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; ARCADIS U.S., INC.; GEORGIA DEPARTMENT OF TRANSPORTATION; and JOHN DOES 1-10, *Defendants.*	Civil Action No.: [redacted]

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT ARCADIS U.S., INC.'S MOTION FOR SUMMARY JUDGMENT

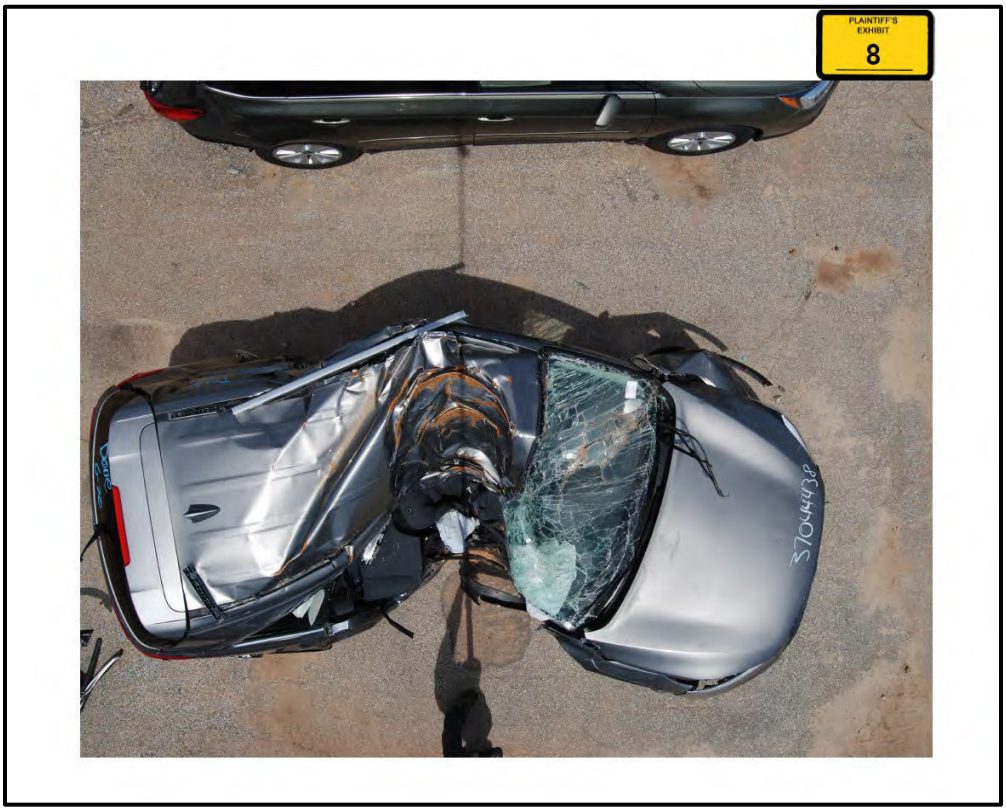
1. Introduction

This is a wrongful death case. The case arises from the failure of Martin Robbins Fence Company ("Martin Robbins"), Arcadis U.S., Inc. ("Arcadis"), and the Georgia Department of Transportation ("GDOT") (collectively, "Defendants") to fulfill their contractual, statutory, and common law duties to timely identify and repair damaged guardrail. As to Arcadis, the crux of the case is this: Arcadis was legally and contractually required to locate and report nonfunctional guardrail to Martin Robbins and GDOT in a timely manner so that the guardrail could be repaired. Arcadis failed to do that.

Instead of timely identifying and repairing damaged guardrail, Arcadis and the other Defendants left a section of guardrail on I-85 in "nonfunctional" condition for at least ten months. When Arcadis finally notified Martin Robbins on April 20, 2018 that the guardrail was

nonfunctional, Martin Robbins failed to repair the guardrail within 21 days. When a vehicle struck that nonfunctional guardrail 45 days later on June 3, 2018, the guardrail still had not been repaired, and as a result it could not keep the vehicle in the roadway. Because the guardrail was already damaged, the vehicle ramped over the guardrail and struck a camera pole. The impact killed [redacted] and catastrophically injured [redacted]. It is undisputed that if the guardrail had been properly maintained, the vehicle would not have struck the camera pole.[1]

An overhead photograph of the vehicle taken after the wreck shows the damage caused by the pole:



Plaintiff's Trial Ex. 8. As the photograph shows, the area in which [redacted] was seated was destroyed in the wreck.

[1] Earnhart 07/01/21 Dep., 21:20-25 ("Q. If the guardrail that the Sorento truck had been in good repair, would the Sorento have struck the camera pole? A. No.") (Ex. A); *see also* Kent Dep., 11:18-24 (Ex. B).

A photograph of the subject guardrail taken only one month before the subject wreck shows the poor condition of the guardrail.

Plaintiff's Trial Ex. 1. Inspector Calvin Thrasher, an employee of Arcadis, *admitted* that the subject guardrail was dangerous in its damaged condition:

3	Q	Sir, does the guardrail in Plaintiff's
4	Exhibit 1 look dangerous to you?	
5	**A**	**Yeah.**
6	Q	Yeah, it does, doesn't it?
7	**A**	**Yeah.**

[2]

[2] Thrasher Dep., 43:3-7 (Ex. C).

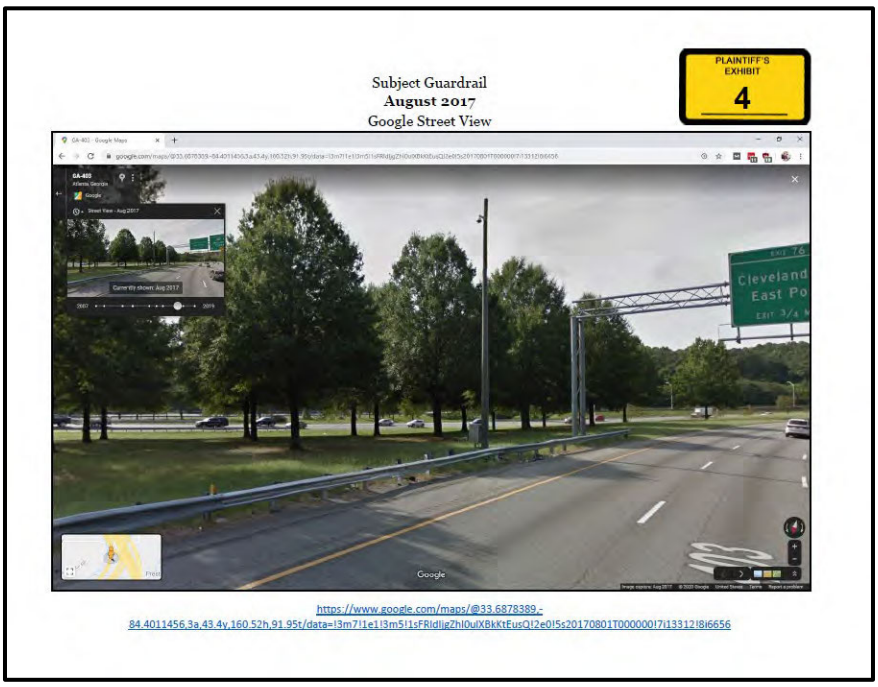
Arcadis' motion for summary judgment should be denied for four reasons. First, Arcadis negligently performed a voluntary undertaking under the Restatement of Torts. Second, Arcadis breached its common law duty to Plaintiff by failing to meet the industry standard for identifying and reporting nonfunctional guardrail in Georgia. Third, Arcadis breached its duty to [redacted] as a third-party beneficiary to its contract with GDOT. Fourth, Arcadis maintained a continuing nuisance. Because Plaintiff has adduced evidence in support of each of these four claims, Arcadis' motion must be denied.

2. Facts

2.1. The subject guardrail was nonfunctional for at least ten months.

Defendants should have identified and repaired the subject guardrail long before the subject wreck. The subject wreck happened on June 3, 2018.[3] The undisputed evidence shows that the subject guardrail had been nonfunctional since at least August 2017 – *ten months* before [redacted] died.[4] Witnesses for each party, *including Arcadis*, have testified that the subject guardrail was non-functional in August 2017, September 2017, and January 2018 based on the images from Google Street View[5] shown below. (These three months are the only months for which Google provides Street View images in the relevant period.)

