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]

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

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

INTRODUCTION

Plaintiff asserts in their response brief that Arcadis is liable in this case because it purportedly breached a legal duty to locate and report nonfunctional guardrail in a timely manner. Arcadis disputes that it owed such a legal duty to Plaintiff, but even if it did, summary judgment should be granted to Arcadis because **Plaintiff cannot show that Arcadis had a legal duty to identify and report the subject guardrail earlier than Arcadis reported it**. Legal duties can arise from three sources: 1) contract; 2) statute, or 3) common law principles recognized in case law. Here, **Arcadis did not have a legal duty arising from contract, statutory, or common law principles to identify and report the subject guardrail any earlier**. As such, summary

judgment should be granted to Arcadis on all of the claims against it (negligence, nuisance, punitive damages and attorney's fees).

There is no viable negligence claim based on breach of contractual duty. The contract between GDOT and Arcadis clearly states that "**there are no individual or personal third party beneficiaries of this Agreement**." As such, Plaintiff has no standing to enforce a claim for breach of any legal duty that arises solely under a contract, since Plaintiff is not a third-party beneficiaries to said contract. Even if this Court determined Plaintiff was a third-party beneficiary to the contract, there is no viable negligence claim based on breach of contractual duty, based on the plain language of the contract, because **there is no contractual provision requiring Arcadis to see the subject guardrail or report it any earlier than Arcadis did**.

Plaintiff attempts to establish the existence of the legal duty at issue in this case – **that Arcadis had a legal duty to identify and report the subject guardrail earlier** – through an expert, Herman Hill. Mr. Hill opines that Arcadis failed to inspect and monitor guardrails as required by the contract, the voluntary undertaking doctrine and "industry standards," such that **Arcadis should have seen and reported the subject guardrail prior to April 20, 2018**. These opinions attempt to establish that Arcadis had a legal duty to see and report all damaged guardrail that exists on the highways in District 7 and that Arcadis had a legal duty to report damaged guardrail that it didn't see. Such a heightened legal duty was not required by the contract between Arcadis and GDOT. Herman Hill admitted in this deposition that the contract between Arcadis and GDOT contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails. Mr. Hill's opinions (including those purporting to interpret contractual requirements and referencing common law principles such as the voluntary undertaking doctrine and "industry standards") are Mr. Hill's personal wish-list as to heightened performance standards

but **are not required by the contract, the voluntary undertaking doctrine, or recognized industry standards**, and go beyond the exercise of ordinary care. But for Herman Hill's testimony, the legal duty at issue in this case – that Arcadis had a legal duty to identify and report the subject guardrail earlier – does not otherwise exist under Georgia law. **Georgia law is clear that a plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law**. As shown herein, **there is no "industry standard" requiring Arcadis to see the subject guardail or report it any earlier than Arcadis did**.

There is no viable negligence claim based on breach of a duty that arises from the voluntary undertaking doctrine. First, the voluntary undertaking doctrine does not apply because Arcadis' duties with respect to guardrail arise under the contract. Second, even if the voluntary undertaking doctrine did apply, the undisputed material facts show that Arcadis' conduct complied with the standard of performance of ordinary care. Third, and most importantly, **even if the voluntary undertaking doctrine did apply, it did not require Arcadis to see and report the subject guardrail any earlier**.

Arcadis is entitled to summary judgment on Plaintiff's negligence claim, notwithstanding Herman Hill's expert testimony that it was chargeable with a breach of duty for failing to identify and report the subject guardrail earlier. What duty a defendant owes to a plaintiff is a question of legal policy to be decided by the Court as an issue of law, and not by an expert. **Because Plaintiff has not established that Arcadis owed Plaintiff a legal duty** (arising from the contract or established by statute or common law) **to see and report the subject guardrail earlier,** Plaintiff's negligence action against Arcadis cannot be maintained.

With respect to the nuisance claim, Arcadis is entitled to summary judgment. First, the

subject guardrail was not a "nuisance" under Georgia law. Second, even it was, Arcadis had no legal duty to abate it. Third, Arcadis had no knowledge of the condition of the subject guardrail. There is no evidence in the record that an Arcadis inspector **actually saw** the subject guardrail at any time before it was reported to Martin-Robbins. Fourth, Arcadis had no control over the cause of the harm: 1) Arcadis did not create the hazard; 2) Arcadis had no control over a harm it didn't know about; and 3) Arcadis had no control over whether a guardrail noticed for repair would be timely repaired. Herman Hill's supplemental affidavit filed with Plaintiff's response brief does not serve to confer control onto Arcadis, when such control does not otherwise exist.

