IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

[redacted], as administrator of the estate of [redacted] and as guardian of J.H. and T.H., Plaintiff, vs. MARTIN-ROBBINS FENCE COMPANY, GEORGIA DEPARTMENT OF TRANSPORTATION, ARCADIS U.S., INC., and JOHN DOES 1-10, Defendants.	Civil Action File No.: [redacted]
[redacted], Plaintiffs, vs. GEORGIA DEPARTMENT OF TRANSPORTATION; MARTIN-ROBBINS FENCE COMPANY; and ARCADIS U.S., INC., Defendants.	Civil Action File No.: [redacted]

DEFENDANT ARCADIS U.S., INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW, Defendant Arcadis U.S., Inc. ("Arcadis") and files this Brief in Support of Its Motion for Summary Judgment, showing the Court as follows:

INTRODUCTION

These cases arise from a motor vehicle accident that occurred on June 3, 2018. [redacted] was the driver of a car that left the subject roadway and struck a concrete pole located

behind the subject guardrail. [redacted] was a passenger in the subject vehicle. Arcadis was hired by the Georgia Department of Transportation ("GDOT") to provide Management, Administration and Inspection Services, as required for a wide-variety of GDOT maintenance service contracts, including the inspection of guardrails. Martin-Robbins Fence Company ("Martin-Robbins") was hired by GDOT to repair damaged guardrails.

Plaintiffs assert negligence and nuisance claims against Arcadis. Arcadis moves for summary judgment on the basis that there is an absence of evidence to support the first three elements of Plaintiffs' negligence claim (existence of a legal duty, breach of that duty and causation).

Plaintiffs cannot maintain a negligence claim against Arcadis because there is no legal duty owed to them as a matter of law. The contract between Arcadis and the GDOT clearly states that "**there are no individual or personal third party beneficiaries of this Agreement**." As such, Plaintiffs have no standing to enforce a claim for breach of duty that arises solely under a contract, since they are not third-party beneficiaries to said contract. Whether, and to what extent, a defendant owes a legal duty to a plaintiff is a question of law. This Court should decide, as a matter of law, that Arcadis had no legal duty to Plaintiffs, based on the plain language of the contract.

Even if the Court finds that Arcadis owed a legal duty to Plaintiffs, summary judgment should be granted to Arcadis because there is an absence of evidence to support the second element of Plaintiffs' negligence claim (breach of duty). There is no viable negligence claim based on breach of contractual duty, based on the plain language of the contract, because said contract contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.

Even if the Court finds that the contract between Arcadis and GDOT required Arcadis to act with a reasonable promptness, analogous to a duty of ordinary care, the Court should grant summary judgment to Arcadis on Plaintiffs' negligence claim because a reasonable jury could not find that Arcadis breached such a duty. There is no competent evidence in the record to contradict that Arcadis became aware of damage to the subject guardrail on April 18, 2018. It is undisputed that Arcadis reported the damaged guardrail to Martin-Robbins on April 20, 2018. As such, a jury could not reasonably find that Arcadis breached its duty of ordinary care. This Court should decide this issue as a matter of law, as it can do in plain as palpable cases where reasonable minds cannot differ as to the conclusion to be reached.

Moreover, there is no viable negligence claim based on breach of duty that was voluntarily undertaken because, as explained above, a reasonable jury could not find that Arcadis breached its duty of ordinary care.

Plaintiffs attempt to establish Arcadis' duties arising from the contract and "generally accepted standards" based on the expert testimony of Herman Hill, P.E. However, Plaintiffs' effort to establish such duties (that otherwise do not exist) through expert testimony fails because it is well-settled that what duty a defendant owes, and the scope of such duty, is a question of legal policy to be decided by this Court as an issue of law, and not by an expert. Mr. Hill opines that Arcadis failed to inspect and monitor guardrails as required by the contract and unspecified "generally accepted standards of the time," such that Arcadis should have seen and reported the subject guardrail prior to April 20, 2018. These opinions imply a duty to see and report all damaged guardrail that exists on the highways in District 6. Such a heightened duty was not required by the contract between Arcadis and GDOT. Herman Hill admitted in this deposition that the contract between Arcadis and GDOT contains no specifics as to time or performance

requirements with respect to inspecting or reporting of guardrails. Mr. Hill's opinions (including those purporting to interpret contractual requirements and referencing "generally accepted standards of the time") are Mr. Hill's personal wish-list as to heightened performance standards but are not contractually required or tethered to any specific statute, rule or standard, and go beyond the exercise of ordinary care. There is no viable negligence claim based on breach of duty arising from either the contract or "generally accepted standards". Arcadis is entitled to summary judgment notwithstanding Herman Hill's expert testimony that it was chargeable with a breach of duty, as what duty a defendant owes to plaintiff is a question of legal policy to be decided by the Court as an issue of law.

