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*, v. MARTIN-ROBBINS FENCE COMPANY, GEORGIA DEPARTMENT OF TRANSPORTATION, and ARCADIS U.S., INC., and JOHN DOES 1-10 *Defendants.*	Civil Action File No.: [redacted]

DEFENDANT MARTIN-ROBBINS FENCE COMPANY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF [redacted] CLAIMS

COMES NOW Defendant Martin-Robbins Fence Co. ("Martin Robbins") and files this Brief in Support of Its Motion of Its Motion for Summary Judgment on Plaintiff [redacted], as administrator of the estate of [redacted] and as guardian of J.H. and T.H.'s ("Plaintiff") claims, showing the Court as follows:

INTRODUCTION

This case arises out of a June 2018 car crash in which a vehicle driven by [redacted] and carrying [redacted] made contact with a taxicab, exited the interstate, went over a previously damaged guardrail, and collided with a camera pole located on the interstate's median. Defendant Georgia Department of Transportation ("GDOT") owned the interstate where the incident occurred and the guardrails that ran along it. At the time of the incident, GDOT had a written contract with Martin Robbins under which Martin Robbins was obligated to repair damaged guardrails reported to it by GDOT. Martin Robbins' only contact with the guardrails

arose out of its contract with GDOT and Martin Robbins had no duty or right to touch the guardrails beyond the express terms of that contract. One such contractual term required Martin Robbins repair a damaged guardrail within 21 days of GDOT reporting its location to Martin Robbins. There is no dispute Martin Robbins failed to meet its contractual obligation to repair the guardrail involved in this incident within 21 days.

In this case, Plaintiff attempts to convert Martin Robbins' purely contractual obligation to repair within 21 days into a legal duty supporting her negligence claim. But Georgia law is clear that contractual obligations do not create legal duties. Accordingly, a person who is not a party to or third-party beneficiary of a contract has no standing to bring suit for another party's failure to fulfill a contractual obligation. Plaintiff in this case is neither a party to the contract nor a third-party beneficiary of it. Thus, Plaintiff could only proceed on her claim by showing Martin Robbins had a duty to repair the guardrail within 21 days independent of the contract. Neither Plaintiff nor her expert could identify any statutory or common law principle creating such a duty, and therefore, Plaintiff's claims against Martin Robbins fail as a matter of law.

UNDISPUTED MATERIAL FACTS

The Contract

GDOT owns certain highway systems and guardrails in and around metro Atlanta, which it referred to as District 7. (Martin Robbins' Statement of Material Facts,[1] ¶ 1.) GDOT has the authority to enter contracts to procure "services ancillary to the construction and maintenance" of such highway systems. (MR Fact, ¶ 2.) In accordance with that authority, GDOT solicited bids for contractors to provide labor and materials necessary to perform guardrail maintenance, repair,

[1] Martin Robbins simultaneously files its Statement of Undisputed Material Facts and Theories of Recovery in Support of Its Motion for Summary Judgment in accordance with Uniform Rule 6.5. Martin Robbins will cite to the facts therein as "MR Fact, ¶ __."

or replacement for one year in District 7. (MR Fact, ¶ 3.) In September 2017, GDOT awarded Martin Robbins the contract and the parties entered into a written agreement (the "Contract").[2] (MR Fact, ¶ 4.) The Contract was solely between GDOT and Martin Robbins. (MR Fact, ¶ 6.) The Contract's benefits were "to flow from one [party] to the other," and the Contract named no third-party beneficiaries. (MR Fact, ¶ 7.) The Contract stated it was entered into pursuant to O.C.G.A. § 32-1-2 which states its purpose is to:

> … provide an effective legal basis for the organization, administration, and operation of an efficient, modern system of public roads and other modes of transportation. (MR Fact, ¶ 8.)

The Contract only authorized Martin Robbins to perform the specific scope of work identified in the Contract. (MR Fact, ¶ 9-10.) Martin Robbins' scope of work did not include identification or reporting of damaged guardrails. (MR Fact, ¶ 11.) Pursuant to the Contract, GDOT was to identify damaged guardrails and notify Martin Robbins their location. (MR Fact, ¶ 12-13.) GDOT's was required to classify a damaged guardrail as either "functional" or "non-functional" in its notice to Martin Robbins. (MR Fact, ¶ 14.) According to the Contract, Martin Robbins was to "complete work" on a non-functional guardrail "within twenty-one (21) calendar days of notification." (MR Fact, ¶ 15.) The Contract did not require Martin Robbins to erect any signs or other warnings alerting traffic to a damaged guardrail after notification.