[3] *See* Police Report (Ex. D).
[4] Martin-Robbins Resp. to Pl's 4th Req. for Admissions, No. 2 (Ex. E).
[5] These images from Google Maps Street View are admissible for two reasons. First, they have been authenticated by witnesses. *See Clark v. City of Atlanta*, 322 Ga. App. 151, 153-54 (2013) (finding Google Map image authenticated by a witness to be admissible). Second, the Court can take judicial notice of a Google Maps image. *See Todd v. Carstarphen*, 2017 WL 655756, at *4 n. 14 (N.D. Ga. Feb. 17, 2017) (taking judicial notice of Google images); *see also Olem Shoe Corp. v. Washington Shoe Corp.*, 591 F. App'x 873, 884 n. 14 (11th Cir. 2015) (relying on screen shot of Google Maps showing store location); *United States v. Proch*, 637 F.3d 1262, 1266 (11th Cir. 2011) (taking judicial notice of a map); *Permenter v. Fedex Freight, Inc.,* No. 7:14-CV-104 (HL), 2016 WL 878496, at *2 (M.D. Ga. Mar. 7, 2016) (relying on *United States v. Proch* to take



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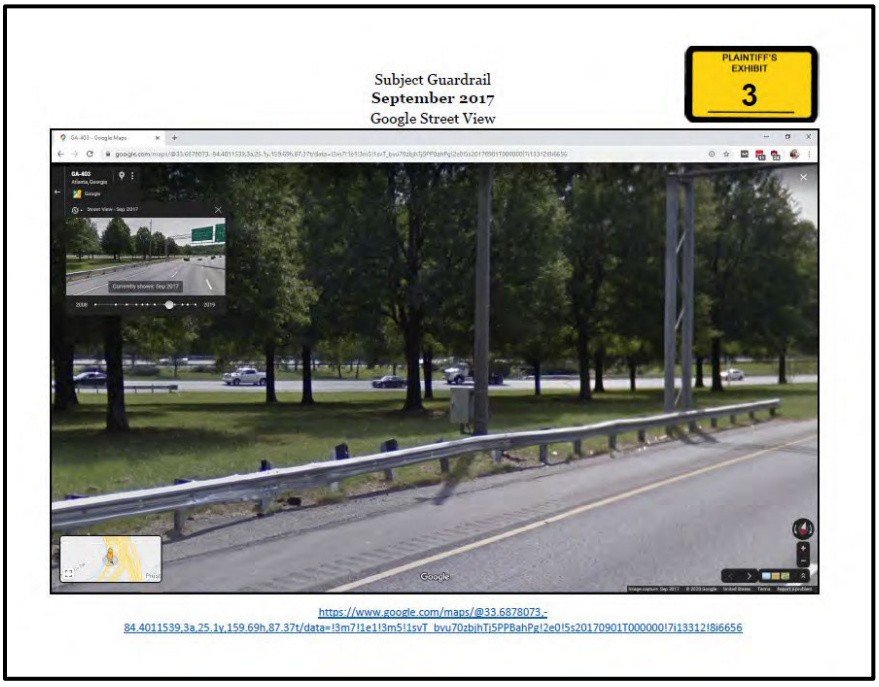

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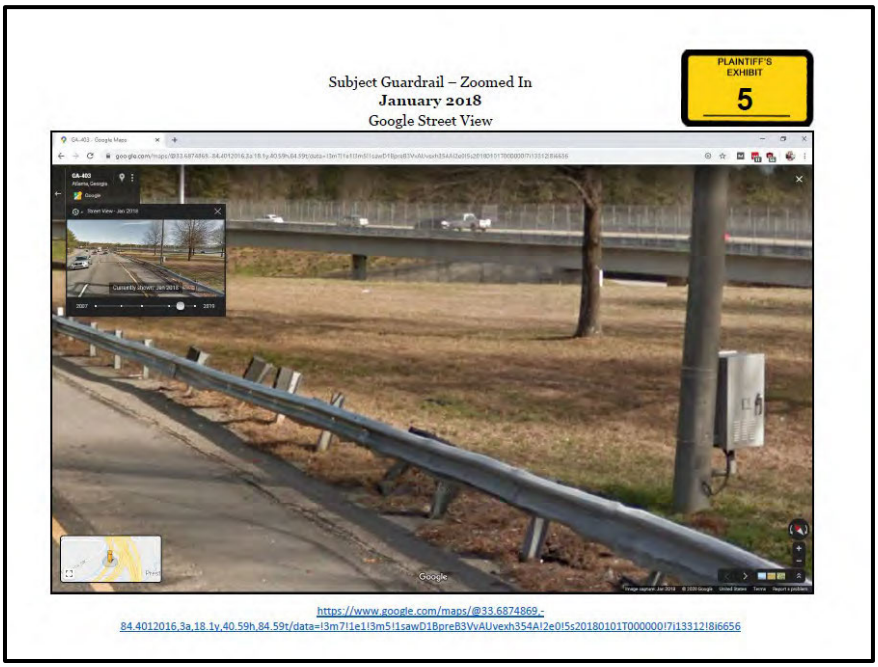
judicial notice of Google Maps as a source whose accuracy cannot be reasonably questioned); *accord* Matt Kahn, Proving Constructive Knowledge with Google Maps, The Verdict Magazine, Georgia Trial Lawyers Association (Winter 2019) (Ex. F).

[6] Martin Dep., 29:15-24 (Ex. G).

[7] Martin Robbins 30(b)(6) Dep., 196:20-197:20 (Ex. H); Anderson 30(b)(6) Dep., 23:2-25 (Ex. I); Martin Dep., 29:6-14; Kent Dep., 24:6-24; Thrasher Dep., 34:17-35:4; Hendon 30(b)(6) Dep., 61:16-62:6 (Ex. J).



[8]

When shown the Google Maps image marked Plaintiff's Exhibit 5, Arcadis' corporate representative testified that he *would have expected* an inspector to report a guardrail as damaged if it were in the pictured condition.[9] When shown the Google Maps image marked Plaintiff's Exhibit 3, Arcadis Inspector Calvin Thrasher testified that had he seen the guardrail shown in the photo, he would have reported it as damaged.[10] However, the record shows that neither Mr. Thrasher nor any other Arcadis inspector reported the subject guardrail as damaged in the ten months before the wreck despite driving past it numerous times.[11]

[8] Martin Robbins 30(b)(6) Dep., 198:14-199:4; Anderson 30(b)(6) Dep., 24:22-25:13; Martin Dep., 33:20-34:6; Kent Dep., 25:13-26:2; Thrasher Dep., 39:12-40:5; Hendon 30(b)(6) Dep., 60:18-61:14.
[9] Hendon 30(b)(6) Dep., 71:10-72:22.
[10] Thrasher Dep., 37:18-38:5.
[11] Pl.'s Trial Ex. 203 (showing that Thrasher drove by the subject guardrail on March 14, 2018) (Ex. K); Pl.'s Trial Ex. 204 (showing a time-stamped photograph down the highway from the subject guardrail on March 27, 2018) (Ex. L); Pl.'s Trial Ex. 205 (showing that Thrasher drove past the subject guardrail on March 29, 2018) (Ex. M); Pl.'s Trial Ex. 206 (email asking Thrasher to inspect damaged guardrail on I-85 South down the road from the subject guardrail) (Ex. N).

On April 18, 2018, a GDOT employee took and emailed a photograph of the subject guardrail to Arcadis. By that date, the subject guardrail was nearly flattened in places, as shown in GDOT's photograph below.

[12]

Two days *after* GDOT took the above photograph and sent it to Arcadis, and after the guardrail had been nonfunctional for at least ten months, Arcadis finally acted. On April 20, 2018, based on GDOT's photograph, Arcadis finally gave Martin Robbins notice that the subject guardrail was nonfunctional and that it needed to be repaired.[13] Martin Robbins did not repair the subject guardrail until June 4, 2018, which was 45 days later.[14] The subject collision had occurred the day before Martin Robbins's repair – on June 3, 2018.

[12] Plaintiff's Trial Ex. 221 (Ex. O).
[13] Martin Dep., 34:18-22, 37:9-11; Flanders 30(b)(6) Dep., 42:4-7 (Ex. P).
[14] Martin Robbins 30(b)(6) Dep., 204:15-17.

2.2. The non-functional guardrail didn't do its job.

Guardrail is "first and foremost a safety barrier intended to shield a motorist who has left the roadway."[15] When functional, guardrail, "can make roads safer and lessen the severity of crashes."[16] According to one defense expert, "guardrail is there to protect a car that leaves the roadway, to try to protect it from a hazard behind the guardrail."[17] The guardrail in this case was "nonfunctional" and, therefore, unable to protect [redacted] from the hazard behind it.

