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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.  
  
MARTIN-ROBBINS FENCE  
COMPANY; ARCADIS U.S.,  
INC.; AND GEORGIA  
DEPARTMENT OF  
TRANSPORTATION,  
  
Defendants.

CIVIL ACTION FILE NO.

[REDACTED]

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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CARTILIA CARTER  
CERTIFIED COURT REPORTER  
ATLANTA, GEORGIA 30303  
(404) 374-2804

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IN THE STATE COURT OF FULTON COUNTY  
STATE OF GEORGIA

	)	
[REDACTED] AS	)	
ADMINISTRATOR OF THE	)	
ESTATE OF [REDACTED]	)	
AND AS GUARDIAN OF [REDACTED]	)	
AND [REDACTED]	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	CIVIL ACTION FILE NO.
	)	[REDACTED]
MARTIN-ROBBINS FENCE	)	
COMPANY; ARCADIS U.S.,	)	
INC.; AND GEORGIA	)	
DEPARTMENT OF	)	
TRANSPORTATION; AND JOHN	)	
DOES 1-10,	)	
	)	
Defendants.	)	

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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

- - -

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, [REDACTED], there's been a settlement with

1           Arcadis.   Okay.   All right.

2                   MR. LAWSON:   Thank you, Judge.

3                   THE COURT:   I'll get this done so all can  
4           move forward with that.

5                   The next one is a motion in limine to exclude  
6           the use of plaintiffs' animation and related  
7           testimony.

8                   MS. KLINGLER:   Thank you, Your Honor,  
9           Elenore Klingler again for Martin-Robbins.  
10          Plaintiffs have produced two animations in this  
11          case, one is a slightly different version of the  
12          first one and we referenced it a couple of times.  
13          The first part of that animation is setting up  
14          what plaintiffs contend is what actually happened  
15          in the accident.   And then the second piece of  
16          that is this what-if scenario that they deposited  
17          about what might have happened had the guardrail  
18          not been damaged.

19                   Your Honor ruled on GDOT's motion to exclude  
20          Nick Earnhart and the animation, kind of at same  
21          time in a Daubert motion.   The Court's ruling was  
22          based on the animation being an illustration of  
23          the expert's opinion, Mr. Earnhart's opinion, but  
24          that's actually not what they do.   And, therefore,  
25          the Brown case really say doesn't address this

1 issue. And I think that's really highlighted by  
2 the facts that since Your Honor has ruled on  
3 GDOT's Daubert motion, there is then a second  
4 animation that was produced and to my knowledge we  
5 don't have any testimony about why there are two  
6 and the differences between them.

7         These animations, and you can see some  
8 examples in our briefing, were made to not  
9 illustrate a principle, that is what it looks like  
10 when you hit a guardrail, this is what a guardrail  
11 is set up to do. They are trying to show the jury  
12 an argument as to what actually happened, what  
13 actually happened as though this were a video of  
14 the accident. The way that it is designed, the  
15 way it zooms in, the way they have pictures of  
16 this is what the car looks like and here is our  
17 animation of what the cart looks like, this all  
18 designed to set up for the jury like, wow, I'm  
19 really watching something that is legitimate and I  
20 should believe that this is what happened.

21         And then, you know, those assertions, their  
22 expert said he had no part in making this video,  
23 this is a graphic design company that was hired to  
24 illustrate this accident. And, in fact, the  
25 expert testified that the plaintiff directed them

1 to do certain things. For example, the video that  
2 purports to show what happened in the accident  
3 does not show the taxicab impact. It does not  
4 identify that Ms. [REDACTED] is traveling 70 miles  
5 an hour above the speed limit when she hit the  
6 taxicab. It starts with an imagining of what  
7 happened when she hit the guardrail. And to  
8 purport to show what actually happened in the  
9 accident, but be relying on it being merely an  
10 illustration of the expert's opinion, those two  
11 things don't match up. And instead what we have  
12 is a misleading document that's being shown to the  
13 jury as though it's something that actually  
14 happened.

15 And then you go from the first part of the  
16 video into the entirely imagined speculative what  
17 if portion of the video that has no other vehicles  
18 on the roadway, it has a number of things that the  
19 plaintiff have made choices about to show what  
20 could have happened in this accident. But there's  
21 no way to know what could have happened in this  
22 accident. These are similar to the facts that,  
23 you know, accidents are non-linear, so when you  
24 hit a guardrail we don't know what's going to  
25 happen.

1           And there's been testimony to that facts in  
2           this case. And so the reason we bring this to  
3           your attention is that the basis of GDOT's motion,  
4           the Daubert motion, we are not contesting that  
5           Mr. Earnhart is qualified to give the opinions  
6           that he is, what we are saying is that contrary to  
7           this animation being an illustration of his  
8           opinions which is the basis on which you ruled  
9           that it could come in, instead what you have  
10          highlighted by the fact that there's two  
11          animations now so who knows which one is right and  
12          who know why they changed certain things, perhaps  
13          because the plaintiffs told them to.

