IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

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

DEFENDANT ARCADIS U.S., INC.'S MOTION TO EXCLUDE EXPERT TESTIMONY OF HERMAN HILL, P.E. AND BRIEF IN SUPPORT THEREOF

COMES NOW, Defendant Arcadis U.S. ("Arcadis") and files this Motion to Exclude Expert Testimony of Herman Hill, P.E., showing the Court as follows:

INTRODUCTION

Plaintiffs have designated traffic engineer, Herman Hill, P.E., as a liability expert in

connection with a motor vehicle accident that occurred on June 3, 2018.[1] [redacted] was the driver of a car that left the subject roadway and struck a concrete pole located behind the subject guardrail.[2] [redacted] was a passenger in the subject vehicle.[3] Arcadis was hired by the Georgia Department of Transportation ("GDOT") to provide Management, Administration and Inspection Services, as required for a wide-variety of GDOT maintenance service contracts, including the inspection of guardrails.[4] Martin-Robbins Fence Company ("Martin-Robbins") was hired by GDOT to repair damaged guardrails.[5]

Mr. Hill has been designated by Plaintiffs to offer opinions as to the fault and liability of all three Defendants (GDOT, Martin-Robbins, and Arcadis).[6]

In evaluating the admissibility of expert testimony, the trial court must act as a "gatekeeper" to ensure that the proffered opinions are both reliable and the proper subject of expert testimony. Whether, and to what extent, a defendant owes a legal duty to a plaintiff is a question of law for the court. In the absence of a legally cognizable duty, there can be no fault or negligence on the part of the defendant.

With regard to Arcadis, Plaintiffs attempt to establish Arcadis' duties arising from the contract and "generally accepted standards" based on the expert testimony of Herman Hill, P.E. However, Plaintiffs' effort to establish such duties (that otherwise do not exist) through expert testimony fails because it is well-settled that what duty a defendant owes, and the scope of such duty, is a question of legal policy to be decided by this Court as an issue of law, and not by an

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[1] See Plaintiffs' Disclosure of Trial Experts, filed on September 14, 2020.
[2] See First Amended Complaint [redacted]), ¶ 41; First Amended Complaint [redacted], ¶ 34.
[3] See First Amended Complaint [redacted]), ¶ 44; First Amended Complaint [redacted]), ¶ 38.
[4] See Deposition of Tony Hendon, taken on August 8, 2021, Defendant's Exhibit 2 (Contract between GDOT and Arcadis dated June 14, 2016) and Defendant's Exhibit 4 (Task Order No. 2 dated June 16, 2017).
[5] See T. Hendon Depo., Defendant's Exhibit 5 (Contract between GDOT and Martin-Robbins dated September 15, 2017).
[6] See Plaintiffs' Disclosure of Trial Experts, filed on September 14, 2020.

expert. Mr. Hill opines that Arcadis failed to inspect and monitor guardrails as required by the contract and unspecified "generally accepted standards of the time," such that Arcadis should have seen and reported the subject guardrail prior to April 20, 2018.[7] These opinions imply a duty to see and report all damaged guardrail that exists on the highways in District 6. Such a heightened duty was not required by the contract between Arcadis and GDOT. Herman Hill admitted in this deposition that the contract between Arcadis and GDOT contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.[8] Mr. Hill's opinions as to Arcadis' duties (including those purporting to interpret contractual requirements and referencing "generally accepted standards of the time") are Mr. Hill's personal wish-list as to heightened performance standards but are not contractually required or tethered to any specific statute, rule or standard, and go beyond the exercise of ordinary care. Mr. Hill's opinions as to Arcadis must be excluded as a matter of law because they seek to invoke a heightened duty of care, not required by the contract, or any identified law or standard. This Court should act as gatekeeper to exclude Mr. Hill's expert testimony that seeks to establish heightened duties as to Arcadis that do not exist, but for his improper and unsupported opinions. Plaintiffs' attempts to establish a heightened duty (that otherwise does not exist) through expert testimony should not be allowed as a matter of law. Mr. Hill's opinions as to Arcadis' various legal duties must be excluded by this Court.