On June 3, 2018, [redacted] was the passenger of a Kia Sorrento traveling on I-85 South.[18] After a collision with another vehicle, the Sorrento lost control and entered a counter-clockwise yaw.[19] The Sorrento slid, remaining on all four wheels, and struck a portion of the nonfunctional guardrail.[20] Because the guardrail was nonfunctional, it failed to keep the car in the roadway.[21] Instead, the guardrail tripped the Sorrento, causing the Sorrento to ramp *over* the guardrail toward the camera pole that stood close behind the guardrail.[22]

The wreck sequence can be seen below in screen shots from Plaintiff's reconstruction animation. The accuracy of this reconstruction animation has been confirmed by Plaintiff's reconstruction expert and GDOT's reconstruction expert.[23] Neither Arcadis nor Martin Robbins

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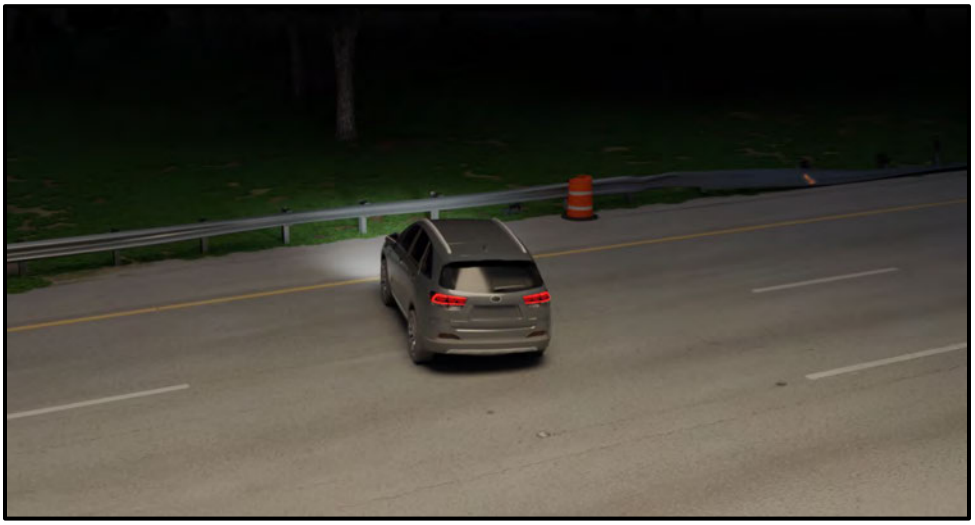
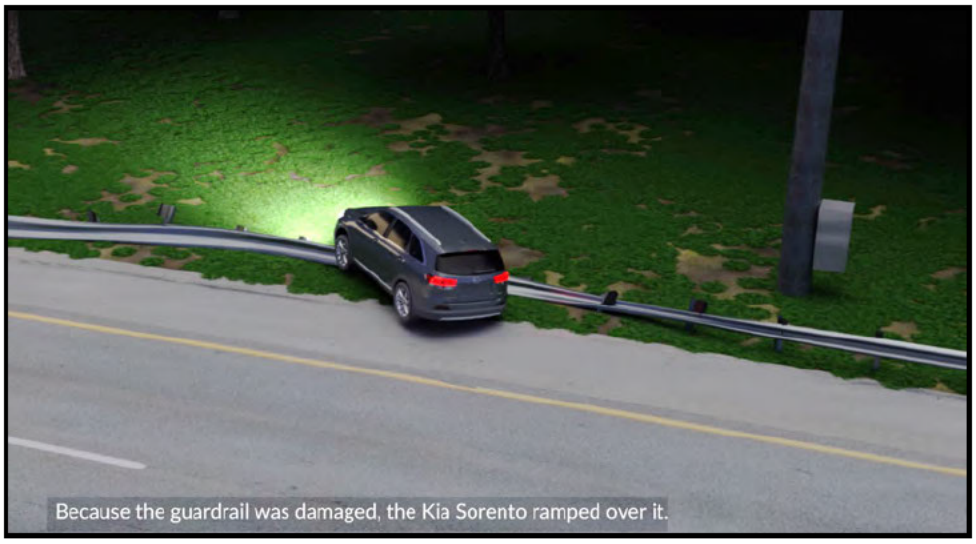
[15] Doyle Dep., 52:3-9 (Ex. Q).
[16] Doyle Dep., 52:19-15.
[17] Doyle Dep., 52:16-20.
[18] Police Report.
[19] Earnhart 07/21/21 Dep., 53:23-55:1, 66:14-67:3, 73:1-74:2, 75:24-76:9.
[20] Earnhart 07/01/21 Dep., 22:7-9; Earnhart 07/21/21 Dep., 108:5-16 (Ex. R); Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 2 (Ex. S); Kent Dep., 10:7-16.
[21] Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.
[22] Earnhart 07/01/21 Dep., 21:13-18; Earnhart 07/21/21 Dep., 128:18-129:1; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.
[23] Earnhart 07/01/21 Dep., 20:7-21:2 (authenticating reconstruction animation); Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 1; Earnhart 07/21/21 Dep., 90:10-91:4 (explaining involvement in creating animation); *see also* Kent Dep., 12:24-14:11 (testifying to accuracy of the animation).

have presented any expert reconstruction testimony to challenge the animation. A link to the full animation is available for the Court in this footnote.[24]



[24] https://www.dropbox.com/s/ke2sur3eihb7fhw/Hendon%20Px%20100%20-%20Reconstruction%20Animation.mp4?dl=0.


Because the guardrail was damaged, the Kia Sorento ramped over it.


POI #2
The vehicle slammed into a camera pole.

Decedent [redacted] was a front-seat passenger in the Kia Sorrento. Her side of the car slammed into the camera pole.[25] The car bent around the pole.[26] The pole ripped through the occupant area.[27] [redacted] seating area was demolished.[28] She was killed.[29]

[25] Earnhart 07/01/21 Dep., 21:13-18; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:21-24.
[26] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3.
[27] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3.
[28] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3; Plaintiff's Trial Ex. 8 (Ex. T).
[29] *See* Sullivan Declaration ¶ 10 (Ex. U); *see also* Fulton County Medical Examiner's Report (Ex. V) (identifying the cause of death as "[g]eneralized blunt force injuries" after striking "a fixed object.")

The Fulton County Medical Examiner has opined that "[redacted] died due to generalized blunt force injuries as evidenced by injuries of her brain, lungs, liver, and spleen, and multiple skeletal fractures. Specifically, the cause of death was blunt force trauma when the Kia Sorrento hit the fixed utility pole off the shoulder of the highway."[30]

2.3. Arcadis was responsible for identifying and reporting the subject guardrail.

Arcadis was legally and contractually required to identify and report nonfunctional guardrail in a timely manner.[31] Because Arcadis contracted with GDOT and undertook to perform GDOT's statutory duties to the traveling public, Arcadis was legally responsible for fulfilling those duties. Georgia's statutory scheme makes GDOT responsible for maintaining the state highway system, including the guardrail at issue.[32] *See* O.C.G.A. § 32-2-2. GDOT's responsibilities are based on its obligation to "provide a safe highway system" for the traveling public.[33] "GDOT has the authority to hire third-party contractors to fulfill [its] duties" to the traveling public.[34] To that end, GDOT hired Defendants Arcadis and Martin Robbins to help fulfill its maintenance duties.[35] Both private Defendants breached those duties.

Arcadis was responsible for identifying damaged guardrail and telling GDOT and Martin Robbins about it.[36] To fulfill its duty, Arcadis hired inspectors to drive along the state highway

[30] Sullivan Declaration ¶ 10.
[31] Hendon 30(b)(6) Dep., 19:22-20:10.
[32] Flanders 30(b)(6) Dep., 18:1-10, 19:9-18; Hill Dep., 70:18-71:7 (Ex. W).
[33] Flanders 30(b)(6) Dep., 18:21-19:7.
[34] Flanders 30(b)(6) Dep., 18:11-17.
[35] Martin Dep., 13-18; Young 30(b)(6) Dep., 78:4-19; Wilson Dep., 129:14-18, 137:6-139:15 (Ex. X); Plaintiff's Trial Ex. 230 (Arcadis' contract with GDOT) (Ex. Y); Plaintiff's Trial Ex. 231 (Arcadis Task Order # 2) (Ex. Z); Hendon 30(b)(6) Dep., 19:9-20:10, 22:15-17.
[36] Hendon 30(b)(6) Dep., 19:9-20:10, 22:15-17, 84:8-20; Anderson 30(b)(6) Dep., 21:2-6; Young 30(b)(6) Dep., 78:4-19 (Ex. AA); Wilson Dep., 129:14-18.

system looking for damaged guardrail.[37] The inspectors were "not expected to know the technical specifications of the repair process."[38] The inspectors were only supposed to find and report damaged guardrail.[39] *Each day*, Arcadis was supposed to send photographs and GPS coordinates of damaged guardrail it had found to GDOT and Martin Robbins.[40] That is, Arcadis had a duty to identify damaged guardrail on a *daily* basis.[41] That duty was made clear in a meeting that took place on March 13, 2018 between Arcadis and GDOT, as memorialized in the meeting minutes shown below.

