert opinions is admissible under *Daubert* or evidentiary standards. For these reasons and the reasons below, GDOT respectfully requests that its motion to exclude, in part, the testimony of Plaintiffs' expert about said video and the video itself be granted.

I.   **BACKGROUND**

      A. **Relevant Facts**

The relevant facts are as set forth in GDOT's motion to dismiss filed contemporaneously with this motion, as well as in the accompanying motion to exclude the testimony of Herman Hill, P.E., P.T.O.E. and are incorporated herein by reference. In summary, Plaintiffs allege that the subject accident occurred on June 3, 2018, in Fulton County along Georgia State Highway I-85, southbound near Exit 76. ███████ was traveling south on I-85 near the Metropolitan exit at approximately mile marker 76.5, and lost control of her Kia Sorrento vehicle, which went off the roadway and made contact with a guardrail. After contact with the guardrail, the vehicle struck a concrete camera pole approximately eight feet behind the guardrail. *See also* ███████ Am. Compl. ¶¶ 17-18; *see generally* Georgia Motor Vehicle Crash Report No. 18154201300.

      B. **Earnhart's Testimony and Opinions.**

Dr. Earnhart, Plaintiffs' accident reconstruction expert, provided his opinions concerning how the accident happened at his July 21, 2021 deposition. In summary, his opinion is: "If the guardrail had been in an intact and repaired condition, the vehicle would not have gone through

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[1] GDOT, contemporaneously with this motion, has filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and incorporates the facts and legal arguments in those motions herein.

or over the guardrail and would have been redirected back out into the roadway." (Deposition of Nicholas Earnhart[2] Dep. 82-83:3.)

GDOT here seeks to exclude one area of Earnhart's testimony related to video animation and seeks to exclude said video animation. Earnhart offered an animation video of the subject accident ("the Animation") to illustrate what he in his expert opinion believes happened during the accident and what would have occurred had the guardrail not been damaged. The Animation is excludable and/or inadmissible for several reasons. First, the Animation does not accurately depict the accident and thus fails the reliability test pursuant to O.C.G.A. § 24-7-702. Discussion, *infra*. Second, Earnhart did not prepare the animation or sufficiently authenticate it pursuant to O.C.G.A. § 24-9-901. Third, the Animation is excludable and inadmissible because he admitted to limited input into how the Animation was prepared and did not confirm its accuracy. Fourth, in light of all of these deficiencies, admission of the Animation likely would mislead or confuse the jury and result in prejudice to GDOT in contravention of O.C.G.A. § 24-4-403. Discussion, *infra*.

II. ARGUMENT AND CITATIONS TO AUTHORITY

A. Earnhart's Opinions and Testimony About the Animation video Should Be Excluded Under The Standards Governing the Admissibility of Expert Opinions.

1. Legal Background

As discussed *infra*, GDOT moves to exclude certain of Earnhart's opinions and testimony because they do not meet the applicable burdens of proof to establish that they meet the standards of reliability and relevance under Georgia law, which incorporates Federal law based on United States Supreme Court decisions such as *Daubert*. Discussion, *infra*.

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[2] Cited portions of Mr. Earnhart's deposition are attached hereto as **Exhibit 1.**

The burden of laying a proper foundation for proposed expert testimony is on the party

offering it, here, the Plaintiffs. *McDowell v. Brown*, 392 F.3d 1283, 1298 (11ᵗʰ Cir. 2004); *see*

also Jones v. Anderson, 2018 U.S. Dist. Lexis 95315, at *52 (S.D. Ga. 2018).