Plaintiffs cannot maintain a negligence claim against Arcadis because there is no evidence to create a genuine issue of material fact with respect to the essential element of causation. Any failure on the part of Arcadis is not the proximate cause of the injury. Martin-Robbins' failure to repair the subject guardrail by the May 11, 2018 repair date is a superseding proximate cause of Plaintiffs' injuries, rendering moot any action or inaction on the part of Arcadis.

With respect to the nuisance claim, Arcadis moves for summary judgment due to lack of control over the cause of the harm and lack of proximate cause. Arcadis had no control over the cause of the harm, as it had no control over whether a guardrail noticed for repair would be timely repaired. Moreover, any failure on the part of Arcadis is not the proximate cause of the injury, as explained above.

Plaintiffs also seek punitive damages and attorney's fees under O.C.G.A. § 13-6-11 against Arcadis. However, as explained below, those ancillary claims are not viable where the underlying claims against Arcadis fail.

Arcadis is entitled to judgment as a matter of law on all claims asserted against it.

STATEMENT OF UNDISPUTED MATERIAL FACTS THAT RENDER PLAINTIFF'S CLAIMS AGAINST ARCADIS MOOT

The Contract Between Arcadis and Georgia Department of Transportation

On or about June 14, 2016, Arcadis entered into a Professional Services Agreement with GDOT in which Arcadis agreed to perform "On-Call Maintenance Management and Design Services" for District 7 and State Maintenance Office.[1]

On or about June 16, 2017, Arcadis entered into Task Order No. 2 with GDOT.[2]

In both the Professional Services Agreement and Task Order No. 2 (collectively, "Arcadis Contract"), Arcadis agreed to provide Management, Administration and Inspection Services, as required for GDOT maintenance service contracts.[3]

In the Arcadis Contract, Arcadis agreed to provide "roadway inspection services" in connection with a wide variety of GDOT maintenance service contracts.[4]

Although guardrail inspection is a "roadway inspection service[]" that Arcadis may be called upon to perform under the Arcadis Contract, the inspection of guardrails is not specifically referenced anywhere in the Arcadis Contract.[5]

The Arcadis Contract contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.[6]

Article #102 of the Arcadis Contract states as follows:

ARTICLE #102 TERM OF AGREEMENT:

> This Agreement is effective as of the date written in ARTICLE #101 AGREEMENT BETWEEN above and shall terminate on May 31, 2021, unless terminated earlier under ARTICLE #116 TERMINATION of this Agreement. The

[1] See Contract between GDOT and Arcadis dated June 14, 2016. Such Contract is attached hereto as **Exhibit A**.
[2] See Task Order No. 2 dated June 16, 2017. Such Contract is attached hereto as **Exhibit B**.
[3] See Exhibits A and B hereto.
[4] See id.
[5] See id.; Deposition of Tony Hendon, taken on August 8, 2021, p. 146, lines 12-14.
[6] See T. Hendon Depo., p. 146, lines 12-14; See also Deposition of Herman Hill, taken on May 5, 2021, p. 271, lines 1-6, p. 277, lines 21-25.

> Consultant [Arcadis] shall not begin any work under the terms of this Agreement until authorized in writing by the Department through a Notice to Proceed which shall provide an effective date for the start of Consultant services. No services of any kind, including but not limited to travel, preliminary meetings, planning, etc., shall be compensated by the Department prior to the effective date of the Notice to Proceed. **Time is of the essence** in this Agreement and the Consultant shall perform its responsibilities for the Project in accordance with assignments made by the Department Project Manager (PM).[7]

Article #129 of the Arcadis Contract states as follows:

> **ARTICLE #129 THIRD PARTY BENEFICIARY:**
>
> The Consultant [Arcadis] acknowledges, stipulates and agrees that the Department is a public department, agency, or commission of the executive branch of government of the State of Georgia performing an essential public and governmental function by means of the Agreement. The Consultant acknowledges, stipulates and agrees that **there are no individual or personal third party beneficiaries of this Agreement.**[8]

In July 2017, GDOT Asked Arcadis to Begin Inspecting and Reporting Damaged Guardrail

On or about July 2017, pursuant to the Arcadis Contract, GDOT asked Arcadis to begin assisting GDOT with the inspection and reporting of damaged guardrail in District 7.[9]

If an Arcadis inspector saw a damaged guardrail in the course of performing their inspections of various GDOT assets in District 7, and could safely pull over and take a photo of the damaged guardrail, they were directed to classify it as "functional" or "non-functional"[10] and report it to GDOT.[11]