The Contract referred to itself as an "open agency" agreement with "no minimum or maximum purchases required." (MR Fact, ¶ 16.) The Contract did, however, include "Estimated Quantities" of the amount of work to be performed. (MR Fact, ¶ 17.) Relying on those Estimated

[2] GDOT entered a similar contract with Martin Robbins in 2011 which was extended or renewed through 2016. (MR Fact, ¶ 5.)

Quantities, Martin Robbins anticipated GDOT would request repair of approximately fifty (50) location per month. (MR Fact, ¶ 18.)

The Work

From September 2017 to February 2018, GDOT requested a volume of repairs consistent with the Estimated Quantities: approximately 50 locations per month. (MR Fact, ¶ 19.) But in March 2018, GDOT's requests suddenly and unexpectedly spiked. (MR Fact, ¶ 20.) Unbeknownst to Martin Robbins, GDOT had engaged Defendant Arcadis U.S., Inc. ("Arcadis") to identify damaged guardrails in District 7. (MR Fact, ¶ 21-22.) Arcadis' involvement caused the repair requests to increase dramatically and unreasonably beyond the Estimated Quantities. After GDOT notified Martin Robbins of over 150 locations in a single week of March 2018, Martin Robbins notified GDOT it would likely not be able to complete that volume of repairs within the contractual timeframe and requested GDOT send a "realistic quantity of work" in the future. (MR Fact, ¶ 23.) GDOT did not. Instead, GDOT increased the number of requests which ballooned to over 350 locations in April 2018, over 200 locations in May 2018, and over 300 locations in June 2018. (MR Fact, ¶ 24-26.)

Martin Robbins tried to meet GDOT's unreasonable demands. It attempted to locate a qualified subcontractor to supplement its Work and pulled crews from other projects to assist on this Contract. (MR Fact, ¶ 27.) All of Martin Robbins' superintendents, as well as its project manager, worked overtime every week after the spike occurred. (MR Fact, ¶ 28.) But even these efforts were not enough to perform the volume of repairs requested. As Martin Robbins' corporate representative testified: "[W]e made our best effort to try and keep up with the pace. We just weren't able to." (MR Fact, ¶ 29.)

Subject Guardrail

On April 20, 2018, Arcadis notified Martin Robbins of 31 locations needing repair, including a guardrail located on the left side of Interstate 85 Southbound near Mile Marker 77.4 ("Subject Guardrail"). (MR Fact, ¶ 30.) Plaintiff alleges the Subject Guardrail had been damaged for several months when Martin Robbins first received notice on April 20, 2018.[3] (Amended Complaint, ¶ 25.) Arcadis' notification classified the Subject Guardrail as "non-functional," and therefore, the Contract required Martin Robbins repair it within 21 days from notification, which would have been May 11, 2018. (MR Fact, ¶ 15, 31.) As Martin Robbins was still working to repair the hundreds of locations already requested by GDOT and Arcadis in the prior weeks, it was unable to repair the Subject Guardrail within the contractual timeframe. (MR Fact, ¶ 32.) Martin Robbins scheduled repair of the Subject Guardrail for the morning of June 4, 2018. (MR Fact, ¶ 33.)

Incident

At approximately 9:57 p.m. on the night of June 3, 2018, [redacted] was driving her vehicle down Interstate 85 South with her niece [redacted] ("Decedent") in the passenger seat. (MR Fact, ¶ 34.) After making contact with another car, [redacted] vehicle exited the roadway where the Subject Guardrail was located. (MR Fact, ¶ 35.) [redacted] vehicle went over the Subject Guardrail and collided with a pole in the median (the "Incident"). (MR Fact, ¶ 36.) As a result of the Incident, [redacted] suffered injuries and Decedent died. Thirteen hours after the Incident, Martin Robbins arrived at the Subject Guardrail and repaired it as scheduled. (MR Fact, ¶ 37.)

[3] Martin Robbins accepts this allegation as true for the purposes of this Motion.

Plaintiff's Allegations

Plaintiff filed suit against Martin Robbins asserting claims of negligence and nuisance, seeking punitive damages as well as attorney's fees. Plaintiff's negligence claim is based on three theories: (1) Martin Robbins "failed to live up to its contractual obligation… to timely repair" the Subject Guardrail; (2) Martin Robbins "failed to inspect and maintain" the Subject Guardrail; and (3) Martin Robbins "failed to warn traffic of the dangers" of the damaged Subject Guardrail. (Amended Complaint, ¶¶ 46(a)-(h).) In her nuisance claim, Plaintiff alleged Martin Robbins "maintained and/or failed to abate a continuous hazardous condition that caused an injury, such that the [S]ubject [G]uardrail was a nuisance under Georgia law." (Amended Complaint, ¶ 46(h).) In an effort to support her theories, Plaintiff engaged liability expert Herman Hill ("Mr. Hill") who offered opinions regarding the duties owed by the defendants, including Martin Robbins.

