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Donald Talley, Clerk
Civil Division

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

[REDACTED] as administrator of
the estate of [REDACTED] and as
guardian of [REDACTED] a minor; and [REDACTED]
[REDACTED],

Plaintiffs,

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], AS
CONSERVATOR FOR ADULT WARD
[REDACTED] and [REDACTED]
[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 MOTION IN LIMINE TO
EXCLUDE THE USE OF PLAINTIFFS' ANIMATION AND RELATED TESTIMONY**

COMES NOW Defendant MARTIN ROBBINS FENCE COMPANY ("Martin Robbins") and moves *in limine* to exclude the use of Plaintiffs' demonstrative animations and related testimony about them, showing the Court as follows:

Plaintiffs created an animation purporting to show the actual facts of the subject collision and an imagined "what if" scenario theorizing about how an intact guardrail might have changed the outcome of Ms. [REDACTED] collision. (Original Animation, attached hereto as Ex. A). The [REDACTED] Plaintiffs have also produced a slightly different version of the animation. (Revised Animation, attached hereto as Ex. B) (collectively, the "Animations"). Plaintiffs' reconstruction expert, Nicholas Earnhart, testified that he provided a legal animation studio, DK Global, Inc., with some data from his work, and DK Global produced the animation. Earnhart did not create the animation, confirm the accuracy of the animation, or authenticate the animation.

The Court denied GDOT's motion to exclude Nicholas Earnhardt on Daubert grounds and ruled at that time that the Original Animation was admissible demonstrative evidence. (Order, July 14, 2022). However, since the Court's ruling, the [REDACTED] Plaintiffs have produced a revised version of the Animation, calling the accuracy of both into further question. Therefore, Martin Robbins raises this issue *in limine* to exclude both versions of the Animations without consideration of Nicholas Earnhart's qualifications under Daubert. The fact that there are now two versions of the Animations serves to highlight that they are not, in fact, supported by appropriate foundation to satisfy the requirements of evidence as described by the Georgia Supreme Court in Pickren v. State, 269 Ga. 453, 455, 500 S.E.2d 566, 569 (1998).

ARGUMENT AND CITATION OF AUTHORITY

Standard of Law

An animation like Plaintiffs' must meet the same foundational requirements as any other evidence. In this case, it is clear that the Animations do not meet this standard. Plaintiffs claim, and the Court's prior ruling on GDOT's motion, was premised on the idea that the Animations will merely be used for demonstrative purposes.¹ However, that is a misdirection. Plaintiffs are not using a general animation to illustrate a principle of physics, for example, or to show how a car generally behaves when encountering an obstacle, as the Court of Appeals discussed in J.B. Hunt Transp., Inc. v. Brown, 236 Ga. App. 634, 635, 512 S.E.2d 34, 37 (1999). Instead, Plaintiffs are putting up a video that they claim shows what **actually happened** in the accident, and what "might have" happened in an imaginary accident—they cannot be permitted to tell the jury that something is real, but then cross their fingers and say they don't mean "real real." As the Georgia Supreme Court said in Pickren v. State, 269 Ga. 453, 455, 500 S.E.2d 566, 569 (1998), "certain materials may be used as tools to illustrate testimony without being admitted as demonstrative evidence, but not where the illustrative material contains erroneous or prejudicial matter unauthenticated by the testimony which it purports to illustrate." The Animations are rife with erroneous and prejudicial matter, as described below, and should therefore be excluded.

The Animations are Designed to Mislead

In approving the Original Animation for use as demonstrative evidence, the Court was persuaded that the Original Animation was merely "illustrating the expert's opinion of how the accident happened." However, a closer look at the Animations shows that these videos are intended to do much more than that. They are slickly produced in a way that makes it appear that

¹The Court characterized it as "admissible demonstrative evidence," suggesting that it will go back with the jury.

they are authoritative and accurate. For example, the video opens by zooming down from a U.S. map to the exact location of the accident as though the jury were watching news footage:



The video then proceeds through a series of efforts to attempt to show how accurate it is, such as showing a photo of the damaged guardrail next to the animation:



The video makes special note of the vehicle at rest with Ms. [REDACTED] deceased body inside, again showing a photo to bolster credibility:



As to the accident itself, however, the video makes no effort to show an accurate picture of the roadway or the full accident. The Animations do not even show the entire accident—they begin **after** Ms. [REDACTED] loses control of her vehicle and collides with the taxi cab. What the video describes as "Point of Impact 1" when Ms. [REDACTED] hits the guardrail **is actually her second collision.** They also make no attempt to accurately reflect the lighting, road conditions, other vehicles on the roadway, or that fact that Ms. [REDACTED] was speeding when she collided with the taxi cab. Dep. Earnhart, portions attached hereto as Ex. C, at 139:10-141:13. Earnhart thought that these choices were likely made by Plaintiffs' counsel, and were not made by him. Id. at 140:1-4. Instead, all the jury sees, having been primed to believe in the video's accuracy, is an incomplete and misleading collision with the guardrail.