O.C.G.A. § 24-7-702 governs the admissibility of expert opinions in this case (O.C.G.A. §

24-7-702(a)), and provides, in pertinent part, as follows:

> (b) If scientific, technical, or other specialized knowledge will assist the trier of fact
> to understand the evidence or to determine a fact in issue, a witness qualified as an
> expert by knowledge, skill, experience, training, or education may testify thereto in
> the form of an opinion or otherwise, if:
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the
> case which have been or will be admitted into evidence before the trier of fact. . ..
> . . . .
>
> (d) Upon motion of a party, the court may hold a pretrial hearing to determine
> whether the witness qualifies as an expert and whether the expert's testimony
> satisfies the requirements of subsections (a) and (b) of this Code section. Such
> hearing and ruling shall be completed no later than the final pretrial conference
> contemplated under Code Section 9-11-16. . . .
>
> (f) It is the intent of the legislature that, in all civil proceedings, the courts of the
> State of Georgia not be viewed as open to expert evidence that would not be
> admissible in other states. Therefore, in interpreting and applying this Code section,
> the courts of this state 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.

The trial court acts as a "gatekeeper" to ensure that speculative, unreliable expert

testimony does not reach the jury. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592-93

(1993). Accordingly, the testimony must: (1) be reliable, such that it is grounded "in the methods

and procedures of science" (*id.* at 590), and (2) constitute something more than "subjective belief

or unsupported speculation." *Id.*; *see also HNTB Ga. Inc. v. Hamilton-King*, 287 Ga. 641, 645-46

(2010). Under this "rigorous" inquiry, the testimony must "assist the trier of fact, through the

application of scientific, technical, or specialized expertise, to understand the evidence or to

determine a fact in issue." *Jones*, 2018 U.S. Dist. Lexis 95315, at *14.

The Animation is offered as demonstrative evidence to allegedly show how the accident

happened and how, allegedly, it would have turned out differently had the guardrail been fully

intact and repaired at the relevant time. Discussion, *infra*. Following this settled law, and for the

reasons below, GDOT's motion should be granted to exclude Earnhart's testimony about the

video and to exclude the Animation, and his opinions that are based on the Animation.

2. Certain of Earnhart's Opinions and Testimony Are Unreliable Pursuant to O.C.G.A. § 24-7-702.

With respect to the reliability analysis:

> [T]he proponent of the expert testimony must establish that '(1) the testimony is
> based upon sufficient facts or data, (2) the testimony is the product of reliable
> principles and methods, and (3) the witness has applied the principles and methods
> reliably to the facts of the case.' Moreover, the facts or data underlying the expert's
> opinion must be 'of a type reasonably relied upon by experts in the particular field in
> forming opinions or inferences upon the subject.' Fed. R. Evid. 703.

Jones, 2018 U.S. Dist. Lexis 95315 at *16-17. Courts also consider, with respect to the

expert's technique or theory:

> (1) whether it can be (and has been) tested; (2) whether it has been subjected to peer
> review and publication; (3) what its known or potential rate of error is, and whether
> standards controlling its operation exist; and (4) whether it is generally accepted in
> the field.

Id. at *17.[3]

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[3] With respect to the relevancy analysis, "the offered opinion" must have "the appropriate fit"
with "the facts of the case." *McDowell*, 392 F.3d at 1298-99; *Daubert*, 509 U.S. at 591, 597

For the reasons below, Earnhart's opinions and testimony with respect to the Animation video should be excluded because they do not rely on established industry standards related to guardrail function and testing. The Animation should also be excluded because it does not reliably reflect the accident, as discussed above, and was not properly authenticated. Moreover, Earnhart conceded that he did not confirm its accuracy, as discussed below. Finally, permitting the jury to view the animation would be misleading and unfairly prejudice GDOT given these deficiencies. *See* Discussion, *infra*.

3. The Animation Concerning the Subject Accident Is Inadmissible Under Settled Evidentiary Standards And Does Not Meet the *Daubert* Reliability Standard.

Earnhart, as discussed below, retained DK Global, Inc., a legal animation company with which he is not affiliated, to prepare an animation video ("the Animation") to support his accident reconstruction opinions. Discussion, *supra*. But, as shown by Earnhart's testimony as well as that of GDOT's expert Kent, the Animation does not depict an accurate version of the subject accident. Further, Earnhart did not sufficiently review the Animation to confirm its accuracy, despite offering it in support of his expert opinion. And, he did not provide any way by which the Animation, prepared by a third party, could be authenticated, which is a precondition to its admissibility.