Moreover, Arcadis is entitled to summary judgment on Plaintiff's claims for punitive damages, as Plaintiff cannot show Arcadis' actions exhibited willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences.

Lastly, Arcadis is entitled to summary judgment on Plaintiff's claims for attorney's fees under O.C.G.A. § 13-6-11, as there is no evidence Arcadis acted in bad faith, has been stubbornly litigious or caused Plaintiff unnecessary trouble or expense.

Arcadis is entitled to summary judgment on all claims asserted against it.

ARGUMENT AND CITATION OF LEGAL AUTHORITY

I. Arcadis is Entitled to Summary Judgment on Plaintiff's Negligence Claim.

Plaintiff cannot maintain a negligence claim against Arcadis because Plaintiff cannot show Arcadis breached any legal duty owed to Plaintiff under Georgia law. **Plaintiff cannot show that Arcadis had a legal duty to identify and report the subject guardrail earlier than Arcadis reported it**. Legal duties can arise from three sources: 1) contract; 2) statute, or 3) common law principles recognized in case law. *See Rasnick v. Krishna Hospitality, Inc.*, 289 Ga. 565, 566-567

(2011). As shown herein, because Plaintiff has not established that Arcadis owed Plaintiff a legal duty (arising from the contract or established by statute or common law) to see and report the subject guardrail earlier, Plaintiff's negligence action against Arcadis is not viable and cannot be maintained.

A. There is No Viable Negligence Claim Based on Breach of Contractual Duty.

1) Plaintiff Has No Standing to Assert the Breach of Any Legal Duty Arising Under the Contract Because Plaintiff is Not a Third-Party Beneficiary to the Contract.

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

Here, it is clear that Arcadis' duties with respect to inspection of guardrails arise solely under the Arcadis' contract with GDOT ("Arcadis Contract"). The Arcadis Contract clearly states that "**there are no individual or personal third party beneficiaries of this Agreement**."[1] As

[1] See Article #129 to the Contract between GDOT and Arcadis dated June 14, 2016) (emphasis supplied), attached hereto as **Exhibit A**.

such, Plaintiff has no standing to enforce a claim for breach of **ANY** alleged duty that arises solely under a contract, since Plaintiff is not a third-party beneficiary to said contract.

2) Based on the Plain Language of the Contract, Arcadis Had No Legal Duty Arising Under the Contract to See and Report the Subject Guardrail Any Earlier.

Even if this Court determined that Plaintiff was a third-party beneficiary to the contract, there is no viable negligence claim based on breach of contractual duty, based on the plain language of the contract, because there is no provision in the Arcadis Contract that required it to: 1) identify the subject guardrail, or 2) to report the subject guardrail any earlier.

Although guardrail inspection is a "roadway inspection service[]" that Arcadis may be called upon to perform under the Arcadis Contract, the inspection of guardrails is not specifically referenced anywhere in the Arcadis Contract.[2] The Arcadis Contract does have a provision that generically says, "time is of the essence".[3] The Arcadis Contract contains no other time or performance requirements with respect to inspecting or reporting of guardrails.[4]

Plaintiffs have cited no contractual provision that required Arcadis to see all damaged guardrail that exists in District 7. As such, **there is no contractual provision that required Arcadis to see the subject guardrail at issue in this case, at any time**.

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[2] See Scope of Services, Exhibit A to the the Contract between GDOT and Arcadis dated June 14, 2016, attached hereto as **Exhibit B**; T. Hendon Depo., p. 146, lines 12-14.

[3] See Article #102 to the Contract between GDOT and Arcadis dated June 14, 2016, attached hereto as **Exhibit C**. **ARTICLE #102 TERM OF AGREEMENT**, states as follows:

> This Agreement is effective as of the date written in ARTICLE #101 AGREEMENT BETWEEN above and shall terminate on May 31, 2021, unless terminated earlier under ARTICLE #116 TERMINATION of this Agreement. The Consultant [Arcadis] shall not begin any work under the terms of this Agreement until authorized in writing by the Department through a Notice to Proceed which shall provide an effective date for the start of Consultant services. No services of any kind, including but not limited to travel, preliminary meetings, planning, etc., shall be compensated by the Department prior to the effective date of the Notice to Proceed. **Time is of the essence** in this Agreement and the Consultant shall perform its responsibilities for the Project in accordance with assignments made by the Department Project Manager (PM). (emphasis supplied).