Mr. Hill's Unsupported Opinions

Mr. Hill offered two opinions relevant to this Motion.[4] First, Mr. Hill opined Martin Robbins had a duty to repair the Subject Guardrail within the Contract's 21-day timeframe. (MR Fact, ¶ 38.) Mr. Hill admitted no statute, code, rule, regulation, or industry standard required Martin Robbins to repair the Subject Guardrail within that timeframe. (MR Fact, ¶ 39.) Mr. Hill testified he relied solely on the Contract as the basis for his opinion, stating:

> Q: Does any statute, code, regulation, rule, or industry-standard require a contractor to repair a non-functional guardrail within 21 days?
> A: I'm not aware of it and it doesn't matter. Contract is the only thing that matters.
> Q: Are you aware of any statute, code regulation, rule, or industry standard that sets out any specific timeframe in which a contactor must repair a non-functional guardrail?

[4] Martin Robbins simultaneously files a Motion to Exclude Mr. Hill's opinions related to Martin Robbins.

> A: As far as I'm concerned, it doesn't matter. The Contract here says that and that's the only thing that matters. It doesn't matter what the industry standard is.[5] (MR Fact, ¶ 39.)

Second, Plaintiff alleged the Subject Guardrail was damaged several months before Martin Robbins received notice on April 20, 2018. (Amended Complaint, ¶ 25.) Mr. Hill opined he "believe[d]" if a Martin Robbins employee noticed the damaged Subject Guardrail prior to April 20, 2018, "that employee had an obligation to say something to there [sic] supervisors about that."[6] (MR Fact, ¶ 40.) Again, Mr. Hill could not identify any statue, code, rule, regulation, or industry standard creating such duty. (MR Fact, ¶ 41.) Mr. Hill's sole basis for this opinion was the Contract, though he did not identify any specific term supporting his position. (MR Fact, ¶ 42-43.) In fact, the Contract did not require Martin Robbins to identify or report damaged guardrails. (MR Fact, ¶ 44.)

Mr. Hill did not opine Martin Robbins had a duty to "warn traffic" about any alleged danger created by the Subject Guardrail.

ARGUMENT AND CITATION TO AUTHORITY

I. STANDARD FOR SUMMARY JUDGMENT

To prevail on a motion for summary judgment, the moving party must demonstrate there is no genuine issue of material fact and the undisputed facts warrant judgment as a matter of law. *Lau's Corp., Inc. v. Haskins*, 261 Ga.491, 491 (1991). A defendant need not produce any evidence to obtain summary judgment but must only point to an absence of evidence supporting at least one essential element of the plaintiff's claim. *Sheaffer v. Marriott International, Inc.*, 349 Ga. App.

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[5] GDOT's corporate representative testified nothing other than the Contract required Martin Robbins to repair the Subject Guardrail within 21 days. (MR Fact, ¶ 45.)

[6] Plaintiff has adduced no evidence Martin Robbins was aware the Subject Guardrail was damaged prior to receiving notice from Arcadis on April 20, 2018.

338, 338 (2019). In this case, Martin Robbins is entitled to summary judgment on Plaintiff's negligence and nuisance claims as she cannot establish the essential element of duty.[7] Martin Robbins is further entitled to summary judgment on Plaintiff's punitive damages claim as there is no evidence Martin Robbins acted recklessly or wantonly. Finally, summary judgment for attorney's fees under O.C.G.A. § 13-6-11 is appropriate as there is no evidence Martin Robbins acted in bad faith in this case which involves bona fide controversies.

II. MARTIN ROBBINS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S NEGLIGENCE CLAIM

To prove negligence, a plaintiff must show: the existence of a legal duty, breach of that duty, causation, and damages. *Rasnick v. Krishna Hospitality, Inc.*, 289 Ga. 565, 566 (2011). Whether a defendant owed a duty to a plaintiff is a threshold issue in any negligence case as plaintiff "will not be entitled to recover unless the defendant did something that it should not have done…or failed to do something that it should have done… pursuant to the duty owed the plaintiff under law." *Id*.; *see New Star Realty, Inc. v. Jungang PRI USA, LLC*, 346 Ga. App. 548, 560 (2018). Plaintiff asserts Martin Robbins was negligent for allegedly: (1) failing to repair the Subject Guardrail within 21 days; (2) failing to "maintain and inspect" the Subject Guardrail; and/or (3) failing to "warn traffic" about the alleged danger of the damaged Subject Guardrail. Plaintiff cannot establish Martin Robbins had a duty to take any of these actions, and accordingly, her negligence claim fails as a matter of law.

