IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

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

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT MARTIN ROBBINS FENCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

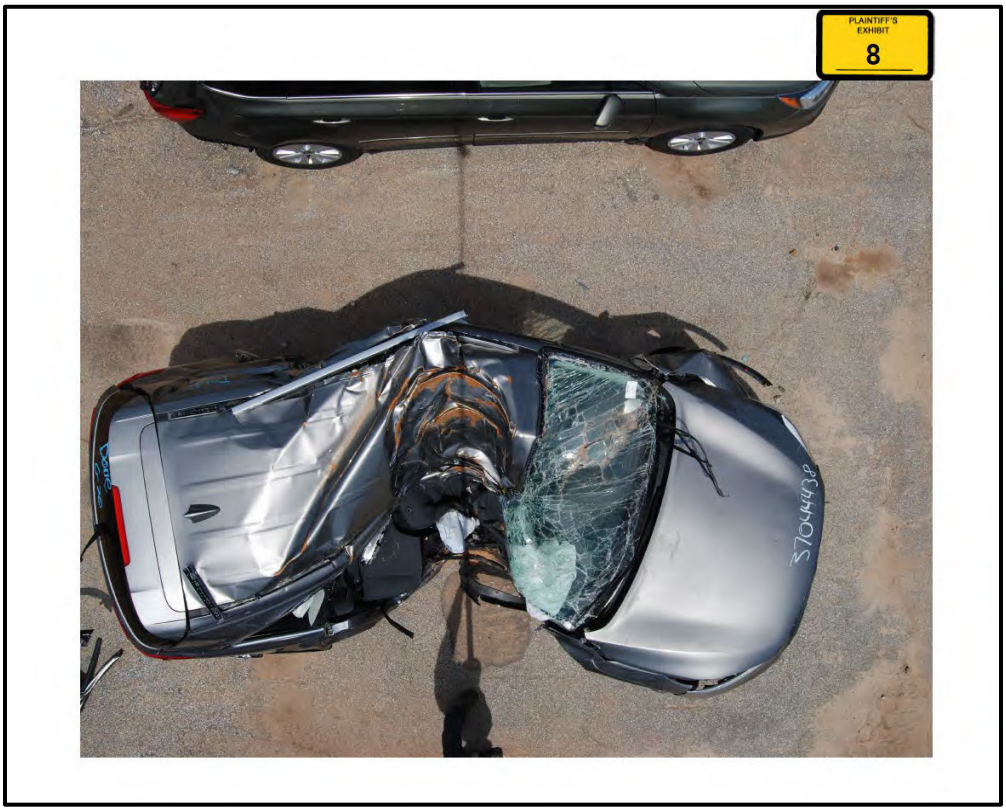
1. Introduction

This is a wrongful death case. The case arises from the failure of Martin Robbins Fence Company ("Martin Robbins"), Arcadis U.S., Inc. ("Arcadis"), and the Georgia Department of Transportation ("GDOT") (collectively, "Defendants") to fulfill their contractual, statutory, and common law duties to timely identify and repair damaged guardrail. As to Martin Robbins, the crux of the case is this: Martin Robbins was legally and contractually required to repair nonfunctional guardrail within 21 days of being notified of the need for repair. Martin Robbins failed to do that.