[4] See T. Hendon Depo., p. 146, lines 12-14; See also Deposition of Herman Hill, taken on May 5, 2021, p. 271, lines 1-6, p. 277, lines 21-25; Scope of Services, Exhibit A to the Contract between GDOT and Arcadis dated June 14, 2016, attached hereto as **Exhibit B**.

Plaintiffs have cited no contractual provision that required Arcadis to report the subject guardrail any earlier than Arcadis reported it. Arcadis concedes that the Arcadis Contract required it to promptly report all damaged guardrail that it saw or was reported to it. However, the undisputed facts show that GDOT reported the subject guardrail to Arcadis on April 19, 2018, and that Arcadis reported subject guardrail to Martin-Robbins on April 20, 2018. **There is no contractual provision that required Arcadis to report the subject guardrail any earlier than it did**.

Given the above, there is no contractual provision that required Arcadis to identify and report the subject guardrail any earlier than it did. As such, the purported legal duty at issue in this case – that Arcadis had a legal duty to identify and report the subject guardrail earlier than Arcadis reported it – cannot and does not arise from the Arcadis Contract. As such, there is no viable negligence claim based on breach of contractual duty.

B. There is No Common Law Principle Recognized in Case Law that Required Arcadis to See and Report the Subject Guardrail Earlier.

1) There is No Viable Negligence Claim Based on Breach of Legal Duty Arising from "Industry Standards".

a. There is no "industry standard" that required Arcadis to see and report the subject guardrail earlier.

Plaintiff attempts to establish the existence of the legal duty at issue in this case – **that Arcadis had a legal duty to identify and report the subject guardrail earlier** – through an expert, Herman Hill. The sole source of the contention that Arcadis had a legal duty to see and report the subject damaged guardrail earlier is Herman Hill. However, Plaintiff's effort to establish such a legal duty through expert testimony fails because **Georgia law is clear that a plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law**. What duty a defendant owes is a question of legal policy

to be decided as an issue of law, and not by an expert. *See Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008) ("Nonetheless, Lawson's efforts to establish a duty through expert testimony fails because 'what duty a defendant owes…is a question of legal policy to be decided as an issue of law.'").

In *Diamond v. Department of Transp.*, 326 Ga. App. 189 (2014), a plaintiff similarly tried to establish a non-existent duty through Mr. Hill. In the *Diamond* case, an injured motorist presented Mr. Hill's testimony that defendant had a duty to take certain actions including erecting warning signs and removing roadway striping. *See Id.* at 195. The trial court disregarded Mr. Hill's testimony, as it attempted to establish a non-existent duty through expert testimony, and granted summary judgment to the defendant. The Court of Appeals affirmed, holding that plaintiff's "efforts to establish a duty" through Mr. Hill's testimony failed because "duty arises either from statute or from a common law principle recognized in the case law." *Id.* at 195. The Court of Appeals found that, because the plaintiff presented no evidence – other than Mr. Hill's testimony – that any statute or case law created the purported duty, defendant was entitled to summary judgment on plaintiff's negligence claim. *See Id.* at 195 – 196.

In *Nat. Foundation Co. v. Post, Buckley*, 219 Ga. App. 431, 435 (1999), a plaintiff attempted to establish a duty via expert testimony. *See id.* at 433-434. The Court of Appeals rejected plaintiff's effort to establish a non-existent 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, that allowing experts to create legal duties that otherwise do not exist 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). The Court of Appeals upheld the trial court's order that the defendant was

entitled to summary judgment notwithstanding plaintiff's expert testimony that defendant was chargeable with breach of duty, as what duty a defendant owes to plaintiff is a question of legal policy to be decided as an issue of law.

Here, just as in *Diamond, Adams v. APAC-Georgia*, *Nat. Foundation Co. v. Post, Buckley*, *Lawson v. Entech Enterprises, Inc.* Plaintiff attempts to establish a non-existent duty through an expert, Mr. Hill. Mr. Hill opines that Arcadis failed to inspect and monitor guardrails as required by the contract, the voluntary undertaking doctrine, and "industry standards," 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 7. Such a heightened legal duty was not required by the contract between Arcadis and GDOT. Herman Hill admitted in his 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.[5] Mr. Hill's opinions (including those purporting to interpret contractual requirements and referencing common law principles such as the voluntary undertaking doctrine and "industry standards") are Mr. Hill's personal wish-list as to heightened performance standards but are not required by the contract, the voluntary undertaking doctrine, or recognized industry standards, and go beyond the exercise of ordinary care.

b. Herman Hill's supplemental affidavit cannot and does not establish an "industry standard" that required Arcadis to see and report the subject guardrail earlier.