(explaining that the expert's opinion must be "relevant to the task at hand" and must concern "[p]ertinent evidence based on scientifically valid principles"). And, the testimony must logically advance a material aspect of the case. *Daubert*, 509 U.S. at 591. Here, GDOT primarily seeks to exclude certain portions of Earnhart's testimony, as well as the Animation, as unreliable, but such testimony and evidence most likely also fails to satisfy the relevance standard. In particular, the Animation would not be relevant because, at least in part, it is not based on what actually happened in the subject accident.

O.C.G.A. § 24-9-901(a) states as follows:

> (a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

A film or video made **after** a material event that purports to reconstruct that event, must pass the substantial similarity test. The burden is on the party offering the evidence to lay proper foundation establishing a similarity of circumstances and conditions. *See Burchfield v. CSX Transp., Inc.,* 636 F.3d 1330, 1336. (11th Cir. 2011). As discussed below, Earnhart cannot establish the proper foundation for this Animation video.

The result is an unreliable and misleading impression of what occurred during the accident (which also renders the "what if" scenario in the Animation similarly misleading and unreliable), in contravention of settled law concerning admissibility of evidence as well as admissibility of expert testimony and opinions. In short, "a trial court is not permitted to 'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. Simply put, there may be "too great an analytical gap between the data and the opinion proffered.'" *Cash v. LG Elecs, Inc.*, 342 Ga. App. 735, 736, 740 (2017) (quoting *Joiner*, 522 U. S. at 146, and citing *HNTB Ga., Inc.*, 287 Ga. At 644) (excluding expert's opinion that a fire originated in the plaintiff's television because there was no "evidence that the circumstances the expert created in his experiment existed in the television on the day of the fire"). Likewise, if the Animation does not accurately reflect how the accident happened, Earnhart's opinions that rely on the Animation, reflect "too great an analytical gap between the data" and his opinions. *Cash*, 342 Ga. App. at 736, 740.

Earnhart testified concerning the Animation as follows:

Q. . . . . Now, included in your expert file, there was an animation . . . 2021-06-07 DK Global Reconstruction Animation. So that is your animation in this case?

A. I didn't prepare it, but I provided the animator some feedback.

Q. So tell me about that. What was your involvement in the reconstruction animation that I just spoke of which says DK Global Reconstruction Animation?

A. So I provided some of the basics from my reconstruction to help them generate the animation. For example, the initial speed of the vehicle as it's shown on the road is within the range of -- actually, the initial speed is from the download of 70.8 miles an hour, the rate at which the vehicle decelerates and yaws is consistent with my analysis, the motion of the vehicle across the road is consistent with my analysis. You know, and then generally the orientation of the vehicle over the shoulder and the orientation of the vehicle as it contacts the pole would all be consistent with my analysis and giving, you know, feedback about sort what of the scenario and the alternate scenario would look like.

Q. All right. But your office didn't create it?

A. We did not.

(Ex. 1, Earnhart Dep. 90-91:7.)

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Q. All right. And in any other cases that you have been involved in as a hired expert in accident reconstruction, have you ever made an animation of an accident reconstruction analysis?

A. As an expert, we would generate a simulation depending on the needs of the case, but we don't produce animations in house.

Q. All right. And am I correct in understanding your testimony, that what DK Global produced was an animation and not a simulation?

A. That is correct. Again, with the confines of the physics of my reconstruction.

Q. All right. And would it be safe for me to understand that the animation that DK Global created is not your expert opinions in this case?

A. To the extent that it's consistent with them, it would be, like I said, consistent. Right? But it is not a simulation, it's an animation.

(Ex. 1, Earnhart Dep. 92:3-24.)

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Q. And did you do anything to analyze the animation, to check or confirm that the animation was consistent with your own expert opinions in this case?

A. In terms of going back and doing some kind of frame by frame video analysis, no, I have not done that.

Q. All right. So there could be inconsistencies within the DK Global animation compared to your own professional expert opinions in this case?

A. It's possible. I have not specifically checked that.

(Ex. 1, Earnhart Dep. 93:1-16.)