Between July 2017 and March 2018, GDOT compiled the guardrail damage reports received from both GDOT and Arcadis inspectors, and then GDOT notified Martin-Robbins of the

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[7] See Exhibit A hereto, Article #102) (emphasis supplied).
[8] See Exhibit A hereto, Article #129) (emphasis supplied).
[9] See T. Hendon Depo., p. 112, lines 1-5; Defendant's Exhibit 6, attached hereto as **Exhibit C**.
[10] The definitions of "functional" and "non-functional" are contained in the contract between GDOT and Martin-Robbins dated September 15, 2017. See Tony Hendon Depo., Defendant's Exhibit 5, attached hereto as **Exhibit D**.
[11] See Tony Hendon Depo., p. 24, lines 9-15.

need for repair.[12]

The Contract Between Martin-Robbins Fence Company and GDOT

On or about September 15, 2017, Martin-Robbins entered into a maintenance services contract with GDOT in which Martin-Robbins agreed to perform "D7 Guardrail, Cable Barrier, and Impact Attenuator Maintenance Services" ("Martin-Robbins Contract").[13]

Martin-Robbins was the maintenance service provider responsible for repairing damaged guardrails in District 7.[14]

The Martin-Robbins Contract set forth that the deadline for repair of a "non-functional" guardrail was 21 days.[15]

In March 2018, GDOT Asked Arcadis to Assist in the Management of the Martin-Robbins Contract

In March 2018, GDOT asked Arcadis to assist in the management of the Martin-Robbins Contract.[16]

In this new role, Arcadis was directed to compile spreadsheets of damaged guardrail that had been reported to GDOT by both GDOT and Arcadis inspectors, and then notify Martin-Robbins of the need for repair and the deadline for same, based on the classification of the guardrail as "functional" or "non-functional".[17]

On or about April 2, 2018, Arcadis began sending guardrail damage reports to Martin-Robbins, rather than GDOT doing so.[18]

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[12] See Tony Hendon Depo., p. 89, lines 24-25 – p. 90, line 1, p. 94, lines 6-11, p. 112, lines 1-5.
[13] See Tony Hendon Depo., Defendant's Exhibit 5 (Contract between GDOT and Martin-Robbins dated September 15, 2017).
[14] See id.
[15] See id.
[16] See Tony Hendon Depo., page 19, lines 24-25 – page 29, line 1; page 133, lines 8-13; Defendant's Exhibit 12, attached hereto as **Exhibit E**.
[17] See Tony Hendon Depo., page 94, lines 6-11; page 94, lines 14-17; page 149, lines 11-25 – page 150, lines 1-10; Arcadis Meeting Minutes for meeting held on March 13, 2018, attached hereto as **Exhibit F**.
[18] See Tony Hendon Depo., page 89, lines 24-25 – page 90, lines 1-4; page 94, lines 18-25.

After March 2018, Arcadis was responsible for verifying guardrail repairs, but such responsibility was not triggered until after Martin-Robbins notified Arcadis that a repair had been made.[19]

March 14, 2018 Photo of the Other Guardrail and Reporting of Same

On March 14, 2018, Arcadis inspector, Calvin Thrasher, took a photo of a damaged guardrail on the other side of the interstate from the subject damaged guardrail (the "Other Guardrail") and reported it to GDOT.[20]

On April 2, 2018, Arcadis notified Martin-Robbins that the Other Guardrail was "non-functioning" and that the deadline for such repair was April 23, 2018.[21]

April 18, 2018 Photo of the Subject Guardrail and Reporting of Same

On April 18, 2018, GDOT took a photo of the subject guardrail and reported it to GDOT as needing repair.[22]

GDOT's photo of the subject guardrail came into Arcadis's possession shortly after it was taken on April 18, 2018.[23]

On April 20, 2018, Arcadis compiled a spreadsheet of damaged guardrail that had been reported to GDOT by both GDOT and Arcadis inspectors, and notified Martin-Robbins that the subject guardrail was "non-functioning" and that the deadline for such repair was May 11, 2018.[24]

The subject accident occurred on June 3, 2018.[25] At the time of the accident, the subject

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[19] See Tony Hendon Depo., p. 135, lines 12-14; p. 135, lines 9-14.
[20] See Deposition of Calvin Thrasher, taken on August 11, 2021, Plaintiff's Exhibit 201 and 207, attached hereto as **Exhibits G and H.**
[21] See Deposition of Kevin Wilson, taken on May 13, 2021, Defendant's Exhibit 29, attached hereto as **Exhibit I.**
[22] See Deposition of Ryan Anderson, taken on August 10, 2021, p. 36, lines 19-22; Plaintiff's Exhibit 221, attached hereto as **Exhibit J.**
[23] See Ryan Anderson Depo., p. 36, lines 19-22.
[24] See Tony Hendon Depo., p. 62, lines 14-23; Plaintiff's Exhibit 6, attached hereto as **Exhibit K.**
[25] See First Amended Complaint ([redacted]), ¶ 21; First Amended Complaint ([redacted]), ¶ 15.