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

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

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



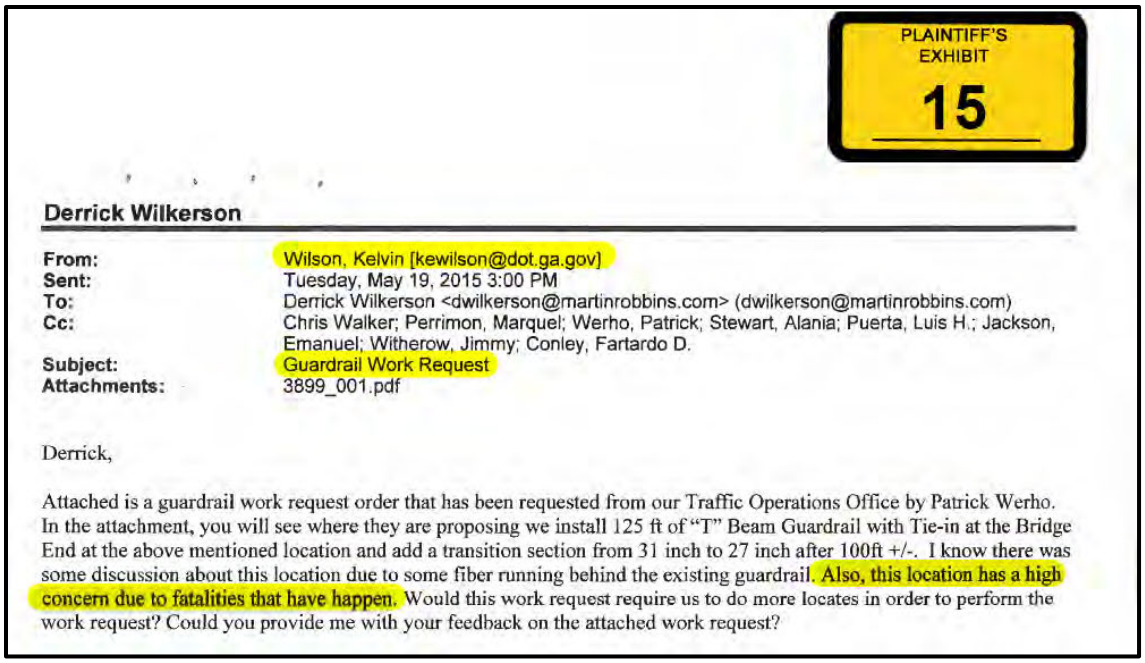
Plaintiff's Trial Ex. 8. As the photograph shows, the area in which Ms. [redacted] was seated was destroyed in the wreck.

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

A photograph of the subject guardrail taken only one month before the subject wreck shows the poor condition of the guardrail. The photograph below was taken by Martin Robbins:

Plaintiff's Trial Ex. 1

Martin Robbins knew the subject guardrail was a risk long before the subject wreck. As of May 19, 2015 – over three years before the wreck – GDOT warned Martin Robbins that the subject guardrail was "a high concern due to fatalities that have happened," as shown in the email below:



PLAINTIFF'S EXHIBIT 15

Derrick Wilkerson

From: Wilson, Kelvin [kewilson@dot.ga.gov]
Sent: Tuesday, May 19, 2015 3:00 PM
To: Derrick Wilkerson <dwilkerson@martinrobbins.com> (dwilkerson@martinrobbins.com)
Cc: Chris Walker; Perrimon, Marquel; Werho, Patrick; Stewart, Alania; Puerta, Luis H.; Jackson, Emanuel; Witherow, Jimmy; Conley, Fartardo D.
Subject: Guardrail Work Request
Attachments: 3899_001.pdf

Derrick,

Attached is a guardrail work request order that has been requested from our Traffic Operations Office by Patrick Werho. In the attachment, you will see where they are proposing we install 125 ft of "T" Beam Guardrail with Tie-in at the Bridge End at the above mentioned location and add a transition section from 31 inch to 27 inch after 100ft +/-. I know there was some discussion about this location due to some fiber running behind the existing guardrail. Also, this location has a high concern due to fatalities that have happen. Would this work request require us to do more locates in order to perform the work request? Could you provide me with your feedback on the attached work request?

Plaintiff's Trial Ex. 15.

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

2. Facts

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

Guardrail is "first and foremost a safety barrier intended to shield a motorist who has left the roadway."[2] When functional, guardrail "can make roads safer and lessen the severity of

[2] Doyle Dep., 52:3-9 (Ex. C).

crashes."[3] According to GDOT's expert, "guardrail is there to protect a car that leaves the roadway, to try to protect it from a hazard behind the guardrail."[4] The guardrail in this case was "nonfunctional" and, therefore, unable to protect Ms. [redacted] from the hazard behind it.

