IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

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

DEFENDANT MARTIN-ROBBINS FENCE COMPANY'S MOTION TO EXCLUDE PLAINTIFFS' EXPERT HERMAN HILL AND BRIEF IN SUPPORT THEREOF

COMES NOW Defendant Martin-Robbins Fence Co. ("Martin Robbins") and files this Motion to Exclude Plaintiffs [redacted], as administrator of the estate of [redacted] and

as guardian of J.H. and T.H.'s and Plaintiff [redacted] and [redacted] (collectively, the "Plaintiffs") Expert Herman Hill and Brief in Support Thereof,[1] showing the Court as follows:

INTRODUCTION

This case arises out of a June 2018 car crash in which a vehicle driven by Plaintiff [redacted] and carrying [redacted] made contact with a taxicab, exited the interstate, went over a previously damaged guardrail, and collided with a pole located on the interstate's median. Defendant Georgia Department of Transportation ("GDOT") owned the interstate where the incident occurred and the guardrails that ran along it. At the time of the incident, GDOT had a written contract with Martin Robbins under which Martin Robbins was obligated to repair damaged guardrails reported to it by GDOT. Martin Robbins' only contact with the guardrails arose out of its contract with GDOT and Martin Robbins had no duty or right to touch the guardrails beyond the express terms of that contract. One such contractual term required Martin Robbins repair a damaged guardrail within 21 days of GDOT reporting its location to Martin Robbins. There is no dispute Martin Robbins failed to meet its contractual obligation to repair the guardrail involved in this incident within 21 days.

In their cases, Plaintiffs attempt to convert Martin Robbins' purely contractual obligation to repair within 21 days into a legal duty supporting their negligence claims. But Georgia law is clear that contractual obligations do not create legal duties. Legal duties are created only by statute or common law principles, and Plaintiffs have failed to show either created a duty for Martin Robbins to repair within 21 days. Plaintiffs try to disguise this failure by offering the testimony

[1] The above-captioned cases arise out of the same events and were consolidated for discovery in an Order signed by Judge Myra Dixon on April 22, 2020. (A true and correct copy of the Order is attached hereto as **Exhibit 1**.) Plaintiffs jointly retained the expert at issue, Herman Hill, who offered the same opinions for both matters. Therefore, in the interest of judicial economy, Martin Robbins files a single motion asking the Court to exclude his testimony in both cases.

of their jointly retained expert Herman Hill who opined Martin Robbins had a duty to repair within 21 days. But like Plaintiffs, Mr. Hill could not identify any statutory or common law basis for his opinion. Instead, Mr. Hill admitted his opinion was based solely on the terms of the contract. Plaintiffs cannot use Mr. Hill to create a duty not recognized by Georgia law. Mr. Hill's opinions run contrary to Georgia law, and therefore, should be excluded.

UNDISPUTED MATERIAL FACTS

The Contract

GDOT owns certain highway systems and guardrails in and around metro Atlanta, which it referred to as District 7. (Martin Robbins' Statement of Material Facts,[2] ¶ 1.) GDOT has the authority to enter contracts to procure "services ancillary to the construction and maintenance" of such highway systems. (MR Fact, ¶ 2.) In accordance with that authority, GDOT solicited bids for contractors to provide labor and materials necessary to perform guardrail maintenance, repair, or replacement for one year in District 7. (MR Fact, ¶ 3.) In September 2017, GDOT awarded Martin Robbins the contract and the parties entered into a written agreement (the "Contract").[3] (MR Fact, ¶ 4.) The Contract was solely between GDOT and Martin Robbins. (MR Fact, ¶ 6.) The Contract's benefits were "to flow from one [party] to the other," and the Contract named no third-party beneficiaries. (MR Fact, ¶ 7.) The Contract stated it was entered into pursuant to O.C.G.A. § 32-1-2 which states its purpose is to:

---

[2] Martin Robbins simultaneously files a Motion for Summary Judgment, Brief in Support of that Motion, and a Statement of Undisputed Material Facts and Theories of Recovery in Support of Its Motion for Summary Judgment in accordance with Uniform Rule 6.5. Martin Robbins attaches its Statement of Undisputed Material Facts hereto as **Exhibit 2** and will cite to the facts therein as "MR Fact, ¶ __."