Then, with the jury believing that they are viewing the closest thing to actual footage that they could get, Plaintiffs show a wholly-imagined "what if" scenario of the accident if the guardrail had been intact. Other than the title card, there is no qualification or caveat to the "what if" scenario, and no consideration of other variables or possibilities. Instead, the "what if" video shows the jury that the Plaintiffs would have been completely fine if the guardrail had been intact:



There is, of course, no way to know what actually would have happened in the counterfactual. It is, quite literally, speculation.

The Animations are Not Accurate, Verified, or Realistic

Nicholas Earnhart testified that he did not prepare the Animations himself, but rather provided an animation studio with some basic data points to allow them to create the computer graphics:

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. C, p. 90:10-91:7. Earnhart did not conduct a close review of the resulting Animation² to determine whether it was accurate. He admitted that the Animation could conflict with his own opinions:

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. C, p. 93:1-15. In fact, Earnhart later testified that the angle of Ms. [REDACTED] impact with the guardrail in the "What if" scenario was incorrect:

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.

² At the time of Earnhart's deposition, there was only the Original Animation. Since then, a second, slightly different, one has been produced, without further testimony or support regarding the changes.

Ex. C, p. 143:14-21. The reason that these inaccuracies occurred is because the Animations do not represent a scientific simulation of the facts of the accident, with data points that can be verified in the real world and operating under the actual laws of physics. Instead, the Animations are functionally the same as a Pixar film—something dreamed up by computer graphics artists that resembles real life but which is under no obligation to actually be real. Earnhart himself agreed:

A. 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?
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.**

Id. p. 137:14-138:8. (emphasis added) The Animations simply do not show, in an accurate and verifiable way, what happened in the accident--they show elements helpful to Plaintiffs and do not show elements unhelpful to Plaintiffs, and there is no way to prove that what we are seeing is consistent with the data Earnhart provided.

The Animations Will Mislead the Jury and Unduly Prejudice Defendants

To be clear, Martin Robbins is not objecting to Nicholas Earnhart testifying about his opinions, or challenging his qualification as an expert. GDOT's own expert, Joe Kent, did not greatly disagree with the broad strokes of Earnhart's analysis. But the Animations are not the visual expression of Earnhart's opinions. **They are, in fact, the arguments of Plaintiffs dressed up in the trappings of objective accuracy.** This is exactly the danger raised by the 10th Circuit in Robinson v. Mo. Pac. RR, 16 F.3d 1083, 1088 (10th Cir. 1994) when it said that "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." Plaintiffs know that the jury will believe what they see on the screen, because they hired graphic designers to make them believe it.

Cross-examination is not a sufficient remedy for these efforts to mislead. Earnhart has already admitted that he did not make the video and cannot testify as to whether any of it is accurate. Cross-examination of a witness who did not create the Animations, likely hours or days after they are first shown to the jury in opening statements, is far too late to change the inaccurate impressions that the Animations give. The potential for prejudice here vastly outweighs the very questionable probative value of misleading Animations not supported by provable facts. This is not the kind of evidence contemplated by the Brown case, but is instead "erroneous or prejudicial matter unauthenticated by the testimony which it purports to illustrate" that the Georgia Supreme Court said should be excluded. See Pickren v. State, 269 Ga. at 455.

CONCLUSION

Plaintiffs should not be permitted to show the jury an incomplete, unverified, and inaccurate "video" of the accident and tell them that it fairly and accurately depicts what happened. The Animations must be excluded *in limine* pursuant to O.C.G.A. §§ 24-4-402, -403.

This 14th day of August 2023.

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CERTIFICATE OF SERVICE

This is to certify that on this date I have electronically filed the foregoing **DEFENDANT MARTIN ROBBINS FENCE COMPANY'S MOTION IN LIMINE TO EXCLUDE THE USE OF PLAINTIFFS' ANIMATION AND RELATED TESTIMONY** with the Clerk of the Court using the *Odyssey eFileGA* e-Filing system, which will automatically send a notification attaching same thereon to all counsel of record as follows:

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This 14th day of August 2023.

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