On June 3, 2018, Ms. [redacted] was the passenger of a Kia Sorrento traveling on I-85 South.[5] After a collision with another vehicle, the Sorrento lost control and entered a counter-clockwise yaw.[6] The Sorrento slid, remaining on all four wheels, and struck a portion of nonfunctional guardrail.[7] Because the guardrail was nonfunctional, it failed to keep the car in the roadway.[8] Instead, the guardrail tripped the Sorrento, causing the Sorrento to ramp *over* the guardrail toward the camera pole that stood close behind the guardrail.[9]

The wreck sequence can be seen below in screen shots from Plaintiff's reconstruction animation. The accuracy of this reconstruction animation has been confirmed by Plaintiff's reconstruction expert and GDOT's reconstruction expert.[10] Neither Martin Robbins nor Arcadis have presented any expert reconstruction testimony to challenge the animation. A link to the full animation is available for the Court in this footnote.[11]

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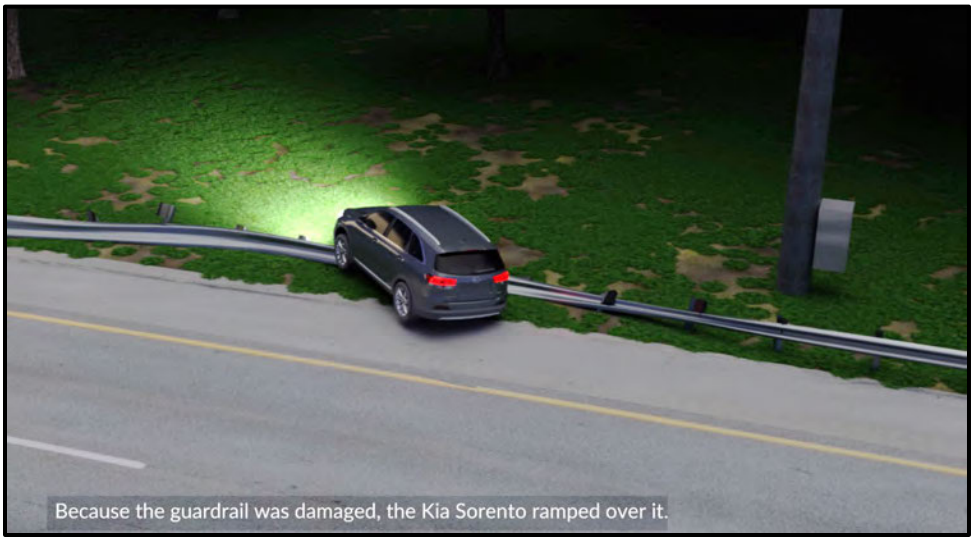
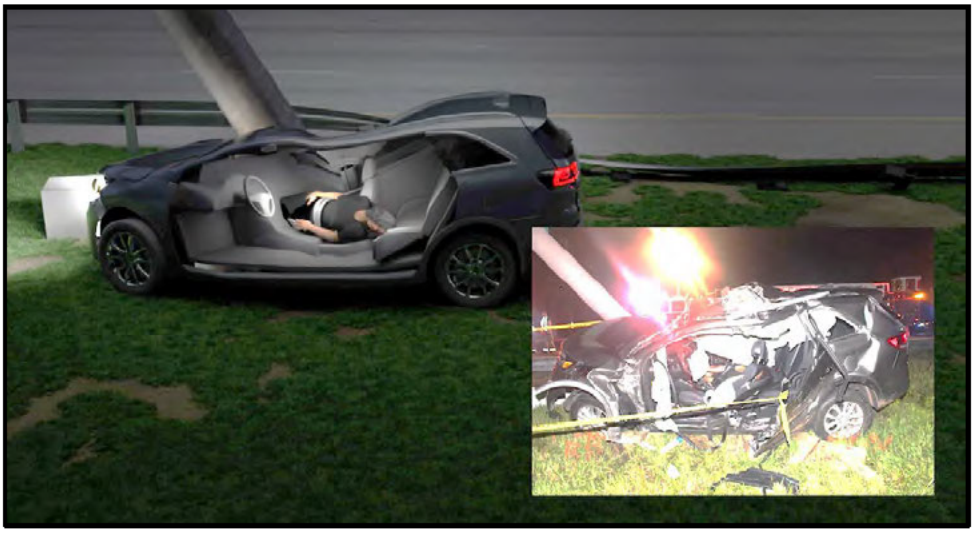
[3] Doyle Dep., 52:19-15.
[4] Doyle Dep., 52:16-20.
[5] Police Report (Ex. D).
[6] Earnhart 07/21/21 Dep., 53:23-55:1, 66:14-67:3, 73:1-74-2, 75:24-76:9 (Ex. E).
[7] Earnhart 07/01/21 Dep., 22:7-9; Earnhart 07/21/21 Dep., 108:5-16; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 2 (Ex. F); Kent Dep., 10:7-16.
[8] Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.
[9] Earnhart 07/01/21 Dep., 21:13-18; Earnhart 07/21/21 Dep., 128:18-129:1; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.
[10] Earnhart 07/01/21 Dep., 20:7-21:2 (authenticating reconstruction animation); Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 1; Earnhart 07/21/21 Dep., 90:10-91:4 (explaining involvement in creating animation); *see also* Kent Dep., 12:24-14:11 (testifying to accuracy of the animation).
[11] [https://www.dropbox.com/s/feiwhpwqu2x5489/Hendon%20Px%20100%20-%20Reconstruction%20Animation.mp4?dl=0]