Discussion:

How will the information flow from initial findings to the contractor and through the invoicing process?

Conclusions:

Reports will be sent by Arcadis inspectors and GDOT staff to D7Guardrail@dot.ga.gov. Linda and Jordan will compile a spreadsheet of damaged locations and email to Kelvin daily. Kelvin will email the spreadsheet to Martin Robins (contractor) on the same day and CC Linda and Jordan. Once the repairs are complete, the contractor will email Kelvin with pictures and GPS coordinates. The repairs will be verified primarily by Geno Crawford (Arcadis inspector). Other inspectors may verify repairs as needed. Invoices will be verified by Linda and Jordan.

[42]

2.4. Arcadis didn't do its job.

Arcadis failed to timely identify and report guardrail to GDOT and Martin Robbins. Instead, Arcadis drove past the subject guardrail on numerous occasions for *months* without telling anyone that it was damaged and in need of repair. If Arcadis had done its job and timely

[37] Moore 30(b)(6) Dep., 49:6-50:8 (Ex. BB); Anderson 30(b)(6) Dep., 15:20-16:2; Hendon 30(b)(6) Dep., 19:9-20:10.
[38] Wilson Dep., 127:24-128:7; Plaintiff's Trial Ex. 200 (meeting minutes from 03/13/18) (Ex. CC); Anderson 30(b)(6) Dep., 14:11-18 ("It does not require a professional engineer to identify damaged guardrail.").
[39] Anderson 30(b)(6) Dep., 15:20-16:2, 21:2-6; Hendon 30(b)(6) Dep., 19:9-20:10, 27:24-28:9.
[40] Wilson Dep., 124:14-125:4; Hendon 30(b)(6) Dep., 69:2-8; *see also* Plaintiff's Trial Ex. 200.
[41] *Id.*
[42] Pl.'s Trial Ex. 200.

reported the guardrail, the evidence shows that Martin Robbins would have been able to complete the repairs before the wreck. Specifically, Martin Robbins was notified about the subject guardrail by Arcadis on April 20, 2018, and Martin Robbins repaired the subject guardrail 45 days later, on June 4, 2018.[43] Therefore, if Arcadis had told GDOT and Martin Robbin about the subject guardrail 45 days or more *before* the wreck – i.e., on or before April 19, 2018 – then the guardrail would have been repaired before the Sorrento struck it, and [redacted] would be alive today.

The subject guardrail had been damaged since at least August of 2017, as shown by the Google image that has been marked as Plaintiff's Exhibit 4 (and was shown above). If Arcadis had notified Martin Robbins that the guardrail was nonfunctional anytime in August 2017, September 2017, October 2017, November 2017, December 2017, January 2018, February 2018, *or* March 2018, then the subject guardrail would have been fixed before the Kia Sorrento struck it. Even if Arcadis had done nothing until GDOT notified Arcadis of the damage to the guardrail on April 18, 2018, Arcadis *still* could have kept [redacted] and [redacted] safe if it had reported the damage to Martin Robbins on the same day (April 18) *or* the next day (April 19). Unfortunately, Arcadis did none of that. Consequently, when the Sorrento struck the guardrail, the guardrail could not keep the Kia Sorrento in the roadway.

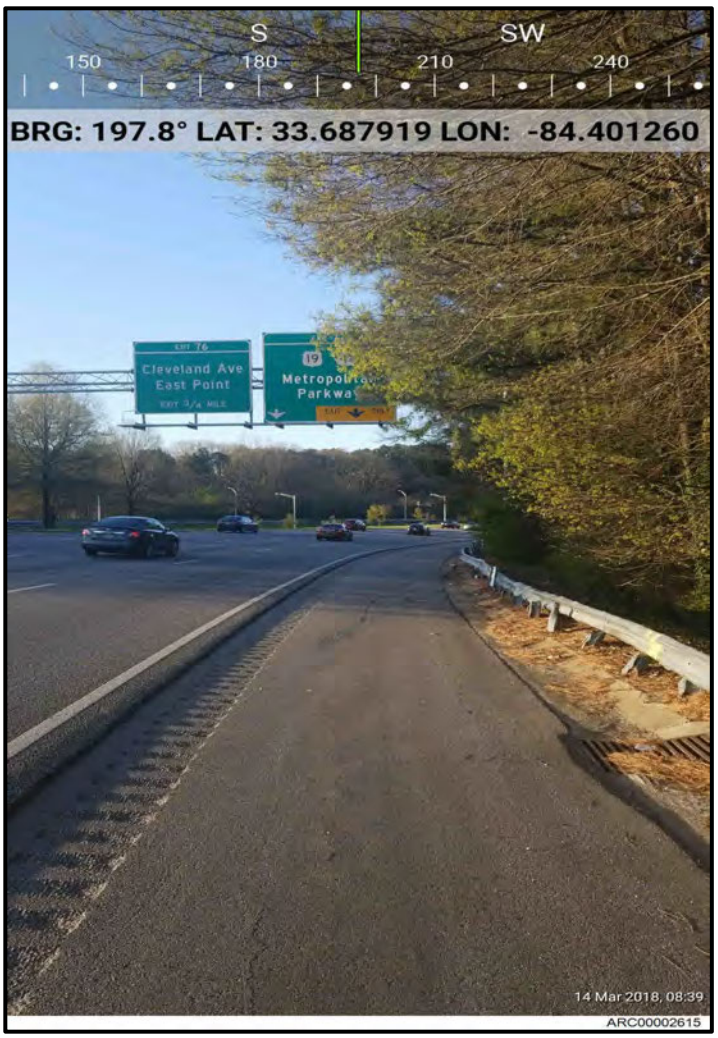
Arcadis Inspector Calvin Thrasher had many opportunities to notify Martin Robbins and GDOT about the damage to the subject guardrail, but he failed to do so. Mr. Thrasher was the Arcadis employee assigned to ride up and down I-85 to look for damaged guardrail.[44] When Mr. Thrasher saw damaged guardrail, he was supposed to pull over to the shoulder and photograph

[43]Martin Dep., 34:18-22, 37:9-11; Flanders 30(b)(6) Dep., 42:4-7; Martin Robbins 30(b)(6) Dep., 204:15-17.
[44] Hendon 30(b)(6) Dep., 18:8-18.

it.[45] The documentary evidence shows that Mr. Thrasher drove past the subject guardrail numerous times in the two months before the damage was eventually reported *by GDOT* (not by Arcadis) on April 18, 2018.[46] For example, the evidence shows Calvin Thrasher performed inspections for damaged guardrail along I-85 in which he drove past the subject guardrail on March 14, March 27, March 29, and April 2.[47] If he had reported the subject guardrail as damaged on any of those days, Martin Robbins' would have been able to repair it within 45 days and the guardrail when have been in good condition when the Kia Sorrento struck it.

March 14 is especially significant. On March 14, 2018, Mr. Thrasher pulled over on the right shoulder of I-85 *directly across the road from the damaged guardrail* and took the photograph shown below.

[45] Thrasher Dep., 72:19-23.
[46] Pl.'s Trial Ex. 203 (showing that Thrasher drove by the subject guardrail on March 14, 2018); Pl.'s Trial Ex. 204 (showing a time-stamped photograph down the highway from the subject guardrail on March 27, 2018); Pl.'s Trial Ex. 205 (showing that Thrasher drove past the subject guardrail on March 29, 2018); Pl.'s Trial Ex. 206 (email asking Thrasher to inspect damaged guardrail on I-85 South down the road from the subject guardrail).
[47] *Id.*



From where Thrasher stood on March 14 when he took the photograph above, it was nearly impossible *not* to see the subject guardrail, which was directly across the street. For reference, in the photograph from Google Street View below (which was taken in October 2018, after this collision and after the guardrail had been fixed), the yellow arrow identifies the location from which Arcadis took the March 14 photograph shown above, and the red arrow identifies the subject guardrail. As the photograph below demonstrates, when Arcadis took the photograph above on March 14, Arcadis could not have failed to notice the nonfunctional condition of the subject guardrail directly across the street. Arcadis should have reported that damage to Martin Robbins and GDOT. Arcadis did not.

Instead of reporting the subject guardrail on March 14 – or any of the other times Arcadis employees drove past it – Arcadis did nothing.

Defendants collectively did too little, too late.