Earnhart also was questioned by Defendant Martin-Robbins's counsel concerning the

Animation, as follows:

Q. . . . .Am I correct that an animation is a video sort of illustrating your opinion – or this animation is an illustration of your opinion about what happened in the case?
A. That is right.
Q. Okay. And on the other hand and tell me if I am wrong because I am learning, but a simulation relies on computer models or programs to tell somebody what happened according to mathematical or scientific principles or calculations, right?
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Q. In a simulation you have models that represent physics, right, in the interaction of all the parts in the universe that you are simulating. And in a simulation you set up the initial conditions. Right? You say I have a vehicle on the road in this spot, at this speed and rotating at this angle. From there you push go and the simulation with physics tells you what happens after that. Right? In an animation, the animators have control over every frame. Right? So to the extent that the animation is consistent with physics, that is certainly possible, but it is not a simulation in the sense that every single tiny interaction between the vehicle and the road is consistent with, you know, the laws of physics.
Q. So this program could, I am not saying it did, I am saying it could allow the animators to create an animation that is not consistent with the laws of physics?
A. To whatever level of detail you would like to discuss that, sure. Yes. There is control over the vehicle in every frame.
Q. And a simulation would allow someone to test different theories by putting different parameters on the situation, correct?
A. That is correct.
Q. Did you create or did you ask anybody to create an animation showing any different scenario than the two that are shown there, being what you think happened and what you believe would have happened?
A. I have not.
Q. Did you rely on any eye witness testimony in the creation of the animation?
A. I did not. No.
Q. Did you consider putting in the speed at which you believe the vehicle is going at any point during the animation?
A. I believe I testified that, yes, the vehicle is traveling at the speed recorded in the download.
Q. But it does not show that in the animation?
A. The speed doesn't show up as a number in the animation, that is right.
Q. And this program would not be able to reject the animation if it did not comply with the law of physics?
A.That is correct. It's an animation.
Q. The animation of what happened does not show contact with the other vehicle, does it?
A. It does not.
Q. Why did you choose not to include that?

A. That was not my choice.

Q. That was by the directive of counsel?

A. It must have been.

Q. Would you agree that adding that would make the illustration more accurate?

A. It would include that aspect of the scenario, that contact like I testified doesn't affect any of my opinions in terms of performance of the guardrail.

Q. Did you do anything to determine whether the lighting shown in the animation was consistent with the lighting at the time of the incident?

A. I have not.

Q. Did you do anything to ensure the weather conditions shown in the animation were consistent with those conditions on the night of June 3rd?

A. I have not given that kind of feedback.

Q. So no?

A. Correct.

Q. In creating this animation, did you make any assumptions regarding ███ ███████ behavior?

A. I didn't create the animation.

Q. In instructing the persons who made the animation or consulting with them, did you advise on the assumption they should make regarding ████████ behavior?

A. No. The vehicle motion begins at the loss of control, where now that the tires are saturated and the vehicle is out of control, driver inputs have little to do with what happens after that.

Q. Do you have any opinion regarding whether ████████ made any attempt to stay on the roadway?

A. I have no information about the driver inputs after the initiation of the loss of control.

Q. And again, the animation has two parts, what you believe happened and what you believe would have happened had the guardrail been repaired, correct?

A. Correct.

(Ex. 1, Earnhart Dep. 137-141:24.)

Q. And I will represent to you that [Ex. 21, photographs] are screen shots that I took of the animation. There is four of them.

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Q. Okay. And I will tell you, I put those little markers at the time that say 59 seconds or two minutes and 33 seconds in. . . . .If you compare the first and the third. . . . And the second and the fourth. They do not appear to show the Sorrento exiting the roadway at the same angle, do they?

A. They don't appear to be exact. No.

Q. Is there any reason why that is?

A. Not to my knowledge.

Q. Because as you said, the damaged guardrail would have had no impact on the angle of the vehicle prior to making contact with it, right?

A. Correct.
Q. So the what if scenario presents a different path before contact with the subject guardrail, then the ["] what you believe actually happened ["] animation?
A. Well, assuming that these are taken at the exact same moment in the animation, at the two different scenarios there appears to be a discrepancy.
Q. Do you have any reason to think they weren't based on the time layout here and where the tires are?
A. I am relying exclusively on your representation as to that.

