IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

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

DEFENDANT MARTIN-ROBBINS FENCE COMPANY'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS

COMES NOW Defendant Martin-Robbins Fence Co. ("Martin Robbins") and files this Reply Brief in Support of Its Motion for Summary Judgment on the claims of Plaintiffs [redacted] and [redacted] ("Plaintiffs"), showing the Court as follows:

SUMMARY OF ARGUMENT

Plaintiffs' negligence claim against Martin Robbins is only about whether Plaintiffs have an actionable claim against Martin Robbins for failing to meet a contractual obligation with the Georgia Department of Transportation ("GDOT") to repair a guardrail within 21 days. Plaintiffs cannot establish an actionable tort claim as she cannot show Martin Robbins had a duty to repair that guardrail within 21 days. The arguments asserted in Plaintiffs' opposition brief ("Opposition") do not change this conclusion. First, Plaintiffs assert Martin Robbins "voluntarily undertook" GDOT's duty to perform maintenance activities related to guardrails. This argument fails as Martin Robbins did not increase the risk of harm from the damaged guardrail ("Subject Guardrail")

and did not "completely" assume any duty owed by GDOT. GDOT did not owe a duty to Mrs. [redacted] to repair the Subject Guardrail within 21 day nor did it actually rely on Martin Robbins to perform such repair within 21 days. Accordingly, liability does not exist under Restatement Torts § 324A. Next, Plaintiffs assert Plaintiff [redacted] ("Mrs. [redacted] was a third-party beneficiary to the contract and thus is entitled to enforce the 21-day term. Plaintiffs present no evidence; however, that the 21-day provision was intended to benefit Mrs. [redacted] Plaintiffs present no evidence; however, that the 21-day provision was intended to benefit Mrs. [redacted] The Contract's references to the "traveling public" in other provisions does not establish Mrs. [redacted] as a third-party beneficiary to the term at issue or any other term in the Contract. Finally, Plaintiffs assert "industry standards" required repair within 21 days. This argument is entirely unsupported as Plaintiffs cannot point to any evidence an industry standard exists for time to repair in Georgia, much less that the standard is 21 days. There is no evidence any entity performing guardrail repair in Georgia adheres to a 21-day repair schedule as a matter of course.

Plaintiffs further assert a nuisance claim but concedes a one-time occurrence will not constitute a "nuisance." Plaintiffs cannot show the guardrail at issue ever caused any other injury, and thus her nuisance claim fails. Plaintiffs also assert claims for punitive damages but have not elicited evidence from which a reasonable jury could find in their favor on that claim. Plaintiffs also argued against granting summary judgment on attorneys' fees, but did not specially plead a claim under O.C.G.A. § 13-6-11. Regardless, even if the Court considers such claim, Plaintiffs cannot survive summary judgment as there is no evidence of bad faith or stubborn litigiousness.

ARGUMENT AND CITATION TO AUTHORITY

I. Plaintiffs' Negligence Claim Based on a Theory of Voluntary Undertaking Fails as a Matter of Law

Plaintiffs assert Martin Robbins is liable in negligence under the theory that it voluntarily undertook a duty owed by GDOT and negligently performed the same relying on Section 324A of the Restatement of Torts which states:

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

Plaintiffs argue liability under all three subparts. Their arguments all fail.

A. Martin Robbins' Inaction Did Not Increase the Risk of Harm

Plaintiffs allege Martin Robbins is liable under Restatement § 324A(a) because it "increased the risk of harm" by not repairing the Subject Guardrail sooner. (Opp., p. 22.) Georgia law is clear, however, that "mere failure to abate a[n] [allegedly] hazardous condition—without making it worse—does not trigger the application of Section 324A(a). *Fair v. CV Underground, LLC*, 340 Ga. App. 790, 796 (2017). Liability under subpart (a) only "applies when a nonhazardous condition is made hazardous through the negligence of a person who changed its condition or caused it to be changed." *Id.* In other words, a party is not liable for "failing to decrease the risk of harm." *Lockman v. S.R. Smith, LLC*, 405 Fed. Appx. 471, 474 (11th Cir. 2010) (citing *BP Exploration & Oil, Inc. v. Jones*, 252 Ga. App. 824, 830 (2001) (interpreting Georgia law); *see also Goodhart v. Atlanta Gas Light Co.*, 349 Ga. App. 65, 75 (2019); *Dale v. Keith Built Homes, Inc.*, 275 Ga. App. 218, 220 (2005); *Smallwood v. United States*, 988 F. Supp. 1479, 1481-1482 (S.D. Ga. 1997) (OSHA's alleged failure to inspect for dangerous conditions at plant did not

increase risk that claimant would step into unguarded vat of molten metal; "indeed if the vats were hazardous, they were hazardous prior to the inspections.").

Plaintiffs rely on *Urban Services Group, Inc. v. The Royal Group, Inc.* in arguing Martin Robbins' failure to act can form the basis for liability under subpart (a). (Opp., p. 22.) Such reliance is misplaced as the inaction in *Urban*—unlike Martin Robbins' inaction in this case—created a hazardous condition. In *Urban*, a janitorial service agreed to identify and remediate ice formation on a courthouse's sidewalks each morning prior to the court opening. 295 Ga. App. 350, 351 (2008). On the morning at issue, the janitorial service failed to inspect the sidewalks, and thus, failed to identify and remediate a patch of ice that had formed overnight. *Id*. A courthouse visitor later slipped on that patch of ice. *Id*. The court found because the janitorial service's inaction led to a changed condition—the sidewalk going from dry the night before to icy the morning of the fall—liability could exist under subpart (a). *Id*. at 352.