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

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

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

The Contract referred to itself as an "open agency" agreement with "no minimum or maximum purchases required." (MR Fact, ¶ 16.) The Contract did, however, include "Estimated Quantities" of the amount of work to be performed. (MR Fact, ¶ 17.) Relying on those Estimated Quantities, Martin Robbins anticipated GDOT would request repair of approximately fifty (50) location per month. (MR Fact, ¶ 18.)

The Work

From September 2017 to February 2018, GDOT requested a volume of repairs consistent with the Estimated Quantities: approximately 50 locations per month. (MR Fact, ¶ 19.) But in March 2018, GDOT's requests suddenly and unexpectedly spiked. (MR Fact, ¶ 20.) Unbeknownst to Martin Robbins, GDOT had engaged Defendant Arcadis U.S., Inc. ("Arcadis") to identify damaged guardrails in District 7. (MR Fact, ¶ 21-22.) Arcadis' involvement caused the repair requests to increase dramatically and unreasonably beyond the Estimated Quantities. After GDOT

notified Martin Robbins of over 150 locations in a single week of March 2018, Martin Robbins notified GDOT it would likely not be able to complete that volume of repairs within the contractual timeframe and requested GDOT send a "realistic quantity of work" in the future. (MR Fact, ¶ 23.) GDOT did not. Instead, GDOT increased the number of requests which ballooned to over 350 locations in April 2018, over 200 locations in May 2018, and over 300 locations in June 2018. (MR Fact, ¶ 24-26.)

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

Subject Guardrail

On April 20, 2018, Arcadis notified Martin Robbins of 31 locations needing repair, including a guardrail located on the left side of Interstate 85 Southbound near Mile Marker 77.4 ("Subject Guardrail"). (MR Fact, ¶ 30.) Plaintiffs allege the Subject Guardrail had been damaged for several months when Martin Robbins first received notice on April 20, 2018.[4] ([redacted] Amended Complaint, ¶ 25; [redacted] Amended Complaint, ¶ 19-23.) Arcadis' notification classified the Subject Guardrail as "non-functional," and therefore, the Contract required Martin Robbins repair it within 21 days from notification, which would have been May 11, 2018. (MR Fact, ¶ 15, 31.) As Martin Robbins was still working to repair the hundreds of locations already

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

requested by GDOT and Arcadis in the prior weeks, it was unable to repair the Subject Guardrail within the contractual timeframe. (MR Fact, ¶ 32.) Martin Robbins scheduled repair of the Subject Guardrail for the morning of June 4, 2018. (MR Fact, ¶ 33.)

Incident

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

Plaintiffs' Allegations

Plaintiff [redacted] filed suit against Martin Robbins, and Plaintiffs [redacted] and [redacted] filed a separate suit against Martin Robbins. Both lawsuits assert claims of negligence against Martin Robbins. (*See* [redacted] Plaintiff's Amended Complaint, ¶ 46; [redacted] Plaintiffs' Amended Complaint, ¶ 40.) Relevant to this Motion, Plaintiffs premised their negligence claims on two theories: (1) Martin Robbins "failed to live up to its contractual obligation… to timely repair" the Subject Guardrail; and (2) Martin Robbins "failed to inspect and maintain" the Subject Guardrail. (*Id*.)

Mr. Hill's Opinions Regarding Martin Robbins

To support their theories, Plaintiffs engaged liability expert Herman Hill ("Mr. Hill") who offered opinions regarding the duties owed by the defendants, including Martin Robbins. Mr. Hill

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

> Q: Does any statute, code, regulation, rule, or industry-standard require a contractor to repair a non-functional guardrail within 21 days?
> A: I'm not aware of it and it doesn't matter. Contract is the only thing that matters.
> Q: Are you aware of any statute, code regulation, rule, or industry standard that sets out any specific timeframe in which a contactor must repair a non-functional guardrail?
> A: As far as I'm concerned, it doesn't matter. The Contract here says that and that's the only thing that matters. It doesn't matter what the industry standard is.
> Q: But is there one that you're aware of?
> A: I'm not aware of one.[5] [6](MR Fact, ¶ 39.)