guardrail had not been repaired.[26]

ARGUMENT AND CITATION OF LEGAL AUTHORITY

I. Summary Judgment Standard.

To prevail on motion for summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the party opposing the motion, warrant a judgment as a matter of law. *See Lau's Corp. v. Haskins*, 261 Ga. 491 (1991) (citing O.C.G.A. § 9-11-56(c)). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the plaintiff's case. *See id.* at 491. "If there is *no evidence sufficient to create a genuine issue* as to *any essential element of plaintiff's claim*, that claim *tumbles like a house of cards. All of the other disputes of fact* are *rendered immaterial*." *Id.* at 491 (citing *Holiday Inns v. Newton*, 157 Ga. App. 436 (1981) (emphasis supplied).

At summary judgment, a defendant "who will not bear the burden of proof at trial need not conclusively prove the opposite of each element of the non-moving party's case." *Lau's Corp. v. Haskins*, 261 Ga. at 495. Rather, the moving party "must demonstrate by reference to evidence in the record that there is an absence of evidence to support at least one essential element of the non-moving party's case." *Id.* The burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions, and other documents in the record that there is an absence of evidence to support the non-moving party's case. *Id.* at 491. Should the defendant do so, the plaintiff "cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." *Id.* (citing O.C.G.A. § 9-11-56(e)).

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[26] See Tony Hendon Depo., p. 44, lines 10-15.

II. Plaintiffs' Negligence Claim Against Arcadis Is Not Legally Viable; Summary Judgment on this Claim Should Be Granted in Arcadis' Favor as a Matter of Law.

The essential elements of a negligence claim are:

(1) The existence of a legal duty on the part of the defendant;

(2) A breach of that duty;

(3) A causal connection between the defendant's conduct and the resulting injury; and

(4) Damages resulting from the alleged breach of the duty.

Glover v. Georgia Power Company, 347 Ga. App. 372, 375 (2018); *Dutt v. Mannar and Company, LLC*, 354 Ga. App. 565, 566 (2020).

Arcadis is entitled to summary judgment if it can show that there is an absence of evidence to prove any essential element of Plaintiffs' negligence claim. In this Motion for Summary Judgment, Arcadis asserts that there is an absence of evidence to support the first three elements of Plaintiffs' negligence claim (existence of a legal duty, breach of that duty and causation).

A. Plaintiffs Cannot Maintain a Negligence Claim Against Arcadis Because There Was No Legal Duty Owed to Plaintiffs.

The threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes a legal duty to the plaintiff. *See Dutt*, 342 Ga. App. at 566. Whether, and to what extent, a defendant owes a legal duty to a plaintiff is a question of law. *See id.* "Whether a duty exists upon which liability can be based is a question of law." *Martin v. Ledbetter*, 342 Ga. App. 208, 211 (2017). "In the absence of a legally cognizable duty, there can be no fault or negligence." *Id.*

The Court of Appeals stated in *Meinken v. Piedmont Hosp.*, 216 Ga. App. 252 (1995):

> One of the problems arising out of the question of duty is the parties' status and their relation to each other. Does the defendant owe the duty to this plaintiff? If a defendant owes no legal duty to the plaintiff, there is no cause of action in

> negligence. **What duty a defendant owed a plaintiff is a policy problem – a matter of law.**

Id. at 253 (emphasis supplied).

According to O.C.G.A. § 51-1-11(a),

> no privity [of contract] is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract.

O.C.G.A. § 51-1-11(a).

Georgia case law is clear that, in personal injury cases, an injured party may not recover as a third-party beneficiary for failure to perform a duty imposed by a contract unless it is apparent from the language of the agreement that the contracting parties intended to confer a direct benefit upon the plaintiff to protect him from physical injury. *See, e.g., Donnally v. Sterling*, 274 Ga. App. 683, 685 (2005). "In order for a third-party to have standing to enforce a contract…it must clearly appear from the contract that it was *intended* for his or her benefit. The mere fact that the third-party would benefit from performance of the agreement is not alone sufficient." *Culbertson v. Fulton-DeKalb Hosp. Auth.*, 201 Ga. App. 347, 349 (1991). Accordingly, "[a]lthough the third-party beneficiary [does not need to] be specifically named in the contract, the contracting parties' intention to benefit the third party must be shown on the face of the contract." *Brown v. All-Tech Investment Group*, 265 Ga. App. 889, 897 (2004).