3. Legal Standard

"When ruling on a motion for summary judgment, the trial court should give the party opposing the motion the benefit of all reasonable doubt, construing the evidence most favorably toward the opposing party." *Bulloch S., Inc. v. Gosai*, 250 Ga. App. 170, 170 (2001). In evaluating a motion for summary judgment, a trial court "may not weigh conflicting evidence or determine the credibility of witnesses." *Ferros v. Georgia State Patrol*, 211 Ga. App. 50, 51 (1993) (citations omitted). Summary judgment for a defendant is only proper when, after viewing the evidence *in favor of the plaintiff*, no genuine issues of material fact exist. *Gosai*, 250 Ga. App. at 170. Here, the evidence supporting Plaintiff's claims is overwhelming.

4. Argument

Arcadis' motion for summary judgment should be denied for four reasons. First, Arcadis negligently performed a voluntary undertaking under the Restatement of Torts. Second, Arcadis breached its common law duty to Plaintiff by failing to meet the industry standard for repairing nonfunctional guardrail. Third, Arcadis breached its contractual duty to [redacted] as a third-party beneficiary to the contract with GDOT. Fourth, Arcadis maintained a continuing nuisance. Because the evidence supporting Arcadis' liability is not only sufficient but overwhelming, Arcadis' motion must be denied.

4.1. Arcadis negligently performed a voluntary undertaking.

Arcadis is liable because the evidence shows it failed to use reasonable care to perform its voluntary undertaking of timely identifying and reporting damaged guardrail for the protection of the traveling public. A contractor who undertakes to render services may be held liable for injury to third persons who are injured by the contractor's negligent performance of its duty. *See Huggins v. Aetna Cas. & Sur. Co.*, 245 Ga. 248, 248 (1980). Georgia has long adopted the doctrine of "negligent undertaking" under Section 324A of the Restatement (Second) of Torts. *Id.* Under Section 324A of the Restatement of Torts,

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Huggins, 245 Ga. at 248; *see also Urban Services Group, Inc. v. Royal Group, Inc.*, 295 Ga. App. 350, 351-352 (2008); *Allstate Ins. Co. v. Sutton*, 290 Ga. App. 154, 158 (2008); *Blossman Gas Co. v. Williams*, 189 Ga. App. 195, 197-198 (1988). Under Section 324A, omissions, as well as affirmative acts, can give rise to liability of third parties. *Urban Services*, 295 Ga. App. at

352. "'[A]ny undertaking to render services to another,' including a 'failure to exercise reasonable care to complete it . . .' can give rise to liability." *Id.* (citations omitted).

Arcadis is liable for negligently performing a duty owed by GDOT and undertaken by Arcadis pursuant to subsection (b) of § 324A. Arcadis is *also* liable for increasing the risk of harm to Plaintiff under subsection (a). Subsections (b) and (a) are addressed below.

4.1.1. Arcadis negligently performed a duty owed by GDOT and assumed by Arcadis pursuant to subsection (b) of § 324A.

A contractor is liable under subsection (b) of § 324A "if, by his undertaking with [another], he has undertaken a duty which the other owes to the third person." Restatement (Second) of Torts § 324A, cmt. d. (Ex. DD). Subsection (b) applies to Arcadis here, and Comment D to § 324A perfectly illustrates why. Comment D says, "[t]he A Telephone Company employs B to inspect its telephone poles. B negligently inspects and approves a pole adjoining the public highway. Because of its defective condition the pole falls upon and injures a traveler upon the highway. B is subject to liability to the traveler." *Id.* Substituting the names "A" and "B" in that comment with "GDOT" and "Arcadis" shows why Arcadis is liable. With the names substituted, Comment D reads, "[GDOT] employs [Arcadis] to inspect its [guardrail]. [Arcadis] negligently inspects and [fails to report a guardrail] adjoining the public highway. Because of its defective condition the [guardrail] injures a traveler upon the highway. [Arcadis] is subject to liability to the traveler." *Id.* In sum, Arcadis did *exactly* what Restatement § 324A – which has been adopted as law by the Georgia Supreme Court – contemplates as a basis for liability. *Huggins*, 245 Ga. at 248 (adopting § 324A).

Further, the undisputed evidence shows that GDOT is responsible for maintaining the state highway system, including guardrail,[48] and that Arcadis undertook the 'inspection' aspect of that duty. GDOT is free to delegate its duties among contractors, as it did here.[49] As to guardrail reporting, GDOT contracted Arcadis to perform that function.[50] Therefore, Arcadis undertook "to perform a duty owned by [GDOT] to the [traveling public]."[51] *Huggins*, 245 Ga. at 248 (quoting Restatement 2d Torts § 324A). Because Arcadis' failure to exercise due care while discharging GDOT's duty caused the death of [redacted] and the catastrophic injuries to [redacted], who were members of the traveling public, Arcadis is liable under subsection (b) of Section 324A of the Restatement of Torts. This scenario is *exactly* why Georgia courts adopted the Restatement of Torts. *See* Restatement (Second) of Torts § 324A ("This Section applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking . . . results in physical harm to the third person or his things.").

4.1.2. Arcadis' negligence increased the risk of harm pursuant to subsection (a) of § 324A.

In addition to subsection (b), Arcadis is also liable under subsection (a) of § 324A. Where a contractor's "negligent performance of his undertaking results in increasing the risk of harm to a third person, the fact that he is acting under a contract . . . **will not prevent his liability to the third person**." Restatement (Second) of Torts § 324A, cmt. c (emphasis added). Arcadis undertook the job of identifying and reporting damaged guardrails "for consideration" –

[48] Wilson Dep., 137: 3-20
[49] Wilson Dep.137:23-138:3; O.C.G.A. § 32-2-2 ("The department shall have the authority to…enter into contracts…with any person…for the construction or maintenance of any public road.").
[50] Hendon 30(b)(6) Dep., 19:22-20:10.
[51] Hendon 30(b)(6) Dep., 19:22-20:10.

i.e., pursuant to a contract and in exchange for money.[52] Arcadis' services were rendered "for the protection of" third persons.[53] Therefore, Arcadis is liable to third parties injured from its "failure to exercise reasonable care" if its "failure to exercise reasonable care increase[d] the risk of such harm." *Huggins*, 245 Ga. at 248 (quoting Restatement 2d Torts § 324A). A contractor's act or omission increases the risk of harm where it "exposes the injured person to a greater risk of harm than had previously existed." *Herrington v. Deloris Gaulden*, 294 Ga. 285, 288 (2013).

Arcadis' failure to timely identify and report the subject guardrail increased the risk of harm to a motorist who struck it. Specifically, each time a car struck the guardrail, but Arcadis failed to identify and report the damage, the guardrail became more dangerous. The undisputed record shows that the subject guardrail was nonfunctional dating back to at least August 2017 based on Google Maps images.[54] The condition of the subject guardrail worsened between August 2017 and June 2018 because of Defendants' failure to identify and report damage to it.[55] By April 2018, the subject guardrail was nearly flattened in places.[56] In other words, Arcadis' failure to repair the subject guardrail allowed the hazard to worsen, which "increase[d] the risk of . . . harm" to travelers like [redacted] and [redacted]. Restatement (Second) of Torts § 324A(a). Therefore, Arcadis is liable under subsection (a) of the Section 324A of the Restatement of Torts. *See Williams*, 189 Ga. App. at 120 (holding that "[plaintiff's] injuries were a foreseeable consequence of [defendant's] failure to complete its voluntarily assumed

[52] Hendon 30(b)(6) Dep., 19:22-20:10.
[53] Flanders 30(b)(6) Dep., 18:21-19:7.
[54] Martin Dep., 29:15-24 (authenticating Pl.'s Trial Ex. 4); *see also* Martin-Robbins Resp. to Pl's 4th Req. for Admissions, No. 2.
[55] *Id.*; *see also* Pl.'s Trial Ex. 1-5.
[56] Pl.'s Trial Ex. 1.

duties . . . thus the trial court did not err by denying [defendant's] motion for a directed verdict.").

4.2. Arcadis failed to meet the industry standard.

Arcadis owed a common law duty to Plaintiff to perform work that conformed to the industry standard for a Georgia guardrail contractor. Under Georgia law, a contractor owes a duty to perform its work in accordance with industry standards. *Mays v. Valley View Ranch, Inc.*, 317 Ga. App. 143, 148 (2012). A negligent maintenance claim against a contractor arises "'not from a breach of contract claim but from breach of a duty implied by law to perform the work in accordance with industry standards.'" *City of Atlanta v. Benator*, 310 Ga. App. 597, 605 (2011) (quoting *Rowe Dev. Corp. v. Akin & Flanders, Inc.*, 240 Ga. App. 766, 769 (1999)). A cause of action based on industry standards arises in tort and "'exists independently of any claim for breach of contract.'" *Id.*; *see also Schofield Interior Contractors, Inc. v. Standard Bldg. Co.*, 293 Ga. App. 812, 814 (2008).