[7] Mr. Hill's opinions are set forth in the Supplemental Affidavit of Herman A. Hill, dated November 13, 2020, and in a letter report dated March 25, 2021. Such Supplemental Affidavit is attached hereto as **Exhibit A**. Such letter report is attached hereto as **Exhibit B**.

[8] See Deposition of Herman Hill, taken on May 5, 2021, lines 1-6 (Q: "Have you seen anything that outlines the kind of outline of services that say you think should have occurred; have you seen any such thing? A: To this date, I'm not aware that I have seen that."); H. Hill Depo., p. 277, lines 21-25 (Q: "[T]here is nothing in the Contract that speaks to "reasonably prompt basis;" is there? A: I don't know that that -- those -- that phrase is there."). The deposition of Herman Hill is attached hereto as **Exhibit C**.

Furthermore, Mr. Hill's opinions as to Arcadis should be excluded because they are not the proper subject of expert testimony. Expert opinion evidence is not admissible where the matter under consideration is not shrouded in the mystery of professional skill and beyond the ken of the average layperson. Mr. Hill's opinion that Arcadis ***knew*** about the subject guardrail on March 14, 2018, yet failed to notify Martin-Robbins until April 20, 2018, should be excluded, as such factual questions can be properly determined by the jury without the aid of expert testimony. Moreover, Arcadis seek to exclude Mr. Hill's opinions as to the ultimate issues (the fault or negligence of each Defendant) because such matters could and should be determined by an average layperson. The jury is more than capable of determining Arcadis' (and the other Defendants') liability (or lack thereof) based on the evidence presented, and Mr. Hill's opinions as to same would only serve to mislead and improperly influence the jury.

Moreover, Mr. Hill's opinions as to Arcadis that set forth improper legal conclusions should be excluded. Expert opinions that speak to legal conclusions are not admissible and must be excluded. Mr. Hill seeks to interpret Arcadis' duties under the contract, which he admitted in his deposition that he is not qualified or capable of doing.[9] Moreover, Mr. Hill admitted in his deposition that the duties he attributes to Arcadis are not set forth expressly in the contract.[10] Mr. Hill's opinions as to his interpretation of Arcadis' duties under the contract, that Arcadis's notice was not "reasonably prompt" and that Arcadis "[a]cted negligently, wantonly, willfully, or recklessly", are just a few examples of his opinions that constitute impermissible legal conclusions and must be excluded.

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[9] See H. Hill Depo., p. 259, lines 15-17 (A: "If you're telling me that I have made a legal conclusion here, I do not intend to make legal conclusions...").

[10] See H. Hill Depo., p. 214, lines 3-9 (Q: "The variety of duties that you described as being your understanding of what Arcadis agreed to, are all of those set forth expressly in the Contract, or are they your interpretations of your reading of the contract? A: I think – they're my words. They're not the Contract wording. I agree with that."

Even if the Court determines that Mr. Hill's opinions should not be excluded on the bases cited above, Arcadis seeks to exclude Mr. Hill's opinions as to Arcadis (including the opinions that Arcadis was negligent, that Arcadis failed to live up to its contractual obligations, and that Arcadis failed to inspect guardrails as required by unspecified and unidentified "generally accepted standards of the time") because such opinions are not based on upon sufficient facts or data and are not the product of a reliable methodology. Mr. Hill's opinions that Arcadis was negligent, that Arcadis failed to live up to its contractual obligations, and that Arcadis failed to inspect guardrails as required by unspecified and unidentified "generally accepted standards of the time," are not based upon sufficient facts or data and are not the product of reliable methodology, as described herein. Moreover, the jury can decide for themselves (1) when Arcadis became aware of the subject guardrail, (2) whether Arcadis's notice to Martin-Robbins on April 20, 2018 met the standard of care, and (3) whether Arcadis's actions constituted negligence.

Lastly, Mr. Hill's testimony with respect to Arcadis should be excluded because even if it is admissible, it should nevertheless be excluded under O.C.G.A. § 24-4-403 because its probative value would be outweighed by its prejudicial effect. Mr. Hill's opinion that Arcadis knew about damage to the subject guardrail on March 14, 2018 has no factual basis, constitutes inadmissible speculation and has no probative value. Moreover, his remaining opinions as to Arcadis should be excluded, as described herein, because their probative value would be outweighed by their prejudicial effect. The jury should be able to weigh the evidence as to Arcadis's conduct independently from the improper and unsupported opinions of Mr. Hill.