There is an established line of Georgia cases finding that any benefit to the personal injury plaintiff was merely incidental to the contract, and, thus plaintiffs were not intended third party beneficiaries. *See, e.g., Anderson v. Atlanta Committee for the Olympic Games*, 273 Ga. 113, 118 (2000) (park visitors not third-party beneficiaries of security contract between security company and Olympic committee); *All-Tech Investment Group*, 265 at 897 (tenant's visitors not third-party

beneficiaries to contracts between tenant and property manager and property manager and security service provider).

In *City of Atlanta v. Benator*, 310 Ga. App. 597 (2011), City residents filed putative class actions against the City and its contractors alleging that the plaintiffs were overcharged for water and sewer service. The Court of Appeals upheld the trial court's determination that the City residents were not third-party beneficiaries of the contractors' contracts to install, read, and maintain water meters for the City, and that the residents lacked standing to bring claims against the contractors. *Id.* at 604. The Court stated, "Like all contracts entered into by government entities, these agreements benefited all citizens indirectly…but these benefits were only incidental. Merely entering into a contract for the benefit of the public does not create third-party beneficiary status under Georgia law." *Id.* (citing *Page v. City of Conyers*, 231 Ga. App. 264, 267-68 (1998). The Court further held that the contractors owed no duties to City residents independent of their contract with the City. *See id.* at 606.

In *Hubbard v. Dept. of Transp.*, 256 Ga. App. 342, 352 (2002), the Court of Appeals held that a motor vehicle accident victim who sustained injuries when her vehicle stalled in a highway construction zone lacked standing to assert any claims arising from violations of the construction contract between GDOT and the road construction contractor. The court held that the victim was not a party to the contract and was not an intended beneficiary of the contract. Therefore, she had no standing to sue for an alleged breach. *See id.*

Here, it is clear that Arcadis' duties with respect to inspection of guardrails arise solely under the Arcadis Contract. The Arcadis Contract clearly states that "**there are no individual or personal third party beneficiaries of this Agreement**." As such, Plaintiffs have no standing to enforce a claim for breach of duty that arises solely under a contract, since they are not third-party

beneficiaries to said contract. Plaintiffs cannot maintain a negligence claim against Arcadis because there is no legal duty owed to them as a matter of law. *See Anderson v. Atlanta Committee for the Olympic Games*, 273 Ga. 113, 118 (2000) ("It is axiomatic that an action for negligence cannot be maintained if the defendant did not owe the plaintiff a legal duty").

Plaintiffs' efforts to establish a duty through expert testimony fails because "what duty a defendant owes...is a question of legal policy to be decided as an issue of law." *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008) ("Nonetheless, Lawson's efforts to establish a duty through expert testimony fails because 'what duty a defendant owes...is a question of legal policy to be decided as an issue of law.'"). Moreover, because Plaintiffs have not established that Arcadis owed Plaintiffs a contractual duty or one established by law or statute, their action for negligence cannot be maintained. *See id.* ("Because Lawson has not established that Entech owed the decedent a contractual duty or one established by law or statute, her negligence action cannot be maintained.").

This Court should decide, as a matter of law, that Arcadis had no legal duty to Plaintiffs, as they are not third-party beneficiaries to the Arcadis Contract, and Arcadis' duties with respect to this care arise solely from the Arcadis Contract.

B. Plaintiffs Cannot Maintain a Negligence Claim Against Arcadis Because a Reasonable Jury Could Not Find that Arcadis Breached Its Duty of Ordinary Care.

Even if the Court finds that Arcadis owed a legal duty to Plaintiffs, summary judgment should be granted to Arcadis because there is an absence of evidence to support the second element of Plaintiffs' negligence claim (breach of duty).

Whether a defendant breached a legal duty is usually an issue to be decided by a jury. *See Pound v. Augusta National, Inc.*, 158 Ga. App. 166, 167 (1981). However, this issue may be

decided by the court in plain and palpable cases where "reasonable minds cannot differ as to the conclusion to be reached." *Id.* However, as stated above, whether, and to what extent, a defendant owes a legal duty to a plaintiff is a question of law. *See Dutt v. Mannar and Company, LLC*, 354 Ga. App. 565, 566 (2020).

1) There is no viable negligence claim based on breach of contractual duty.