Second, Plaintiffs alleged the Subject Guardrail was damaged several months before Martin Robbins was first notified on April 20, 2018. (*See* [redacted] Amended Complaint, ¶ 25-29; [redacted] Amended Complaint, ¶ 19-23.) Mr. Hill opined he "believe[d]" if a Martin Robbins employee noticed the damaged Subject Guardrail prior to April 20, 2018, "that employee had an obligation to say something to there [sic] supervisors about that."[7] (MR Fact, ¶ 40.) Again, Mr. Hill could not identify any statue, code, rule, regulation, or industry standard creating such duty.

---

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

[6] GDOT's State Maintenance Engineer oversees drafting and administration of guardrail contracts and testified the 21 day timeframe included in this Contract was not based on industry standard. (MR Fact, ¶ 46-47.) He further acknowledged GDOT entered into guardrail repair contracts with timeframe to repair other than 21 days. (MR Fact, ¶ 48.)

[7] Plaintiffs adduced no evidence showing Martin Robbins was aware of the damaged Subject Guardrail prior to receiving notice from Arcadis on April 20, 2018.

(MR Fact, ¶ 41.) Mr. Hill's sole basis for this opinion was the Contract, though he did not identify any specific term supporting his position. (MR Fact, ¶ 42-43.) In fact, the Contract did not require Martin Robbins to identify or report damaged guardrails. (MR Fact, ¶ 44.)

Mr. Hill's Qualifications

Mr. Hill admitted he has no experience repairing guardrails or scheduling their repairs. Mr. Hill testified he has **never**:

- Worked for a guardrail contractor. (Deposition of Herman Hill,[8] 87:12-23.)
- Installed or repaired a guardrail. (Ex. 3, Hill Dep. 87:21-25)
- Supervised a crew installing or repairing guardrail. (Ex. 3, Hill Dep. 88:1-6)
- Trained someone on how to install or repair guardrail. (Ex. 3, Hill Dep. 89:17-19)
- Evaluated guardrail damage to determine the manpower, material, or equipment or machinery needed to repair it. (Ex. 3, Hill Dep. 90:18-20; 92:2-4; 92:20-23.)
- Performed an analysis to determine when a guardrail repair could be performed considering available manpower, equipment, or materials; location of the repair; timing of approval of traffic control plans; the weather; and restrictions from the owner (i.e. no work on holiday weekends). (Ex. 3, Hill Dep. 96:4-8; 97:5-98:15.)
- Participated in discussions about the contractual timeframe for a contractor to repair a guardrail. (Ex. 3, Hill Dep. 119:14-23.)
- Administered an open agency contract with no maximum and no minimum requests. (Ex. 3, Hill Dep. 120:4-6.)

[8] Cited portions of Mr. Hill's deposition are attached hereto as **Exhibit 3**.

- Scheduled requests for performance of services under an open agency contract. (Ex. 3, Hill Dep. 110:2-5)
- Scheduled locations where multiple crews would operate for a single contractor on a given day or a in a given month. (Ex. 3, Hill Dep. 104:17-21; 106:18-23.)
- Managed, maintained, or ordered an inventory of materials needed to install or repair guardrail. (Ex. 3, Hill Dep. 90:11-17)
- Hired employees to oversee guardrail installation or maintenance. (Ex. 3, Hill Dep. 101:8-16; 102:2-4.)

