

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

[REDACTED], as administrator of
the estate of [REDACTED] 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 File No.: [REDACTED]

[REDACTED] and [REDACTED] Y

Plaintiffs,

v.

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

Defendants.

Civil Action File No.: [REDACTED]

**ORDER DENYING DEFENDANTS' MOTIONS
TO EXCLUDE HERMAN HILL, P.E.**

Defendants seek to exclude the testimony of Herman Hill, P.E., under O.C.G.A. § 24-7-702. After considering the briefs and with the benefit of a hearing on May 17, 2022, the Court denies these motions for three principal reasons. First, because Mr. Hill's testimony satisfies the requirements of Rule 702, he may testify. Second, Mr. Hill's bases for his opinions regarding industry standards are adequate. Third, Defendants' trepidation that Plaintiff's counsel may ask

Mr. Hill to offer impermissible legal conclusions at trial does not provide any basis to exclude Mr. Hill – if impermissible testimony is sought at trial, the proper remedy is a contemporaneous objection.

1. Rule 702 is satisfied.

Rule 702 imposes three requirements for expert testimony. “Expert testimony may be admitted into evidence if: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.” *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 562 (11th Cir. 1998).¹ The Court addresses each requirement in turn.

First, Mr. Hill is qualified by “knowledge, skill, experience, training, or education.” *See* O.C.G.A. § 24-7-702(b). He has Bachelor’s and Master’s degrees in Civil Engineering from Georgia Tech.² He is certified as a Professional Traffic Operations Engineer (or P.T.O.E.), which is “a powerful demonstration of requisite knowledge, skill, and ability in the specialized application of traffic operations engineering.”³ He has worked for local and state government in

¹ *See also* O.C.G.A. § 24-7-702(f) (“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.”).

² *See* C.V. of Herman Hill (Exhibit ___ to Pl.’s Resp. to Defs.’ Mot. to Exclude Herman Hill).

³ *Id.*; *see also* Transportation Professional Certification Board, Inc., Professional Traffic Operations Engineer (PTOE), available at <https://www.tpcb.org/certification/ptoe/>.

Georgia, including GDOT and Floyd County.⁴ In that context, he has attended and taught GDOT-related classes about guardrails.⁵ He has drafted the documents that public agencies use to solicit and accept bids from contractors, hired guardrail contractors on behalf of a public agency, inspected guardrail to identify sections in need of repair, and supervised others who inspected guardrail to identify sections in need of repair.⁶ This education, training, and experience qualifies Mr. Hill to testify in the areas in which he has been designated.

Second, Mr. Hill's methodology is sufficiently reliable. His work in this case includes reviewing the accident reconstruction, the police report, and the photographs and videos from the scene. He also reviewed contracts between Defendants and their relevant correspondence. He reviewed depositions taken in the case, including but not limited to the Rule 30(b)(6) and employee testimony from all three Defendants. He reviewed the relevant authorities, including but not limited to GDOT's Standard Specifications and the federal W-Beam Repair Guide. Mr. Hill applied his education, training, and experience to the facts of this case to reach his opinions. Mr. Hill's reliance upon his own knowledge and experience is appropriate. *See Brady v. Elevator Specialists, Inc.*, 287 Ga. App. 304, 306-07 (2007) ("[T]he relevant reliability concerns may focus upon personal knowledge or experience."). Mr. Hill's methodology is sufficiently reliable. *See Lawes v. CSA Architects*, 963 F.3d 72, 102 (1st Cir. 2020) (approving similar methodology); *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, No. 18-21365-CIV, 2019 WL 2013007, at *4 (S.D. Fla. Mar. 11, 2019) ("[A]n engineer's use of techniques of visual inspection, code review, and reliance on experience and expertise can satisfy the *Daubert* reliability prong.").

⁴ C.V. of Herman Hill.

⁵ Hill Dep. 116:21-117:3.

⁶ Hill Dep. 99:7-24, 117:19-118:10, 120:7-22.

Third, Mr. Hill's testimony will assist the trier of fact. His education, training, and experience allows him to analyze evidence and draw conclusions that a layperson could not. For example, Mr. Hill's knowledge of the relationships between government and contractor, and his knowledge of industry standards, are beyond the ken of a lay juror. As the Court of Appeals held in another traffic case, Mr. Hill's expertise can "assist the trier of fact to understand the evidence." *GDOT v. Miller*, 300 Ga. App. 857, 861-62 (2009).

Because Mr. Hill is qualified, his methodology is reliable, and his testimony will assist the trier of fact, Rule 702 is satisfied. *See City of Tuscaloosa*, 158 F.3d at 562 (articulating three requirements of Rule 702). Mr. Hill may testify as an expert.

