

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

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

Plaintiffs,

v.

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

Defendants.

Civil Action File No.: [REDACTED]

**DEFENDANT MARTIN ROBBINS FENCE COMPANY'S REPLY IN SUPPORT OF ITS
MOTION TO EXCLUDE PLAINTIFFS' EXPERT WITNESS, J.P. GINGRAS**

COMES NOW, Defendant MARTIN ROBBINS FENCE COMPANY ("Martin Robbins")
and makes this reply in support of its motion to exclude Plaintiffs' expert witness, J.P. Gingras,
showing the Court as follows:

I. SUMMARY OF ARGUMENT

Plaintiffs' responses¹ to Martin Robbins' Motion² to Exclude J.P. Gingras spend nearly all of their combined 37 pages making an argument that Mr. Gingras satisfies the Daubert test because he is a qualified accountant, and his underlying methodology is sound. Plaintiffs did not, however, spend any of their pages disputing the actual argument that Martin Robbins made—that regardless of whether he satisfies Daubert, Mr. Gingras' analysis and conclusions are deceptive and unfairly prejudice the Defendants because of the likelihood of misleading the jury. The Court, pursuant to O.C.G.A. § 24-4-403, has the responsibility to exclude even relevant evidence when the prejudicial value outweighs the probative value. Because that is the case here, Mr. Gingras should be excluded as an expert witness.

II. ARGUMENT

A. Mr. Gingras Should be Excluded

1. Rule 403 Excludes Prejudicial Evidence

Plaintiffs did not attempt to rebut Martin Robbins' argument regarding the prejudicial nature of Mr. Gingras' conclusions, but instead only argue that he satisfies the Daubert standard under Rule 702.³ While Martin Robbins has many concerns about Mr. Gingras' assumptions and their "fit" to the specific facts of these cases, such that he does not meet the Daubert standard, the greater thrust of its argument is the interplay between Rules 702 and 403. It is not enough for an expert to meet the Daubert test—even relevant evidence must be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

¹ The [REDACTED] and [REDACTED] Plaintiffs filed separate responses, but they are effectively identical in argument as to Mr. Gingras. Ms. [REDACTED] attorney included an attorneys' fees claim with his response.

² Defendants GDOT and Arcadis filed their own motions incorporating the arguments in Martin Robbins' motion.

³ Plaintiffs also spend much ink pointing to all of the times that Mr. Gingras was not excluded as a witness. In those cases, however, the argument for exclusion concerned Mr. Gingras' assumptions, not the baldly misleading presentation of evidence that this motion concerns.

jury." O.C.G.A. § 24-4-403. This gatekeeping function is broadly given over to the discretion of the trial judge and will not be overturned absent an abuse of that discretion. Miller v. Cole, 289 Ga. App. 471, 473 (2008).

2. **Mr. Gingras' Opinions are Intentionally Misleading**

The best way to see how deceptive Mr. Gingras' summary opinions are is to look in detail at one particular example, that of Ms. [REDACTED] life care plan. Mr. Gingras was asked to calculate the future value of Ms. [REDACTED] life care plan, based on the costs determined by the Plaintiff's life care planner. Obviously, the longer Ms. [REDACTED] lives, the more expensive her life care plan will be. Mr. Gingras produces what, at first glance, appears to be a straightforward summary of his opinions:

<i>Future Cost of Medical Life Care Plan Valuation</i>	
<i>Future Cost of Medical Life Care Plan Valuation (Beginning January 1, 2022)</i>	
Present Value of Future Cost of Medical Life Care Plan - Scenario # 1 (Lower / Lower / Lower)	\$ 9,216,436
Present Value of Future Cost of Medical Life Care Plan - Scenario # 2 (Higher / Higher / Higher)	29,921,799
<i>Rounded Average</i>	<i>\$ 19,570,000</i>

There are two input values on the chart: the cost of Ms. [REDACTED] life care plan if she lives to be 83 years old and a discount rate of 2.65% applies, and the cost of her life care plan if she lives to be 98 years old and a discount rate of 5% applies.⁴ There is a 3.89% chance, according to the life tables, that Ms. [REDACTED] will live to be 98 years old—that fact will be relevant below. Mr. Gingras then creates a so-called "rounded average" of the 83 year/2.65 percent plan and the 98 year/5 percent plan to produce what appears to be a "correct" or "resulting" value of \$19.5 million—it is boxed like the sum of a math problem and helpfully highlighted in red text and so the jury can't miss it.

The question, then, is what is wrong with this presentation? The problem is that this "rounded average" of \$19.5 million is nothing more than \$9.2 million and \$29.9 million added together and

⁴ There are numerous problems with Mr. Gingras' assumptions of life expectancy and discount rate, as detailed in Martin Robbins' original brief.

divided by two. Why is that deceptive? Because that "rounded average" is a nearly-meaningless number that is artificially high because the "end point" value of a life care plan to 98 years is so high. The chance of Ms. [REDACTED] living to be 98 is less than 4%, but that <4% likelihood makes up 50% of the inputs for Mr. Gingras' "rounded average." There is no methodology underlying the creation of this "rounded average," just the straight averaging of a realistic number with a wildly unrealistic number.