ARGUMENT AND CITATION OF LEGAL AUTHORITY

I. The Daubert Standard.

In evaluating the admissibility of expert testimony, the trial court must act as a

"gatekeeper" and consider whether the expert witness is qualified to deliver the proffered opinions and whether the expert's testimony is both "reliable" and "relevant." O.C.G.A. § 24-7-702(b). Further, O.C.G.A. § 24-7-702(f) provides that the Courts in Georgia may draw upon the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 140, 118 S. Ct. 512, 516, 139 L. Ed. 2d 508 (1997), *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), and their progeny. The proponent of the expert testimony bears the burden of establishing its admissibility. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999) (citing *Daubert*, 509 U.S. at 592 n. 10).

Under O.C.G.A. § 24-7-702, there are five prerequisites to the admissibility of expert testimony: (1) the opinion must be of some scientific, technical, or other specialized knowledge that is relevant and will "assist the trier of fact;" (2) the expert must be qualified "by knowledge, skill, experience, training, or education;" (3) the expert's testimony must be "based on sufficient facts or data;" (4) the testimony must be "the product of reliable principles and methods;" and (5) the expert must "appl[y] the principles and methods reliably to the facts of the case." O.C.G.A. § 24-7-702(b)(1)-(3).

The federal courts have established a three-part test for admissibility of expert testimony. *See City of Tuscaloosa v. Harcros Chems. Inc.*, 158 F. 3d 548, 562 (11th Cir. 1998) (citing *Daubert*, 509 U.S. at 589). First, the expert must be qualified to testify competently regarding the matters. *See id.* Second, the methodology used by the expert to reach his conclusions must be reliable as determined under *Daubert*. *See id.* Third, the testimony must be relevant and must assist the trier of fact through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact at issue. *See id.*

II. The Opinions of Mr. Hill as to Arcadis Must Be Excluded As a Matter of Law Because They Improperly Seek to Invoke a Heightened Duty of Care.

Mr. Hill's opinions as to Arcadis should be excluded because he improperly seeks to invoke a heightened duty of care, over and above the exercise of ordinary care under the circumstances. *Rios v. Norsworthy*, 266 Ga. App. 469, 473 (2004) (Relevant standard of care was duty to exercise ordinary care under the circumstances, and defendant cannot be found negligent for failure to exercise a heighted degree of care, despite expert testimony which attempts to set forth such a standard). In *Rios*, the Court of Appeals upheld the exclusion of an expert that gave opinions as to the standards of care in the professional truck driving industry. *See id.* at 473. This trucking safety expert opined that standards of care in the industry require truck drivers to use rear and side view mirrors to be "constantly aware of other vehicles," and that the defendant's failure to meet this standard was a cause of the collision. *See id.* The Court of Appeals stated,

> The trial court properly disregarded this opinion for two reasons. First, **the relevant standard of care was the duty to exercise ordinary care under the circumstances. Where the duty is that of ordinary care, Norsworthy cannot be found negligent merely because he could have prevented the collision if he had exercised a heightened degree of care.** (citation omitted). Second, expert opinion evidence is not admissible where the matter under consideration – whether Norsworthy exercised ordinary care to discover and avoid the collision – is not shrouded in the mystery of professional skill and beyond the ken of the average layman. (citation omitted).

Id. (emphasis supplied).