Unlike in *Urban*, here, Plaintiffs do not allege Martin Robbins' inaction changed the condition of the Subject Guardrail prior to the Incident or made it more hazardous. The Subject Guardrail was in the same condition on the day of the Incident as it was the day Martin Robbins was notified of the damage. As Plaintiffs cannot show Martin Robbins' inaction changed the condition of the Subject Guardrail, Plaintiffs' claim under Section 324A(a) fails.

B. Martin Robbins Did Not Undertake a Duty GDOT Owed to Plaintiff

1. Martin Robbins Did Not "Completely" Assume Guardrail Maintenance Duties

Under O.C.G.A. § 32-2-2, GDOT has the power and duty to perform "substantial maintenance activities and operations" related to "furnishing guardrails." O.C.G.A. § 32-2-2(a)(1). Plaintiffs allege Martin Robbins is liable under Restatement § 324A(b) because it "undertook" that duty for GDOT. (Opp., p. 23.) This argument fails, however, as subpart (b) "only applies… to

those situations where the alleged tortfeasor's performance is to be substituted *completely* for that of the party on whose behalf the undertaking is carried out." *BP Exploration & Oil,* 252 Ga. App. at 831 (emphasis original) (BP did not "voluntarily assume" duty to respond to customer complaints at franchised gas station where franchisee remained involved in aspects of resolution of customer complaints); *see also Lockman*, 2010 WL 11566367 at *10; *Catalano v. GWD Management Corp.*, 2005 WL 5519861 at *14 (S.D. Ga. 2005). Thus, for Plaintiff to pursue this argument, she must show GDOT completely delegated its guardrail maintenance duty to Martin Robbins. *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1156-1157 (11th Cir. 1993) (interpreting Georgia law) ("complete delegation of a duty" is an essential element of a claim under Restatement § 324A(b)).

Plaintiffs cannot meet this burden as GDOT retained significant responsibilities related to guardrail maintenance. The Contract itself stated that it was to procure "services **ancillary** to the construction and maintenance" of state highways and Plaintiffs admit Martin Robbins (and Arcadis) were hired only to "help" GDOT with its maintenance duties. (Contract,[1] Par. 1.1; emphasis added) (Opp., p. 11.) Per the plain language of the Contract, GDOT determined when maintenance was needed and where it would be done. (MR Fact,[2] ¶ 9-11.) GDOT was required to supply details of the location where it requested repair and to provide a visible marking on that

[1] The Contract is attached as Exhibit 2 to Martin Robbins' Statement of Material Facts.

[2] Martin Robbins will cite to its Statement of Material Facts filed with its Motion for Summary Judgment as "MR Fact, ¶ __."

location in the field.[3] (MR Fact, ¶ 13-14; Contract,[4] Art. XVI(B)(2).) Martin Robbins could not perform any guardrail repair until GDOT identified and reported it to Martin Robbins. (MR Fact, ¶ 9-11.) GDOT decided what materials Martin Robbins could use for repairs. (Doyle Dep.[5] p. 60:23-25.) GDOT decided when the work could be performed and could unilaterally stop Martin Robbins from performing. (Contract, Art. XV; Moore Dep.[6] 127:19-128:1.) GDOT approved or denied traffic control plans for repairs. (Moore Dep. 125:25-126:2.) If a repair required digging, GDOT had to authorize Martin Robbins to do so in a specific location. (Contract, Art. X(D); Moore Dep. p. 191:4-8.) GDOT dictated how Martin Robbins was to perform a repair and decided any questions or issues related to repair. (Contract, Art. III; Art. V; Art. XII(A).) GDOT inspected guardrail repairs and determined compliance with GDOT's specifications. (Contract, Art. XII(A).) If GDOT deemed a repair insufficient, Martin Robbins had to re-do the work until it met GDOT's satisfaction. (Contract, Art. XVII.) This does not evidence a "complete" delegation of "maintenance activities" to Martin Robbins.[7]

---

[3] Under the Contract, GDOT was to notify Martin Robbins immediately when nonfunctional guardrail was located. (MR Fact, ¶ 13.) GDOT failed to comply with this requirement by allowing Arcadis to collect several months' worth of damaged locations without notifying Martin Robbins and then overwhelming Martin Robbins by sending this backlog all at once. (*See* March 7, 2018 email attached hereto as **Exhibit 1**; email from Arcadis to GDOT stated a "full list of location reported (starting 1/1/18)" would be sent to the contractor in the coming days.) This demonstrates why a "complete delegation" of a duty is an essential element of liability under subpart (b). Martin Robbins did not control this aspect of "maintenance activities" even though it impacted Martin Robbins' ability to perform its repairs.

[4] The Contract is attached as Exhibit 2 to Martin Robbins' Statement of Material Facts.

[5] Cited portions of Mr. Doyle's deposition are attached hereto as **Exhibit 2.**

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

[7] Despite acknowledging Martin Robbins was engaged to "help" GDOT with its maintenance duty, (Opp., p. 11), Plaintiffs later reverse course and argue the Contract shifted GDOT's entire statutory obligation to perform "maintenance activities" related to guardrails to Martin Robbins, citing a provision which stated: "The Contractor represents and warrants that all obligations owed to third parties with respect to the activities contemplated to be undertaken by the Contractor pursuant to the Contract are or will be fully satisfied by the Contractor so that the State and the Department

Further, the Contract was non-exclusive. (Contract, Art. 104(B).) GDOT was free to engage other contractors to perform guardrail repairs in District 7 without notifying Martin Robbins and did so on at least one occasion.[8] Martin Robbins cannot have "completely" assumed a duty to perform guardrail maintenance for GDOT in District 7 where another entity was performing the same work. Because Martin Robbins did not completely assume any GDOT duty to perform guardrail maintenance, Plaintiff's claim under Restatement § 324A(b) fails.