POI #1
The Kia Sorento slid into the damaged guardrail.


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


POI #2
The vehicle slammed into a camera pole.



Decedent [redacted] was a front-seat passenger in the Kia Sorrento. Her side of the car slammed into the camera pole.[12] The car bent around the pole.[13] The pole ripped through the occupant area.[14] Ms. [redacted] seating area was demolished.[15] She was killed.[16]

The Fulton County Medical Examiner opines that "[redacted] died due to generalized blunt force injuries as evidenced by injuries of her brain, lungs, liver, and spleen, and multiple skeletal fractures. Specifically, the cause of death was blunt force trauma when the Kia Sorrento hit the fixed utility pole off the shoulder of the highway."[17]

2.2. Martin Robbins was responsible for repairing the subject guardrail.

[12] Earnhart 07/01/21 Dep., 21:13-18; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:21-24.
[13] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3.
[14] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3.
[15] Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3; Plaintiff's Trial Ex. 8.
[16] *See* Sullivan Declaration ¶ 10 (Ex. G); *see also* Fulton County Medical Examiner's Report (Ex. H) (identifying the cause of death as "[g]eneralized blunt force injuries" after striking "a fixed object.")
[17] Sullivan Declaration ¶ 10.

Martin Robbins was legally and contractually required to repair nonfunctional guardrail within 21 days of being notified of the need for repair.[18] Martin Robbins failed to do that. Instead, Martin Robbins left the subject guardrail unrepaired for 45 days after being notified that the guardrail was nonfunctional.[19] If Martin Robbins had completed the repairs on a timely basis, the guardrail would have been functional when the vehicle carrying [redacted] struck it, and Ms. [redacted] would not have died.

Because Martin Robbins contracted with GDOT and undertook to perform GDOT's statutory duties to the traveling public, Martin Robbins was legally responsible for fulfilling those duties. Georgia's statutory scheme makes GDOT responsible for maintaining the state highway system, including the guardrail at issue.[20] *See* O.C.G.A. § 32-2-2. GDOT's responsibilities are based on its obligation to "provide a safe highway system" for the traveling public.[21] "GDOT has the authority to hire third-party contractors to fulfill [its] duties" to the traveling public.[22] To that end, GDOT hired Defendants Martin Robbins and Arcadis to help with its maintenance duties.[23] Both private Defendants breached those duties.

Arcadis was responsible for identifying damaged guardrail and telling GDOT and Martin Robbins about it.[24] To fulfill its duty, Arcadis hired inspectors to drive along the state highway

[18] Young 30(b)(6) Dep., 39: 3-12 (Ex. I); Martin Dep., 10:13-18 (Ex. J); Martin-Robbins Resp. to Pl's 4th Req. for Admissions, No. 39 (Ex. K); Martin Dep., 10:13-21; *see also* Plaintiff's Trial Ex. 12.
[19] Martin Robbins 30(b)(6) Dep., 204:15-17 (Ex. L).
[20] Flanders 30(b)(6) Dep., 18:1-10, 19:9-18 (Ex. M); Hill Dep., 70:18-71:7 (Ex. N).
[21] Flanders 30(b)(6) Dep., 18:21-19:7.
[22] Flanders 30(b)(6) Dep., 18:11-17.
[23] Martin Dep., 13:18; Young 30(b)(6) Dep., 78:4-19; Wilson Dep., 129:14-18, 137: 6 – 139: 15 (Ex. O); Plaintiff's Trial Ex. 230 (Arcadis' contract with GDOT); Plaintiff's Trial Ex. 231 (Arcadis Task Order # 2); Hendon 30(b)(6) Dep., 19:9-20:10, 22:15-17 (Ex. P).
[24] Hendon 30(b)(6) Dep., 19:9-20:10, 22:15-17, 84: 8-20; Anderson 30(b)(6) Dep., 21:2-6 (Ex. Q); Young 30(b)(6) Dep., 78:4-19; Wilson Dep., 129:14-18.