[7] Whether a duty exists is a question of law for the Court and is properly the subject of summary judgment adjudication. *Diamond v. Dep't of Transp.*, 326 Ga. App. 189, 195 (2014).

A. Plaintiff Cannot Maintain a Negligence Action Based on the Contract's 21-Day Repair Requirement

Plaintiff's first negligence theory is Martin Robbins' had a duty to repair the Subject Guardrail within 21 days and failed to meet that duty. This theory fails because (1) Martin Robbins' obligation to repair within 21 days arose solely from the terms of the Contract; and (2) Plaintiff has no standing to bring a claim based on violations of the Contract as she is not a third-party beneficiary to that agreement.

1. Martin Robbins' Contractual Obligation to Repair the Subject Guardrail Within 21 Days Did Not Create a Legal Duty

It is well-settled in Georgia that a breach of a purely contractual duty does not give rise to a tort claim. *ServiceMaster Co., L.P. v. Martin.,* 252 Ga. App. 751, 754 (2001). Indeed, the Georgia Code defines a tort as "the unlawful violation of a private legal right ***other than a mere breach of contract***." O.C.G.A. § 51-1-1 (emphasis added). Accordingly, a party's mere failure to perform a contractual obligation cannot serve as the basis for a negligence claim. *USF Corp. v. Securitas Sec. Services USA, Inc.*, 305 Ga. App. 404, 408-9 (2010); *Doty Commc'ns, Inc. v. L.M. Berry & Co*., 417 F. Supp.2d 1355, 1358 (N.D. Ga. 2006) (interpreting Georgia law); *DaimlerChrysler Motors Co., LLC*, 294 Ga. App. 38, 47 (2008); *Bouboulis v. Scottsdale Ins. Co*., 860 F. Supp. 2d 1364, 1380 (N.D. Ga. 2012) (interpreting Georgia law); *Integrated Pest Management Services, LLC v. BellSouth Advertising & Publishing Corp.*, 2005 WL 3096131 at *4 (N.D. Ga. 2005) (interpreting Georgia law); *Swyters v. Motorola Employees Credit Union*, 244 Ga. App. 356, 358 (2000). As explained by the Georgia Court of Appeals, an "action in tort may not be maintained for what is a mere breach through non-action or through ineffective performance (which is the same thing) of a contract duty." *Orkin Exterminating Co. v. Stevens*, 130 Ga. App. 363, 365 (1973). To maintain a negligence action, a plaintiff must show a defendant owed a legal

duty **independent of the contract**. *ServiceMaster Co., L.P.,* 252 Ga. App. at 754. Such independent duty can only be created through (i) statute, or (ii) common law principles. *Boller v. Robert W. Woodruff Arts Center, Inc.*, 311 Ga. App. 693, 696 (2011).

Plaintiff cannot show such an independent duty to repair within 21 days existed pursuant to either as her only evidence related to this purported duty is Mr. Hill's testimony. But Mr. Hill admitted his opinion was based on the Contract alone, stating:

> Q: Does any statute, code, regulation, rule, or industry-standard require a contractor to repair a non-functional guardrail within 21 days?
> A: **I'm not aware of it and it doesn't matter. Contract is the only thing that matters.**
> Q: Are you aware of any statute, code regulation, rule, or industry standard that sets out any specific timeframe in which a contactor must repair a non-functional guardrail?
> A: **As far as I'm concerned, it doesn't matter. The Contract here says that and that's the only thing that matters.**
> Q: But is there one that you're aware of?
> A: **I'm not aware of one**.[8] (MR Fact, ¶ 39.)

Plaintiff tries to use Mr. Hill to do what Georgia law will not by transforming a contractual obligation into a legal duty. But expert testimony "does not, and cannot, create a legal duty where none existed before.[9] *Diamond*, 326 Ga. App. 189, 195 (2014); *see also McGarrah v. Posig*, 280 Ga. App. 808, 810-811 (2006).

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[8] GDOT's corporate representative testified nothing other than the Contract required Martin Robbins to repair the Subject Guardrail within 21 days. (MR Fact, ¶ 45.)