To prevail on a negligent maintenance claim against a contractor, the plaintiff must show that a violation of industry standards caused the injury or harm. *Benator*, 310 Ga. App. at 606. An "industry standard" is simply the "standard practice[] of an industry." *Monitronics Int'l, Inc. v. Veasley*, 323 Ga. App. 126, 141 (2013); *accord Thomas v. Metro. Atlanta Rapid Transit Auth.*, 300 Ga. App. 98, 103 (2009). It is not necessarily a specific code section or regulation. One way a plaintiff can show the violation of an industry standard is by presenting testimony from an expert witness familiar with the standard practices of a particular industry. *Veasley*, 323 Ga. App. at 141; *Mays*, 317 Ga. App. at 149; *Thomas*, 300 Ga. App. at 103.

Here, the applicable industry is the Georgia guardrail industry, and the evidence shows that Arcadis failed to meet that industry's standard for identifying and reporting nonfunctional

guardrail. The evidence shows that "[t]he industry standard for reporting damaged, state-owned guardrail is to report it on the same day as it is identified."[57] This industry standard is supported by the March 13, 2018 meeting minutes in which GDOT and Arcadis agreed that Arcadis would report damaged guardrail "daily."[58] Arcadis did not do that. The evidence further shows that "Arcadis inspectors drove by the subject guardrail multiple times each week. Specifically, on March 14, 2018, an Arcadis inspector stopped his vehicle to report damaged guardrail directly across the street from the subject guardrail."[59] Therefore, "Arcadis should have identified the subject guardrail . . ."[60] Because Arcadis failed to timely identify the subject guardrail as in need of repair, Arcadis fell short of the industry standard. Because evidence shows that Arcadis failed to meet the industry standard, summary judgment is inappropriate, and Arcadis' motion should be denied. *See Mays*, 317 Ga. App. at 148.

4.3. Arcadis' breached its duty to [redacted] as a third-party beneficiary of its contract with GDOT.

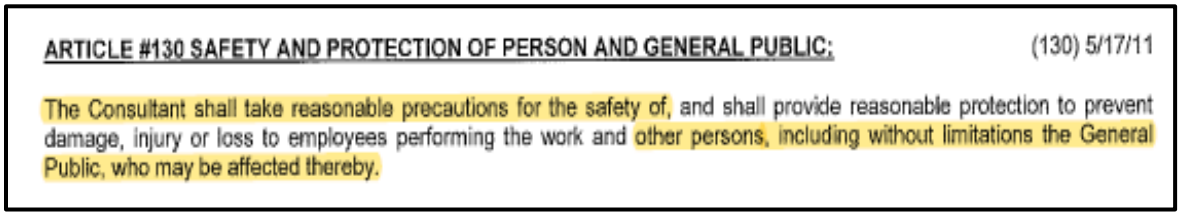
The "General Public" was a third-party beneficiary to Arcadis' contract with GDOT. An injured party can recover for personal injuries based on a contractor's failure to perform under a contract if the injured party is a third-party beneficiary. O.C.G.A. § 9-2-20(b); *see also CDP Event Servs., Inc. v. Atcheson*, 289 Ga. App. 183, 184 (2008). A third-party beneficiary "does not need to be specifically named in the contract . . ." as long as the contracting parties' *intention* to benefit the third-party is evident. *City of Atlanta v. Benator*, 310 Ga. App. 597, 603 (2011).

Brazeman v. IPC International Corporation shows how a contract between private parties can benefit a group of people who are not parties to the contract. 2008 WL 11334073

[57] Second Supp. Hill Aff. ¶ 19 (Ex. EE).
[58] Pl.'s Trial Ex. 200.
[59] Second Supp. Hill Aff. ¶ 20.
[60] Second Supp. Hill Aff. ¶ 21.

(N.D. Ga. Aug. 25, 2008) (applying Georgia law). In *Brazeman*, the plaintiff was viciously beaten while he was inside Lenox Square Mall. *Id.* at *1–2. He filed a lawsuit against the mall's security company, alleging that he was a third-party beneficiary to the contract between the mall and the security company. *Id.* at *2. The security company, much like Arcadis, claimed that contract did not intend to create third-party beneficiaries. *Id.* The court disagreed, holding that the plaintiff was an intended beneficiary to the contract, and therefore denied the security company's motion for summary judgment. *Id.* at *4. In so doing, the Court looked to the language of the contract, which said: "**The [security services] shall be performed in such a manner as to minimize the possibility of any annoyance, interference, or disruption to the occupants of the Property *and their invitees***." *Id.* (bold in original, italics added). The Court found this language "evidence[ed] an intent to benefit third party invitees, such as plaintiff." *Id.*

In this case, just like in *Brazeman*, the intention to benefit the traveling public is clear on the face of the contract. Arcadis' contract with GDOT *requires* that Arcadis "take reasonable precautions for the safety of . . . the General Public," as shown below:



ARTICLE #130 SAFETY AND PROTECTION OF PERSON AND GENERAL PUBLIC: (130) 5/17/11

The Consultant shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to employees performing the work and other persons, including without limitations the General Public, who may be affected thereby.

Just as the contract in *Brazeman* intended to benefit third parties because it referred to performing services for occupiers of the property "*and their invitees*," the contract here intended to benefit third parties because it referred to performing services to protect the "*the General Public*."

Although Arcadis' contract with GDOT purports to stipulate that "there are no individual or personal third party beneficiaries of" the contract, "[t]he entire contract must be examined to

determine the parties' intent." *Arnsdorff v. Papermill Plaza, LLC*, 326 Ga. App. 438, 440 (2014). "The 'court must consider [the contract] as a whole, give effect to each provision, and interpret each provision to harmonize with each other.'" *Id.* The plain language of the contract – specifically, the provision excerpted above – shows that the intent of the contract was to benefit the traveling public. Therefore, Defendant's motion for summary judgment should be denied. *E.g.*, *Green v. Pateco Servs., LLC*, 348 Ga. App. 132, 133–34 (2018) (reversing trial court's entry of summary judgment based on several provisions evidencing an intent to protect others from injury).

Arcadis' reliance on *City of Atlanta v. Benator* is misplaced. In *Benator*, a group of plaintiffs filed a class action against the City of Atlanta and its contractors based on routine overcharges for water. 310 Ga. App. at 597, disapproved on other grounds by *Fed. Deposit Ins. Corp. v. Loudermilk*, 305 Ga. 558 (2019). The Court of Appeals found that the class failed to adequately allege a breach of contract claim because the contracts did not explicitly confer a benefit onto the class members. The Court found that the benefits of the contract were incidental and held that "[m]erely entering into a contract for the benefit of the public does not create third-party beneficiary status under Georgia law.'" *Id.* at 604.

The contract in this case is not like the one at issue in *Benator*. In *Benator*, the contractual provision read, "[t]he Contractor is responsible for ensuring that all City customers and their properties are treated with respect and consideration and providing professional customer service." *Id.* That is, the contract did not address the *safety* of the public, but only contemplating treating customers with "respect and consideration." Stated differently, any benefit to the public under the contract in *Benator* was truly incidental to the performance of the contract and did not involve safety. Here, however, the contract between GDOT and Arcadis

explicitly recites obligations to keep the "General Public" *safe*. Specifically, the contract required Arcadis to "take reasonable precautions ***for the safety of*** . . . the General Public."[61] Keeping the traveling public safe was the focus of the contract, and that is what Arcadis failed to do.

4.4. Arcadis maintained a continuing nuisance.

The subject nonfunctional guardrail constituted a continuing nuisance. "A nuisance is anything that causes hurt, inconvenience, or damage to another . . ." O.C.G.A. § 41-1-1. An otherwise lawful act may constitute a nuisance where it causes damage to another. *Id.* A defendant need not own the property on which a nuisance exists in order to be liable for it. *Sumitomo Corp. of Am. v. Deal*, 256 Ga. App. 703, 707 (2002). Rather, the defendant must only exercise "control over the cause of the harm." *Id.* To prove nuisance, a plaintiff must show "the maintenance of a dangerous condition on a continuous or regular basis over a period of time in which no action or inadequate action is taken to correct the condition after knowledge thereof.'" *City of Atlanta v. McCrary*, 328 Ga. App. 746, 748 (2014); *see also Barnes v. St. Stephen's Missionary Baptist Church*, 260 Ga. App. 765, 769 (2003) ("The whole idea of nuisance is that of either a continuous or regularly repetitious act or condition which causes the hurt, inconvenience or injury."). Stated differently, "a one-time occurrence does not amount to a nuisance." *Barnes*, 260 Ga. App. at 769. Whether a nuisance exists is generally a question of fact for the jury to decide. *McCrary*, 328 Ga. App. 748.

