

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  
BRIEF IN FURTHER SUPPORT OF MOTION TO EXCLUDE PORTIONS OF THE  
TESTIMONY OF PLAINTIFFS' EXPERT WITNESS NICHOLAS EARNHART, Ph.D.**

Defendant Georgia Department of Transportation (“GDOT”) files this brief in further support of its motion 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 (██████████ and ██████████) have not met their burden of proving that the animation video

offered by Mr. Earnhart (“the Animation”) in support of his expert opinions, or his opinions and testimony related to the Animation are admissible under *Daubert* or evidentiary standards.<sup>1</sup> For these reasons and the reasons below, GDOT respectfully requests that its motion to exclude, in part, the testimony of Plaintiffs’ expert about the Animation and the Animation itself be granted.

## I. INTRODUCTION

Plaintiffs’ response materials do not support the admission of the Animation or Mr. Earnhart’s opinions concerning the Animation. In particular, Plaintiffs rely on inaccurate presumptions. For example, Plaintiffs contend that Mr. Kent, GDOT’s accident reconstruction expert, agreed that the Animation accurately depicted the subject accident. Mr. Kent did not so agree and testified as much. *See* GDOT MTE at 6, 11-12. Likewise, Plaintiffs claim that Earnhart can authenticate the animation simply by stating that he agrees with how it depicts the accident and his alternative, hypothetical version of the accident. *See* Plfs’ Resp. at 3-4, 5-6. But Earnhart testified that the Animation was created by a third party and that he had no meaningful input into its preparation. GDOT MTE at 7-11.

Further, the case law on which Plaintiffs rely is either distinguishable or supports exclusion of the Animation.<sup>2</sup> Georgia courts admit animations as demonstrative evidence under

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<sup>1</sup> 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.

<sup>2</sup> Plaintiffs note that GDOT discussed a South Carolina court’s analysis (*see* GDOT MTE at 12-13, citing *Cantrell*) of the admissibility of an animation of a motor vehicle accident. Plfs’ Resp. at 13-14. Pursuant to O.C.G.A. § 24-7-702: “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.” Regardless, one of the cases on which Plaintiffs rely cites *Cantrell* with approval. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 559-60 (D. Md. 2007) (*cited in* Plfs’ Resp. at 4): “[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 . . . [including] the testimony of the expert who prepared the underlying data and the

certain circumstances. First, Plaintiffs must sufficiently authenticate the Animation pursuant to O.C.G.A. § 24-9-901, which they have not done. GDOT MTE at 6-12, 14; Discussion, *infra*. Second, the Animation must be a fairly accurate representation of the events. GDOT showed in its motion to exclude that the Animation failed to meet this standard. GDOT MTE at 7-12; Discussion, *infra*. Finally, given these deficiencies, 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. For all these reasons, this Court should grant GDOT's motion to exclude.

## 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.

Plaintiffs have not met their burden of laying a proper foundation with respect to the Animation. GDOT MTE at 4-5 (citing Earnhart's testimony and citing cases); *see also* O.C.G.A. § 24-7-702. 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. GDOT MTE at 2-3, 7, 10-11; Discussion, *infra*. Plaintiffs' response confirms that their attempt to authenticate the Animation is based on Earnhart's say so that it is an accurate representation of the accident. But because the Animation was prepared by a third party, his "say so" is not sufficient. As Earnhart testified, he was not familiar "with the preparation of the [A]nimation." GDOT MTE at 7-8. And, he did not confirm that the Animation was consistent with his expert opinion or that the data he supplied to the vendor was properly used and/or depicted in the finished product. *Id.* at 7-11 (providing

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computer technician who used that data to create it." (internal citation omitted) (quoting *Clark v. Cantrell*, 339 S.C. 369, 383-85, 529 S.E.2d 528, 535-37 (S.C. Supr. Ct. 2000)).