2. <u>GDOT Did Not Have a Duty to Repair the Subject Guardrail Within 21 Days</u>

Even if the Court assumes Martin Robbins' work was "completely substituted" for GDOT's performance of guardrail maintenance, Plaintiffs' claim would still fail as they cannot show GDOT had a duty to repair a damaged Subject Guardrail within 21 days. Under Section 324A(b), a party can only be liable if it fails to undertake a duty owed by another party. *Id*. at 1156. Thus, it is axiomatic that Plaintiff must show GDOT owed a duty to repair the Subject Guardrail within 21 days before it can assert Martin Robbins owed such a duty by virtue of its substitution of performance. *Hutcherson*, 984 F.2d at 1156 (liability under subpart (b) can only attach where a party's performance was "in lieu of, rather than a supplement to" the duty owed by the other party); *Howell v. United States*, 932 F.2d 915, 918-919 (11th Cir. 1991) (interpreting Georgia law).

Plaintiffs cannot meet this burden as they presented no evidence GDOT had a duty to repair the Subject Guardrail within 21 days. No statute, code, rule, or regulation required GDOT to repair a damaged guardrail within 21 days. (MR Fact, ¶ 39.) As explained in Section III of this Reply,

---

will not have any obligations with respect thereto." (Opp., p. 27; citing Contract, Art. 111(G).) This provision plainly did not shift the duty to perform "all" maintenance activities to Martin Robbins. GDOT retained contractual obligations to perform the litany of "maintenance activities" described in this paragraph, including identification and inspection of damaged guardrails.

[8] *See* November 16, 2017 email attached hereto as **Exhibit 4** showing GDOT contracting guardrail repairs to a contractor other than Martin Robbins.

no industry standard required GDOT to repair the Subject Guardrail within 21 days either. Indeed, GDOT's State Maintenance Engineer testified he was not aware of any industry standard on the time to repair a damaged guardrail. (Doyle Dep. 42:10-43:4.) Martin Robbins cannot have "assumed" a duty which GDOT did not owe. *See Adams v. APAC-Georgia, Inc.*, 236 Ga. App. 215, 216-217 (1999). As Plaintiff presented no evidence GDOT had a duty to repair a nonfunctional guardrail within 21 days, Martin Robbins cannot be liable for failing to perform such purported duty under Section 324A(b).

3. Plaintiffs Cannot Establish GDOT's "Actual Reliance" on Martin Robbins to Repair the Subject Guardrail Within 21 Days

Lastly, Plaintiffs argue liability under subpart (c) which requires proof of actual reliance on a defendant's undertaking.[9] *Catalano*, 2005 WL 5519861 at *14. Thus, Plaintiffs must show GDOT actually relied on Martin Robbins to repair the Subject Guardrail within 21 days. There is no such evidence. When the spike in repair requests began in March 2018, Martin Robbins promptly notified GDOT it would likely not be able to complete the volume of repairs within the contractual timeframe and requested GDOT send a "realistic quantity of work" in the future.[10] GDOT did not. Instead, GDOT increased the number of requests which ballooned to over 350 locations in April 2018,[11] over 200 locations in May 2018,[12] and over 200 locations in June 2018.[13] (MR Fact, ¶ 24-26.) There is no dispute GDOT knew Martin Robbins was not meeting the 21-day

[9] Plaintiffs do not allege Mrs. [redacted] relied on Martin Robbins' purported undertaking.

[10] *See* March 16, 2018 email from Derrick Wilkerson. (A true and correct copy of the same is attached hereto as **Exhibit 5.)**

[11] Wilkerson Affidavit, ¶ 26. A true and correct copy of the Wilkerson Affidavit is attached hereto as **Exhibit 6.**

[12] Martin Robbins Corp. Rep. Dep. 14:14-15:2; cited portions of the corporate representative deposition are attached hereto as **Exhibit 7.**

[13] Ex. 7, Martin Robbins Corp. Rep. Dep., p. 14:14-15:2.

contractual timeframes for all repairs in April, May, and June 2018.[14] (Moore Dep. p. 61:16-62:3.) In light of GDOT's actual knowledge Martin Robbins was not repairing guardrails within the 21-day period, Plaintiffs cannot establish GDOT actually relied on them to do the same.

4. <u>There is No Evidence Martin Robbins Failed to Exercise Reasonable Care</u>

Martin Robbins denies any of the three subparts apply, but even if the Court finds otherwise, summary judgment is still appropriate as there is no showing Martin Robbins failed to perform guardrail repair with reasonable care. A prerequisite to liability under any subpart in Section 324A is a showing that a party failed to exercise reasonable care. *Housing Authority of Atlanta v. Famble*, 170 Ga. App. 509, 524 (1084) (a failure to exercise reasonable care is the "primordial ingredient" of liability under Restatement § 324A). What constitutes "reasonable care" requires consideration of how others in the same position would act "under the same or similar circumstances." O.C.G.A. § 51-1-2. The burden of establishing a breach of reasonable care is on a plaintiff. *Georgia Cas. & Sur. Co. v. Salter's Indus. Service, Inc.*, 318 Ga. App. 620, 624 (2012). Plaintiffs cannot meet their burden here as they present no evidence a reasonable guardrail contractor in like circumstances (i.e. one overwhelmed with hundreds of unexpected repair requests and working overtime to meet demand) would have repaired the Subject Guardrail prior to the Incident.[15] To the contrary, the record shows other Georgia guardrail contractors failed to meet contractual timeframes to repair even when they were <u>not</u> overwhelmed with a sudden and

[14] *See* Moore Dep. 61:16-62:3. When asked if Martin Robbins "wasn't doing a good job under the contract," GDOT's corporate representative testified: "No. Martin Robbins was performing work. It was just some of the strikes were outside of the [contractual] window for repairs. It wasn't an overall poor performance. It was just certain strike locations were outside of the [contractual] repair window."