The undisputed facts show that Arcadis created and maintained a nuisance. As to the first element – causing harm to another – the evidence shows that the nonfunctional guardrail caused

[61] Emphasis added.

Plaintiff's vehicle to ramp up into the concrete pole behind the guardrail.[62] A reasonably functional guardrail would have kept the vehicle in the roadway and away from the concrete pole with which it ultimately collided.[63] Therefore, the nonfunctional guardrail "cause[d] hurt, inconvenience, or damage to another . . ." as required by O.C.G.A. § 41-1-1.

As to the element of control, abundant evidence shows that Arcadis exercised control over the subject guardrail and other guardrail in District 7. Specifically, Arcadis had control over initiating the repair process. The best illustration of Arcadis' control is the reporting and repair of the guardrail directly across the highway from the subject guardrail. Arcadis saw the damaged guardrail and reported it, as it was required to do under its contract with GDOT, on March 14. Because Arcadis initiated the repair process, the guardrail across the street from the subject guardrail was repaired within 21 days. In other words, as to the guardrail *across the street* from the subject guardrail, Arcadis exercised its control over the initiation of the repair process, and the guardrail was fixed as a result. As to the *subject guardrail*, Arcadis was likewise in control of the initiation of the repair process. Arcadis simply failed to act – in other words, although it had control over the initiation of the repair process, Arcadis did nothing and thereby perpetuated a nuisance.

Expert testimony further demonstrates that Arcadis exercised control over the subject guardrail. Professional Engineer Herman Hill has established that "GDOT had the power to hire contractors to identify and report damaged guardrail, including the subject guardrail. GDOT

[62] Earnhart 07/01/21 Dep., 21:13-18; Earnhart 07/21/21 Dep., 128:18-129:1; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.
[63] Earnhart 07/21/21 Dep., 81:6-18 ("So had the guardrail been replaced and this vehicle made contact with it, the CG of the vehicle is below the height of the guardrail, so it makes it less likely or unlikely, in my opinion, that it would have gone over or rolled over the guardrail.").

hired Arcadis to identify and report damaged guardrail, including the subject guardrail.[64] *Therefore, Arcadis had control over the condition of the subject guardrail*."[65] In sum, Arcadis had control over the repair of the subject guardrail, and Arcadis' failure to timely initiate that repair led to [redacted] death.

Finally, as to the third element – the length of time the nuisance existed – the evidence shows that the subject guardrail was a danger to the traveling public for at least ten months. In other words, the subject guardrail existed in a dangerous condition "over a period of time in which no action or inadequate action [was] taken to correct the condition after knowledge thereof.'" *Id.* Therefore, Arcadis is liable for maintaining a continuing nuisance.

4.5. Arcadis' negligence proximately caused Plaintiff's damages.

Arcadis' failure to exercise reasonable care to identify and report the subject guardrail was a proximate cause of Plaintiffs' damages. "'[Q]uestions of negligence, diligence, contributory negligence[,] and proximate cause are peculiarly matters for the jury, and a court should not take the place of the jury in solving them, except in plain and indisputable cases.'" *GEICO Indem. Co. v. Whiteside*, 311 Ga. 346, 355 n.16 (2021) (quoting *Bussey v. Dawson*, 224 Ga. 191, 193–94 (1968)); *accord Layfield v. Dep't of Transp.*, 280 Ga. 848, 849 (2006) ("[I]t is axiomatic that questions regarding proximate cause are 'undeniably a jury question' and may only be determined by the courts 'in plain and undisputed cases.'"). Where a party presents expert testimony on causation, the jury must decide whether the defendant's breach caused the damages. *See Layfield*, 280 Ga. at 852.

[64] Martin Dep., 10:13-18.
[65] Second Supp. Hill Aff. ¶¶ 27-29 (emphasis added).

Here, the evidence of causation is strong. First, the evidence shows that but for Arcadis' negligence, Martin Robbins would have repaired the subject guardrail before June 3, 2018. In other words, had Arcadis identified and reported the subject guardrail sooner, the subject guardrail would have been in good repair when the Kia Sorrento collided with it on June 3. If Arcadis had reported the subject guardrail to Martin Robbins on any of the dates from August 2017 through April 19, 2018 on which its inspector drove by it, Martin Robbins would have been able to repair the subject guardrail *before* June 3, 2018. That is because the evidence shows that Martin Robbins repaired the subject guardrail 45 days after Arcadis finally notified Martin Robbins of the need for repair. Therefore, if Arcadis had reported the subject guardrail on March 14, 2018 when Calvin Thrasher was parked directly across from the subject guardrail and took a picture, Martin Robbins would have repaired the guardrail by April 28, 2018.[66] If Arcadis had reported the subject guardrail on March 27 or 29 – when Mr. Thrasher drove past the subject guardrail while supposedly looking for damaged guardrail – Martin Robbins would have repaired it by May 11 or 13.[67] If Arcadis had reported the subject guardrail on April 2 – another date on which its inspector was supposedly looking for damaged guardrail in the area – Martin Robbins would have repaired it by May 17.[68] Even if Arcadis had reported the subject guardrail on the day it learned about it (April 18) or the next day (April 19), Martin Robbins would *still* have been able to repair it by June 2 or June 3. Arcadis' repeated delays are particularly egregious because it was supposed to email the damaged locations to GDOT "daily."[69]

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[66] Pl.'s Trial Ex. 203 (showing that Thrasher drove by the subject guardrail on March 14, 2018).
[67] Pl.'s Trial Ex. 204 (showing a time-stamped photograph down the highway from the subject guardrail on March 27, 2018); Pl.'s Trial Ex. 205 (showing that Thrasher drove past the subject guardrail on March 29, 2018).
[68] Pl.'s Trial Ex. 206 (email asking Thrasher to inspect damaged guardrail on I-85 South down the road from the subject guardrail on April 2, 2018).
[69] Pl.'s Trial Ex. 200 (March 13, 2018 meeting minutes).

Second, the evidence shows that if the subject guardrail had been in good repair when the Kia Sorrento collided with it on June 3, the Sorrento would not have struck the camera pole. The evidence on this point is unrebutted. Expert testimony establishes that the Sorento would not have struck the camera pole if the guardrail had been repaired: "Q. If the guardrail that the Sorento struck had been in good repair, would the Sorento have struck the camera pole? A. No".[70]

Third and finally, the evidence shows that if the Sorrento had not struck the camera pole, [redacted] would not have been killed. The Fulton County Medical Examiner has established that [redacted] "cause of death was blunt force trauma when the Kia Sorrento hit the fixed utility pole off the shoulder of the highway."[71]

Because the evidence shows that Arcadis' negligence was a contributing cause to [redacted] death, a jury must decide how much fault to apportion to Arcadis. *Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323, 337 (2017) ("A person will be considered to have contributed to the alleged injury where that person is shown to have 'breach[ed] ... a legal duty in the nature of [a] tort that is owed for the protection of the plaintiff, the breach of which is a proximate cause of his injury.'"). Summary judgment is inappropriate.

4.6. Arcadis is liable for punitive damages.

Punitive damages are appropriate because Plaintiff has presented evidence from which a jury could determine that Arcadis acted with the "entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1. "'Actions arising to a conscious indifference to consequences may authorize a finding of punitive

[70] Earnhart 07/01/21 Dep., 21:20-25.
[71] Sullivan Declaration ¶ 10.

damages.'" *Weller v. Blake*, 315 Ga. App. 214, 219 (2012) (citation omitted). Specifically, "[a] continuing nuisance will authorize a punitive damage award." *Id.* (citing *Tyler v. Lincoln*, 272 Ga. 118, 120 (2000)). "[W]hether the tort was sufficiently aggravating to authorize punitive damages is generally a jury question . . ." *Id.*

The facts of this case authorize a jury to impose punitive damages for two reasons. First, as discussed above, Plaintiff has presented evidence showing that Arcadis created and maintained a continuing nuisance. The Court of Appeals has held that continuing nuisances authorize punitive damages. *Weller*, 315 Ga. App. at 219. Therefore, the question of whether punitive damages should be imposed is one for the jury.