Further, Mr. Hill testified he **never** taught a class or written a paper on:

- The standard of care for a guardrail contractor. (Ex. 3, Hill Dep. 111:20-22; 113:1-4.)
- The standard of care for a contractor performing open agency contracts. (Ex. 3, Hill Dep. 111:23-112:4; 113:6-9.)
- Guardrail installation or repair. (Ex. 3, Hill Dep. 110:6-8; 112:15-17.)
- Scheduling guardrail repair or installation. (Ex. 3, Hill Dep. 110:9-18; 112:18-20.)
- Scheduling or management of open agency contracts. (Ex. 3, Hill Dep. 110:19-111:6; 112:21-24.)

While Mr. Hill has testified in dozens of cases, Mr. Hill admitted he has **never** testified regarding the key issues in this case, including:

- Industry standards for the timing of a guardrail repair. (Ex. 3, Hill Dep. 114:10-18; 115:7-19.)

- Industry standards for a contractor performing under an open agency contract. (Ex. 3, Hill Dep. 116:14-20.)
- Whether a guardrail contractor failed to perform in a timely manner. (Ex. 3, Hill Dep. 114:1-6.)
- Scheduling of guardrail installation or repair. (Ex. 3, Hill Dep. 114:7-9.)
- Scheduling or management of open agency contracts. (Ex. 3, Hill Dep. 114:10-18; 115:7-19.)

Mr. Hill's Investigation

Despite never working in guardrail installation or repair, Mr. Hill did not speak with any guardrail contractors to form his opinions. (Ex. 3, Hill Dep. 130:20-22; 131:21-24.) Indeed, Mr. Hill could not identify any guardrail contractor other than Martin Robbins operating in the southeastern United States during the relevant timeframe. (Ex. 3, Hill Dep. 131:5-13.)

ARGUMENT AND CITATION TO AUTHORITY

I. LEGAL STANDARD

O.C.G.A. § 24-7-702 governs the admissibility of expert testimony and requires the trial court to act "as a gatekeeper," assessing the relevancy and reliability of the proffered testimony and the qualifications of the expert making them. *HNTB Georgia, Inc. v. Hamilton-King*, 287 Ga. 641, 642 (2010). The trial court's screening function is important because "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993).[9] The burden of establishing the admissibility of an expert opinion lies with the party seeking to introduce the expert testimony.

[9] O.C.G.A. § 24-7-702(f) explicitly states Georgia state courts should consider federal authority, including *Daubert* and cases applying it, when analyzing admission of expert testimony.

Stern v. Pettis, 357 Ga. App. 78, 80 (2020). Plaintiffs have failed to meet this burden for Mr. Hill's opinions related to Martin Robbins. Mr. Hill offers opinions regarding duties purportedly owed by Martin Robbins; however, these opinions run contrary to Georgia law and are therefore not relevant to the proceedings. To the extent Plaintiffs assert Mr. Hill's opinions relate to the "standard of care" applicable to Martin Robbins as opposed to its duties, the opinions should still be excluded as Mr. Hill is not qualified to offer a standard of care opinion and Plaintiffs have failed to show Mr. Hill's opinions are reliable.

II. MR. HILL'S DUTY OPINIONS RUN CONTRARY TO GEORGIA LAW AND THEREFORE WOULD NOT ASSIST THE TRIER OF FACT

To satisfy the reliability prong of the *Daubert* standard, the proffering party must show an expert's opinion would assist the trier of fact. *McDowell v. Brown*, 392 F.3d 1283, 1298-9 (11th Cir. 2004). An expert opinion that contradicts the law does not assist the trier of fact. *Vincent v. American Honda Motor Co., Inc.*, 2010 WL 11537726 at *9 (S.D. Ga. 2010). Here, Mr. Hill opinions regarding the duties owed by Martin Robbins run contrary to well-settled Georgia law and therefore should be excluded.