[15] As further explained in Section III of this Reply, Plaintiffs cannot show Martin Robbins failed to comply with any code, law, rule, regulation, or industry standard by not repairing the Subject Guardrail sooner.

unexpected increase in requests.[16] Plaintiffs cannot show Martin Robbins failed to exercise reasonable care, and therefore, even if subparts (a), (b), and (c) of Restatement § 324(a) apply, their claim fails as a matter of law.

II. Plaintiffs' Third-Party Beneficiary Claim Fails as a Matter of Law

Plaintiffs allege Mrs. [redacted] was a third-party beneficiary to the Contract citing three instances where the "traveling public" is mentioned in the Contract. This argument is unavailing for two reasons: (1) Mrs. [redacted] was not a third-party beneficiary to the specific 21-day contract term at issue; and (2) the "traveling public" was not a third-party beneficiary to any Contract term.

A. Mrs. [redacted] Was Not a Third-Party Beneficiary to the 21-Day Time to Repair Term

Plaintiffs' theories of liability are based solely on breach of the Contract term requiring Martin Robbins repair a nonfunctional guardrail within 21 days. Plaintiffs assert they are entitled to sue for breach of that specific provision because Mrs. [redacted] was a third-party beneficiary to the Contract as a whole, relying on three Contract provisions other than the 21-day term that mention the "traveling public."[17] (Opp., p. 27-28.) These Contract provisions do not support Plaintiffs' argument because according to Georgia law, a "third party is entitled to enforce only

---

[16] *See* Moore Dep. 278:22-25; discussing subsequent District 7 guardrail contractor's failure to repair within contractual timeframe.

[17] The provisions cited by Plaintiffs are:

(1) Under the heading of *Scheduling*, the Contract stated: "Schedule all work to ensure the least inconvenience and the utmost in safety to the traveling public, the Contractor's, and the Department's forces." (Contract, Art. X(A).)

(2) Under the heading of *Inspection of Impact Attenuator*, the Contract stated: "Perform site clean-up and leave site safe for the traveling public." (Contract, Art. V(F)(1)(f).)

(3) Under the heading of *Maintenance of Traffic*, the Contract stated: "Always leave the project in a manner that will be safe to the traveling public and which will not impede motorists." (Contract, Art. XI(A)(1).)

those specific provisions of a contract of which he is an intended beneficiary." *Murray v. ILG Techs., LLC*, 378 F. Supp. 3d 1227, 1238 (S.D. Ga. 2019), aff'd, 798 F. App'x 486 (11th Cir. 2020) (interpreting Georgia law) (emphasis added). As the Georgia Supreme Court explained:

> "A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his rights to performance [are] predicated on the contracting parties' intent to benefit him. **As to any provision not made for his benefit but for the benefit of the contracting parties… he becomes an intermeddler**."

Archer Western Contractors, Ltd. v. Estate of Pitts, 292 Ga. 219, 227 (2012) (emphasis added). Accordingly, a party must show she was an intended third-party beneficiary to the particular contract term she alleges was breached. *Id.*

Here, Plaintiffs claim Martin Robbins breached the Contract term requiring repair within 21 days of notification. Thus, the only relevant inquiry is whether that particular term evidences an intent to confer a benefit to Mrs. [redacted] as a third-party. It does not. Specifically, the Contract states:

B. **Non-functional Notification for Guardrail and Cable Barrier**

Notification by the Engineer for non-functional removal and replacement of damaged guardrail and cable barrier, including anchors, will have sufficient detail to allow the contractor to quickly determine the location of the site and to begin making preparations for corrective action.

1. Non-functional notification will be sent regardless of the linear feet of non-functional guardrail, cable barrier, or impact attenuators available.
2. A stake, orange flagging, orange paint or other methods agreed upon will mark the limits of repair with the site number written on it.
3. Complete work within twenty-one (21) calendar days of notification.
4. For steel beam guardrail repairs, end treatment repairs and replacement: When a non-functional notification is for less than two (2) terminal sections or less than one hundred (100) linear feet of rail, a mobilization fee may be utilized.

(*See* Contract, Art. XVI(B).) A third-party is not mentioned in this provision, much less any intent to benefit a third-party. As the face of the Contract does not show this provision was intended to

confer a benefit to a third-party, Plaintiffs' third-party beneficiary argument fails as a matter of law.[18]

B. The "Traveling Public" was Not a Third-Party Beneficiary to Any Contract Provision

Even if the Court considers the Contract's mention of the "travelling public" in provisions other than the one at issue, it would not change the result. "Mere mention of individuals who may benefit from the terms of a contract does not create third-party beneficiary status." *See Perry Golf Course Dev., LLC*, 294 Ga. App. at 388. Georgia courts have repeatedly refused to find the general public has status as a third-party beneficiary. *Backus v. Chilivis*, 236 Ga. 500, 501 (1976) (taxpayers not third-party beneficiary of contract to perform tax appraisals); *Miree v. United States*, 242 Ga. 126, 135-136 (1978) (members of public were not third-party beneficiary to contract Federal Aviation Administration and Dekalb County); *Mitchell v. Ga. Dept. of Community Health*, 281 Ga. App. 174, 181 (2006) (state employee not third-party beneficiary to contract to administer state health benefit plan); *Floyd v. City of Albany*, 2010 WL 11575227 at *4 (M.D. Ga. 2010) (residents not third-party beneficiary to government contract to provide services related to utilities) *City of Atlanta v. Benator*, 310 Ga. App. 597, 603 (2011) (residents not third-party beneficiaries to contract to provide water and sewer services).