The Court of Appeals in *Rios* further held that the truck driving safety expert's additional opinions, that the driver did not use mirrors, that he was not attentive and alert, and that he may have been fatigued "either have no factual basis or constitute inadmissible speculation or conclusions without probative value." *Id.*

Here, Mr. Hill opines that Arcadis failed to timely identify and report the damaged guardrail, failed to "live up to its contractual obligations with the State of Georgia" and failed to

inspect and monitor guardrails as required by unspecified "generally accepted standards of the time," such that Arcadis should have seen and reported the subject guardrail prior to April 20, 2018. These opinions imply a duty to see and report all damaged guardrail that exists on the highways in District 6. Such a heightened duty was not required by the contract between Arcadis and GDOT. Herman Hill admitted in this deposition that the contract between Arcadis and GDOT contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.[11] Mr. Hill's opinions as to Arcadis' duties (including those purporting to interpret contractual requirements and referencing "generally accepted standards of the time") are Mr. Hill's personal wish-list as to heightened performance standards but are not contractually required or tethered to any specific rule, regulation or standard, and go beyond the exercise of ordinary care. As such, Mr. Hill's opinions should be excluded, as they improperly seek to invoke a heightened duty of care, that doesn't exist, but for Mr. Hill's opinions. *See Rios*; *see also Seagraves v. ABCO Mfg. Co.*, 118 Ga. App. 414 (1968) (Where duty is that of ordinary care, one is not negligent or contributorily negligent because of the failure to exercise that degree of care which would have absolutely prevented injury).

Plaintiffs attempt to establish a heightened duty based on the expert testimony of Herman Hill, P.E. However, Plaintiffs' effort to establish such duties through expert testimony fails because "what duty a defendant owes…is a question of legal policy to be decided as an issue of law." *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008) ("Nonetheless, Lawson's efforts to establish a duty through expert testimony fails because 'what duty a defendant owes…is a question of legal policy to be decided as an issue of law.'").

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

In *Nat. Foundation Co. v. Post, Buckley, etc.*, 219 Ga. App. 431 (1995), plaintiff attempted to establish a duty via expert testimony. *See id.* at 433-434. Plaintiff's expert opined that defendant engineering firm beached its duty (a) when it designed a shoring wall in a particular manner without providing for certain safety measures during construction, and (b) in failing to require the construction of certain barricades during construction. *See id.* at 433-434. The Court of Appeals rejected plaintiff expert's effort to establish such a duty through expert testimony. The Court of Appeals stated, "We conclude as a matter of law that, under the attendant circumstances, appellees had no such legal duty toward appellant." *Id.* at 434. The Court further explained,

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

Id. (emphasis supplied) (citing *Meinken v. Piedmont Hospital*, 216 Ga. App. 252, 253 (1995)).

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

Mr. Hill's opinions as to Arcadis must be excluded as a matter of law because they seek to invoke a heightened duty of care, not required by the contract or any identified standard. As in *Rios*, *Lawson v. Entech Enterprises, Inc.*, *Nat. Foundation Co.*, and *Adams*, cited above, such a heightened duty is improper and should not be presented to the jury. This Court should act as gatekeeper to exclude Mr. Hill's expert testimony that seeks to establish heightened duties as to Arcadis that do not exist, but for his improper and unsupported opinions. This Court should decide the existence and scope of Arcadis' legal duty, as matter of law, and exclude Mr. Hill's improper

opinions as to same.

III. The Opinions of Mr. Hill as to Arcadis Must Be Excluded Because They Are Not the Proper Subject for Expert Testimony

A. Mr. Hill's Opinion that Arcadis *Knew* About the Subject Guardrail on March 14, 2018 Yet Failed to Report it Martin-Robbins Until April 20, 2018, Is Not the Proper Subject for Expert Testimony and Should Be Excluded.

Expert opinion evidence is not admissible where the matter under consideration is not shrouded in the mystery of professional skill and beyond the ken of the average layperson. *See Rios v. Norsworthy*, 266 Ga. App. 469, 473 (2004).

Here, Mr. Hill opines and testifies that Arcadis ***knew*** about the subject guardrail on March 14, 2018 yet failed to notify GDOT or Martin-Robbins about damage to the subject guardrail until April 20, 2018.[12] Mr. Hill asserts that Arcadis ***knew*** about the subject guardrail on March 14, 2018 because an Arcadis inspector took a picture of a damaged guardrail on that day that was ***across the interstate*** from the subject guardrail.[13]

In his deposition, Mr. Hill testified as follows:

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

The Arcadis inspector who took the photo on March 14, 2018 of the guardrail across the street from the damaged guardrail testified at his deposition that he did not see the subject damaged guardrail.[15] The inspector testified, if he had seen it (the subject damaged guardrail), he would