In connection with Plaintiff's response in opposition to Arcadis' motion for summary judgment, Plaintiff filed a supplemental affidavit of Herman Hill (dated December 1, 2021) in

[5] See H. Hill Depo., p. 271, lines 1-6 (Q: "Have you seen anything that outlines the kind of outline of services that you 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.").

order to attempt to establish an "industry standard" to serve as the legal basis for the purported legal duty that Arcadis was required to see and report the subject guardrail earlier. However, Plaintiff's efforts to establish such a legal duty via an "industry standard" fail.

Hill asserts in his supplemental affidavit that "**[t]he industry standard for reporting damaged, state-owned guardrail is to report it on the same day as it is identified**."[6]

Herman Hill states in his affidavit that, on March 14, 2018 an Arcadis inspector (Calvin Thrasher) stopped his vehicle to report a damaged guardrail across the interstate from the subject guardrail, and that, Arcadis should have identified the subject guardrail on March 14, 2018, at the latest.[7] Hill concludes, "**to have complied with the industry standard [to report damaged guardrail on the same day as it is identified], Arcadis must have identified and reported the subject guardrail no later than March 14, 2018.**"[8]

i. A preliminary discussion in Meeting Minutes cannot and does not form the basis of an industry standard.

Plaintiff states in their response brief that the purported "industry standard" – that damaged guardrail must be reported on the same day it is identified - is "supported by the March 13, 2018 meeting minutes in which GDOT and Arcadis agreed that that Arcadis would report damaged guardrail 'daily.'"[9] The meeting minutes to which Plaintiff refers are notes from an early meeting between GDOT and Arcadis in which there was a preliminary discussion as to how the flow of information would occur in connection with Arcadis' new role in assisting with the management

[6] H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶ 19 (emphasis supplied).
[7] H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶¶ 20-21.
[8] H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶¶ 22 (emphasis supplied).
[9] While Arcadis disputes that it was required to compile the damaged guardrails reports daily, this disputed fact is not material to Arcadis' Motion for Summary Judgment.

of the Martin-Robbins contract.[10] A preliminary discussion in Meeting Minutes cannot and does not form the basis of an industry standard.

ii. The "industry standard" articulated– that damaged guardrail must be reported on the same day it is identified – cannot and does not serve as the basis to support Hill's opinion that Arcadis should have ***identified*** the subject guardrail as damaged on March 14, 2018.

Even if a preliminary discussion in Meeting Minutes can form the basis of an industry standard, an industry standard speaking to the timing of a ***reporting*** requirement has nothing to do with a requirement to ***identify*** damaged guardrail in the first place. Hill has not offered ***any*** industry standard to support his opinion that Arcadis had a legal duty to see the subject damaged guardrail in the first place. The "industry standard articulated" – that damaged guardrail must be reported on the same day it is identified – cannot and does not serve as the basis to support Hill's opinion that Arcadis should have ***identified*** the subject guardrail as damaged no later than March 14, 2018.

iii. The "industry standard" articulated – that damaged guardrail must be reported on the same day it is identified – cannot and does not serve as the basis to support Hill's opinion that Arcadis should have ***reported*** the subject guardrail as damaged on March 14, 2018.

There is no evidence in the record that an Arcadis inspector ***actually saw*** the subject guardrail on March 14, 2018 or any other time. Arcadis can't report a damaged guardrail (on a daily basis or otherwise) that it hasn't actually seen. The "industry standard" articulated – that

[10] See Arcadis Meeting Minutes for meeting held on March 13, 2018, attached to Arcadis' Motion for Summary Judgment Brief as Exhibit F. The March 14, 2018 Meeting Minutes state:

> Reports will be sent by Arcadis inspectors and GDOT staff to D7Guardail@dot.ga.gov. **[Arcadis] will compile a spreadsheet of damaged locations and email to [GDOT] daily.** [GDOT] will email the spreadsheet to Martin Robins (contractor) on the same day and CC [Arcadis]." (emphasis supplied).

This meeting was very early on in the process and, in fact, the procedure was eventually worked out where it was later decided that Arcadis would compile and distribute the reports to Martin-Robbins on a **weekly** basis.

damaged guardrail must be reported on the same day it is identified – cannot and does not serve as the basis to support Hill's opinion that Arcadis should have ***reported*** the subject guardrail as damaged no later than March 14, 2018.

As such, Herman Hill's supplemental affidavit cannot and does not establish an "industry standard" to serve as the legal basis for the purported legal duty that Arcadis was required to see and report the subject guardrail earlier than April 20, 2018.