Rather, the contract must show an intent to benefit "a specific, targeted, person or group." *Melvin H. v. Atlanta Indep. Sch. Sys.*, 2008 WL 11342510, at *16 (N.D. Ga. 2008). This is particularly true in the context of government contracts. "Georgia courts have repeatedly recognized that contracts entered into with a public entity benefit the public, but these benefits are

[18] Plaintiffs cite parol evidence to support their argument regarding the Contract's intent. (Opp., p. 27.) Parol evidence has no bearing on this issue as "parol evidence cannot confer third-party beneficiary status where the contract itself fails to do so." *Murray*, 378 F. Supp. 3d at 1237.

typically incidental to the contract and do *not* create third-party beneficiary status." *Health v. ILG Techs., LLC*, 2020 WL 6889164, at *12 (N.D. Ga. 2020) (emphasis original). Thus, "a third party does not obtain standing to assert claims for breach of [a government] contract where the contract does not evidence an intent to benefit a third party directly, but rather, only benefits citizens and members of the general public indirectly and incidentally." *Floyd*, 2010 WL 11575227 at *4 (third-party beneficiary status is not conferred when "there is no intention manifested in the contract… to permit the public to sue for breach of contract"); *see also Riddle v. Georgia Dep't of Pub. Safety*, 2017 WL 11072952 at *7 (N.D. Ga. 2017) (member of public was not third-party beneficiary to employment contract with state trooper)

Here, the Contract shows no intent to confer a benefit on any "specific, targeted, person or group." To the contrary, it expressly stated the benefits of Contract performance were to flow "from one [party] to the other." (MR Fact, ¶ 7.) There is no intent manifested that the 'traveling public' be allowed to file suit for breach of any Contract provision, including those cited by Plaintiffs. That the public would incidentally benefit from the work does not establish Mrs. [redacted] as a third-party beneficiary and her claim for the same fails.[19]

III. Plaintiffs Cannot Establish Martin Robbins Breached Any Industry Standard, and Therefore, Their Negligence Claim Fails

[19] Plaintiffs do not cite any case where the general public was found to be a third-party beneficiary. The cases cited by Plaintiffs, (Opp. 29-30), involved contracts between private entities that identified discrete groups the contracts' performance was intended to benefit. *See Green v. Pateco Serv., LLC*, 348 Ga. App. 132, 135-136 (2018) (restaurant worker was third-party beneficiary to services contract which stated work was to be done "in a manner which will minimize health, safety, legal, and other risks to the Owner, and its respective employees, agents, guests, and invitees"); *Brazeman v. IPC International Corp*., 2008 WL 11334073 (N.D. Ga. 2008) (mall invitee was third-party beneficiary to contract between mall owner and security company which required security company to perform "all aspects" of security services "in such a manner as to minimize the possibility of any annoyance, interference, or disruption to the occupants of the Property and their invitees.").

Plaintiffs engaged expert witness Herman Hill ("Mr. Hill") to testify regarding the duties owed by defendants, including Martin Robbins. Mr. Hill testified Martin Robbins had a duty to repair the Subject Guardrail within 21 days. At his deposition, he unequivocally testified his opinion was based solely on the Contract as opposed to any industry standard. Indeed, he testified he was not aware of any industry standard governing the time to repair a nonfunctional guardrail, including any industry standard that would require repair within 21 days.

> 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**.[20] (MR Fact, ¶ 39.)

In its Brief, Martin Robbins cited Georgia law establishing a contract term alone does not create a duty in tort. In a bald attempt to create a factual dispute and avoid summary judgment, Plaintiff filed a supplemental affidavit from Mr. Hill stating the exact opposite of his previous sworn testimony. (*See* Supp. Aff.; attached hereto as **Exhibit 8**.) Mr. Hill now asserts an industry standard does exist, stating: "As the governing authority on the maintenance of state-owned guardrail located within the state highway system, GDOT sets the industry standard for guardrail maintenance within the state of Georgia. Therefore, the industry standard is what GDOT says it is." (Supp. Aff., ¶ 4-5.) He goes on to state: "The industry standard for repairing nonfunctional guardrail is to make the repair within 21-days of notice, as shown by the repair timeline in GDOT's

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

contract" with Martin Robbins.[21] (Supp. Aff., ¶ 5.) This opinion is unsupported and does not create an issue of material fact for several reasons: (1) GDOT denies an industry standard exists for the time to repair guardrail; (2) GDOT routinely sets the time to repair guardrail at greater than 21 days in its contracts; and (3) Plaintiffs presented no evidence even one entity in Georgia's guardrail industry recognizes and/or adheres to a 21-day standard.[22]

A. GDOT Denies an Industry Standard on the Time to Repair Guardrail Exists

Mr. Hill deferred to GDOT on what the "industry standard" for the time to repair a guardrail is, stating "the industry standard is what GDOT says it is."[23] (Supp. Aff., ¶ 4.) GDOT has testified no industry standard exists as to the time to repair a guardrail. (Doyle Dep. 42:25-43:4.) GDOT's State Maintenance Engineer is responsible for administration and oversight of guardrail maintenance and specifically denied a 21-day time to repair was an industry "standard set by GDOT." (Doyle Dep. 44:7-11.) GDOT's engineer went on to testify he was not aware of any such industry standard:

> Q: Is it your opinion Martin Robbins should have repaired the subject guardrail… within 21 days?
> A: They were required to by the contract, yes.