Earnhart's testimony); *see e.g.*, Earnhart Dep. at 142 l. 12-143 l. 21 (agreeing that there is a discrepancy in the Animation concerning the angle at which the Sorento left the roadway, and that he did not know why that was the case); *Cantrell*, 339 S.C. at 386; *cf. Lorraine*, 241 F.R.D. at 559-60 (*cited* in Plfs' Resp. at 4-5) (explaining that authentication requires that the "witness testify as to personal knowledge of the content of the animation, upon a showing that it fairly and adequately portrays the facts"). Thus, Earnhart did not sufficiently authenticate the Animation.<sup>3</sup>

Concerning the "reliability" analysis, GDOT showed that the Animation portrays 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). GDOT MTE at 6-7. And, 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. *Id.* at 7 (citing cases); *see e.g.*, Earnhart Dep. at 142 l. 12-143 l. 21 (agreeing that there is a discrepancy in the Animation concerning the angle at which the Sorento left the roadway, and that he did not know why that was); *Cantrell*, 339 S.C. at 386; *cf. Lorraine*, 241 F.R.D. at 559-60.<sup>4</sup>

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<sup>3</sup> The Court in *J. B. Hunt Transp. v. Brown*, 236 Ga. App. 634, 636 (1999) (*cited* in Plfs' Resp. at 4, 12-13), *overruled on other grounds*, *Rockdale Hosp., LLC v. Evans*, 306 Ga. 847 (2019), explained that "minimal authentication" is required where the animation simply is used to "illustrate the testimony of the witness." However, as provided in GDOT's initial brief, the Animation does not pass even this lenient test.

<sup>4</sup> Plaintiffs cite to the factually distinguishable case where an expert's animation was not meant to recreate the accident but "merely [to] illustrate a theory or scientific principle." *Datskow v. Teledyne Cont'l Motors Aircraft Prods.*, 826 F. Supp. 677, 686 (W.D.N.Y. 1993) (*cited* in Plfs' Resp. at 5, 16). In such a case, the animation is "not required to possess as high a degree of similarity to the actual event as are purported re-creations of the event." *Datskow*, 826 F. Supp. at 686. But here, Earnhart testified that the Animation contains two parts, with part one illustrating what he believe happened in the accident and part two illustrating what he believed would have happened had the guardrail been intact. Earnhart Dep. at 140 l. 21-141 l. 18. Based

In particular, the Animation is not a “substantially accurate” (or, as described in certain cases, a “fair and accurate”) representation of the accident sequence. GDOT MTE at 7-11; *id.* at 11-12 (providing Kent’s testimony concerning the Animation); *cf.* Plfs’ Resp. at 14 (relying on case law discussing the “substantially accurate” standard). As the court in *Clark*, 339 S.C. at 383-85, 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. In addition although the Animation:

need not be exact in every detail, . . . 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 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. GDOT showed that the Animation did not meet this standard. GDOT MTE at 13-14.

Plaintiffs’ citations to case law do not change this result. In *Brown*, 236 Ga. App. at 636 (*cited in* Plfs’ Resp. at 4, 12-13), the Court found that the trial court had not abused its discretion in admitting an animation of a motor vehicle accident because, under those facts, the videotape “accurately illustrated the expert's opinion of how events transpired, and because any inaccuracies in the animation could be brought out upon cross-examination of the expert.” *See also Cleveland v. Bryant*, 236 Ga. App. 459, 460 (1999) (*cited in* Plfs’ Resp. at 1, 3-4, 10) (applying same “fair and accurate representation” standard to admissibility of an animation).

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on his testimony, it does not appear, as in *Datskow*, that the animation is merely meant to illustrate a scientific principle. Thus, *Datskow* is inapposite.

Here, however, GDOT has demonstrated that the Animation does not meet this standard. GDOT MTE at 5-7, 12-14.

Plaintiffs also have not shown why Earnhart's related opinions and testimony are admissible. Plaintiffs rely on Kent's alleged approval of Earnhart's accident reconstruction analysis to show that Earnhart's opinions and testimony are reliable. But this argument misstates Kent's testimony. GDOT MTE at 11-12 (discussing Kent's testimony).<sup>5</sup> Plaintiffs then rely on this purported approval by Kent to contend that there is no risk of prejudice in admitting the Animation or related testimony. Plfs' Resp. at 4. As discussed above, Plaintiffs' approach does not meet the standards of O.C.G.A. § 24-7-702 or § 24-4-403.