The reason this is misleading and prejudicial is because it is presented to the jury in a summary form that appears to be reasonable and derived from Mr. Gingras' methods. The jury is led to believe that this "rounded average" is a reasonable middle ground between two reasonable goal posts. Instead, the jury is given a skewed field where the end post is so far beyond reasonable that taking an "average" with it creates a number that is millions of dollars higher than is actually reasonable.⁵ The jury is quite literally being tricked.

3. Mr. Gingras' Misleading Testimony Should be Excluded

The above is an exemplar of the repeated misleading presentations throughout Mr. Gingras' analysis in both the [REDACTED] and [REDACTED] cases. As fully described in Martin Robbins' Brief in Support, he creates misleading summaries to describe Ms. [REDACTED] future earnings,⁶ the value of fringe benefits and lost services,⁷ and the value of Ms. [REDACTED] future earnings.⁸ To be clear, this is

⁵ For contrast, the average of values of an average life expectancy at 2.65% and 5% would produce a "rounded average" of \$12.45 million.

⁶ Mr. Gingras presents an "average" of output values for high and low growth rates, not a calculation of future earnings using an average growth rate.

⁷ Mr. Gingras presents a "range" of percentages of lost services from 5% to 95% with a "helpful" 50% limitation in the middle, as though it is a reasonable middle ground that the women, each of whom was employed full time, and neither of whom cared for dependents, were doing 12 hours of home services a day. Like the life care plan analysis, the end goal post of 22.8 hours of home services a day is ridiculous and creates a skewed field which invites the jury to find a "middle ground" on an improper basis.

⁸ Mr. Gingras presented two endpoints for the range of Ms. [REDACTED] potential value, one where she was working full time, and one where she had obtained an associate's degree. He then presents an "average" of the two values. Neither of those endpoints—working full time or having an associate's degree—was even in evidence, meaning his "average" was completely fictive.

not a matter of quibbling with the assumptions that Mr. Gingras makes, or something that can be cleared up on cross-examination. Mr. Gingras is doing complicated mathematics with valid methodology, and then presenting the output of that analysis in a way that is actively misleading and is not underpinned by any methodology. Mr. Gingras covers his tracks by also giving the jury all of the underlying source material, purportedly so that the jury could check his work, consult the charts, and use his formulae to derive their own answers different from the summary that he provided, if they so chose. Even the most diligent of juries could not be expected to do such a thing. Plaintiffs are counting on the jury seeing the complicated mathematics that Mr. Gingras waves around and then going back to the jury room with his handy summaries and assuming that they are making a reasonable choice when they are not.

This is exactly the kind of scenario that Rule 403 was designed to prevent. As the 11th Circuit said in the Frazier case, because expert testimony is so powerful to a jury, the trial judge **must** take care to be sure that the potential to mislead or confuse does not overwhelm the value of the evidence. U.S. v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004). Though the test for admissibility in a Rule 403 context is "strongly weighted toward admission," evidence can and should be excluded when it "tends to suggest decision on an improper basis." U.S. v. You, 534 F. Supp. 3d 880, 887 (E.D. Tenn. 2021). That is the distinction that Martin Robbins is making with regard to Mr. Gingras. The reason his testimony should be excluded is not because it is harmful to Martin Robbins, but because his misleading presentations would cause the jury to reach conclusions on an improper basis.⁹

⁹ See, e.g., Henry v. Hess Oil Virgin Islands Corp., 33 V.I. 163, 179 (D.V.I. Aug. 25, 1995) (economics expert's conclusions excluded on Rule 403 grounds because his analysis of future earnings were based on facts not in evidence, and therefore his conclusions were misleading and prejudicial).

B. Attorneys' Fees Are Not Merited Under O.C.G.A. § 9-15-14(a)

Plaintiff [REDACTED] tacks on a spurious argument to her response that attorneys' fees should be awarded per O.C.G.A. § 9-15-14(a) because Martin Robbins filed a motion seeking to exclude Mr. Gingras. Per the statute, fees are awarded only when there is "a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position."

In this case, Martin Robbins had and has a valid basis for its argument that Mr. Gingras should be excluded—his presentation of evidence is intentionally misleading and should be excluded under O.C.G.A. § 24-4-403 because its prejudicial value outweighs its probative value. Martin Robbins, in both its original Brief and in this Reply, shows concrete factual evidence of the misleading nature of Mr. Gingras' conclusions, and cites case authority in support of its arguments. **Plaintiff did not even attempt to address Martin Robbins' Rule 403 argument** in her response brief. If, as it appears, Plaintiff has conceded this argument, it is axiomatic that Plaintiff cannot be entitled to attorneys' fees for failing to rebut it. Plaintiff's motion is groundless and should be denied.

III. CONCLUSION

Even if Mr. Gingras passes the Daubert test, which is not a given, his testimony should still be excluded under O.C.G.A. § 24-4-403 because the presentation of his evidence is deceptive, misleading, and will cause the jury to make an award on an improper basis. Plaintiffs have not argued otherwise. Accordingly, Defendant Martin Robbins Fence Company respectfully requests that the Court grant its motion and enter an order excluding the expert testimony of J.P. Gingras.

This 14th day of January 2022.

**HUDSON LAMBERT PARROTT
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/s/ Claire A. Williamson _____

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **DEFENDANT MARTIN ROBBINS FENCE COMPANY'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE PLAINTIFFS' EXPERT WITNESS, J.P. GINGRAS** via File & Serve Xpress which will automatically serve the following counsel of record:

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This 14th day of January 2022.

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