---

[21] The Contract specifically contemplates that it may require performance beyond industry standard. Art. 111(I) stated: "The Contract represents and expressly warrants that all aspects of the Services provided or used by it shall at a minimum conform to the standards in the Contractor's industry. This requirement shall be in addition to any express warranties, representations, and specifications included in this Contract, which shall take precedence."

[22] Mr. Hill offers no explanation for why he did not identify this supposed "industry standard" in his deposition, despite being questioned specifically about its existence.

[23] Plaintiffs incorrectly contend aside from GDOT, "there are no other entities responsible for creating the time in which nonfunctional guardrail is repaired." (Opp., p. 31.) This is plainly incorrect. Guardrail installation and repair is performed for and by entities other than GDOT in Georgia. By way of example, Martin Robbins routinely contracts with county governments to perform guardrail installation and maintenance. (Dep. of Tommy Martin, p. 11:13-17; cited portions of Mr. Martin's deposition are attached hereto as **Exhibit 9**.) Attached hereto as **Exhibit 10** is one such contract with Hall County, Georgia, which required repair of guardrails within 60 days. (Ex. 9, p. 2.)

Q: And is that statement… based solely on the contract; correct?
A: That's correct.
Q: It's not based on any statute, code, regulation, rule, or industry standard requiring a guardrail contractor to repair a nonfunctional guardrail within 21 days, correct?
A: That's correct.
Q: Are you aware of any statute, code, regulation, rule, or industry standard that sets out a specific timeframe in which a guardrail contractor must repair a nonfunctional guardrail?
A: I'm not. (Doyle Dep. p. 42:10-43:4.)

Likewise, GDOT's corporate representative testified nothing other than the Contract created an obligation for Martin Robbins to perform the work within 21 days. (MR Fact, ¶ 45.) Mr. Hill opined the industry standard "is what GDOT says it is" and GDOT says the industry standard does not exist. Martin Robbins cannot be liable for breaching a non-existent industry standard and Plaintiffs' negligence claim under that theory fails. *See Butler v. First Acceptance Ins. Co., Inc.*, 652 F. Supp. 2d 1264, 1273 (N.D. Ga. 2009).

B. <u>GDOT Routinely Sets the Time to Repair Guardrail Greater Than 21 Days</u>

In arguing that a 21-day standard exists, Plaintiffs assert GDOT "requires guardrail contractors to repair nonfunctional guardrails within 21 days of notice." (Opp., p. 32.) This is simply false as GDOT routinely used timeframes other than 21 days in its guardrail maintenance contracts. (Doyle Dep. p. 66:4-19.) By way of example, GDOT has incorporated a 44-day time to repair and a 60-day time to repair into its contracts.[24] In one solicitation for guardrail repairs,

[24] *See* GDOT Negotiated Contract No. 48400-173-RROD71800260, p. 4, attached hereto as **Exhibit 11** (allowing from August 17, 2017 to September 30, 2017 to perform guardrail repairs); GDOT Invitation to Bid No. 48400-DOT0002467, p. 7, attached hereto as **Exhibit 12** (requiring completion of guardrail repairs within 60 days); GDOT Invitation to Bid No. 48400-DOT0002468, p. 7, attached hereto as **Exhibit 13** (requiring completion of guardrail repairs within 60 days).

GDOT set a time to repair of approximately 100 days.[25] [26] Mr. Hill nor Plaintiffs offer an explanation for why Martin Robbins' Contract with GDOT sets the "industry standard" as opposed to GDOT's contracts setting 44-day, 60-day, or 100-day times to repair. The burden is on Plaintiff to establish an industry standard and having failed to do so, her claim for negligence fails.

C. Plaintiffs Presented No Evidence Others in Georgia's Guardrail Industry Follow a 21-Day Repair "Industry Standard"

Expert testimony is typically required to prove industry standards, but such testimony must be more than the expert's "say-so." *Id*.; *see Frazier v. Godley Park Homeowners Ass'n, Inc.*, 342 Ga. App. 608, 610 (2017). "Say-so" is all Mr. Hill has offered. He relies exclusively on the Contract to support his opinion that a 21-day time to repair is industry standard in Georgia.[27] Plaintiffs cite no authority a contract provision alone can establish an industry standard, and indeed it cannot. Under Georgia law, an expert must show an act is widely practiced or followed by those in the applicable industry to establish the act as "industry standard" *Mays*, 317 Ga. App. at 148-149*; see Rentz v. Brown*, 219 Ga. App. 187, 188 (1995) (evidence of a "universal custom or practice" is required to show "industry standards"). Such principle was illustrated in the case of *Mays v. Valley View Ranch*. In that matter, claimant's child was injured when a hitching rail for

---

[25] *See* Questions and Answers for Emergency Guardrail Quotes, p. 2, attached hereto as **Exhibit 14.** The document stated guardrail work would "likely" begin around November 19 and the contractor was not expected to complete work until February 28 of the following year.