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.

**A. The Animation And Earnhart's Related Opinions Should Be Excluded Because They Are More Prejudicial than Probative.**

For the reasons discussed above and in GDOT's initial brief, 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); *see also Robinson v. Mo. Pac. R.R.*, 16 F.3d 1083, 1088 (10th Cir. 1994) (discussed in GDOT MTE at 14-15). Here, because the Animation does not accurately reflect the evidence,

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<sup>5</sup> Likewise, Plaintiffs' citation to *Key Safety Sys. v. Bruner*, 334 Ga. App. 717, 721-22 (2015) (*cited in* Plfs' Resp. at 4), where the Court noted that the opposing party's expert *agreed* that the simulation in question was acceptable to explain scientific principles, is irrelevant. And, in *Bruner*, the Court noted that the simulation was not offered to recreate the accident (*id.* at 721-22), which also distinguishes *Bruner* from this case.

and is an unfair and misleading depiction of the subject accident,<sup>6</sup> 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) (*cited in* GDOT MTE at 15). Accordingly, such testimony and opinions concerning the Animation and the Animation itself are inadmissible under O.C.G.A. § 24-4-403.

**B. The ██████████ Plaintiffs Are Not Entitled to Attorneys' Fees Pursuant to O.C.G.A. § 9-5-14.**

The ██████████ Plaintiffs have moved for attorneys' fees in connection with GDOT's motion to exclude pursuant to O.C.G.A. § 9-5-14(a). That statute provides, in pertinent part:

In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such 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*. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

O.C.G.A. § 9-15-14 (a) (emphasis supplied). Under the plain terms of the statute, GDOT's bases for its motion to exclude are based on applicable, settled law and thus, by definition, the

██████████ Plaintiffs' motion should be denied in its entirety. *See also European Am. Realty v. Lang*, 2008 GABC LEXIS 1 (Fulton Co. Super. Ct. Feb. 6, 2008) ("The standard set forth in

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<sup>6</sup> Plaintiffs contend, in support of their argument that admitting the Animation would not confuse or mislead the jury, that Earnhart worked with the animators to "ensure that the animation complied with the laws of physics" but his actual testimony is that he did not create the animation and that the company created the animation "within the confines of the physics of my reconstruction." Earnhart Dep. at 92 ll. 12-14. And, he also provided testimony that was inconsistent with respect to the physics aspect as well as his role in creating the Animation. *See id.* at 93 ll. 1-16; 138 ll. 2-8; 139 ll. 19-22; GDOT MTE at 7-10 (providing Earnhart's testimony that he did not create the animation and did not confirm its accuracy).

O.C.G.A. 9-15-14 is an extremely difficult burden to meet, and one that falls upon the moving party.”) (citing *Northen v. Mary Anne Froflick & Assoc.*, 236 Ga. App. 7 (1999)).

Regardless, the ██████ Plaintiffs’ citation to *LabMD, Inc. v. Savera*, 331 Ga. App. 463 (2015) (*cited in* Plfs’ Resp. at 16) is inaposite because, in that case, “LabMD d[id] not contend that the trial court's award was not authorized by the evidence; rather, it claim[ed] simply that the amount of the trial court's award should be reduced.” *Id.* at 463. Thus, the Court did not analyze whether the moving party had met its “difficult burden” of proving entitlement to attorneys’ fees under O.C.G.A. § 9-15-14.

Accordingly, the ██████ Plaintiffs’ motion for attorneys’ fees pursuant to O.C.G.A. § 9-15-14 should be denied in its entirety.

## II. CONCLUSION

For the foregoing reasons, and for the reasons set forth in GDOT’s initial brief, 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 24th day of January, 2022.

**[Signatures on following page]**



Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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This 24th day of January, 2022.

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