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;
ARCADIS U.S., INC.; GEORGIA
DEPARTMENT OF TRANSPORTATION;
and JOHN DOES 1-10,

    Defendants.

Civil Action No.: ███████████

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT GDOT'S MOTION TO EXCLUDE NICHOLAS EARNHART

Defendant's motion a is really a motion in limine masquerading as a *Daubert* motion.

The animation of the subject collision is admissible demonstrative evidence because "it is a fair

and accurate representation of the scene sought to be depicted." *Cleveland v. Bryant*, 236 Ga.

App. 459, 460 (1999) (articulating standard). Here, Dr. Nicholas Earnhart, the accident

reconstruction expert retained by Plaintiff, has testified that the animation "accurately reflect[s]

the series of events in the subject collision."[1] Defendant GDOT's accident reconstruction expert

has agreed that, in a macro sense, the animation "reflects what happened out there [in the subject

collision]."[2] Because no other accident reconstruction expert will testify at trial, *all*

reconstruction experts in this case have agreed that the animation reflects the subject collision

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[1] Earnhart 07/01/21 Dep., 20:23-21:2 (Ex. A).
[2] Kent Dep., 13:7-14:11 (Ex. B).

with reasonable accuracy. Therefore, the animation is admissible. If Defendants want to quibble about details, they have the right to do so, but "any inaccuracies in the animation could be brought out upon cross-examination of the expert" rather than in a pretrial motion. *Id.*

The standards under Rule 702 and *Daubert* do not apply to demonstrative animations, as Defendant erroneously submits. *Id*. However, even under a Rule 702 analysis, the animation and Dr. Earnhart's testimony about the animation are admissible because Dr. Earnhart is qualified, his opinions are reliable, and his opinions will be helpful to the jury. *See* O.C.G.A. § 24-7-702. The Court should deny Defendant's motion.

1. **Introduction**

At trial, Plaintiff intends to offer a computer-generated animation of the wreck sequence as demonstrative evidence to help the jury. The animation has two parts. The first part shows how the subject wreck happened. The second part shows what would have happened had the subject guardrail been functional.[3] Importantly, the animation does *not* purport to be a scientific reconstruction, which would be referred to as a "simulation." It is simply a computer-generated animation to help the jury understand what happened.

"Animations" and "simulations" are different animals, and they have different standards for admissibility. Generally, an animation constitutes demonstrative evidence, and a simulation constitutes substantive evidence. *See* Victoria Webster, et al., *The Use of Computer-Generated Animations and Simulations at Trial*, Defense Counsel Journal, Vol. 83, No. 4 (Oct. 2016), at 440 (Ex. C). An "animation" constitutes demonstrative evidence because it merely serves as a

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[3] The full animation can be viewed at the following Dropbox link:

visual aid to support expert testimony. *Id.* Its purpose is to help the jury understand a witness'

testimony. *Id.* An animation does not purport to be a scientific recreation of an actual event. *Id.*

To be admissible, an animation need only be "a fair and accurate representation of the scene

sought to be depicted." *Cleveland*, 236 Ga. App. at 460.

On the other hand, a "simulation" is considered substantive evidence because it involves

a computer's independent application of scientific principles. *Id.* A simulation, as opposed to an

animation, is created by entering data and engaging in computer-assisted analysis in accordance

with widely accepted methodology. *Id.* Rather than depicting a witness' testimony in the

manner of an animation, a simulation forms its own conclusions based on raw data. *Id.* Because

a simulation constitutes substantive, scientific evidence, the evidentiary standard for a simulation

is higher. The video at issue in this case is an animation, *not* a simulation. *See* Earnhart

07/21/21 Dep., 92:23-24 ("But it is not a simulation, it's an animation.")