[26] Again, entities other than GDOT request and perform guardrail installation and repair. *See* Hall County contract setting a 60-day timeframe to repair.

[27] Mr. Hill's citation of supposed "standards" for the time to repair guardrails in other states does not support his opinion. Mr. Hill did not raise any of these alleged standards during his eight-hour deposition, despite being questioned specifically regarding their existence. (Supp. Aff, ¶ 8.) (MR Fact, ¶ 39.) Martin Robbins denies the cited provisions are "industry standards" for the named states, but even assuming they are, they have no bearing on this case. Plaintiff nor Mr. Hill asserts these "standards" govern guardrail maintenance in Georgia, which is the only relevant inquiry for this Motion.

horses fell and struck the child. *Id*. at 143. Claimant filed suit alleging, in part, negligent construction of the hitching rail. *Id*. at 148-9. Claimant's expert testified the hitching rail's height and various other aspects did not meet industry standards but was unable to state whether other builders actually complied with his opinions as part of their "industry practices." *Id*. at 149. The court refused to accept the expert's unsupported conclusions, writing his testimony "failed to show" his criticisms "amounted to industry standards or practices." *Id*.

Like the expert in *Mays*, Plaintiffs' expert offered no evidence those in Georgia's guardrail contracting industry adhere to a 21-day repair timeframe as a standard practice. Neither Mr. Hill's deposition testimony nor his supplemental affidavit identifies even one guardrail contractor in Georgia that repairs guardrails within 21 days as a matter of course. (Hill Dep.[28] 130:20-22, 131:21-24.) Plaintiffs do not explain why this Court should accept a 21-day time to repair is an "industry standard" in Georgia when they have presented no evidence anyone in the industry actually follows such timeline. Plaintiffs' citation to alleged "industry standards" for the time to repair guardrails in other states does not change the result. (Opp., p. 32.) Martin Robbins denies the cited provisions are "industry standards" for the named states, but even if the Court assumes they are, they have no bearing on this case. The only relevant inquiry is whether an industry standard exists in Georgia and there is no evidence it does. The burden is on Plaintiffs to establish an industry standard through properly supported expert testimony. Having failed to do so, their argument that Martin Robbins breached an industry standard fails as a matter of law.

[28] Cited portions of Mr. Hill's deposition transcript are attached hereto as **Exhibit 15.**

IV. Plaintiffs Admit a "One Time Occurrence" is Not a Nuisance and Accordingly Their Nuisance Claim Fails

In its Brief in Support in Support of Summary Judgment, Martin Robbins asserted it was not liable for nuisance because "a one-time occurrence does not amount to a nuisance." *Barnes v. St. Stephen's Missionary Baptist Church*, 260 Ga. App. 765, 769 (2003). Martin Robbins noted Plaintiffs presented no evidence the damaged Subject Guardrail had caused any injury other than the one at issue in this case, and therefore, this was a "one-time occurrence."[29] (Brief, Section III.) Plaintiffs did not dispute this authority and did not present any evidence showing the Subject Guardrail caused any injury prior to this Incident. (Opp., p. 33.) Thus, there appears to be no dispute this one-time occurrence cannot amount to a nuisance and summary judgment in Martin Robbins' favor necessarily follows. *See Bowden v. Pryor*, 215 Ga. App. 351, 352 (1994) (in response to a properly supported motion for summary judgment, the nonmovant **"**must come forward with evidence to contravene defendants' proof or suffer judgment.")

V. Plaintiffs' Claim for Punitive Damages Fails as a Matter of Law

Plaintiffs assert they are entitled to pursue punitive damages because (1) Martin Robbins "maintained a continuing nuisance," and (2) "Martin Robbins had actual and constructive knowledge of the Subject Guardrail long before the subject wreck and its inaction shows conscious indifference to the consequences." (Opp., p. 35.) As to her first theory, as shown in Section IV, Martin Robbins did not maintain a continuing nuisance.

As to her second theory, Plaintiffs base their claim on two allegations: (i) "since May 2015, Martin Robbins knew the Subject Guardrail was 'a high concern due to fatalities that have happened;'" and (ii) the Subject Guardrail was nonfunctional as early as August 2017. (Opp., p.

[29] Plaintiff alleges the Subject Guardrail was damaged as early as August 2017.

30.) Martin Robbins denies the veracity of these allegations,[30] but even if the Court takes them as true, it would not entitle Plaintiffs to seek punitive damages in light of the undisputed facts. Martin Robbins had no contractual obligation to locate damaged guardrails and could not perform a repair until GDOT notified it of a location. (MR Fact, ¶ 9-11, 13.) There is no dispute that Martin Robbins was not notified of damage to the Subject Guardrail until April 20, 2018. (MR Fact, ¶ 30.) Thus, even if the Subject Guardrail was damaged in August 2017, Martin Robbins could not have repaired it at that time. Further, nothing in the Contract required or even suggested that Martin Robbins should prioritize locations on any basis, including any location where a fatality had previously occurred. Any purported knowledge that a fatality had occurred near the Subject Guardrail is irrelevant.

Plaintiffs cannot show Martin Robbins did not repair the Subject Guardrail for any reason other than the fact GDOT had overwhelmed it with an unexpected and unreasonable spike in repair requests in the preceding weeks. (MR Fact, ¶ 32.) In light of the same, Plaintiffs cannot establish the requisite intent to pursue punitive damages.