Although guardrail inspection is a "roadway inspection service[]" that Arcadis may be called upon to perform under the Arcadis Contract, the inspection of guardrails is not specifically referenced anywhere in the Arcadis Contract.[27]

The Arcadis Contract contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.[28]

The Arcadis Contract does have a provision that says, "time is of the essence" but such provision is not referring to inspection or reporting of guardrails specifically.[29]

Here, Plaintiffs' expert, Herman Hill, opines that Arcadis failed to timely identify and report the damaged guardrail and failed to "live up to its contractual obligations with the State of Georgia," such that Arcadis should have seen and reported the subject guardrail prior to April 20, 2018. These opinions imply a duty to see and report all damaged guardrail that exists on the highways in District 6. Such a heightened duty was not required by the contract between Arcadis and GDOT. Herman Hill admitted in this deposition that the contract between Arcadis and GDOT contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.[30] Any attempts by Plaintiffs to impose a duty not required by the Arcadis Contract

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[27] See id.; T. Hendon Depo., p. 146, lines 12-14.

[28] See T. Hendon Depo., p. 146, lines 12-14; See also Deposition of Herman Hill, taken on May 5, 2021, p. 271, lines 1-6, p. 277, lines 21-25.

[29] See T. Hendon Depo., Defendant's Exhibit 2 (Contract between GDOT and Arcadis dated June 14, 2016, Article #102) (emphasis supplied), attached hereto as Exhibit A.

[30] See H. Hill Depo., p. 271, lines 1-6 (Q: "Have you seen anything that outlines the kind of outline of services that say you think should have occurred; have you seen any such thing? A: To this date, I'm not aware that I have seen

(or any statute or unspecified standard) must be rejected as a matter of law. *See Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008) ("Nonetheless, Lawson's efforts to establish a duty through expert testimony fails because 'what duty a defendant owes...is a question of legal policy to be decided as an issue of law.'").

There is no viable negligence claim based on breach of contractual duty, based on the plain language of the contract, because the Arcadis Contract contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.

Even if the Court finds that the Arcadis Contract required Arcadis to act with a reasonable promptness, analogous to a duty of ordinary care, the Court should grant summary judgment to Arcadis on Plaintiffs' negligence claim because a reasonable jury could not find that Arcadis breached such a duty, as explained below.

2) There is no viable negligence claim based on breach of duty of ordinary care.

In this case, Plaintiffs assert that Arcadis is liable because it "knew the subject guardrail was damaged but did not give prompt notice."[31]

However, the undisputed evidence shows that Arcadis acted with reasonable promptness and within the standard of ordinary care:

- On April 18, 2018, GDOT took a photo of the subject guardrail and reported it to GDOT as needing repair.[32]
- GDOT's photo of the subject guardrail came into Arcadis's possession shortly after it was taken on April 18, 2018.[33]

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that."); H. Hill Depo., p. 277, lines 21-25 (Q: "[T]here is nothing in the Contract that speaks to "reasonably prompt basis;" is there? A: I don't know that that -- those -- that phrase is there.").

[31] First Amended Complaint, ¶ 42 ([redacted]), ¶ 42 ([redacted].

[32] See Deposition of Ryan Anderson, taken on August 10, 2021, p. 36, lines 19-22; Plaintiff's Exhibit 221.

[33] See Ryan Anderson Depo., p. 36, lines 19-22.

- On April 20, 2018, Arcadis compiled a spreadsheet of damaged guardrail that had been reported to GDOT by both GDOT and Arcadis inspectors, and notified Martin-Robbins that the subject guardrail was "non-functioning" and that the deadline for such repair was May 11, 2018.[34]

Herman Hill opines that Arcadis knew about the subject damaged guardrail on March 14, 2018 but failed to notify Martin-Robbins until April 20, 2018, such that the notice was not reasonably prompt. However, such opinion should be excluded because it is based on pure speculation. In his deposition, Mr. Hill testified as follows:

> Q: "The photograph, though, that we're looking at [the March 14, 2018 photo of the guardrail across the interstate from the subject guardrail], is it your belief that; however, the person from Arcadis who got there to take it looked across the road and saw the damage to the subject of the guardrail. Is that what your belief is?
>
> A: I believe he could have. He should have...."[35]

It is well-settled that "[g]uesses or speculation which raise merely a conjecture or possibility are not sufficient to create even an inference of fact for consideration on summary judgment." *Hunsucker v. Belford*, 304 Ga. App. 200, 202 (2010) (

As such, there is no competent evidence in the record to contradict that Arcadis found out about damage to the subject guardrail on April 18, 2018. It is undisputed that Arcadis reported the damaged guardrail to Martin-Robbins on April 20, 2018. "Although issues of negligence are generally left to the jury, in cases where the alleged negligent conduct is susceptible to only one inference, the question becomes a matter of law for the court to determine." *Hunsucker*, 304 Ga. App. at 201.

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[34] See Tony Hendon Depo., p. 62, lines 14-23; Plaintiff's Exhibit 6.
[35] H. Hill Depo., p. 289, lines 22-25 – p. 290, lines 1-3.

The Court should grant summary judgment to Arcadis on Plaintiffs' negligence claim because a reasonable jury could not reasonably find that Arcadis breached its duty of ordinary care.