[9] This is not the first time a plaintiff has attempted to establish a non-existent duty through Mr. Hill. In the *Diamond* case, an injured motorist filed suit after his car plunged into a ditch near a roadside construction project. 326 Ga. App. at 190. The motorist presented Mr. Hill's testimony that defendant had a duty to take certain actions related to the roadway, including erecting warning signs and removing the striping on the roadway. *Id*. at 195. The lower court granted summary judgment to the defendant and the Georgia Court of Appeals affirmed. *Id*. at 189. The Court disregarded Mr. Hill's testimony writing the motorist's "efforts to establish a duty" through Mr. Hill failed because "duty arises either from statute or common law." *Id*. at 195. Because the motorist presented no evidence any statute or case law created a duty for defendant to erect warning signs or remove striping, summary judgment in defendant's favor was warranted.

Plaintiff has not identified any statutory or common law principle requiring Martin Robbins repair the Subject Guardrail within 21 days. Mr. Hill admitted he was "not aware" of any statute requiring repair within 21 days or any specific timeframe. (MR Fact, ¶ 39.) As Plaintiff cannot establish a statutory duty, she must show such duty existed under the common law. She cannot. Under Georgia common law, the duty owed by a contractor is to perform its work with the same degree of skill and care as others in the same profession in similar circumstances. *Mays v. Valley View Ranch, Inc.*, 317 Ga. App. 143, 148-149 (2012). In other words, Georgia common law requires a contractor perform in accordance with "industry standards." *Id*. A plaintiff bears the burden of establishing the existence of an industry standard as it is axiomatic that a contractor cannot follow an industry standard that does not exist. *Butler v. First Acceptance Ins. Co., Inc.*, 652 F. Supp. 2d 1264, 1273 (N.D. Ga. 2009) (interpreting Georgia law). Typically, expert testimony is required to establish an industry standard, though such testimony must be compromised of something beyond the expert's say-so. *Mays*, 317 Ga. App. at 148-9. Rather the expert must present credible evidence of the industry standard either by citing applicable codes, rules, or regulations, or by presenting evidence a practice is widely recognized and followed by practitioners in the relevant industry. *Id*.

In this matter, Mr. Hill admitted he was "not aware" of any code, law, rule, regulation, or industry standard governing the time to repair a damaged guardrail, much less one that required repair within 21 days. (MR Fact, ¶ 39.) This admission is fatal to Plaintiff's claim. *Doty Communications*, 417 F. Supp. 2d at 1358. But even if it were not, Plaintiff presented no evidence a 21-day repair window is a widely practiced or recognized standard in the guardrail contracting industry. Plaintiff did not identify any other guardrail contractor who repairs guardrails within 21 days as its standard practice. Indeed, GDOT's State Maintenance Engineer responsible for drafting

and administering guardrail contracts testified 21 days is not an industry standard for guardrail repair and acknowledged GDOT enters into contracts that have timeframes for repair other than 21 days. (MR Fact, ¶ 45-48.) Having failed to show even one other guardrail contractor adheres to the 21-day timeframe, Plaintiff cannot establish it as an "industry standard" under common law principles, and her claim under this theory must fail.

2. Plaintiff Was Not a Third-Party Beneficiary to the Contract

To the extent Plaintiff argues she is entitled to enforce the 21-day obligation as a third-party beneficiary to the Contract, such claim would also fail. Pursuant to O.C.G.A. § 9-2-20(b), a third-party beneficiary may sue to enforce a contract; however, the contract must show the parties intended the third-party to be the beneficiary of that contract. *See Hubbard v. Dept. of Trans.*, 256 Ga. App. 342, 352 (2002). The mere fact that a third-party would benefit incidentally from the performance of the contract is not alone sufficient to give such person standing to sue on the contract. *Id*.. Importantly, "where a contract is silent as to its intent to confer a benefit upon a plaintiff, the plaintiff may not recover as a third-party beneficiary to the contract." *Boller*, 311 Ga. App. at 698. Here, the Contract did not state an intent to benefit the motoring public. To the contrary, it stated the benefits of the Contract were to "flow from one [party] to the other." (MR Fact, ¶ 7.) It further stated the purpose of the Contract was to "an efficient, modern system of public roads and other modes of transportation." (MR Fact, ¶ 8.) While it is true the motoring public may have benefited from the Contract, this is not sufficient to establish Plaintiff as a third-party beneficiary of that agreement. Having failed to show she is a third-party beneficiary of the Contract, Plaintiff has no standing to pursue a claim based on the Contract's 21-day repair term.