VI. Plaintiffs Did Not Assert a Claim for Attorneys' Fees

Plaintiffs' Opposition asserts "Martin Robbins is liable for attorneys' fees." (Opp., p. 36.) While Plaintiffs asserted a claim for attorneys' fees against GDOT and Arcadis, they did not assert such a claim against Martin Robbins. (*See* Amended Complaint, ¶ 40-41, 43, 48.) Under O.C.G.A. § 13-6-11, a claim for attorneys' fees must be "specially pleaded." Having failed to make such

[30] The 2015 communication was referencing a GDOT request for Martin Robbins to install additional guardrail at a location north of the Subject Guardrail. (Wilkerson Dep., 122:24-125:9; cited portions of Mr. Wilkerson's deposition transcript are attached hereto as **Exhibit 16**.) As to the August 2017 allegation, Martin Robbins cannot state when the Subject Guardrail was initially damaged. Plaintiff cites no evidence Martin Robbins was aware of damage to the Subject Guardrail at any point prior to Arcadis notifying it on April 20, 2018.

pleading, Plaintiffs cannot seek attorneys' fees. Even if the Court ignores Plaintiffs' failure to specially plead attorneys' fees, such fees are not warranted in this action and summary judgment is appropriate.[31]

A. Plaintiffs Cannot Establish Martin Robbins Acted in Bad Faith

Plaintiffs argue they are entitled to attorney's fees because Martin Robbins exhibited bad faith by failing to "conform to statutes or industry standards." (Opp., p. 31.) As shown in Sections III, Martin Robbins did not fail to conform to any statute or industry standard. Even if it had, such failure does not evidence bad faith. *MARTA v. Mitchell*, 289 Ga. App. 1, 4 (2007) (a finding of bad faith cannot be premised on "mere negligence").

B. Plaintiffs Cannot Establish Martin Robbins Was Stubbornly Litigious

Plaintiffs also argue they are entitled to attorney's fees because Martin Robbins has been stubbornly litigious. (Opp., p. 38.) Plaintiffs do not point to any specific behavior demonstrating stubborn litigiousness, but generically asserts because Plaintiffs believe there is "clear evidence" of liability, Martin Robbins defense of this matter entitles it to attorney's fees. (Opp., p. 39.) Georgia law is clear, though, that if a bona fide controversy exists in a case, then there can be no stubborn litigiousness as a matter of law. "Where there is a bona fide controversy for the tribunals to settle, and the parties can not adjust it amicably, there should be no burdening of one with the counsel fees of the other, unless there has been wanton or excessive indulgence in litigation." *Horton v. Dennis*, 325 Ga. App. 212, 216-217 (2013) (affirming trial court's decision that a bona fide controversy existed as a matter of law). In other words, there can be no stubborn litigiousness

[31] Plaintiffs seem to assert a trial court can never award summary judgment to a defendant on attorneys' fees, citing *Covington Square Assocs., LLC v. Ingles Markets, Inc.*, 287 Ga. 445, 446 (2010). But *Covington* stands for the proposition that summary judgment in favor of a plaintiff on attorneys' fees is inappropriate. *Id.* at 446-447.

"if the evidence shows that a genuine dispute exists—whether of law or fact, on liability or amount of damages, or on any comparable issue." *Hart v. Walmart Stores East, L.P.*, 2017 WL 6733970 at *3 (M.D. Ga. 2017) (interpreting Georgia law); *Hart v. Walmart Stores East, L.P.*, 2017 WL 6733970 at *3 (M.D. Ga. 2017) (interpreting Georgia law).

In this action, bona fide controversies exist as to liability, damages, and apportionment. As to liability, Plaintiffs and Martin Robbins disagree as to whether Martin Robbins owed any legal duty to Mrs. [redacted] to repair the Subject Guardrail within 21 days. Regarding damages, Martin Robbins disputes both Plaintiffs' entitlement to and calculation of their damages. By way of example, Martin Robbins previously filed a Motion to Exclude the testimony of Plaintiffs' damages expert witness who testified regarding the purported economic damages in this matter. As to apportionment, there are three defendants in this case who will undoubtedly each have their own position regarding the percentage of fault to be assigned the others. In addition, Martin Robbins has filed a Notice of Non-Party Fault and Request for Apportionment identifying Agnuma Beyene Leta a non-party potentially at fault in this matter.[32] These facts show bond fide controversies exist in this matter, prohibiting a finding of stubborn litigiousness.

CONCLUSION

Martin Robbins' acknowledged failure to repair the Subject Guardrail within the 21-day contractual timeframe does not give rise to tort claim by Plaintiffs. No liability exists under Restatement § 324A as Martin Robbins exercised reasonable care, did not increase the harm, did not "completely" assume GDOT's responsibilities to perform "maintenance activities" related to guardrails, and GDOT did not actually rely on Martin Robbins to repair within 21 days. The

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

Contract's 21-day provision evidences no intent to benefit a third-party. That it references the 'traveling public' in provisions not at issue does not change the result or establish such broad group was an intended beneficiary of any portion of the Contract. Plaintiffs cannot establish any industry standard existed for the time to repair, much less one that required repair within 21 days. Plaintiffs admit a one-time occurrence does not constitute a nuisance and having failed to show this incident was anything other than a one-time occurrence, her nuisance claim fails. Finally, Plaintiffs cannot show the requisite intent or bad behavior necessary to seek punitive damages or attorneys' fees (to the extent the Court finds a claim for attorneys' fees have been plead at all). Plaintiffs' claims fail as a matter of law, and accordingly, Martin Robbins respectfully requests this Court grant it summary judgment on the same.

This 14th day of January 2022.

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 REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS** 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 14th day of January 2022.

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