3) There is no viable negligence claim based on breach of duty that was voluntarily undertaken.

Plaintiffs assert that Arcadis is liable because it "undertook to inspect and monitor guardrails, such as the subject guardrail, but negligently performed that undertaking".[36] Under the common law doctrine of voluntary undertaking, "Where one undertakes an act which he has no duty to perform and another reasonably relies upon that undertaking, the act must generally be performed with ordinary and reasonable care." *S & A Industries, Inc. v. Bank Atlanta*, 247 Ga. App. 377, 382 (2000) (quoting *Stelts v. Epperson*, 201 Ga. App. 405, 407 (1991)).

This theory of liability is not viable because a reasonable jury could not find that Arcadis breached its duty of ordinary care, as explained above.

4) There is no viable negligence claim based on breach of duty arising from "generally accepted standards".

Plaintiffs attempt to establish Arcadis' duties arising from "generally accepted standards" based on the expert testimony of Herman Hill, P.E. However, as stated above, Plaintiffs' effort to establish such duties through expert testimony fails because "what duty a defendant owes…is a question of legal policy to be decided as an issue of law." *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008) ("Nonetheless, Lawson's efforts to establish a duty through expert testimony fails because 'what duty a defendant owes…is a question of legal policy to be decided as an issue of law.'"). Georgia law is clear that "[w]hat duty a defendant owes to a plaintiff is a question of legal policy to be decided as an issue of law." *Nat. Foundation Co. v. Post, Buckley,*

[36] See First Amended Complaint ([redacted] ¶ 49(c); First Amended Complaint ([redacted]n), ¶ 42(d).

etc., 219 Ga. App. 431, 433 (1995) (defendant entitled to summary judgment notwithstanding expert testimony that it was chargeable with breach of duty, as what duty a defendant owes to plaintiff is a question of legal policy to be decided as issue of law).

In *Nat. Foundation Co. v. Post, Buckley*, plaintiff attempted to establish a duty via expert testimony. *See id.* at 433-434. Plaintiff's expert opined that defendant engineering firm beached its duty (a) when it designed a shoring wall in a particular manner without providing for certain safety measures during construction, and (b) in failing to require the construction of certain barricades during construction. *See id.* at 433-434. The Court of Appeals rejected plaintiff expert's effort to establish such a duty through expert testimony. The Court of Appeals stated, "We conclude as a matter of law that, under the attendant circumstances, appellees had no such legal duty toward appellant." *Id.* at 434. The Court further explained,

> [I]n determining the scope of appellees' duty, as an issue of legal policy (*Meinken*, supra), we agree with the appellees that adoption of appellant's position would generate an intolerable legal burden on the design community in this state, and could result in a blizzard of design litigation generated through a battle of experts. **This in effect would remove the issue of legal duty from the breast of the court and vest it within the waiting grasp of the retained expert.**

Id. (emphasis supplied).

In *Adams v. APAC-Georgia*, 236 Ga. App. 215 (1999), the Court of Appeals rejected plaintiff's attempt to establish a duty through expert testimony when such duty does not otherwise exist. The Court stated, "Under Georgia law, her [plaintiff's] attempt to establish the existence of such a duty through expert testimony fails." *Id.* at 217.

Here, Mr. Hill opines that Arcadis failed to inspect and monitor guardrails as required by unspecified "generally accepted standards of the time," such that Arcadis should have seen and reported the subject guardrail prior to April 20, 2018. These opinions imply a duty to see and report all damaged guardrail that exists on the highways in District 6. Such a heightened duty was

not required by the contract between Arcadis and GDOT. Herman Hill admitted in this deposition that the contract between Arcadis and GDOT contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.[37] Mr. Hill's opinions (including those purporting to interpret contractual requirements and referencing "generally accepted standards of the time") are Mr. Hill's personal wish-list as to heightened performance standards but are not contractually required or tethered to any specific statute, rule or standard, and go beyond the exercise of ordinary care. Notwithstanding Herman Hill's testimony that Arcadis breached unspecified "generally accepted standards of the time", summary judgment must be granted to Arcadis on this theory of liability. *See Adams v. APAC-Georgia*, 236 Ga. App. 215, 217 (1999); *Nat. Foundation Co. v. Post*, Buckley, etc., 219 Ga. App. 431, 435 (1995) (defendant entitled to summary judgment notwithstanding expert testimony that it was chargeable with breach of duty, as what duty a defendant owes to plaintiff is a question of legal policy to be decided as issue of law).

C. Plaintiffs Cannot Maintain a Negligence Claim Against Arcadis Because There is No Evidence to Create a Genuine Issue of Material Fact with Respect to the Essential Element of Causation.