To be admissible, a demonstrative animation need only satisfy three requirements. First,

the demonstrative evidence must be relevant. *Rickman v. State*, 304 Ga. 61, 63–64 (2018) (citing

O.C.G.A. § 24-4-401. Second, the probative value must outweigh the risk of unfair prejudice or

confusion. *Id.* (citing O.C.G.A. § 24-4-403). Third, the demonstrative evidence must be

authenticated. O.C.G.A. § 24-9-901. To that end, "a computer-generated animation is

admissible if it is a fair and accurate representation of the scene sought to be depicted."

Cleveland v. Bryant, 236 Ga. App. 459, 460 (1999).

This demonstrative animation is admissible because, as both accident reconstruction

experts have agreed, it fairly and accurately depicts the subject collision. Moreover, despite

Defendants' arguments to the contrary, the animation is relevant because it helps explain Dr.

Earnhart's testimony about how the subject nonfunctional guardrail caused the vehicle in which

Plaintiff was riding to crash into the concrete pole located behind the guardrail. *See* O.C.G.A. §§ 24-4-401, 402. The animation's probative value is not "substantially outweighed by the danger of unfair prejudice" because the risk of confusion is insignificant – Plaintiff's reconstruction expert worked with the animators to ensure that the animation complied with the laws of physics, and the sole defense reconstruction expert agrees that the animation accurately reflects what happened.[4] *See* O.C.G.A. § 24-4-403. Finally, Plaintiff's reconstruction expert authenticated the animation during his deposition, as did GDOT's expert. *See* O.C.G.A. § 24-9-901. Therefore, the animation is admissible. That is all Plaintiff must show to admit demonstrative evidence. *See Rickman*, 304 Ga. at 63-64.

Neither Code Section 24-7-702 nor *Daubert v. Merrell Dow Pharmaceuticals, Incorporated*, 509 U.S. 579 (1993), apply to demonstrative animations. Georgia courts routinely allow the presentation of computer-generated animations as demonstrative evidence without engaging in a Rule 702 analysis. *E.g.*, *Brown*, 236 Ga. App.at 636 (affirming the trial court's decision to allow the plaintiff to show a computer-generated animation "which accurately illustrated the expert's opinion of how events transpired . . ."); *Cleveland*, 236 Ga. App. at 460 ("[A] computer-generated animation is admissible if it is a fair and accurate representation of the scene sought to be depicted."); *see also Key Safety Sys., Inc. v. Bruner*, 334 Ga. App. 717, 722 (2015) (allowing use of demonstrative video because it "was produced in order to explain certain scientific principals [sic], which [the defense] expert agreed it did."). Federal courts have reached the same conclusion. *E.g.*, *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

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[4] Earnhart 07/21/21 Dep., 92:13-14 (testifying that the animation was created "with the confines of the physics of my reconstruction.") (Ex. D) Kent Dep., 13:7-14:11.

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."); *Datskow v. Teledyne Cont'l Motors Aircraft Prod., a Div. of Teledyne Indus., Inc.*, 826 F. Supp. 677, 685 (W.D.N.Y. 1993) (issuing a cautionary instruction that the animation was "not meant to be a re-creation of the accident," but "simply computer pictures to help you understand Mr. Sommer's opinion.").

Defendant's motion should be denied.

2. Facts

2.1. The subject wreck

On June 3, 2018, ███████ was the passenger of a Kia Sorrento traveling on I-85 South.[5] After a collision with another vehicle, the Sorrento lost control and entered a counter-clockwise yaw.[6] The Sorrento slid, remaining on all four wheels, and struck a portion of nonfunctional guardrail.[7] Because the guardrail was nonfunctional, it failed to keep the car in the roadway.[8] Instead, the guardrail tripped the Sorrento, causing the Sorrento to ramp *over* the guardrail toward the camera pole that stood close behind the guardrail.[9]

2.2. The demonstrative, computer-generated animation

Plaintiff prepared an animation showing the subject wreck and what would have happened if the subject guardrail had been functional. Reconstruction expert Nicholas Earnhart,

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[5] Police Report (Ex. E).
[6] Earnhart 07/21/21 Dep., 53:23-55:1, 66:14-67:3, 73:1-74-2, 75:24-76:9.
[7] Earnhart 07/01/21 Dep., 22:7-9; Earnhart 07/21/21 Dep., 108:5-16; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 2 (Ex. F); Kent Dep., 10:7-16.
[8] Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.
[9] Earnhart 07/01/21 Dep., 21:13-18; Earnhart 07/21/21 Dep., 128:18-129:1; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.

