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IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

| | | |
|------------------------|---|-----------------------|
| |) | |
| [REDACTED] AS |) | |
| CONSERVATOR FOR ADULT |) | |
| WARD, [REDACTED] |) | |
| AND [REDACTED] |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | |
| |) | CIVIL ACTION FILE NO. |
| |) | [REDACTED] |
| MARTIN-ROBBINS FENCE |) | |
| COMPANY; ARCADIS U.S., |) | |
| INC.; AND GEORGIA |) | |
| DEPARTMENT OF |) | |
| TRANSPORTATION, |) | |
| |) | |
| Defendants. |) | |

MOTIONS before the Honorable MYRA H. DIXON,
Judge, Fulton County State Court, Courtroom No.
2A, commencing at approximately 1:30 o'clock p.m.
on the 17th day of August 2023.

APPEARANCES OF COUNSEL:

FOR THE DEFENDANTS: Kevin Branch
Claire Williamson
Elenore Klingler
Attorneys At Law

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APPEARANCES

FOR [REDACTED] PLAINTIFFS:

Pete Law
Brian Kaplan
Nick Protentis
Matt Bottom
Attorneys At Law

FOR GDOT:

Kristine Hayter
David Cook
Ron Boyter

FOR [REDACTED] PLAINTIFFS:

James E. Butler
Matt Kahn
Attorneys At Law

ALSO PRESENT: Philip Sarvin
Sarah Christy

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P R O C E E D I N G S

THE COURT: Good afternoon, everyone; is everyone ready?

MS. OTTRELL EDWARDS: It's 1:30 and we will start. This is Judge Dixon's motions calendar. In the [REDACTED] as conservator for Adult Ward [REDACTED] and [REDACTED], plaintiffs, versus Martin-Robbins Fence Company, and Georgia DOT, 19EV300587, there's been a settlement with

1 thing, Your Honor. There was a -- the motion in
2 limine, number one, is limited to the subject
3 guardrail, I need to specify that. Subject to
4 that I believe it is agreed to.

5 MR. LAW: And the [REDACTED] plaintiffs join
6 in that, Your Honor.

7 THE COURT: All right. The settlement with
8 Arcadis.

9 MR. BUTLER: Thank you, Your Honor. There's
10 some agreement on this but not an entire
11 agreement. Plaintiffs have settled with Arcadis.
12 Everyone agrees I believe that the amount of that
13 settlement is inadmissible. And then there is
14 discussion that is outside the scope of the motion
15 about defendants intend to use basically
16 plaintiffs admissions in judicio against them so.

17 THE COURT: So they go on the verdict form
18 anyway because they are a defendant and there was
19 a settlement. So I think they go on the verdict
20 anyway, so we're all in agreement with that.

21 MR. BUTLER: Yes, Your Honor, as far as
22 apportionment goes they are definitely on.

23 THE COURT: Right, okay.

24 MR. BUTLER: But I've prepared a little
25 side -- excuse me, I keep on the law about the

1 admissibility of settlements in the context like
2 this. The first little bit is from Rule 408,
3 which said that compromise are generally
4 inadmissible. And then there are at least three
5 cases part of the Georgia courts that appeal talk
6 about it. They say that the fact of the
7 settlement is inadmissible and the amount is
8 inadmissible, that's the Court of Appeals. And we
9 propose that the Court follow the Court of Appeals
10 and say that the amount of the settlement with
11 Arcadis is inadmissible, everyone agrees about
12 that. We think the Court should also say that the
13 fact that we settled with Arcadis is inadmissible
14 because that is what the Court of Appeals has
15 said.

16 The third sort of component of this motion is
17 that defendants want to use plaintiffs admissions
18 in judicio against them at trial. That's not
19 within the motion. In the general sense I don't
20 disagree with that, I don't particularly like it,
21 but I do believe they have a right to use
22 admissions in judicio. But the motion is about
23 the fact and the amount of the settlement. We
24 think those are both inadmissible.

25 If defendant finds an admission in judicio

1 about plans that they want to use, conceptually
2 and in general I suppose they could do that, but
3 what they don't get to do is say that Arcadis
4 plaintiff settled with Arcadis. Now they can
5 bring up an allegation against Arcadis I suppose,
6 but they don't get to specify why Arcadis isn't
7 there, whether it was because, I mean,
8 theoretically we dropped them, the Court kicked
9 them out on some motion or settlement, that's
10 beyond what they get to specify. Thank you, Your
11 Honor.