14          We now are in a position of having the  
15          plaintiffs' argument that is cloaked as an  
16          illustration of the expert's opinion. And that is  
17          obviously tremendously prejudicial, especially the  
18          speculative, what if scenario, and we believe it  
19          should be excluded under 403 because it has the  
20          potential, the strong potential to mislead the  
21          jury that is grater than the probative value of  
22          it.

23          MR. KAHN: Your Honor, so Matt Kahn for the  
24          plaintiffs. I'll just make a few points in  
25          response to Ms. Klingler first. So Ms. Klingler

1 significantly downplays Nick Earnhart's role in  
2 creating these animations which, by the way,  
3 you've already deemed to be admissible. But he  
4 worked with EK Global, which is a company that  
5 focuses on these reconstruction animations and  
6 gave them all of the data from his reconstruction,  
7 all the side diagrams and measurements that he  
8 took and oversaw the process with them to make  
9 sure that it was accurate.

10 Second, Martin-Robbins is highlighting this  
11 revised animation that we provided acting like  
12 it's some nefarious attempt to pull one over on  
13 the Court and the parties. But during  
14 Dr. Earnhart's deposition they had drawn his  
15 attention to a discrepancy in the what if, the  
16 angle that the car left the road in the what-if  
17 scenario and the angle that the Sorento left the  
18 road in what illustrates his reconstruction of how  
19 the accident actually happened. And so the only  
20 change that what made was at Martin-Robbins  
21 urging, it was that discrepancy.

22 But these are all things that can be pointed  
23 out on directs -- I'm sorry, in cross-examination  
24 like the Court said in its order. So the analysis  
25 here remains the same, we are talking about



1 demonstrative evidence and examination. It has to  
2 be relevant, the probative value has to be -- must  
3 not substantially outweigh the risk of prejudice,  
4 it has to be authenticated. It doesn't even sound  
5 like Martin-Robbins is disputing that it's  
6 relevant. I don't know how they could do that.  
7 In terms of the probative value animation being  
8 substantially out weighted, this Court has in her  
9 words that the, quote, the risk of prejudice is  
10 insignificant.

11           There is not a risk here of a jury thinking  
12 that this is real, that this is a video showing  
13 what actually happened. And that's align with  
14 Georgia law that we cited in our briefing and that  
15 the Court put in its order that says animations  
16 are generally not confusable with real evidence.  
17 Our juries these days are lot more sophisticated  
18 that a lot of lawyers give them credit for and  
19 that they know what this is. They know that they  
20 are not showing them a video or trying to trick  
21 them. This is an illustration of Dr. Earnhart's  
22 reconstruction. And as to authentication  
23 Dr. Earnhart clearly authenticated in his  
24 deposition, plural, depositions and then  
25 Joel Kent, the only other reconstruction that's

1       been in this case, agrees from the general macro  
2       sense that it is accurate and depicts  
3       Dr. Earnhart's opinions in the collision. We don't  
4       know what they would have said about because they  
5       withdrew him because he agreed with everything  
6       that Dr. Earnhart said.

7               So the elements for admissibility are all  
8       met. This is nothing more than a re-litigation of  
9       the prior order briefing and the hours that we  
10      spent arguing it and we would respectfully ask  
11      that the Court deny the motion.

12             MR. LAW: Your Honor, from the [REDACTED]  
13      plaintiffs, really briefly I agree with everything  
14      Mr. Kahn said. The admissibility standard for an  
15      animation is so low, all the expert has to say is  
16      it barely and accurately depicts what it purports  
17      to show and the jury insistence on what Mr. Kahn  
18      said. This seems more like a cartoon to me. The  
19      argument I heard from the defense counsel was they  
20      might think it's a real video of the event, just  
21      tell them it's an animation. No one's trying to  
22      tell them it's a real video. There was no video  
23      from the event. That jury said we don't -- all he  
24      has to say is this was the video. It doesn't even  
25      look like it's real time. It looks a cartoon. So

1 we just oppose this. Your Honor already ruled  
2 that it's admissible in the previous hearing and  
3 so with that the [REDACTED] plaintiffs join with  
4 Mr. Kahn and Mr. Butler in their response.

5 THE COURT: All right. In regard to  
6 defendant Martin-Robbins motion in limine exclude  
7 the use of plaintiffs animation and the negative  
8 testimony, I'm going to deny that motion.

9 The next one is defendants Martin-Robbins  
10 Fence Company motion in limine to exclude evidence  
11 concerning current capacity.

12 MS. KLINGLER: Thank you. Elenore Klingler  
13 for Martin-Robbins. This is a situation in which  
14 I wish we had the zoom working so you could see  
15 what we were looking at, but I don't know if you  
16 have a briefing in front us, but the -- okay,  
17 great. On this brief there's a picture of the  
18 document that I'm talking here and there are  
19 several that like this, I just wanted to give you  
20 a picture kind of generally what it looked like.  
21 To give you a little bit of background the way  
22 contract bidding works in Georgia, don't worry,  
23 I'm not going to go too in depth on this, when it  
24 goes to a construction contract, which is what  
25 these documents relate to, the kind I've shown in