Ph.D., worked with the animator to ensure that it was accurate. Earnhart 07/21/21 Dep., 90:2-91:4, 92:10-24. Specifically, Dr. Earnhart provided data showing the initial speed of the Sorrento, the rate at which the Sorrento decelerated and yawed, the motion of the Sorrento across the highway, the orientation of the Sorrento over the shoulder of the highway, and the orientation of the Sorrento as it contacted the concrete pole. *Id.* at 90:2-91:4. Dr. Earnhart testified that the animation was "consistent with my analysis." *Id.* at 91:1. Critically, the animation is not and does not purport to be a simulation. Earnhart 07/21/21 Dep., 92:23-24 ("But it is not a simulation, it's an animation.").

Dr. Earnhart confirmed the accuracy of the animation:

Q. All right. Dr. Earnhart, does the animation that's been -- you just watched that's been marked as Plaintiffs' Exhibit B accurately reflect the series of events in this collision?

A. Yes.

Earnhart 07/01/21 Dep., 20:23-21:2; *see also* Earnhart 07/21/21 Dep., 90:2-91:4. Similarly, GDOT's reconstruction expert authenticated the animation:

Q. Okay. Do you agree that the animation that you just watched accurately reflects the series of events in the subject collision?
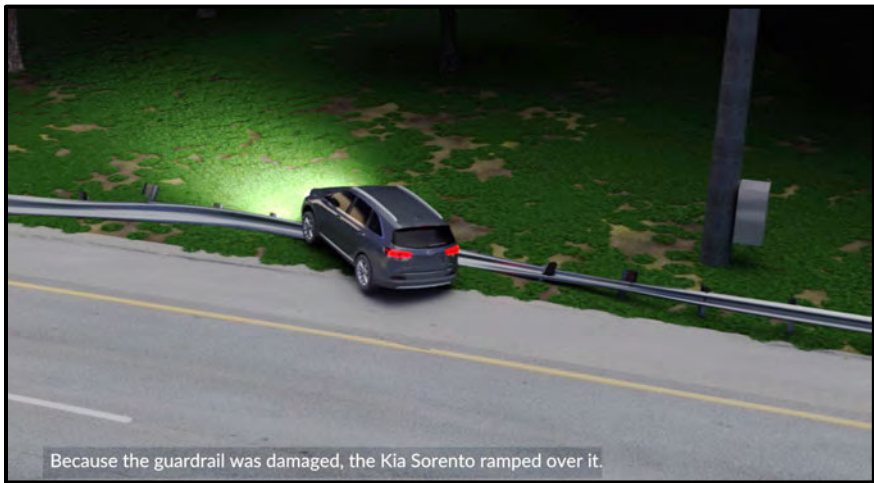
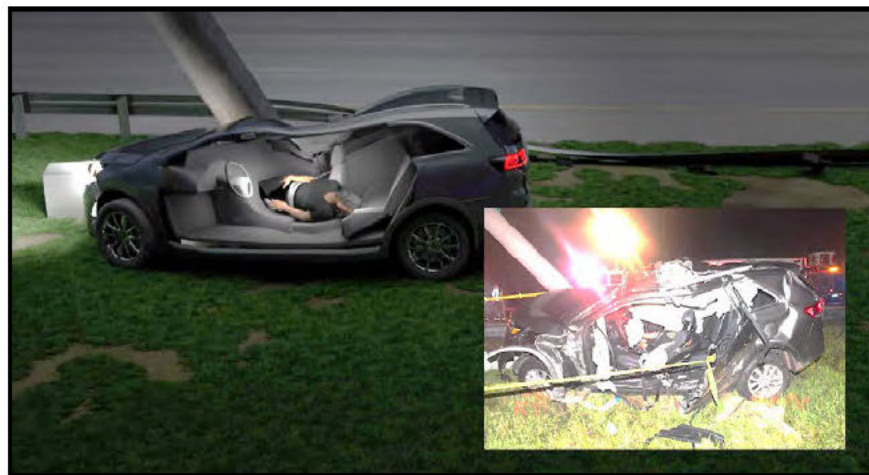A. In a simplified way, yes. . . .