12 MR. LAWSON: Your Honor, the [REDACTED]
13 plaintiffs join on what Mr. Butler said. It's our
14 motion number 6 as well. We join this and the
15 only thing I would add is I completely agree with
16 Your Honor when they settle within this time
17 period they are a non-party and they automatically
18 go on the verdict form as a non-party if they
19 choose without having file a non-party against
20 them. So there's no dispute on that.

21 My only comment would be they still have the
22 burden of proving Arcadis was at fault as well.
23 So we agree that the case law is clear even the
24 fact of a settlement is improper, maybe even the
25 fact that they were a party to the litigation

1 would be improper since they are now going to be
2 an apportioned non-party per the request of the
3 defendants. So I'm not sure if you addressed that
4 yet or whether you wanted -- if they can even say
5 they are a one time party or not.

6 THE COURT: Yeah, I usually don't allow that
7 if it's causing so many problems, so the amount in
8 the fact I don't usually allow.

9 MR. LAW: Got you. Thank you.

10 MR. BRANCH: Your Honor, Kevin Branch on
11 behalf of Martin-Robbins. So just a couple of
12 things. Literally every case that the plaintiff
13 cited about settlement not being admissible before
14 of 2005 and the adoption of the apportionment
15 standard, so the way I've experienced this a
16 couple of times because, you know, I think we
17 would be in difficulty given the case law in
18 Georgia if we were not going to be able to use the
19 pleading with the plaintiffs themselves had
20 asserted the allegations against Arcadis to
21 cross-examine witnesses on that point.

22 And it's also, if you look at the evidentiary
23 rules with regard to keeping out offers of
24 compromise in 24-4-408 and we filed a supplemental
25 brief on this today, Your Honor. If you look at

1 it you will actually see that the language says
2 that the evidence of settlements or negotiations
3 of settlements are inadmissible to prove liability
4 or in validity of any claims of any amounts. And
5 then when you go and look at the apportionment
6 statute it clarifies that when you are apportion
7 fault to a non-party that in that context you not
8 assigning liability, you are assigning fault and
9 that party will bear no liability. So none of
10 those rules are really applicable.

11 And so what I've seen before and I know there
12 are varying approaches, but I know I -- we just do
13 defense work, I was a plaintiff in a case in
14 DeKalb County that involved apportionment issues.
15 And Judge Johns, she just as a part of the jury
16 charges on reading the apportionment standard it
17 simple said that Arcadis had been a party to the
18 suit and settled in there on the verdict form, or
19 not Arcadis, but the party in that case that we
20 settled with would be on verdict form for
21 apportionment.

22 And it just -- the plaintiff can say in that
23 case that that's not the way to do it to clean it
24 up so that the jury is left with some vague
25 understanding as to what has happened here and why

1 this party is on the verdict form, especially when
2 the statute specifies that. Otherwise, I've seen
3 cases --once other case we had this where the jury
4 literally wrote question after question after
5 question to the Judge why is this person on the
6 verdict form, what is the roll of this. And we
7 literally did about like an hour, an hour-and-a
8 half of questioning on that because the first
9 thing that the jury wanted to know. When it was
10 just simply in the case I had with Judge Johnson
11 where she just read it that way. There were not
12 questions on the issue and the jury knew exactly
13 how to deal with it.

14 So that would -- what I've experienced it
15 doesn't become an issue of case, it's not like
16 that in the evidence that we, and we wouldn't do
17 this, stand up and cross-examine witness and say
18 you've settled or you've settled, that not how
19 I've seen this work and not what our expectations
20 would be at all. What I would think would just be
21 in a very simple one-sentence statement when the
22 Court charges the jury on the meaning of the
23 verdict form is to say why this is on the verdict
24 form and then we just move on. That's how I've
25 seen it done and it really just kind of fixes all

1 this and then we don't have this.

2 MR. LAW: Your Honor, in response to any
3 unidentified party, I don't know what this
4 unidentified case and unidentified Judge did in
5 some other case that Mr. Branch had his experience
6 with, but obviously Your Honor is not bounds by
7 that. I'd go with Your Honor's experience and
8 Your Honor's common sense that they are non-party
9 because defendants are blaming them for having
10 some fault and causing or contributing the damages
11 to plaintiff and they now have the burden of doing
12 that. They don't have to put them on the
13 non-party apportionment line, it's their choice.
14 Just like Mr. Leta and any other non-party they
15 file.