Negligence is not actionable unless it is the proximate cause of the injury. *See Dowdell v. Wilhelm*, 305 Ga. App. 102, 104 (2010). Normally, questions of proximate cause are for the jury, but plain and indisputable cases may be decided by the court as a matter of law. *See id.*

Here, it is undisputed that on April 20, 2018, Arcadis notified Martin-Robbins that the subject guardrail was "non-functioning" and that the deadline for such repair was May 11, 2018.[38]

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[37] See H. Hill Depo., p. 271, lines 1-6 (Q: "Have you seen anything that outlines the kind of outline of services that say you think should have occurred; have you seen any such thing? A: To this date, I'm not aware that I have seen that."); H. Hill Depo., p. 277, lines 21-25 (Q: "[T]here is nothing in the Contract that speaks to "reasonably prompt basis;" is there? A: I don't know that that -- those -- that phrase is there.").

[38] See Tony Hendon Depo., p. 62, lines 14-23; Plaintiff's Exhibit 6.

The subject accident occurred on June 3, 2018.[39] At the time of the accident, the subject guardrail had not been repaired.[40]

Any failure on the part of Arcadis is not the proximate cause of the injury. Martin-Robbins' failure to repair the subject guardrail by the May 11, 2018 repair date is a superseding proximate cause of Plaintiffs' injuries, rendering moot any action or inaction on the part of Arcadis.

As shown above, there is an absence of evidence to support the first three elements of Plaintiffs' negligence claim (existence of a legal duty, breach of that duty and causation). Plaintiffs' negligence claim against Arcadis is not viable as a matter of law, and summary judgment should be granted in Arcadis' favor on this claims.

III. Plaintiffs' Nuisance Claim Against Arcadis Is Not Viable Due to Lack of Proximate Cause.

In addition to a negligence claim, Plaintiffs also assert a nuisance claim against Arcadis. Plaintiffs state that "Arcadis is liable because it: ... maintained and/or failed to abate a continuous hazardous condition that caused an injury, such that the subject guardrail was a nuisance under Georgia law".[41]

The elements of a nuisance claim include control over the cause of the harm and proximate cause. *See In re Flyboy Aviation Properties, LLC*, 525 B.R. 510, 527 (2015).

Here, Plaintiffs' nuisance claim against Arcadis is not viable due to lack of control over the cause of the harm and lack of proximate cause. Arcadis had no control over the cause of the harm, as it had no control over whether a guardrail noticed for repair would be timely repaired. After March 2018, Arcadis was responsible for verifying guardrail repairs, but such responsibility

[39] See First Amended Complaint ([redacted], ¶ 21; First Amended Complaint ([redacted], ¶ 15.
[40] See Tony Hendon Depo., p. 44, lines 10-15.
[41] See First Amended Complaint ([redacted], ¶ 49(f); First Amended Complaint[redacted]), ¶ 42(g).

was not triggered until after Martin-Robbins notified Arcadis that a repair had been made.[42] Moreover, any failure on the part of Arcadis is not the proximate cause of the injury. Martin-Robbins' failure to repair the subject guardrail by the May 11, 2018 repair date is a superseding proximate cause of Plaintiffs' injuries, rendering moot any action or inaction on the part of Arcadis.

IV. Plaintiffs' Claims Against Arcasdis for Punitive Damages and Attorney's Fees Are Not Viable Because the Underlying Claims Are Not Viable.

Plaintiffs also seek punitive damages and attorney's fees under O.C.G.A. § 13-6-11 against Arcadis. However, those ancillary claims are not viable where the underlying claims against Arcadis fail. *See Sharp v. Greer, Klosik & Dougherty*, 256 Ga. App. 370, 373 (2002) ("[W]ithout entitlement to compensatory damages[,] punitive damages may not be recovered."); *Sparra v. Deutsche Bank Nat'l Trust Co.*, 336 Ga. App. 418, 423 (2016) ("Attorney's fees and expenses of litigation under O.C.G.A. § 13-6-11…are ancillary and recoverable only where other elements of damage are recoverable on the underlying claim."). As such, Arcadis is entitled to judgment as a matter of law on Plaintiffs' claims for punitive damages and attorney's fees against Arcadis.

CONCLUSION

For the reasons set forth above, Arcadis respectfully requests that this Court **GRANT** its motion for summary judgment, dismiss it from this action, and grant any other relief as is just and proper.

[42] See Tony Hendon Depo., p. 135, lines 12-14; p. 135, lines 9-14.

Respectfully submitted this 24th day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing ***Defendant Arcadis U.S., Inc.'s Brief in Support of Its Motion for Summary Judgment*** upon all parties to this matter by statutory electronic service, addressed to counsel of record as follows:

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