Under Georgia law, a legal duty sufficient supporting a negligence claim is created **only** through (i) statute, or (ii) common law principles.[10] *Boller v. Robert W. Woodruff Arts Center,*

[10] Pursuant to O.C.G.A. § 9-2-20(b), a third-party beneficiary may sue to enforce a contract; however, the contract must show the parties intended the third-party to be the beneficiary of that contract. *See Hubbard v. Dept. of Trans.*, 256 Ga. App. 342, 352 (2002). The mere fact that a third-party would benefit incidentally from the performance of the contract is not alone sufficient to give such person standing to sue on the contract. *Id*. Importantly, "where a contract is silent as to its intent to confer a benefit upon a plaintiff, the plaintiff may not recover as a third-party beneficiary to the contract." *Boller*, 311 Ga. App. 693, 698 (2011). Here, the Contract did not state an intent to benefit the motoring public. To the contrary, it stated the benefits of the Contract were to "flow from one [party] to the other." (MR Fact, ¶ 7.) Mr. Hill did not testify Plaintiff was a third-party beneficiary and stated he "did not intend to nor does he feel qualified to state legal interpretations of contractual documents." (Ex. 3, Hill Dep. 206:12-16.)

Inc., 311 Ga. App. 693, 696 (2011). A contractual term does not create a legal duty. *ServiceMaster Co, L.P. v. Martin*, 252 Ga. App. 751, 754 (2001); *USF Corp. v. Securitas Sec. Services USA, Inc.*, 305 Ga. App. 404 (2010); *Doty Commc'ns, Inc. v. L.M. Berry & Co*., 417 F.Supp.2d 1355, 1358 (N.D. Ga. 2006) (interpreting Georgia law); *DaimlerChrysler Motors Co., LLC*, 294 Ga. App. 38, 47 (2008); *Bouboulis v. Scottsdale Ins. Co*., 860 F. Supp. 2d 1364, 1380 (N.D. Ga. 2012) (interpreting Georgia law); *Integrated Pest Management Services, LLC v. BellSouth Advertising & Publishing Corp.*, 2005 WL 3096131 at *4 (N.D. Ga. 2005) (interpreting Georgia law); *Swyters v. Motorola Employees Credit Union*, 244 Ga. App. 356, 358 (2000). Contrary to this authority, Mr. Hill testified Martin Robbins owed a duty to repair and/or report the Subject Guardrail sooner based solely on the terms of the Contract. Regarding his opinion that Martin Robbins should have repaired the Subject Guardrail within 21 days, Mr. Hill testified:

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

Likewise, Mr. Hill could not cite anything other than the Contract supporting his opinion that Martin Robbins should have reported the Subject Guardrail prior to being notified of its condition on April 20, 2018.[11] (MR Fact, ¶ 41-43.) Plaintiffs nor Mr. Hill cited any statute that created these

[11] Mr. Hill could not point to any contractual term supporting his position at deposition. (MR Fact, ¶ 43.) In reality, the Contract did not require Martin Robbins to identify or report damaged guardrails. (MR Fact, ¶ 44.)

duties. Indeed, Mr. Hill admitted no such statute existed. (MR Fact, ¶ 39.) Neither Plaintiffs nor Mr. Hill has pointed to any case authority showing the common law created such duties for Martin Robbins either.

Plaintiffs plainly tries to use Mr. Hill to do what Georgia law will not by transforming a contractual obligation into a legal duty. But expert testimony "does not, and cannot, create a legal duty where none existed before." *Diamond v. Dep't of Transp.*, 326 Ga. App. 189, 195 (2014); *see also McGarrah v. Posig*, 280 Ga. App. 808, 810-811 (2006); *Glover v. Georgia Power Co*., 347 Ga. App. 372, 375 (2018). Mr. Hill has a history of offering unfounded duty opinions. In the *Diamond* case, an injured motorist filed suit after his car plunged into a ditch near a roadside construction project. 326 Ga. App. at 190. The motorist presented Mr. Hill's testimony that defendant had a duty to take certain actions related to the roadway, including erecting warning signs and removing the striping on the roadway. *Id*. at 195. The lower court granted summary judgment to the defendant and the Georgia Court of Appeals affirmed. *Id*. at 189. In granting summary judgment for the defendant, the Court disregarded Mr. Hill's testimony writing the motorist's "efforts to establish a duty" through Mr. Hill failed because "duty arises either from statute or common law." *Id*. at 195. This Court should follow the *Diamond* court's lead. As Mr. Hill's opinions regarding Martin Robbins run contrary to well-settled Georgia law regarding the creation of duties, these opinions should be excluded.