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[12] See H. Hill Supp. Aff., ¶¶ 10-11.
[13] See H. Hill Supp. Aff., ¶ 10(a) and Exhibit E thereto.
[14] H. Hill Depo., p. 289, lines 22-25 – p. 290, lines 1-3.
[15] See Deposition of Calvin Thrasher, Taken August 11, 2021, p. 42, line 15 (A: "If I seen it, okay, I would report it.").

have reported it.[16] Arcadis testified at its deposition that it learned about the damage to the subject guardrail on or about April 18, 2018,[17] just two days prior to notifying Martin-Robbins on April 20, 2018 that the subject guardrail was in need of repair and that the deadline for such repair was May 11, 2018.[18]

Mr. Hill's opinion as to when Arcadis became aware of the subject guardrail is not the proper subject of expert testimony because an average layperson can decide this question for themselves. The jurors can listen to the fact witnesses and draw their own conclusions as to whether the Arcadis inspector saw the subject guardrail on March 14, 2018, and when Arcadis learned of the subject guardrail. Mr. Hill's opinion on this issue is not the proper subject of expert testimony and must be excluded.

B. Mr. Hill's Opinions that Speak to the Ultimate Issues of this Case Are Not the Proper Subject for Expert Testimony and Should Be Excluded.

Expert testimony that goes to the ultimate issues of a case is not proper where the jury can draw the same conclusions without expert testimony. "Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman." *Baxter v. Melton*, 218 Ga. App. 731, 732 (1995). "However, it is equally clear that the scope of what is admissible as expert testimony is not unlimited." *Id.* "It is the established rule in Georgia, that where (a) the path from evidence to conclusion is not shrouded in the mystery of professional skill or knowledge, and (b) the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony." *Id.* "Where…it is possible for…the jury to take the same elements and

[16] See id., p. 32, lines 4-6 (A: "[W]hen I'm driving and I – and I see a damaged guardrail, I record it.").
[17] See Ryan Anderson Depo., p. 36, lines 19-22.
[18] See Exhibit G to H. Hill Supp. Aff.

constituent factors which guide the expert to his conclusions and from them alone make an equally intelligent judgment of their own, independently of the opinion of others, then...it [is] their province, their right and duty, to form their own conclusions as to the ultimate fact of negligence, uninfluenced by the opinion of the [expert] witness. *Id.* "A party may not bolster his case as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently of the opinion of others." *Id.*

Arcadis seeks to exclude all of Mr. Hill's opinions as to Arcadis because expert testimony regarding the ultimate issues of a case (the fault or negligence of each Defendant) are not the proper subject of expert testimony where the matter under consideration could be determined by an average layman. *Sullivan v. Quisc, Inc.*, 207 Ga. App. 114, 114-115 (1993) (The Court of Appeals held, "the conclusions of the expert witness are not admissible on ultimate issue of defendant's negligence"). The jury is more than capable of determining Arcadis' (and the other Defendants') liability (or lack thereof) independently of Mr. Hill, and Mr. Hill's opinions as to same would offer no assistance to the jury.

Mr. Hill's opinions concerning Arcadis speak to the ultimate issues in this case: his opinion that Arcadis was negligent. For example, Mr. Hill opines as follows:

- The notice provided by Arcadis was not reasonably prompt;[19]
- Arcadis' failure to timely identify and report the damaged guardrail constituted negligence;[20]
- In other words, Arcadis:

    (a) Knew the subject guardrail was damaged but did not give prompt notice;

[19] See H. Hill Supp. Aff., ¶ 12.
[20] See id., ¶ 13.