(Ex. 1, Earnhart Dep. 142-144:1.)

Joe Kent[4] testified as to his concerns with the accuracy of the Animation:

Q. Okay. I'm going to -- I'm going to play ["Px 100 Reconstruction Animation"] and then ask you some questions.
A. All right.
Q. Okay. Do you agree that the animation that you just watched accurately reflects the series of events in the subject collision? . . . .
A. In a simplified way, yes. It does not show the roll angle of the vehicle, in other words, the side-to-side lean. The vehicle would have been leaning considerably to its right as a result of the counterclockwise yaw, and I don't believe the animation reflects that. And so you get a little bit different sequence of the roll angle. As you view that video, all of a sudden it starts rolling fairly abruptly. So I don't think that really accurately reflects that roll motion. As far as trying to look at the individual speeds and directions, . . . I don't have enough information -- there's no speeds shown . . . on the scroll bar. There's, . . . not enough for me to really assess if it's absolute accurate and correct like a simulation would be.. . . .
A. General, I think the collision phase, in general, follows what I believe happened.

(Ex. 2, Kent Dep. 13-14:10.)

Q. . . . Have you . . . reviewed the work of Nick Earnhart in this case?
A. I have.
Q. Is there anything that you agree with . . . Dr. Earnhart on?
A. I think my analysis and his analysis arrived at a lot of the same results in a number of areas.
Q. Is there anything you disagree with?
A. With regard to, in the animation, the what-if scenario -- I'm trying to recall exactly what he responded when he was questioned about the what-if scenario. But I don't believe that what-if scenario is something that can accurately be predicted. So I would disagree if he believes that that is an accurate representation of what would happen if the vehicle struck a fully functional, conforming guardrail at the same

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[4] Cited portions of Mr. Kent's deposition are attached hereto as **Exhibit 2.**

speed and angle that he calculated. And, frankly, my calculations are very close to his. And I guess the other thing is I think maybe I analyzed the motion of the Kia Forte, the taxicab, maybe to a little greater extent than he did, and his -- I'm not quite clear what his steering study was trying to depict, or his methodology, but I didn't see anything in there that would allow you to calculate differences in path based solely on steer angle. There are other factors that, if you were trying to calculate that, you would have to know that I'm not sure we know -- or I don't know -- about this vehicle -- things such as the understeer gradient and the tire cornering stiffness is and those sorts of things. So it's not something that you can just look at steer angle and calculate.

(Ex. 2, Kent Dep. 31-33:1.)

The case of *Clark v. Cantrell*, 339 S.C. 369, 383-85, 529 S.E.2d 528, 535-37 (S.C. Supr. Ct. 2000),[5] provides guidance as to how this Court can analyze the admissibility of the Animation. By way of background, "demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness's testimony, but it also may be admissible as an exhibit for the jury to examine and consider during deliberations." *Id*. (citing cases and Mueller & Kirkpatrick, § 9.31.).

As the court explained, "a computer animation can mislead a jury just as easily as it can educate them. An animation is only as good as the underlying testimony, physical data, and engineering assumptions that drive its images." *Id*. at 383-84.

The court also offered "several concerns about computer animations:

the potential to mislead by an inaccurate portrayal of the facts, the potential to create lasting impressions that unduly override other testimony or evidence, and the need for heightened guarantees of trustworthiness due to the possibility of editorial distortion by the party preparing the animation.

Id. at 384-85.

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[5] Rule 702 of the South Carolina Rules of Evidence is "identical to the federal rule." Rule 702, SCRE, Comment; *see also* O.C.G.A. § 24-7-702(f) (discussing relevance of the analysis of the admissibility of expert evidence by other State courts).

The *Cantrell* court, relying on treatises and secondary sources, offered four criteria by which to determine whether a computer-generated video animation is admissible as demonstrative evidence. Specifically, the proponent must "show that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE." *Id*. at 384-85.