III. TO THE EXTENT MR. HILL'S OPINIONS ARE DEEMED "STANDARD OF CARE" OPINIONS, THEY SHOULD STILL BE EXCLUDED

If Plaintiffs assert Mr. Hill's opinions relate to a "standard of care" as opposed to "duty," it does not change the result. Mr. Hill is not qualified to opine on the standard of care for a guardrail contractor such as Martin Robbins, nor is his opinion reliable under *Daubert*.

A. Mr. Hill Is Not Qualified to Opine on the Standard of Care Applicable to Martin Robbins

"Determining whether a witness is qualified to testify as an expert requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony." *Parton v. United Parcel Serv.*, 2005 WL 5974445 at *2 (N.D. Ga. 2005). It is well-settled an expert's opinion should not exceed the scope of his training or qualifications. *Polston v. Boomershine Pontiac-GMC Truck, Inc.*, 952 F.2d 1304, 1309 (11th Cir. 1992). For his testimony to be admissible, an expert must be qualified in the "relevant area of expertise" applicable to his specific opinions and must "stay within the reasonable confines of his subject area." *Trilink Saw Chain, LLC v. Blount, Inc.*, 583 F.Supp.2d 1293, 1304 (N.D. Ga. 2008). Importantly, the Georgia Supreme Court has held that an expert relying on his experience as the foundation for an opinion regarding a standard of care must have "experience with the particular procedure or practice at issue." *HNTB Georgia*, 287 Ga. at 645; *see also Clarke v. Schofield*, 632 F. Supp. 2d 1350, 1358 (M.D. Ga. 2009) ("more specific knowledge is required to support more specific" opinions). The reasoning for such rule is evident when one considers the standard of care requires a contractor perform its work with the same degree of skill and care as others in the same profession in similar circumstances. *Mays v. Valley View Ranch, Inc.*, 317 Ga. App. 143, 148-149 (2012). In other words, a contractor must act in accordance with industry standards widely practiced and followed by others in their field. *Mays*, 317 Ga. App. at 148-149; *MARTA v. Allen*, 188 Ga. App. 902, 908 (1988). An expert with no experience in the particular field would have no basis to testify regarding industry-wide practices, and therefore, is not qualified to testify on the standard of care. *HNTB Georgia*, 287 Ga. at 645; *Mays,* 317 Ga. App. at 148-149.

The "particular procedures" at issue in this case are guardrail repair and scheduling of the same, but Mr. Hill has no education, training, or experience on these topics. Mr. Hill admitted

guardrail repair is "highly specialized" work but conceded he has done such work. (Ex. 3, Hill Dep. 87:12-88:6; 102-21-25.) He has never supervised guardrail repair, nor has he ever trained others on how to do it. (Ex. 3, Hill Dep. 88:1-6; 89:17-19.) Mr. Hill acknowledged scheduling a repair requires the exercise of professional judgment but admits he has no experience exercising such judgment. More specifically, Mr. Hill conceded a contractor's ability to perform a guardrail repair is contingent on many factors, including available manpower, equipment, or materials; location of the repair; timing of approval of traffic control plans; the weather; and restrictions from the owner (i.e. no work on holiday weekends). (Ex. 3, Hill Dep. 96:4-8; 97:5-98:15.) Yet, Mr. Hill admitted he has never evaluated a damaged guardrail to determine when it could be performed in light of these varying factors. (Ex. 3, Hill Dep. 96:4-8; 97:5-98:15.) He has never scheduled locations where multiple crews would perform guardrail repairs on a given day or over a given month. (Ex. 3, Hill Dep. 104:17-21; 106:18-23.) He has further never administered an open agency contract where the number of repairs to be performed was not known at the outset of the contract. (Ex. 3, Hill Dep. 120:4-6.)