system looking for damaged guardrail.[25] The inspectors were "not expected to know the technical specifications of the repair process."[26] The inspectors were only supposed to find and report damaged guardrail.[27] Each day, Arcadis was supposed to send photographs and GPS coordinates of damaged guardrail it had found to GDOT and Martin Robbins.[28]

Martin Robbins was responsible for inspecting and repairing the guardrail, usually after being notified of damaged sections by Arcadis or GDOT.[29] GDOT's contract with Martin Robbins defined "nonfunctional" guardrail as damaged guardrail with three or more consecutive bent, broken, or separated posts.[30] Martin Robbins was supposed to repair "nonfunctional" guardrail within 21 days of receiving notice.[31] Martin Robbins was also authorized and encouraged to identify damaged guardrail while it was out making other repairs, and Martin Robbins frequently did so.[32]

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

Defendants should have identified and repaired the subject guardrail long before the subject wreck. The subject wreck happened on June 3, 2018.[33] The undisputed evidence shows that the subject guardrail had been nonfunctional since at least August 2017 – *ten months* before

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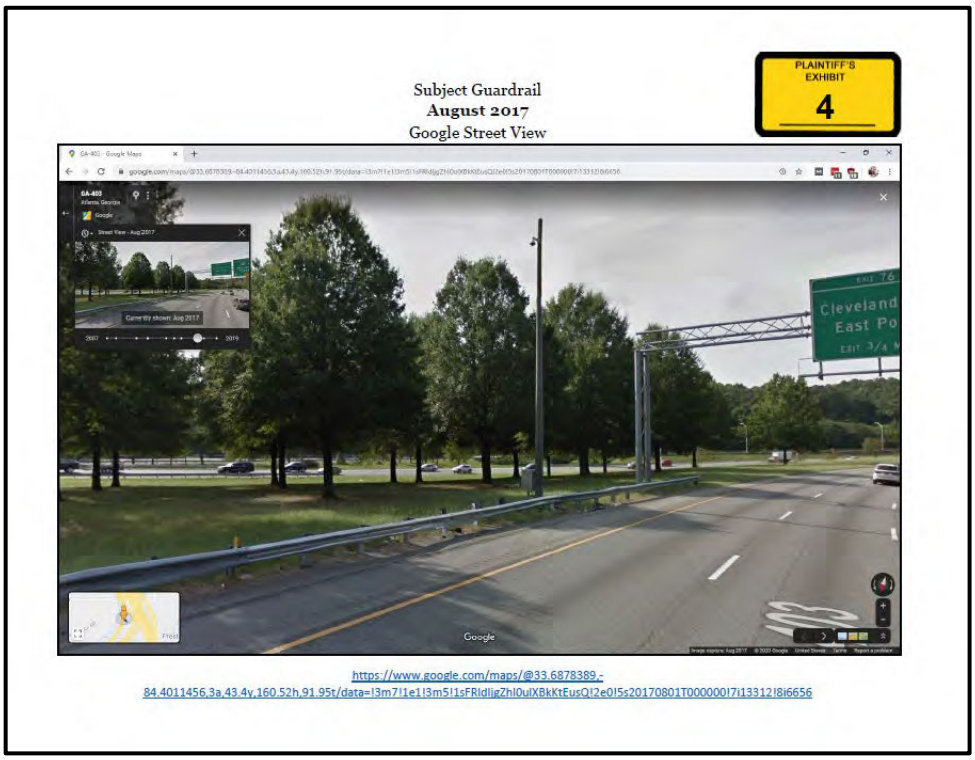
[25] Moore 30(b)(6) Dep., 49:6-50:8 (Ex. R); Anderson 30(b)(6) Dep., 15:20-16:2; Hendon 30(b)(6) Dep., 19:9-20:10.
[26] Wilson Dep., 127:24-128:7; Plaintiff's Trial Ex. 200 (meeting minutes from 03/13/18) (Ex. S); Anderson 30(b)(6) Dep., 14:11-18 ("It does not require a professional engineer to identify damaged guardrail.").
[27] Anderson 30(b)(6) Dep., 15:20-16:2, 21:2-6; Hendon 30(b)(6) Dep., 19:9-20:10, 27:24-28:9.
[28] Wilson Dep., 124:14-125:4; *see also* Plaintiff's Trial Ex. 200.
[29] Young 30(b)(6) Dep., 39: 3-12; Martin Dep., 10:13-18; Martin-Robbins Resp. to Pl's 4th Req. for Admissions, No. 39; Martin Dep., 10:13-21; *see also* Plaintiff's Trial Ex. 12.
[30] Martin Dep., 32:16-33:19; Flanders 30(b)(6) Dep., 41:9-15; Plaintiff's Trial Ex. 12; Plaintiff's Trial Ex. 13; Plaintiff's Trial Ex. 14.
[31] Martin Dep., 34:7-17; *see also* Plaintiff's Trial Ex. 12 at 66-67; Martin Robbins 30(b)(6) Dep., 184:14-185:3; Hendon 30(b)(6) Dep., 43:5-10; 2nd Supp. Hill Aff. ¶ 5 (Ex. T).
[32] Hendon 30(b)(6) Dep., 231:12-234:14.
[33] *See* Police Report.