But for Herman Hill's testimony, the legal duty at issue in this case – that Arcadis had a legal duty to identify and report the subject guardrail earlier – does not otherwise exist under Georgia law. Such duty does not arise under the contract, statute, or common law principles recognized in case law. The only source for the purported legal duty at issue in this case – that Arcadis had a legal duty to identify and report the subject guardrail earlier – is Herman Hill. **Georgia law is clear that a plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law**. *See Adams v. APAC-Georgia*, 236 Ga. App. 215, 217 (1999); *Nat. Foundation Co. v. Post, Buckley*, 219 Ga. App. 431, 435 (1995); *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008).

Arcadis is entitled to summary judgment on Plaintiff's negligence claim, notwithstanding Herman Hill's expert testimony that it was chargeable with a breach of duty for failing to identify and report the subject guardrail earlier. What duty a defendant owes to a plaintiff is a question of legal policy to be decided by the Court as an issue of law, and not by an expert. **Because Plaintiff has not established that Arcadis owed Plaintiff a legal duty** (arising from the contract or established by statute or common law) **to see and report the subject guardrail earlier,** Plaintiff's negligence action against Arcadis cannot be maintained.

2) There is No Viable Negligence Claim Based on Breach of a Duty that Arises from the Voluntary Undertaking Doctrine.

Citing to Section 324A of the Restatement (Second) of Torts, Plaintiff asserts that Arcadis is liable because 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". (See response brief, p. 18). However, Arcadis did not have a legal duty, arising from the voluntary undertaking doctrine, to identify and report the subject guardrail any earlier. As such, there is no viable negligence claim based on breach of a duty arising from a voluntary undertaking.

a. The voluntary undertaking doctrine does not apply because Arcadis' duties with respect to guardrail arise from the contract.

Under the common law doctrine of voluntary undertaking, "Where one undertakes an act which he has no duty to perform and another reasonably relies upon that undertaking, the act must generally be performed with ordinary and reasonable care." *S & A Industries, Inc. v. Bank Atlanta*, 247 Ga. App. 377, 382 (2000) (quoting *Stelts v. Epperson*, 201 Ga. App. 405, 407 (1991)).

The voluntary undertaking doctrine only applies if one undertakes an act "which he has no duty to perform". *See Id.* Here, Arcadis' inspection and reporting duties with respect to guardrail arise under the Arcadis Contract, so the voluntary undertakings doctrine does not apply.

b. Even if the voluntary undertaking doctrine applies, the undisputed material facts show that Arcadis' conduct complied with the standard of performance required by the voluntary undertaking doctrine.

Even if this Court finds that the voluntary undertaking doctrine applied such that Arcadis was required Arcadis to promptly report any damaged guardrail that it saw or was reported to it, the undisputed material facts show that Arcadis' conduct complied with this standard of performance.

The undisputed material facts are as follows: On or about July 2017, pursuant to the Arcadis Contract, GDOT asked Arcadis to begin assisting GDOT with the inspection and reporting

of damaged guardrail in District 7.[11] If an Arcadis inspector saw a damaged guardrail while out on the highways in District 7, and could safely pull over and take a photo of the damaged guardrail, they were directed to and report it to GDOT.[12] In March 2018, GDOT asked Arcadis to assist in the management of the Martin-Robbins Contract.[13] In this new role, Arcadis was directed to compile spreadsheets of damaged guardrail that had been reported to GDOT by both GDOT and Arcadis inspectors, and then notify Martin-Robbins. [14] On March 14, 2018, Arcadis inspector, Calvin Thrasher, took a photo of a damaged guardrail on the other side of the interstate from the subject damaged guardrail (the "Other Guardrail") and reported it to GDOT.[15] On April 2, 2018, Arcadis notified Martin-Robbins that the Other Guardrail was "non-functioning".[16] On April 18, 2018, GDOT took a photo of the subject guardrail and reported it to GDOT as needing repair.[17] GDOT's photo of the subject guardrail came into Arcadis's possession shortly after it was taken on April 18, 2018.[18] On April 20, 2018, Arcadis compiled a spreadsheet of damaged guardrail that had been reported to GDOT by both GDOT and Arcadis inspectors, and notified Martin-Robbins that the subject guardrail was "non-functioning". [19]

Plaintiff has not set forth any evidence that Arcadis **actually** saw the subject damaged