B. Plaintiff Cannot Establish Martin Robbins Had a Duty to "Inspect and Maintain" the Subject Guardrail

Plaintiff's next negligence theory is Martin Robbins had a duty to "maintain and inspect" the Subject Guardrail. (Amended Complaint, ¶ 46.) Plaintiff seems to assert Martin Robbins had a duty to identify the Subject Guardrail as being damaged before Arcadis notified Martin Robbins on April 20, 2018.[10] Plaintiff again relies solely on Mr. Hill to establish the existence of this purported duty. Mr. Hill testified he "believe[d]" if a Martin Robbins employee noticed the Subject Guardrail was damaged then "that employee had an obligation to say something to there [sic] supervisors about that." (MR Fact, ¶ 40.) Mr. Hill testified the sole basis for this opinion was the Contract, though he could not point to any contractual term supporting his position at deposition. (MR Fact, ¶ 42-43.) In fact, the Contract did not require Martin Robbins to identify or report damaged guardrails. (MR Fact, ¶ 44.) But as explained in Section I(A) of this Brief, even if such contractual term existed, it would not create a legal duty that could serve as a basis for Plaintiff's negligence claim. As with her argument regarding the timing of the repair, Plaintiff has failed to identify any statute or case law showing Martin Robbins had a duty to identify or report damaged guardrails. The burden is on Plaintiff to establish the existence of a legal duty and having failed to meet that burden, her claim for negligence under this theory fails as a matter of law.

C. Plaintiff Cannot Establish Martin Robbins Had a Duty to "Warn Traffic" About the Alleged Danger of the Subject Guardrail

Finally, Plaintiff asserts Martin Robbins failed to "warn traffic of the danger" allegedly presented by the Subject Guardrail. (Amended Complaint, ¶ 46.) As with her other two negligence theories, this theory fails as there is no evidence Martin Robbins had a statutory or common law

[10] Plaintiff alleges the Subject Guardrail was damaged several months prior to April 20, 2018. (Amended Complaint, ¶ 25-29.)

duty to provide any warnings. Mr. Hill did not opine Martin Robbins had a duty to provide any warning, and Plaintiff has not cited any statute or case law showing such duty existed under Georgia law. As Plaintiff cannot establish Martin Robbins had a legal duty to "warn traffic," this negligence theory fails as a matter of law.[11]

III. MARTIN ROBBINS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S NUISANCE CLAIM

Plaintiff alleges a nuisance claim asserting Martin Robbins "maintained and/or failed to abate a continuous hazardous condition that caused an injury, such that the [S]ubject [G]uardrail was a nuisance under Georgia law." (Amended Complaint, ¶ 46(h).) Plaintiff's Complaint does not specify whether she asserts a claim for public nuisance or private nuisance; however, Martin Robbins is entitled to summary judgment under either theory. As an initial matter, a defendant must have "a legal duty to terminate the cause of the injuries" sustained by plaintiff to be liable under nuisance. *Briggs & Stratton Corp. v. Concrete Sales & Services, Inc*., 971 F. Supp. 566, 573 (M.D. Ga. 1997) (interpreting Georgia law). As explained in Section I(A), Martin Robbins had no legal duty to repair the Subject Guardrail.

Additionally, under Georgia law, "a one-time occurrence does not amount to a nuisance." *Barnes v. St. Stephen's Missionary Baptist Church*, 260 Ga. App. 765, 769 (2003). A single isolated occurrence or act is not a nuisance until it is "regularly repeated." *Id*. As explained by the Court of Appeals, "the whole idea of nuisance is that of either a continuous or regularly repetitious act or condition which causes the hurt, inconvenience, or injury." *Id*. Here, Plaintiff has failed to present any evidence other than her own accident that the damaged Subject Guardrail allowed cars

[11] Even if Plaintiff had established a duty to warn traffic existed, Plaintiff presented no evidence showing a lack of warning caused her injuries.

to go over it, as occurred with her injury. The evidence shows such occurrence was a one-time event and therefore the damaged Subject Guardrail cannot constitute a nuisance.

For these reasons, as well as those stated below, Plaintiff's claim nuisance claim fails.