2. Mr. Hill may testify about industry standards.

"[E]xpert testimony as to the practices of an industry are acceptable." *Thomas v. MARTA*, 300 Ga. App. 98, 103 (2009). Mr. Hill has the requisite training and experience to offer his opinions regarding industry standards. It is permissible for this aspect of Mr. Hill's opinions to "focus upon [his] personal knowledge or experience." *Brady*, 287 Ga. App. at 306-07. As noted above, Mr. Hill has prepared government contracts, worked with guardrail contractors, inspected guardrail for damage, and supervised others who inspected guardrail for damage. As to the 21-day industry standard for repairing nonfunctional guardrail, Mr. Hill's opinion is based on the contract at issue in this case, his personal knowledge and experience relating to guardrails and contractors, and many other Georgia highway maintenance contracts that apply the same 21-day standard. As to the same-day industry standard for identifying damaged guardrail, Mr. Hill's opinion is based on the meeting minutes between GDOT and Arcadis, his experience inspecting guardrail for damage, and his experience supervising others who were inspecting guardrail for damage. These bases are adequate.

The duty of Defendants to perform work that met the applicable industry standards arises from Georgia law. *Schofield Interior Contractors, Inc. v. Standard Bldg. Co.*, 293 Ga. App. 812, 814 (2008) (describing the “duty implied by law to perform the work in accordance with industry standards”). Therefore, Mr. Hill is not “creating” a duty where none existed before. The duty was created by law. Mr. Hill merely articulates the applicable industry standard and comments upon whether Defendants satisfied it. That is permissible. Because Plaintiffs are not attempting to “create a legal duty where none existed before,” *Diamond v. Department of Transportation* is inapposite. 326 Ga. App. 189, 195 (2014).

Defendants remain free to challenge Mr. Hill’s opinions. Defendants may vigorously cross-examine Mr. Hill and may urge the jury to disregard his testimony in closing arguments. Had Defendants chosen to do so, Defendants could have identified their own expert to suggest a different industry standard or to opine that no industry standard existed. Because Mr. Hill has an adequate basis for his opinions, however, he may testify about industry standards.

3. Defendants’ concerns about legal conclusions afford no basis to exclude Mr. Hill.

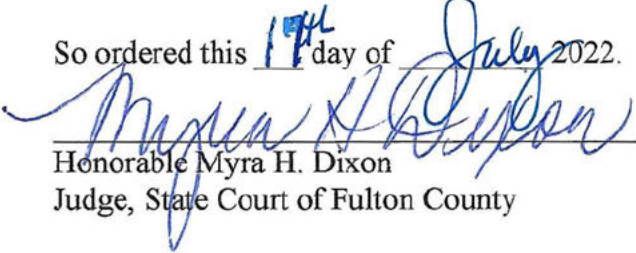
If inadmissible testimony is sought or offered at trial, the proper remedy is a contemporaneous objection. For example, if trial counsel attempts to elicit irrelevant testimony from a witness, the opposing party may object on grounds of relevance. But the possibility that a lawyer might ask for, or a witness might offer, some irrelevant testimony does not authorize the exclusion of that witness. Instead, the proper remedy is a contemporaneous objection. The same principle applies to any allegedly impermissible legal conclusion. If Plaintiffs’ counsel attempts to elicit, or Mr. Hill attempts to offer, an impermissible legal conclusion, Defendants may object. However, the mere possibility that Mr. Hill *could* be asked for an impermissible legal conclusion does not authorize the Court to exclude him as a witness.

The Court notes that some of Defendants' concerns in this area appear misplaced. For example, under Georgia's post-2013 evidence code, "testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact." O.C.G.A. § 24-7-704(a). For another, the fact that a witness mentions a contract does not automatically convert that witness's testimony into an impermissible legal conclusion. See *Camacho v. Nationwide*, 13 F. Supp. 3d 1343, 1366 (N.D. Ga. 2014); *Spires v. Thomas*, 866 S.E.2d 856, 859 (2021). Here, the relationships and interworkings between Defendants are at the heart of this case, and the contracts that created and governed those relationships are important. If Mr. Hill were *not* familiar with those contracts, his opinions would arguably not be sufficiently "reliable" under Rule 702. Finally, the fact that Defendants elicited allegedly inadmissible testimony in response to their own questions during their 338-page deposition of Mr. Hill does not authorize Mr. Hill's exclusion. In other words, a party may not ask impermissible questions of a witness during a deposition and then use the witness's inadmissible answers to exclude him.

4. Conclusion

For the foregoing reasons, Defendants' motions to exclude Mr. Hill are DENIED.

So ordered this 17th day of July 2022.



Honorable Myra H. Dixon
Judge, State Court of Fulton County

Proposed Order prepared at the request of the Court by:

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