* * *

Q. Okay. So from a general point of view, it reflects what happened out there.

A. In a macro sense, I think it does.

Kent Dep., 13:7-14:11.

The wreck sequence can be seen below in screen shots from Plaintiff's animation.

POI #1

The Kia Sorento slid into the damaged guardrail.

Because the guardrail was damaged, the Kia Sorento ramped over it.

POI #2

The vehicle slammed into a camera pole.

Decedent ████████ was a front-seat passenger in the Kia Sorrento. Her side of the car

slammed into the camera pole.[10] The car bent around the pole.[11] The pole ripped through the

occupant area.[12] ████████ seating area was demolished.[13] She was killed.[14]

3. Legal Standards

3.1. 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).

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[10] Earnhart 07/01/21 Dep., 21:13-18; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:21-24.
[11] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3.
[12] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3.
[13] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3; Plaintiff's Trial Ex. 8.
[14] *See* Sullivan Declaration ¶ 10 (Ex. G); *see also* Fulton County Medical Examiner's Report (Ex. H) (identifying the cause of death as "[g]eneralized blunt force injuries" after striking "a fixed object.")

The 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*, 236 Ga. App. at 460.

3.2. Admissibility of Expert Testimony

Code Section 24-7-702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), govern the admissibility of expert testimony.[15] 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

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[15] The General Assembly has explicitly stated that 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).

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 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.

4. Argument

4.1. The animation is admissible demonstrative evidence.

The Court should allow Plaintiff to show the demonstrative evidence to the jury. For good reason, Defendant does not challenge the animation's relevance – it is indisputably relevant to this case. For that reason, Plaintiff only addresses authentication and the insignificant risk of prejudice or confusion, in that order.

4.1.1. *The animation was properly authenticated.*

All experts in this case agree that the animation accurately shows how the wreck happened.[16] 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. The testimony in this case shows that the animation is a fair and accurate representation.

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 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.*

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[16] Earnhart 07/01/21 Dep., 20:23-21:2; Earnhart 07/21/21 Dep., 90:2-91:4; Kent Dep., 13:7-14:11.

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.

GDOT's arguments miss the mark. For example, instead of relying on binding Georgia law – which supports Plaintiff – GDOT looks to South Carolina law. Specifically, GDOT relies on *Clark v. Cantrell*, in which the South Carolina Supreme Court affirmed the exclusion of an animation in a personal injury case. 529 S.E.2d 528 (S.C. 2000). Even if the Court considers *Clark* (which it need not since binding Georgia law favors Plaintiff), *Clark* is distinguishable.

In *Clark*, the Court affirmed the exclusion of an animation because the animation contradicted the proponent's expert's testimony. *Id.* at 537-38. Specifically, "[a] portion of the animation also made it appear that [the plaintiff's] car pulled directly in front of [the defendant's] car when [the defendant] was almost upon it, which conflicted with the testimony of both parties' expert witnesses." *Id.* at 535. Here, Dr. Earnhart provided data for the vehicle's initial speed, the rate at which the vehicle decelerated and yawed, the motion of the vehicle across the highway, the orientation of the vehicle over the shoulder of the highway, and the orientation of the vehicle as it contacted the concrete pole. Earnhart 07/21/21 Dep., 90:2-91:4. Dr. Earnhart testified that the animation was "consistent with my analysis." *Id.* at 91:1. Even GDOT's expert agreed that the animation was generally accurate. Kent Dep., 13:7-14:11. Therefore, even under the analysis in *Clark*, the animation is admissible.