(b) Failed to live up to its contractual obligations with the State of Georgia to inspect and monitor guardrails;

(c) Undertook to inspect and monitor guardrails, such as the subject guardrail, but negligently performed that undertaking;

(d) Failed to inspect and monitor guardrail as required by generally accepted standards of the time; and

(e) Acted negligently, wantonly, willfully, or recklessly.[21]

The above opinions should be excluded because they 1) speak to the ultimate issues in this case (i.e., whether Arcadis was negligent), and 2) are subject matter within the purview of an average juror. It is well-settled that "[e]xpert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman." *Emory v. Dobson*, 206 Ga. App. 482, 483 (1992). "It is the established rule in Georgia, that where (a) the path from evidence to conclusion is not shrouded in the mystery of professional skill or knowledge, and (b) the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony." *Sullivan v. Quisc, Inc.*, 207 Ga. App. 114, 114-115 (1993). "Where...it is possible for...the jury to take the same elements and constituent factors which guide the expert to his conclusions and from them alone make an equally intelligent judgment of their own, independently of the opinion of others, then...it [is] their province, their right and duty, to form their own conclusions as to the ultimate fact of negligence, uninfluenced by the opinion of the [expert] witness. *Baxter v. Melton*, 218 Ga. App. 731, 732 (1995). "A party may not bolster his opinion

[21] See id., ¶ 14.

as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently of the opinions of others." *Sullivan*, 207 Ga. App. at 114-115 (1993) (citing *Clanton v. Von Haam*, 177 Ga. App. 694, 695-96 (1986)).

In *Sullivan*, the Court of Appeals upheld the exclusion of a professional architect's expert opinion that the defendant was negligent. The Court of Appeals stated, "It is within the experience and capacity of an average layman to determine whether a sloped threshold across the doorway is a hazardous condition." 2017 Ga. App. at 115. The Court held "the conclusions of the expert witness are not admissible on the ultimate issue of defendant's negligence…". *Id.*

Mr. Hill's opinions as to Arcadis' negligence should be excluded because they are not the proper subject of expert testimony. Jurors can listen to the evidence and decide for themselves: (1) when Arcadis became aware of the subject guardrail, (2) whether Arcadis's notice to Martin-Robbins on April 20, 2018 met the standard of care, and (3) whether Arcadis's actions constituted negligence. These issues should be decided by the jury without the interference of improper expert testimony.

IV. The Opinions of Mr. Hill as to Arcadis Must Be Excluded Because They Constitute Inadmissible Legal Conclusions.

Expert opinions that speak to legal conclusions are not admissible and must be excluded. In *Rios v. Norsworthy*, 266 Ga. App. 469, 472 (2004), the Court of Appeals upheld the exclusion of Herman Hill's opinion that a defendant truck driver was negligent. The Court of Appeals stated, "Hill's opinion that Norsworthy was negligent is a conclusion constituting a mixture of law and fact and was not admissible as opinion evidence." *Id.* Moreover, the Court of Appeals further held that "Hill's opinion that Norsworthy was liable under the doctrine of 'last clear chance' was inadmissible as a conclusion based on a mixture of law and fact." *Id.*; *see also Lawthorne v. Soltis*, 259 Ga. 502, 504 (1989) (The opinion of an expert "is not admissible if the inference drawn is a

mixture of law and fact."). Moreover, "an expert may not merely tell the jury what result to reach and may not testify to the legal implications of conduct." *Clayton County v. Segrest*, 333 Ga. App. 85, 91-92 (2015) (finding it an abuse of discretion not to exclude expert testimony that a defendant acted recklessly or proximately caused the decedent's injuries as such opinions speak to legal conclusions and would not assist the trier of fact). "[T]he court must be the jury's only source of law." *Montgomery v. Aetna Casualty & Surety Co.*, 898 F. 2d 1537, 1541 (11th Cir. 1990).

The following opinions of Mr. Hill constitute inadmissible legal conclusions:

- Roadway and guardrail maintenance is a responsibility of GDOT.[22]
- Because GDOT hired Arcadis to perform certain maintenance-related tasks and Arcadis agreed to perform those tasks, GDOT's responsibilities and duties as to those maintenance-related tasks flowed to Arcadis.[23]
- The contract between GDOT and Arcadis specified that "[t]ime is of essence."[24]
- Arcadis should have diligently and reasonably monitored guardrails in District 7, and upon finding damaged guardrail, should have notified GDOT and/or Martin-Robbins on a reasonably prompt basis.[25]
- The notice provided by Arcadis was not reasonably prompt;[26]
- Arcadis' failure to timely identify and report the damaged guardrail constituted negligence;[27]
- In other words, Arcadis:

    (f) Knew the subject guardrail was damaged but did not give prompt notice;

[22] See H. Hill Supp. Aff., ¶ 3.
[23] See id., ¶ 4.
[24] See id., ¶ 8.
[25] See id., ¶ 9.
[26] See id., ¶ 12.
[27] See id., ¶ 13.