A. <u>The Subject Guardrail Was Not a "Private Nuisance"</u>

While Georgia courts have recognized the term 'nuisance' is "incapable of any exact or comprehensive definition," they also recognize nuisance law is "grounded in the fundamental premise that everyone has the right to use his or her property as he or she sees fit, provided that in so doing the owner or occupier does not unreasonably invade the corresponding right of others to use their own property as they see fit." *Landings Ass'n, Inc. v. Williams*, 309 Ga. App. 321, 329 (2011) (reversed on other grounds). In other words, an action for private nuisance must arise from an invasion of plaintiff's use or enjoyment of her own land. *See Cox v. De Jarnette*, 104 Ga. App. 664, 675 (1961). Here, Plaintiff does not allege Martin Robbins' conduct interfered with her use or enjoyment of Plaintiff's land, and therefore, she cannot maintain a claim for private nuisance.

B. <u>The Subject Guardrail Was Not a "Public Nuisance"</u>

A "public nuisance" claim applies only where a condition "injures all members of the public who come into contact with it." *Davis v. City of Forsyth*, 275 Ga. App. 747, 750 (2005); *see also* O.C.G.A. § 41-1-2. The burden is on the plaintiff to establish other members of the public who came into contact with the purportedly hazardous condition suffered injury. *Howard v. Gourmet Concepts Intern., Inc.*, 242 Ga. App. 521, 523 (2000). Plaintiff in this case cannot meet this burden as she presented no evidence any other member of the public was injured by the damaged Subject Guardrail. Indeed, the evidence shows the opposite. Plaintiff alleges she was injured after the damaged Subject Guardrail failed to redirect [redacted] vehicle back into the roadway and instead allowed it to go over the Subject Guardrail striking the camera pole behind

it. (Amended Complaint, ¶ 37-40.) But evidence shows at least one other vehicle came into contact with the damaged Subject Guardrail prior to the Incident, however, that vehicle was redirected into the roadway and did not go over the Subject Guardrail or strike the pole. (MR Fact, ¶ 49.) Having failed to show other members of the public who came into contact with the damaged Subject Guardrail were injured, Plaintiff cannot establish the Subject Guardrail was a public nuisance.

IV. MARTIN ROBBINS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES

Plaintiff seeks recovery of punitive damages, alleging Martin Robbins "consciously ignored the known, obvious risk of a damaged and ineffective guardrail, and thereby wantonly, willfully, and recklessly endangered travelers including [Plaintiff]." (Amended Complaint, ¶ 48.) As shown above, Martin Robbins is entitled to summary judgment on Plaintiff's underlying negligence and nuisance claims. Should the Court grant summary judgment on those claims, Plaintiff's punitive damages claim would also fail. *Nash v. Studdard*, 294 Ga. App. 845, 851 (2008) (plaintiff may only recover punitive damages in tort actions where there is a valid underlying claim). But even if Plaintiff is allowed to proceed on her underlying claims, Martin Robbins is still entitled to summary judgment as to punitive damages.

Under Georgia law, "[p]unitive damages may be awarded **only** in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences." O.C.G.A. § 51-12-5.1(b) (emphasis added). "Neither negligence nor gross negligence alone can support a punitive damages claim." *Wardlaw v. Ivey*, 297 Ga. App. 240, 242 (2009). Instead, there must be circumstances of aggravation or outrage, such as spite, malice, or evil motive on the part of the defendant. *Brooks v. Gray*, 262 Ga. App. 232, 232-233 (2003). Indeed, the defendant's conduct must be so reckless

or so charged with indifference to the consequences that it is the equivalent in spirit to actual intent. *Wardlaw*, 297 Ga. App. at 242.

Here, Plaintiff has failed to present evidence Martin Robbins engaged in the type of conduct needed to support a claim for punitive damages. The facts show Martin Robbins was unable to repair the Subject Guardrail within 21 days because GDOT had overwhelmed it with an unexpected and unreasonable spike in repair requests in the preceding weeks. (MR Fact, ¶ 32.) Martin Robbins diligently attempted to meet GDOT's demands, including attempting to locate a qualified subcontractor, pulling crews from other projects, and having its superintendents and project manager work overtime every week. (MR Fact, ¶ 27-28.) Despite these efforts, Martin Robbins was unable to repair the Subject Guardrail within the Contract's timeframe. As Martin Robbins' corporate representative testified, "[W]e made our best effort to try and keep up with the pace. We just weren't able to." (MR Fact, ¶ 32.) There is no evidence Martin Robbins acted willfully or maliciously, and thus, is entitled to summary judgment on Plaintiff's punitive damages claim.