[11] See T. Hendon Depo., p. 112, lines 1-5; Defendant's Exhibit 6, attached to Arcadis' Brief in Support of Its Motion for Summary Judgment as Exhibit C.
[12] See Tony Hendon Depo., page 24, lines 9-15.
[13] See Tony Hendon Depo., p. 19, lines 24-25 – p. 29, line 1; p. 133, lines 8-13; Defendant's Exhibit 12, attached to Arcadis' Brief in Support of Its Motion for Summary Judgment as Exhibit E.
[14] See Tony Hendon Depo., p. 94, lines 6-11; p. 94, lines 14-17; p. 149, lines 11-25 – p. 150, lines 1-10; Arcadis Meeting Minutes for meeting held on March 13, 2018, attached to Arcadis' Brief in Support of Its Motion for Summary Judgment as Exhibit F.
[15] See Deposition of Calvin Thrasher, taken on August 11, 2021, Plaintiff's Exhibit 201 and 207, attached to Arcadis' Brief in Support of Its Motion for Summary Judgment as Exhibits G and H.
[16] See Deposition of Kevin Wilson, taken on May 13, 2021, Defendant's Exhibit 29, attached to Arcadis' Brief in Support of Its Motion for Summary Judgment as Exhibit I.
[17] See Deposition of Ryan Anderson, taken on August 10, 2021, p. 36, lines 19-22; Plaintiff's Exhibit 221, attached to Arcadis' Brief in Support of Its Motion for Summary Judgment as Exhibit J.
[18] See Ryan Anderson Depo., p. 36, lines 19-22.
[19] See Tony Hendon Depo., p. 62, lines 14-23; Plaintiff's Exhibit 6, attached to Arcadis' Brief in Support of Its Motion for Summary Judgment as Exhibit K.

guardrail at any time and failed to report it. Is it undisputed that GDOT's photo of the subject guardrail came into Arcadis's possession shortly after it was taken on April 18, 2018. It is undisputed that Arcadis promptly reported the subject guardrail to Martin-Robbins on April 20, 2018. As such, Arcadis' conduct complied the standard of ordinary care, which is the performance standard required by the voluntary undertakings doctrine.

c. The voluntary undertaking doctrine did not require Arcadis to see and report the subject guardrail earlier.

As shown above, the voluntary undertaking doctrine required Arcadis to perform its inspecting and reporting duties with ordinary and reasonable care. **The voluntary undertaking doctrine did not require Arcadis to see and report the subject guardrail any earlier than it did**. The voluntary undertaking doctrine did not confer a legal duty upon Arcadis to see all damaged guardrail that existed in District 7 such that Arcadis had a legal duty to see the subject guardrail. Moreover, the voluntary undertaking doctrine did not confer upon Arcadis the legal duty to report any damaged guardrail that it didn't see. As such, the voluntary undertaking doctrine did not confer upon Arcadis the legal duty to see and report the subject damaged guardrail any earlier than Arcadis reported it.

The **only** source for the purported legal duty at issue in this case – that Arcadis had a legal duty to identify and report the subject guardrail earlier than it did – is Herman Hill. Such duty does not arise under the contract, statute, or common law principles recognized in case law. **Georgia law is clear that a plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law**. *See Adams v. APAC-Georgia*, 236 Ga. App. 215, 217 (1999); *Nat. Foundation Co. v. Post, Buckley*, 219 Ga. App. 431, 435 (1995); *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008). The

voluntary undertaking doctrine did not require Arcadis to see the subject guardrail or report it any earlier than Arcadis did.

The Court should grant summary judgment on Plaintiff's negligence claim because Plaintiff has not established that Arcadis owed Plaintiff a legal duty (arising from the contract or established by statute or common law) to see and report the subject guardrail earlier. The Court should decide as a matter of law that Arcadis had no legal duty to see and report the subject guardrail earlier, and grant summary judgment to Arcadis on Plaintiff's negligence claim.

II. Arcadis is Entitled to Summary Judgment on Plaintiff's Nuisance Claim.

In addition to a negligence claim, Plaintiff asserts a nuisance claim against Arcadis. Plaintiff asserts that "Arcadis created and maintained a nuisance." (Response Brief, p. 26). However, Plaintiff's nuisance claim against Arcadis fails.

A. Plaintiff's Nuisance Claim Against Arcadis is Not Viable Because the Subject Guardrail is Not a "Nuisance" Under Georgia Law.

A plaintiff in a public nuisance claim must establish that other members of the public who came into contact with the purportedly hazardous condition suffered injury. *See Howard v. Gourmet Concepts International, Inc.*, 242 Ga. App. 521, 523 (2000). Here, Plaintiff has presented no evidence that any other member of the public who came into contact with the subject guardrail was injured. Having failed to show that other members of the public who came into contact with the subject guardrail was injured, Plaintiff cannot establish that the subject guardrail was a public nuisance.