Any critiques as to specific details of the animation go to weight, not admissibility. As the *Clark* Court noted,

> [the animation] *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.

Clark, 529 S.E.2d at 537 (emphasis added).

The animation has been authenticated by both parties' reconstruction experts.

4.1.2. *The risk of prejudice or confusion, if any, is insignificant.*

The probative value of the animation far exceeds any prejudice – to the extent there is any. The Court of Appeals has explicitly 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." *Brown*, 236 Ga. App. at 636 (quoting 2 McCormick on Evidence, § 213, pp. 12–13) (emphasis added).

In this case, both parties' experts have testified that the animation accurately shows how the wreck happened.[17] In other words, the overall accuracy of the animation is not in dispute. Therefore, the animation has probative value, and any risk of prejudice or confusion is insignificant. To the extent Defendant GDOT's expert would like to critique specific portions of the animation, that is proper on direct and cross-examination. *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.

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[17] See Earnhart 07/01/21 Dep., 20:23-21:2; Kent Dep., 13:7-14:11.

4.2.   Dr. Earnhart satisfies Rule 702.

The Court need not engage in a Rule 702 analysis. The animation is admissible as demonstrative evidence.   However, even if the Court considers Rule 702, Dr. Earnhart's expert opinions meet the requirements governing the admissibility of expert testimony. Specifically, Mr. Dr. Earnhart is qualified to give his opinions; his opinions are reliable; and his opinions would be helpful to the jury. *See Kilgore*, 917 F. Supp. 2d at 1292; *see also* O.C.G.A. § 24-7-702. Defendant's motions should be denied.

First, Dr. Earnhart is eminently qualified. Indeed, GDOT does not challenge Dr. Earnhart's credentials. Nor could they in good faith. Dr. Earnhart received his Bachelor of Science in Mechanical Engineering from Purdue University.[18] Thereafter, he received a Master of Science and a Doctorate in Mechanical Engineering from Georgia Tech.[19] Dr. Earnhart specializes in the investigation and reconstruction of motor vehicle collisions.[20] His expertise includes areas such crash testing, impact analysis, and crash simulation.[21]

Second, Dr. Earnhart's accident reconstruction analysis was reliable. The defense experts all agree with Dr. Earnhart. The accident construction expert retained by Defendant Martin Robbins admitted (before he was withdrawn) that he had no basis to dispute Dr. Earnhart's calculations.[22] GDOT's expert also 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."[23]

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[18] Earnhart CV (Ex. I).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Martin Robbins' Suppl. Resp to Pl.'s First ROGs, No. 17 (Ex. J).
[23] Kent Dep., 31:22-25.

As to the animation, GDOT's expert confirmed its accuracy.[24] 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, which is not the proper basis for a Rule 702 motion. *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*, 826 F. Supp. at 685 ("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 should be explored in cross-examination as they 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.").

5. <u>Conclusion</u>

Plaintiff intends to show the jury a demonstrative animation to help the jurors understand Dr. Earnhart's testimony. The animation is admissible for three reasons. First, the animation is relevant. *See* O.C.G.A. §§ 24-4-401, 402. Second, the probative value outweighs any risk of prejudice because the risk of confusion is insignificant. *See* O.C.G.A. § 24-4-403. Third, Plaintiff's reconstruction expert authenticated the animation during his deposition, as did GDOT's expert. *See* O.C.G.A. § 24-9-901. Code Section 24-7-702 and *Daubert* do not apply, but even if they did, the animation would still be admissible because Dr. Earnhart is eminently

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[24] Kent Dep., 13:7-14:11

qualified, his opinions are reliable, and the testimony will help the jury. Therefore, the Court

should deny Defendants' motions.

Respectfully submitted this 24th day of December 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned has this day electronically filed the within

and foregoing ***PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT GDOT'S***

MOTION TO EXCLUDE NICHOLAS EARNHART with the Clerk of Court using the Odyssey

e-filing system which will send e-mail notification of such filing to the following counsel of

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This 24th day of December 2021.

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