In addition:

> the animation must be a fair and accurate representation of the evidence to which it relates. It 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. In an animation reconstructing a vehicle accident, for instance, the animation must be technically correct on details such as distance, terrain, relative speed, path of travel, and surroundings.

Id. at 386-87 (explaining that that the animation is not inadmissible just because it is inconsistent with other testimony as long as it is a "fair and accurate representation" of the events in question). The court concluded:

> In this case, the trial judge properly excluded the animation because it did not accurately reflect the testimony of the proponent and her expert witness. The animation did not accurately reflect the initial position of Anderson's car as Cantrell described it in her testimony. A portion of the animation also made it appear that Anderson's car pulled directly in front of Cantrell's car when Cantrell was almost upon it. Cantrell's expert witness, however, testified Cantrell could have first seen Anderson's car some distance back from the point where Cantrell's car initially was positioned in the animation.

Id. at 387-88. Following this case and the authorities on which the *Cantrell* court relied, as well as the other cases cited above, in light of Earnhart's testimony (as well as Kent's

observations and opinions), the Animation is not admissible under applicable evidentiary standards and fails to satisfy the *Daubert* reliability standards. *See* O.C.G.A. § 24-7-702. Earnhart appears to concede that, not only did he not create the Animation, he could not confirm that the Animation accurately reflected the accident sequence. Discussion, *supra*. In addition, as Kent opined, the Animation does not accurately depict the facts of the subject accident.

With respect to the authentication requirement, Earnhart testified that the Animation was prepared by a third party, and his testimony reveals that the Animation has not been properly authenticated. O.C.G.A. § 24-9-901; *see generally Cantrell*, 339 S.C. at 386 ("a party may authenticate a video animation by offering testimony from a witness familiar with the preparation of the animation and the data on which it is based"). And, without such authentication, the Animation also is excludable as unreliable under O.C.G.A. § 24-7-702 and *Daubert* standards because his testimony would not "be the product of reliable methods." O.C.G.A. § 24-7-702(b)(2); *Daubert*, 509 U.S. at 592-93.

For all these reasons, those of Earnhart's opinions and related testimony discussed above, as well as the Animation, are inadmissible because they fail to meet the reliability standard under applicable statutory and case law. Thus, Plaintiffs cannot meet their burden of proving that such opinions, testimony, and demonstrative evidence are admissible in this case against GDOT.

B. <u>**The Animation And Earnhart's Related Opinions Should Be Excluded Because They Are More Prejudicial than Probative.**</u>

For the reasons discussed above, any probative value of the Animation and related testimony is substantially outweighed by the danger of unfair prejudice to GDOT by "confusing the issues and misleading the jury." *Daubert*, 509 U.S. at 595 (citation omitted). As the court observed in *Robinson v. Mo. Pac. R.R.,* 16 F.3d 1083, 1088 (10th Cir. 1994), with respect to a video animation of a motor vehicle accident:

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> Video animation adds a . . . powerful evidentiary tool to the trial scene. McCormick's work on evidence observes that with respect to one party's staged reproduction of facts "not only is the danger that the jury may confuse art with reality particularly great, but the impressions generated by the evidence may prove particularly difficult to limit . . ." 2 *McCormick on Evidence* 19 (4th ed. 1992) (footnote omitted). Because of its dramatic power, trial judges should carefully and meticulously examine proposed animation evidence for proper foundation, relevancy and the potential for undue prejudice.

Robinson v. Mo. Pac. R.R., 16 F.3d 1083, 1088 (10th Cir. 1994) (citations omitted). Here, because the Animation does not accurately reflect the evidence, and is an unfair and misleading depiction of the subject accident, there is a heightened risk of prejudice to GDOT pursuant to O.C.G.A. § 24-4-403. *See also Cantrell*, 339 S.C. at 386-87; *Racz v. R.T. Merryman Trucking*, 1994 U.S. Dist. LEXIS 4349, at *13-14 (E.D. Pa. 1994) (in accident reconstruction case involving car accident where plaintiff's decedent lost control of her car on a highway, plaintiff sought to preclude defendant's accident reconstructionist expert's animation of the accident; court granted the motion on the grounds of confusion to the jury and prejudice, explaining, given a certain discrepancy in the expert's report: "Because the expert's conclusion would be graphically depicted in a moving and animated form, the viewing of the computer simulation might more readily lead the jury to accept the data and premises underlying the defendant's expert's opinion, and, therefore, to give more weight to such opinion than it might if the jury were forced to evaluate the expert's conclusions in the light of the testimony of all of the witnesses, as generally occurs in such cases.").