B. Even if the Subject Guardrail Was a "Nuisance," Plaintiff's Nuisance Claim Against Arcadis is Not Viable Because Arcadis Had No Legal Duty to Abate the "Nuisance".

A defendant must have a "legal duty to terminate the cause of the injuries" sustained by plaintiff to be liable under a nuisance claim. *Briggs & Stratton Corp. v. Concrete Sales & Services,*

Inc., 971 F. Supp. 566, 573 (M.D. Ga. 1997). Here, Arcadis had no legal duty to identify and report the subject guardrail any earlier than it did. As such, Arcadis had no legal duty to abate the purported nuisance.

C. Plaintiff's Nuisance Claim Against Arcadis is Not Viable Because It Had No Knowledge of the Condition of the Subject Guardrail.

In order 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) (emphasis supplied).

There is no evidence in the record that an Arcadis inspector **actually saw** the subject guardrail at any time before it was reported to Martin-Robbins on April 20, 2018. As such, Plaintiff's nuisance claim against Arcadis is not viable because it had no knowledge of the condition of the subject guardrail.

D. Plaintiff's Nuisance Claim Against Arcadis is Not Viable Due to Lack of Control Over the Cause of the Harm.

In order for a nuisance claim to be viable, a defendant must have "control over the cause of the harm." *Sumitomo Corp. of Am. v. Deal*, 256 Ga. App. 703, 707 (2002).

1) Arcadis Did Not Create the Hazard.

Arcadis had no control over the cause of the harm – the damaged condition of the guardrail – as it is undisputed that Arcadis did not create the hazard. Arcadis did not do the damage to the subject guardrail; cars or other objects striking the guardrail did.

2) Arcadis Had No Control Over a Harm It Didn't Know About.

There is no evidence in the record that an Arcadis inspector ***actually saw*** the subject guardrail on March 14, 2018 or any other time. Arcadis can't report a damaged guardrail (on a

daily basis or otherwise) that it hasn't actually seen. Arcadis had no control over a harm that it didn't know about.

Plaintiff states in their response brief that Arcadis had control over initiating the repair process with respect to the subject guardrail, and therefore perpetuated a nuisance by failing to identify the subject guardrail as damaged. As shown in the negligence section, Arcadis had no legal duty to identify the subject guardrail as damaged or to report a damaged guardrail that it didn't see. As such, Arcadis had no control over initiating the repair process for a guardrail that it didn't see.

3) Arcadis Had No Control Over Whether a Guardrail Noticed for Repair Would Be Timely Repaired.

Arcadis had no control over the cause of the harm, as it had no control over whether a guardrail noticed for repair would be timely repaired. After March 2018, Arcadis was responsible for verifying guardrail repairs, but such responsibility was not triggered until after Martin-Robbins notified Arcadis that a repair had been made.[20]

4) Herman Hill's Supplemental Affidavit Does Not Serve to Confer Control Onto Arcadis when Such Control Does Not Otherwise Exist.

In connection with Plaintiff's response in opposition to Arcadis' motion for summary judgment, Plaintiff filed a supplemental affidavit of Herman Hill (dated December 1, 2021) in order to attempt to establish that Arcadis had control over the condition of the subject guardrail. However, Plaintiff's efforts to establish Arcadis' such control via expert testimony fail.

Hill opines that "GDOT hired Arcadis to identify and report damaged guardrail, including the subject guardrail. Therefore, Arcadis had control over the subject guardrail." However, just as Plaintiff cannot establish a legal duty that otherwise does not exist through an expert, Plaintiff

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

cannot establish the legal element of control through an expert when such control does not otherwise exist. *See Adams v. APAC-Georgia*, 236 Ga. App. 215, 217 (1999); *Nat. Foundation Co. v. Post, Buckley*, 219 Ga. App. 431, 435 (1995); *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008) (A plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law.). The same principle should apply with respect to establishing the element of control in a nuisance action.

III. Arcadis is Entitled to Summary Judgment on Plaintiff's Claim for Punitive Damages.

Plaintiff seeks punitive damages against Arcadis. However, summary judgment should be granted to Arcadis on this claim.

A. Plaintiff's Claim Against Arcadis for Punitive Damages Is Not Viable Because Plaintif Cannot Show Arcadis' Conduct Met the Legal Standard.