Mr. Hill has never sat in the seat of a guardrail contractor attempting to manage hundreds of unexpected repair requests and thus cannot testify what a reasonable guardrail contractor sitting in that seat would (or should) have done under the circumstances. This result is directly in line with the Georgia Supreme Court's decision in *HNTB Georgia.* In that matter, an injured motorist and the estate of deceased motorist brought a negligence claim against an engineering firm and contractor arising out of a car accident on a bridge. The engineering firm designed plans to widen the bridge and the contractor performed its work in accordance with those plans. Claimants had stopped their disabled vehicle on the bridge where the work was occurring when they were struck by another car crossing the bridge. Claimants proffered an expert who testified defendants failed

to meet their standards of care by failing to add shoulders and proper lighting to the bridge's traffic control plan which would have allowed claimants to get out of the way of oncoming traffic and alerted approaching vehicles of their presence. Defendants moved to exclude the expert for lack of qualifications. While the expert had general experience in the construction industry, he had no experience designing traffic control plans specifically. The Georgia Supreme Court excluded the expert, finding the expert's general experience insufficient to qualify him to testify regarding the "particular" relevant area. *Id*. at 646; *see also Payne*, 606 Fed. Appx. at 943; *Trilink,* 583 F. Supp. 2d at 1304; *Cornerstone Missionary Baptist Church v. Southern Mut. Church Ins. Co.*, 2013 WL 6712928 at *3 (M.D. Ga. 2013); *Williams v. Energy Delivery Serv., Inc*., 2005 WL 5976569 at *3 (N.D. Ga. 2005).

When the crucial issue is how a guardrail contractor would have performed under like and similar circumstances, Mr. Hill's failure to ever be in like and similar circumstances becomes a glaring issue. He has no experience repairing guardrails or scheduling their repair. Simply stated, the standard of care for Martin Robbins under these circumstances is outside the domain of Mr. Hill's expertise and his opinions on the matter should be excluded.

B. <u>Mr. Hill's Opinions Regarding the Standard of Care are Unreliable</u>

Even if Mr. Hill was qualified to testify as to the standard of care, his opinion should still be excluded as unreliable. In addition to establishing an expert is qualified, a proffering party must establish her expert's opinion is reliable. O.C.G.A. § 24-7-702(b). To show reliability of a standard of care opinion, an expert must present more than his own "say-so." *McClain v. Metabolife Intern, Inc.*, 401 F.3d 1233, 1244 (11th Cir. 2005). The expert must present credible evidence that an industry standard exists and is based on "readily ascertainable and verifiable standards recognized by practitioners in the field." *Butler v. First Acceptance Ins. Co.,* 652 F. Supp.2d 1264, 1272-1273

(N.D. Ga. 2009); *HNTB Georgia*, 287 Ga. at 645. In other words, a standard of care opinion must be based on widely accepted "industry standards" rather than an expert's personal beliefs about what the standards should be. *Anderson v. Atlanta Gas Light Co.*, 324 Ga. App. 801, 810 (2013) (excluding standard of care opinion where expert failed to demonstrate companies similar to defendant met the standard of care advocated by expert).

Mr. Hill cannot meet this burden. Mr. Hill could not identify any statute, code, rule, regulation, or industry standard which required a guardrail contractor repair a given guardrail within 21 days. (MR Fact, ¶ 39.) Indeed, Mr. Hill admitted he was not aware of any industry standard setting any specific timeframe—much less 21 days – for a contractor to repair a given guardrail, testifying:

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

This is consistent with the testimony of GDOT's State Maintenance Engineer responsible for drafting and administering guardrail contract who stated 21 days is not an industry standard for guardrail repair and acknowledged GDOT enters into contracts that have timeframes for repair other than 21 days. (MR Fact, ¶ 45-48.) It is axiomatic that before an expert can testify as to the substance of an industry standard, he must show a standard exists. *See Butler,* 652 F. Supp.2d at 1272-1273. Having admitted no industry standard exists regarding a contractor's time to repair a

damaged guardrail, Mr. Hill should not be permitted to testify the standard of care required Martin Robbins repair the Subject Guardrail within 21 days.