Accordingly, such testimony and opinions concerning the Animation video and the Animation video itself are inadmissible under O.C.G.A. § 24-4-403.

III.   CONCLUSION

For the foregoing reasons, GDOT respectfully requests that the Court grant its motion to exclude Plaintiffs' expert's testimony and opinions in part, as discussed above, and to preclude admission of the Animation video as evidence in this case.

This 29th day of November, 2021.

Respectfully submitted,

CHRISTOPHER M. CARR	112505
Attorney General	
KATHLEEN M. PACIOUS	558555
Deputy Attorney General	
RONALD S. BOYTER, JR.	073553
Senior Assistant Attorney General	

/s/Kristine K. Hayter

KRISTINE K. HAYTER	108031
Assistant Attorney General	

**PLEASE ADDRESS ALL
COMMUNICATIONS TO:**

KRISTINE K. HAYTER
Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334-1300
Telephone: (404) 458-3268
khayter@law.ga.gov

CERTIFICATE OF SERVICE

     I DO HEREBY CERTIFY that I have this date served a copy of **DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION'S MOTION TO EXCLUDE PORTIONS OF THE TESTIMONY OF PLAINTIFFS' EXPERT WITNESS NICHOLAS EARNHART, Ph.D. AND BRIEF IN SUPPORT THEREOF**, using File & Serve*Xpress* which will automatically send email notification of such filing to all counsel of record:

James E. Butler, III, Esq.
Matthew R. Kahn, Esq.
Butler Law Firm
10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlerfirm.com
matt@butlerfirm.com
Attorneys for ▮▮▮ *Plaintiffs*

Nick T. Protentis, Esq.
Miller Bonham, Esq.
Protentis Law LLC
5447 Roswell Rd. NE
Atlanta, GA 30342
nick@protentislaw.com
matt@protentislaw.com
Attorneys for ▮▮▮ *Plaintiffs*

Brad C. Parrot, Esq.
Claire A. Williamson, Esq.
Hudson Parrott Walker, LLC
3575 Piedmont Road NE
Fifteen Piedmont Center, Suite 850
Atlanta, Georgia 30305
bparrott@hlpwlaw.com
cwilliamson@hlpwlaw.com
Attorneys for Defendant Martin-Robbins Fence Company

Kevin P. Branch, Esq.
Elenore C. Klingler, Esq.
McMickle, Kurey & Branch, LLP
217 Roswell Street, Suite 200
Atlanta, Georgia 30009
kbranch@mkblawfirm.com
eklingler@mkblawfirm.com
Attorneys for Defendant Martin-Robbins Fence Company

Kent T. Stair, Esq.
Sarah L. Bright, Esq.
Copeland, Stair, Kingma & Lovell, LLP
191 Peachtree Street, NE
Suite 3600
Atlanta, Georgia 30303
KStair@cskl.law
sbright@cskl.law
Attorneys for Defendant Arcadis U.S., Inc.

David R. Cook, Jr. Esq.
Antonio E. Veal, Esq.
Autry, Hall & Cook, LLP
3330 Cumberland Blvd.
Suite 325
Atlanta, Georgia 30339
cook@ahclaw.com
veal@ahclaw.com
Co-Counsel for Defendant GDOT

     This 29th day of November, 2021.

                /s/Kristine K. Hayter
                KRISTINE K. HAYTER   108031
                Assistant Attorney General

**PLEASE ADDRESS ALL
COMMUNICATIONS TO:**

KRISTINE K. HAYTER
Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334-1300
Telephone: (404) 458-3268
khayter@law.ga.gov