Arcadis is entitled to summary judgment on Plaintiff's punitive damages claim as Plaintiff cannot show that Arcadis' conduct exhibited willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences. Under Georgia law, punitive damages may be awarded **only** in such tort actions "in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequence." O.C.G.A. § 51-12-5.1(b). "Neither negligence nor gross negligence alone can support a punitive damages claim." *Wardlaw v. Ivey*, 297 Ga. App. 240, 242 (2009).

Here, Plaintiff has failed to present evidence that Arcadis engaged in any of the type of conduct needed to support a claim for punitive damages. Plaintiff has not set forth any evidence that Arcadis **actually** saw the subject damaged guardrail at any time and failed to report it. It

undisputed that GDOT's April 18, 2018 photo of the subject guardrail came into Arcadis' possession on April 19, 2018. It is undisputed that Arcadis reported the subject guardrail to Martin-Robbins on April 20, 2018. As such, there is no evidence Arcadis acted willfully or maliciously, and, thus, is entitled to summary judgment on Plaintiff's punitive damages claim.

B. Plaintiff's Claim Against Arcadis for Punitive Damages Is Not Viable Because the Underlying Claims Are Not Viable.

Moreover, ancillary claims for punitive damages are not viable where the underlying claims against Arcadis fail. *See Sharp v. Greer, Klosik & Dougherty*, 256 Ga. App. 370, 373 (2002) ("[W]ithout entitlement to compensatory damages[,] punitive damages may not be recovered."). As such, Arcadis is entitled to judgment as a matter of law on Plaintiff's claim for punitive damages.

IV. Arcadis is Entitled to Summary Judgment on Plaintiff's Claim for Attorney's Fees Under O.C.G.A. § 13-6-11.

Plaintiff seeks attorney's fees under O.C.G.A. § 13-6-11 against Arcadis. Arcadis is entitled to summary judgment on this claim.

A. Plaintiff's Claim Against Arcadis for Attorney's Fees Is Not Viable Because There Is No Evidence Arcadis Acted in Bad Faith and Bona Fide Controversies Exist.

Arcadis is entitled to summary judgment on Plaintiff's claim for attorney's fees and costs under O.C.G.A. § 13-6-11, as there is no evidence Arcadis acted in bad faith, and bona fide controversies exist in this matter.

With regard to "bad faith", O.C.G.A. § 13-6-11 requires more than mere negligence. Georgia law requires a "sinister motive," a "dishonest purpose," or "moral obliquity." *See Wilson v. Redmond Constr., Inc.,*. 359 Ga. App. 814, 860 S.E.2d 118, 122-123 (2021). Plaintiff must show a "conscious doing of wrong" that is motivated by "ill will." *Id.*

There is no evidence in the record of such "bad faith" in the record. The record shows that Arcadis became aware of the subject guardrail on April 19, 2018. It is undisputed that Arcadis reported the damaged guardrail to Martin-Robbins on April 20, 2018. As such, there is no evidence Arcadis acted in bad faith, and, thus, is entitled to summary judgment on Plaintiff's punitive damages claim.

Georgia law is clear that if a bona fide controversy exists in a matter, there can be no stubborn litigiousness as a matter of law. *See Horton v. Daniels*, 325 Ga. App. 212, 216-217 (2013). Here, bona fide controversies exist as to liability, damages, and apportionment. As to liability, Arcadis disputes that it had a legal duty to identify and report the subject guardrail earlier than it did. Regarding damages, Arcadis disputes both Plaintiff's entitlement to damages and the calculation of same. Lastly, regarding apportionment, all parties in this case undoubtedly have their own position regarding the percentage of fault to be assigned to both parties and non-parties. Arcadis has filed a Notice of Non-Party Fault identifying non-parties potentially at fault in this matter. The foregoing shows that bona fide controversies exist, such that stubborn litigiousness cannot be found against Arcadis, as a matter of law.

B. Plaintiff's Claim Against Arcadis for Attorney's Fees Is Not Viable Because the Underlying Claims Are Not Viable.

Moreover, ancillary claims for attorney's fees are not viable where the underlying claims against Arcadis fail. *See Sparra v. Deutsche Bank Nat'l Trust Co.*, 336 Ga. App. 418, 423 (2016) ("Attorney's fees and expenses of litigation under O.C.G.A. § 13-6-11…are ancillary and recoverable only where other elements of damage are recoverable on the underlying claim."). As such, Arcadis is entitled to judgment as a matter of law on Plaintiff's claim for attorney's fees.

CONCLUSION

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

Respectfully submitted this 17th day of January, 2022.

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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 Reply in Support of Its Motion for Summary Judgment*** upon all parties to this matter by statutory electronic service, addressed to counsel of record as follows:

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