Second, Arcadis had constructive knowledge of the subject guardrail long before the subject wreck, and its inaction despite that knowledge shows conscious indifference to the consequences. *See Jackson v. Waffle House, Inc.*, 245 Ga. App. 371, 373 (2000) (holding that constructive notice exists where a reasonable inspection would have revealed the hazard at issue). The evidence shows that the subject guardrail was nonfunctional as early as August 2017 – *ten months* before [redacted] died.[72] Arcadis employees drove past the subject nonfunctional guardrail countless times between August 2017 and April 2018, but never identified or reported it. On March 14, 2018, an Arcadis inspector even parked his car directly across the street from the subject guardrail to take a photograph of other damaged guardrail, but failed to tell anyone that the subject guardrail was badly damaged. In other words, Arcadis *knew* that the subject guardrail was in nonfunctional condition, but despite knowing that, failed to tell any other party about the damage or initiate a repair. Arcadis' conscious disregard of a known risk authorizes punitive damages. *See Weller*, 315 Ga. App. at 219.

[72] Martin Robbins' Resp. to Pl.'s 4th RFAs, No. 2.

4.7. Arcadis is liable for attorney's fees.

Georgia's attorney's fee statute provides:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, *the jury* may allow them.

O.C.G.A. § 13-6-11 (emphasis added).

Thus, Code Section 13-6-11 contemplates a three-prong test for the recovery of attorney's fees where *any evidence*, no matter how slight, tends to show: (1) the defendant has acted in "bad faith," (2) the defendant has been "stubbornly litigious," or (3) the defendant has caused the plaintiff unnecessary trouble or expense.[73] *Id.*; *see also City of Lilburn v. Astra Group, Inc.*, 286 Ga. App. 568, 571 (2007) (holding that "[e]ven slight evidence of bad faith can be enough to create an issue for the jury.").

"Whether a plaintiff has met any of the preconditions for an award of attorney fees and litigation expenses set forth in [O.C.G.A. § 13-6-11 is] solely a question for the jury." *Covington Square Assocs., LLC v. Ingles Markets, Inc.*, 287 Ga. 445, 446 (2010) (citation omitted). Here, Arcadis is liable under § 13-6-11 because: (1) it acted in bad faith within the meaning of O.C.G.A. § 13-6-11, and (2) it has been stubbornly litigious.

4.6.1. Arcadis acted in bad faith.

"The bad faith referred to [in O.C.G.A. § 13-6-11,] in actions sounding in tort, means bad faith in the transaction out of which the cause of action arose." *Windermere*, 211 Ga. App. at 179. Evidence of bad faith exists where a party fails to conform to statutes or industry standards

[73] Georgia case law does not distinguish between the treatment and meaning of the second and third prongs. *See Jeff Goolsby Homes Corp. v. Smith*, 168 Ga. App 218 (1983). The law does, however, clearly differentiate claims for fees under the "bad faith" prong and the "stubborn litigiousness" prong.

whose purpose is to benefit the injured party. *See Nash v. Reed*, 349 Ga. App. 381, 383 (2019). Where evidence of bad faith is presented, even if slight, the existence of a bona fide controversy is not dispositive of the claim for O.C.G.A. § 13-6-11 attorney's fees. *See Merlino v. City of Atlanta*, 283 Ga. 186, 190 (2008); *Latham v. Faulk*, 265 Ga. 107, 108 (1995); *see also Oglethorpe Power Corp. v. Estate of Forrister*, 332 Ga. App. 693, 705 (2015) (quoting *Lamb v. State Farm Mut. Auto Ins. Companies*, 240 Ga. App. 363, 365 (1999)) (holding "the existence of a bona fide controversy negates the possibility of a statutory award only '[w]here bad faith is not at issue.'"); *Windermere*, 211 Ga. App. at 179

Here, Arcadis acted in bad faith. Arcadis failed to perform its work in accordance with industry standards created to protect the traveling public. Guardrails are safety devices intended to protect motorists.[74] The industry standard for Georgia guardrail contractors to identify damaged guardrail *each day* after riding routes, as established by the March 13, 2018 meeting minutes in which GDOT and Arcadis agreed that Arcadis would report damaged guardrail locations "daily."[75] Arcadis failed to meet that industry standard by driving past the subject guardrail in its nonfunctional condition numerous times in the ten-month period before the wreck but failing to report the damage. The March 14 photograph also shows why Arcadis' misconduct is sufficiently egregious to constitute bad faith. On that day, an Arcadis inspector parked directly across the highway from the subject guardrail, took photographs of another damaged guardrail, but inexplicably ignored the damage to the subject guardrail.

Arcadis failed to meet the industry standard for identifying and reporting damaged guardrail. Violation of that standard is evidence of bad faith under *Nash* and *Windermere*.

[74] Doyle Dep., 52:3-20.
[75] Pl.'s Trial Ex. 200.

Arcadis' decisions to repeatedly ignore the damage to the subject guardrail were egregious. Therefore, the issue of bad faith must go to the jury.

4.6.2. Arcadis was stubbornly litigious.

Claims concerning "stubborn[] litigious[ness]" or "unnecessary trouble and expense" relate to a defendant's actions during litigation. *Southern Ry. Company v. Crowe*, 186 Ga. App. 244, 247 (1988) (recovery under § 13-6-11 appropriate where defendant has "conducted the litigation itself in bad faith"); *accord Spring Lake Prop. Owners Ass'n, Inc. v. Peacock*, 260 Ga. 80, 81 (1990) (recovery under § 13-6-11 appropriate based on conduct during litigation); *see also Kroger Co. v. Walters*, 319 Ga. App. 52, 59 (2012). That focus on a defendant's conduct during litigation distinguishes the "stubborn litigiousness" prong of § 13-6-11 from the "bad faith" prong because the claims of "bad faith" typically relate to conduct in the underlying transaction, before litigation began. *Computer Commc'ns Specialists, Inc. v. Hall*, 188 Ga. App. 545, 547 (1988).

A defendant is "stubbornly litigious" where it denies liability or fault despite the absence of a "bona fide controversy" or "genuine dispute" as to liability or fault. *Buffalo Cab Co. v. Williams*, 126 Ga. App. 522, 524-25 (1972). Whether a bona fide controversy exists as to liability is a jury question. *Spring Lake*, 260 Ga. at 81. "[A] jury may award attorney fees under O.C.G.A. § 13-6-11 if there is no bona fide controversy as to liability, even if there is a bona fide controversy as to damages." *Daniel v. Smith*, 266 Ga. App. 637, 639 (2004).

The record contains abundant evidence of Arcadis' clear liability. Arcadis was required to identify damaged guardrail to GDOT "daily."[76] It is undisputed, however, that Arcadis failed to identify or report the subject guardrail at any time during the ten months before the wreck.

[76] Pl.'s Trial Ex. 200 (March 18, 2018 meeting minutes).

Further, witnesses on behalf of all parties have testified that the subject guardrail existed in a nonfunctional condition for at least ten months before the subject wreck[77] – meaning that Arcadis had constructive knowledge that the subject guardrail was nonfunctional for ten months before [redacted] died, but did nothing about it.

Despite this clear evidence, Arcadis has denied liability from the outset of this case. A jury could reasonably find (and Plaintiff respectfully submits, *should* find) that Arcadis' denial of liability constitutes "stubborn litigiousness" because substantially all the witnesses have admitted that Arcadis was not doing its job. Notably, Arcadis completely failed to address Plaintiff's claim for negligent undertaking under the Restatement of Torts – a tacit admission that there was no bona fide controversy. Therefore, the jury could reasonably find that there was no bona fide controversy, and that Arcadis' insistence on disputing liability was a stubborn attempt to evade responsibility. For that additional reason, summary judgment on Plaintiffs' claims under § 13-6-11 is not appropriate.

5. <u>Conclusion</u>

The evidence shows that Arcadis' motion for summary judgment should be denied for four reasons. First, Arcadis negligently performed a voluntary undertaking under the Restatement of Torts. Second, Arcadis failed to meet the industry standard for repairing non-functional guardrail in Georgia. Third, Arcadis breached its duty to [redacted] as a third-party beneficiary to the contract with GDOT. Fourth, Arcadis maintained a continuing nuisance.

[77] Martin Dep., 29:15-24; Kent Dep., 8:19-9:6; Martin Robbins' Resp. to Pl.'s 4th RFAs, No. 2.

The evidence supporting Plaintiff's claims against Arcadis is not only adequate, but overwhelming. Plaintiffs respectfully submit that Arcadis' motion should be denied in its entirety.

Respectfully submitted this 21st day of December 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned has this day electronically filed the within and foregoing ***PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT GDOT'S MOTION TO DISMISS*** with the Clerk of Court using the Odyssey e-filing system which will send e-mail notification of such filing to the following counsel of record:

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