Mr. Hill likewise failed to show any industry standard required a guardrail contractor report a damaged guardrail noticed in the field. Mr. Hill did not identify any code, law, rule, regulation, or standard requiring a guardrail contractor make such a report.[12] (MR Fact, ¶ 41-43.) Mr. Hill presented no evidence reporting damaged guardrails is a widely recognized or followed "practice" in the guardrail contracting industry.[13] Having failed to show industry standard required Martin Robbins to report the Subject Guardrail as damaged, Mr. Hill's opinion on that topic should be excluded.[14]

CONCLUSION

Based on the foregoing facts and law, Martin Robbins respectfully asks this Court to grant its Motion to Strike Herman Hill from offering any opinions related to Martin Robbins.

[12] Mr. Hill testified the sole basis for his "reporting" opinion was the Contract but could not identify any specific provision requiring such report. (MR Fact, ¶ 42.) In actuality, the Contract did not contain any term requiring Martin Robbins report damaged guardrails. (MR Fact, ¶ 43.)

[13] Despite his lack of experience with guardrail repair and scheduling, Mr. Hill admitted he did not speak to any guardrail contractors to form his opinions in this matter. (Ex. 3, Hill Dep. 130:20-22; 131:21-24.)

[14] There is no evidence Martin Robbins actually noticed the Subject Guardrail as damaged prior to April 20, 2018.

This 24th day of November 2021.

HUDSON LAMBERT PARROTT WALKER, LLC

/s/ Claire A. Williamson
Brad C. Parrott
Georgia Bar No. 595999
Claire A. Williamson
Georgia Bar No. 474247

3575 Piedmont Road NE
Fifteen Piedmont Center, Suite 850
Atlanta, Georgia 30305-1541
Telephone: (404) 554-8181
Facsimile: (404) 554-8171
Email: BParrott@hlpwlaw.com
Email: CWilliamson@hlpwlaw.com
Attorneys for Defendant Martin-Robbins Fence Company

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **DEFENDANT MARTIN-ROBBINS FENCE COMPANY'S MOTION TO EXCLUDE PLAINTIFFS' EXPERT HERMAN HILL AND BRIEF IN SUPPORT THEREOF** via File & Serve Xpress which will automatically serve the following counsel of record:

James E. Butler, III
Matthew R. Kahn
Butler Law Firm
10 Lenox Pointe
Atlanta, Georgia 30324
Attorneys for Plaintiff

David R. Cook, Jr.
Antonio E. Veal
Autry, Hall & Cook, LLP
3330 Cumberland Blvd., Suite 325
Atlanta, Georgia 30339
Attorneys for Defendant GDOT

Kristine Hayter
State of Georgia Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334-1300
Attorneys for Defendant GDOT

Nick T. Protentis
Protentis Law, LLC
5447 Roswell Road NE
Atlanta, GA 30342

Sarah L. Bright
Kent T. Stair
Copeland, Stair, Kingma & Lovell, LLP
191 Peachtree Street NE
Suite 3600
Atlanta, Georgia 30303
Attorneys for Arcadis U.S., Inc.

Kevin P. Branch
Elenore C. Klinger
McMickle, Kurey & Branch, LLP
217 Roswell Street
Suite 200
Alpharetta, GA 30009

[signature on following page]

This 24th day of November 2021.

HUDSON LAMBERT PARROTT WALKER, LLC

/s/ Claire A. Williamson
Brad C. Parrott
Georgia Bar No. 595999
Claire A. Williamson
Georgia Bar No. 474247

3575 Piedmont Road NE
Fifteen Piedmont Center, Suite 850
Atlanta, Georgia 30305-1541
Telephone: (404) 554-8181
Facsimile: (404) 554-8171
Email: BParrott@hlpwlaw.com
Email: CWilliamson@hlpwlaw.com
Attorneys for Defendant Martin-Robbins Fence Company