(g) Failed to live up to its contractual obligations with the State of Georgia to inspect and monitor guardrails;

(h) Undertook to inspect and monitor guardrails, such as the subject guardrail, but negligently performed that undertaking;

(i) Failed to inspect and monitor guardrail as required by generally accepted standards of the time; and

(j) Acted negligently, wantonly, willfully, or recklessly.[28]

Moreover, Mr. Hill's opinions as to Arcadis's duties, as stated in his letter report, constitute inadmissible legal conclusions.[29] He seeks to interpret Arcadis' duties under the contract, which he admitted in his deposition that he is not qualified or capable of doing.[30] Mr. Hill admitted in his deposition that the duties he attributes to Arcadis are not set forth expressly in the contract.[31]

The above opinions, especially Mr. Hill's opinions as to Arcadis' duties under the contract, that Arcadis's notice was not "reasonably prompt" and that Arcadis "[a]cted negligently, wantonly, willfully, or recklessly", constitute impermissible legal conclusions and must be excluded. *Lawthorne v. Soltis*, 259 Ga. 502, 504 (1989) (Expert opinion evidence is not admissible if the inference drawn is a mixture of law and fact).

Mr. Hill's expert testimony speaks to legal conclusions and improperly invokes terms of legal significance, such as "duties," "negligence," "recklessness" or "reasonableness". Such opinions are not proper and inadmissible. As such, Mr. Hill's opinions as to Arcadis should be excluded.

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[28] See id., ¶ 14.

[29] See H. Hill letter report attached as Exhibit B hereto.

[30] See H. Hill Depo., p. 259, lines 15-17 (A: "If you're telling me that I have made a legal conclusion here, I do not intend to make legal conclusions...").

[31] See H. Hill Depo., p. 214, lines 3-9 (Q: "The variety of duties that you described as being your understanding of what Arcadis agreed to, are all of those set forth expressly in the Contract, or are they your interpretations of your reading of the contract? A: I think – they're my words. They're not the Contract wording. I agree with that."

V. Mr. Hill's Opinions as to Arcadis Must Be Excluded Because They Are Not Based Upon Sufficient Facts or Data and Are Not the Product of Reliable Methodology.

Even if the Court determines that Mr. Hill's opinions should not be excluded on the bases cited above, Arcadis seeks to exclude Mr. Hill's opinions with respect to Arcadis because such opinions are not based on upon sufficient facts or data. O.C.G.A. § 24-7-702(b)(1). Moreover, Mr. Hill's opinions as to Arcadis are not the product of a reliable methodology. O.C.G.A. § 24-7-702(b)(2).

A. Mr. Hill's Opinion that Arcadis Knew About the Subject Guardrail on March 14, 2018 and that the Notice Provided by Arcadis on April 20, 2018 Was Not "Reasonably Prompt", Are Not Based Upon Sufficient Facts or Data and Are Not the Product of Reliable Methodology.

Mr. Hill opines and testifies that Arcadis ***knew*** about the subject guardrail on March 14, 2018 because an Arcadis inspector took a picture of a damaged guardrail on that day that was ***across the interstate*** from the subject guardrail.[32]

However, in his deposition, Mr. Hill admitted that he could not possibly know what the Arcadis inspector actually saw. Mr. Hill testified as follows:

> Q: "So your belief is not that the Arcadis person saw it [the subject damaged guardrail]. Your belief is that the Arcadis person in your view could or should have seen it?
> ...
> A: Yes. Right; right."[33]

Arcadis testified that it learned about the damage to the subject guardrail on or about April 18, 2018,[34] just two days prior to notifying Martin-Robbins on April 20, 2018 that the subject guardrail was in need of repair and that the deadline for such repair was May 11, 2018.[35]

Mr. Hill's opinion as to when Arcadis learned of damage to the subject guardrail is without