16 So I don't think we need an explanation that
17 they settled, that's why they're non-party. They
18 are a non-party because they're blaming them for
19 partially being at fault. So we oppose this
20 comment about it being a settlement as they
21 propose.

22 MR. BRANCH: Your Honor, and that's one of
23 issues that we run into then is, you know, the
24 plaintiffs -- we now have a reverse in course
25 which is when is a party this is collectively in

1 the filings or emails that the parties have sent
2 to the Court. And we have a party that paid 16
3 million-dollars collectively to settle these cases
4 and the plaintiffs have now just said that the
5 defendants are blaming them and not the
6 plaintiffs.

7 And what you will see also in the cases that
8 talk about cross-examination and these issues
9 potentially coming off, I mean, it could become,
10 depending on what a witness says on something,
11 relevant for bias, intent and motive. I mean,
12 this could be opening the doors as well because
13 one of the things you get to give is if you have
14 witnesses that have said things with motivation
15 and then all of a sudden they now appear to be
16 taking contrary positions. And we see that the
17 plaintiffs have already switched gears from
18 blaming Arcadis to saying that we are blaming
19 Arcadis. That may become relevant for a point of
20 cross-examination at some point in this case
21 potentially with an expert, potentially with
22 someone else.

23 So I wanted to point this all of this out
24 too, you know, because if we think there's bias
25 and intent and motive because of the witness have

1 change gears about how they are going to try this
2 case. This very much could become a subject of
3 that an omnibus motion can't decide because we
4 might end up with a witness on the stand whose
5 done something, they'll open the door because it's
6 so obvious that this person has changed their
7 opinion and we get to get into why they changed
8 their opinion or what they've done. And so I can
9 think of at least one witness that's going to be
10 in this case that's given some pretty pronounced
11 opinions and if that guy tries to backtrack one
12 iota on this, I think we're going to see a very
13 serious need for cross-examination about why that
14 individual may have changed how he views this
15 case.

16 So I want to, and we have briefed this as
17 well because there are very few cases in the
18 evidentiary code where it says, shall, and when
19 you look at the interpretations of when you can
20 get into bias, intent and motive the word shall
21 always reviews because that's when we get into
22 those things. And so I wanted to point out as
23 well if we have some kind of order on this it's
24 also potentially going to be subject to the
25 witnesses for the plaintiff need to be

1 cross-examination on bias, intent and motive for
2 trial.

3 MR. BUTLER: Your Honor, on behalf of the
4 [REDACTED] plaintiffs we're making a mountain out of a
5 molehill. the Court of Appeals has been pretty
6 clear about it, the fact a settlement is
7 inadmissible, so is the amount. We agree with the
8 Court that you don't get to say that they used to
9 be a party. If Mr. Branch or someone else wants
10 cross-examine experts on based on their deposition
11 transcripts or any valid admissions in-judicio, he
12 can do that. But there are two things at issue in
13 this motion is the fact itself and the amount and
14 the Court of Appeals has said neither is
15 admissible. Thank you.

16 MR. LAW: And, Your Honor, I might add the
17 apportionment statute takes care of all this.
18 Martin-Robbins will only pay their part, Arcadis
19 will get their part to the extent they can prove
20 that the non-party is at fault. And we not say he
21 can't cross witness about prior factual judicial
22 admissions here, that's not the issue here. We --
23 to the contrary Mr. Butler made it clear that they
24 could and we joined in that. The point is that
25 the fact they were a party or settled is off

1 limits and they have the burden of proving that if
2 it's non-parties at fault, not us. And we made
3 any inconsistent position and a judicial
4 admission, then they are entitled to cross Ms.
5 [REDACTED] on that. We didn't say that that's not
6 proper.

7 THE COURT: So I guess we just have to wait
8 until trial. I think that my ruling is what we
9 just talked about. The fact of the settlement nor
10 the amount nor that they were parties will come
11 into this case. It makes it very messy. We can't
12 control what going on with that. I'll think about
13 whoever that other judge was, I mean, it might
14 make sense. I always look at if that will help to
15 keep the jury from back time after time talking
16 about this other defendant who they won't know is
17 a defendant who will just be on the jury form as
18 to apportionment, but I don't know how the case is
19 going to be tried, so right now that's my ruling.
20 I mean, if things change then we'll talk about
21 them at the trial.

22 MR. LAW: Thank you, Your Honor.

23 MR. KAHN: Sorry, this is Matt Kahn. I just
24 notice that there are two defense lawyers from
25 Freeman Mathis that haven't entered an appearance