V. MARTIN ROBBINS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES AND COSTS UNDER O.C.G.A. § 13-6-11

Plaintiff seeks attorney's fees and costs under O.C.G.A. § 13-6-11 asserting generically that Martin Robbins "acted in bad faith, been stubbornly litigious, or caused Plaintiff unnecessary trouble and expense." (Amended Complaint, ¶ 47.) As shown above, Martin Robbins is entitled to summary judgment on Plaintiff's underlying negligence and nuisance claims. Should the Court grant summary judgment on those claims, Plaintiff's claim for attorney's fees would also fail. *Rigby v. Flue-Cured Tobacco Cooperative Stabilization Corp.*, 339 Ga. App. 558, 563 (2016) (a "prerequisite to any award of attorney fees under O.C.G.A. § 13-6-11 is the award of damages or

other relief on the underlying claim.") But even if Plaintiff is allowed to proceed on her underlying claims, Martin Robbins is still entitled to summary judgment on attorney's fees as Plaintiff cannot show Martin Robbins has acted in bad faith, been stubbornly litigious, or caused the plaintiff unnecessary trouble and expense" as required to recover under O.C.G.A. § 13-6-11.

A. There is No Evidence Martin Robbins Acted in "Bad Faith"

In the context of O.C.G.A. § 13-6-11, "bad faith" requires more than bad judgment or negligence related to the transaction and dealings out of which the cause of action rose. *Wilson v. Redmond Construction, Inc.*, 359 Ga. App. 814, 860 S.E.2d 118, 122-123 (2021). The law requires a "sinister motive," a "dishonest purpose," or "moral obliquity." *Id*. Plaintiff much show a "conscious doing of wrong" by Martin Robbins motivated by "ill will." There is no such evidence in the record. Martin Robbins worked diligently to meet GDOT's unexpected and unreasonable spike in repair requests. (MR Fact, ¶ 27-29.) Despite its efforts, Martin Robbins was unable to keep pace with GDOT's demands, including repair of the Subject Guardrail within 21 days. (MR Fact, ¶ 32.) Nothing in the record suggests Martin Robbins' failure to repair the Subject Guardrail within 21 days was the result of ill will that would support an award of attorneys' fees.

B. There is No Evidence Martin Robbins Has Been "Stubbornly Litigious" or Caused Plaintiff Unnecessary Trouble and Expense

Georgia law is clear that if a bona fide controversy exists in a case, then there can be no stubborn litigiousness as a matter of law. "Where there is a bona fide controversy for the tribunals to settle, and the parties can not adjust it amicably, there should be no burdening of one with the counsel fees of the other, unless there has been wanton or excessive indulgence in litigation." *Horton v. Dennis*, 325 Ga. App. 212, 216-217 (2013) (affirming trial court's decision that a bona fide controversy existed as a matter of law). In other words, there can be no stubborn litigiousness "if the evidence shows that a genuine dispute exists—whether of law or fact, on liability or amount

of damages, or on any comparable issue." *Hart v. Walmart Stores East, L.P.*, 2017 WL 6733970 at *3 (M.D. Ga. 2017) (interpreting Georgia law).

In this action, bona fide controversies exist as to liability, damages, and apportionment. As to liability, Plaintiff and Martin Robbins disagree as to whether Martin Robbins owed any legal duty to Plaintiff to repair the Subject Guardrail within 21 days, identify and report the Subject Guardrail as damaged, or "warn traffic" about the damaged Subject Guardrail. (*See* Section I(A), *supra*.) Regarding damages, Martin Robbins disputes both Plaintiff's entitlement to and calculation of her damages. By way of example, Martin Robbins contemporaneously files a Motion to Exclude the testimony of Plaintiff's damages expert witness who testified regarding the purported economic damages in this matter. As to apportionment, there are three defendants in this case who will undoubtedly each have their own position regarding the percentage of fault to be assigned the others. In addition, Martin Robbins has filed a Notice of Non-Party Fault and Request for Apportionment identifying Agnuma Beyene Leta and [redacted] as non-parties potentially at fault in this matter.[12] These facts show bond fide controversies exist in this matter, prohibiting a finding of stubborn litigiousness.

CONCLUSION

Based on the foregoing facts and law, Martin Robbins requests this Court grant its Motion for Summary Judgment as to Plaintiff's claims against it for (i) negligence; (ii) nuisance, (iii) punitive damages, and (iv) attorney's fees and expenses.

[12] Martin Robbins filed its Notice of Non-Party Fault and Request for Apportionment on October 6, 2021.

This 24th day of November 2021.

HUDSON LAMBERT PARROTT WALKER, LLC

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **DEFENDANT MARTIN-ROBBINS FENCE COMPANY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS** via File & Serve Xpress which will automatically serve the following counsel of record:

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