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[32] See H. Hill Supplemental Affidavit, ¶ 10(a) and Exhibit E thereto.
[33] H. Hill Depo., p. 290, lines 7-11.
[34] See Ryan Anderson Depo., p. 36, lines 19-22.
[35] See Exhibit G to H. Hill Supp. Aff.

foundation and based on pure speculation. As such, it must be excluded. *See Layfield v. Dept. of Transportation*, 271 Ga. App. 806, 809 (2005) ("[W]here the only evidence of the cause of an accident is expert testimony based on conjecture and speculation, summary judgment in favor of the defendant is mandated."). Moreover, Mr. Hill's opinions that the notice provided by Arcadis on April 20, 2018 was not "reasonably prompt" is not based upon sufficient facts or data and is not the product of reliable methodology.

The jury can decide for itself when Arcadis learned of damage to the subject guardrail and whether the notice provided by Arcadis met the standard of care.

B. Mr. Hill's Opinions that Arcadis Was Negligent, Failed to Live Up to Its Contractual Obligations with the State of Georgia, and that Arcadis Failed to Inspect Guardrails as Required By "Generally Accepted Standards of the Time", Are Not Based Upon Sufficient Facts or Data and Are Not the Product of Reliable Methodology.

It is undisputed that, on April 20, 2018, Arcadis notified Martin-Robbins that the subject guardrail was in need of repair and that the deadline for such repair was May 11, 2018.[36]

Arcadis testified that became aware of the subject guardrail's need for repair on or about April 18, 2018, just two days before the April 20, 2018 notification to Martin-Robbins.[37] The subject accident occurred on June 3, 2018.

Herman Hill admitted in this deposition that the contract between Arcadis and GDOT contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.[38] The contract merely speaks to "routine maintenance activities" including "roadway inspection services".[39]

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[36] See id.

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

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

[39] See H. Hill Supp. Aff., ¶ 5 and Exhibits B and C thereto.

Mr. Hill's opinions that Arcadis was negligent, that Arcadis failed to live up to its contractual obligations, and that Arcadis failed to inspect guardrails as required by unspecified and unidentified "generally accepted standards of the time," are not based upon sufficient facts or data and are not the product of reliable methodology. *See* O.C.G.A. § 24-7-702(b)(1) and O.C.G.A. § 24-7-702(b)(2). Moreover, the jury can decide for themselves (1) when Arcadis became aware of the subject guardrail, (2) whether Arcadis's notice to Martin-Robbins on April 20, 2018 met the standard of care, and (3) whether Arcadis's actions constituted negligence.

VI. Mr. Hill's Testimony as to Arcadis Must Be Excluded Because Its Probative Value Is Outweighed by Its Prejudicial Effect.

Mr. Hill's testimony with respect to Arcadis should be excluded because even if it is admissible, it should nevertheless be excluded because its probative value would be outweighed by its prejudicial effect. *See* O.C.G.A. § 24-4-403.

Mr. Hill's opinion that Arcadis knew about damage to the subject guardrail on March 14, 2018 has no factual basis, constitutes inadmissible speculation and has no probative value.

Moreover, Mr. Hill's remaining opinions as to Arcadis (including Mr. Hill's opinions as to his interpretation of Arcadis' duties under the contract, that Arcadis's notice was not "reasonably prompt" and that Arcadis "[a]cted negligently, wantonly, willfully, or recklessly") are just a few examples of his opinions that should be excluded because their probative value would be outweighed by their prejudicial effect. The jury should be able to weigh the evidence as to Arcadis's conduct independently from the improper and unsupported opinions of Mr. Hill.

CONCLUSION

As outlined above, Mr. Hill's testimony as to Arcadis should be excluded for failing to meet the requirements as established under O.C.G.A. § 24-7-702 and the relevant case law interpreting admissibility of expert opinion testimony.

This 24th day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANT ARCADIS U.S., INC.'S MOTION TO EXCLUDE EXPERT TESTIMONY OF HERMAN HILL, P.E. AND BRIEF IN SUPPORT THEREOF** upon all parties to this matter by statutory electronic service, addressed to counsel of record as follows:

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