Ms. [redacted] died.[34] Witnesses for each party, *including Martin Robbins*, have testified that the subject guardrail was non-functional in August 2017, September 2017, and January 2018 based on the images from Google Street View shown[35] below.



[36]

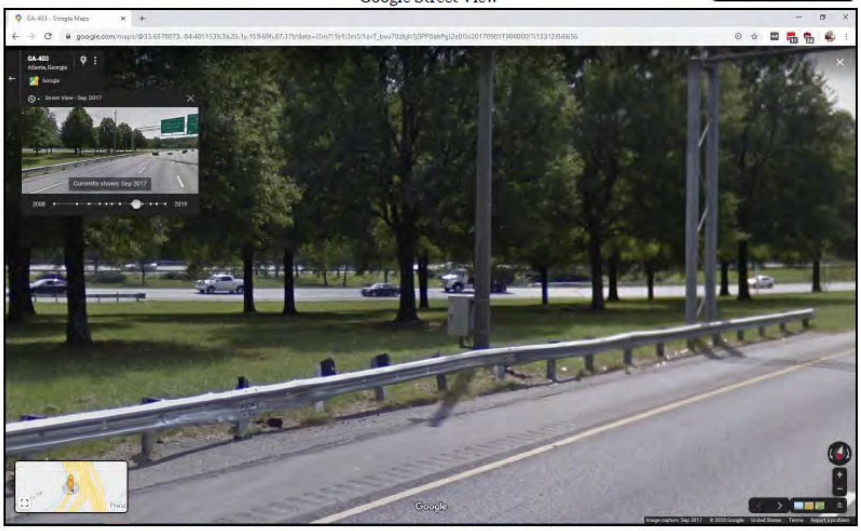
[34] Martin-Robbins Resp. to Pl's 3rd Req. for Admissions, No. 2.

[35] These images from Google Maps Street View are admissible for two reasons. First, they have been authenticated by witnesses. *See Clark v. City of Atlanta*, 322 Ga. App. 151, 153-54 (2013) (finding Google Map image authenticated by a witness to be admissible). Second, the Court can take judicial notice of a Google Maps image. *See Todd v. Carstarphen*, 2017 WL 655756, at *4 n. 14 (N.D. Ga. Feb. 17, 2017) (taking judicial notice of Google images); *see also Olem Shoe Corp. v. Washington Shoe Corp.*, 591 F. App'x 873, 884 n. 14 (11th Cir. 2015) (relying on screen shot of Google Maps showing store location); *United States v. Proch*, 637 F.3d 1262, 1266 (11th Cir. 2011) (taking judicial notice of a map); *Permenter v. Fedex Freight, Inc.*, No. 7:14-CV-104 (HL), 2016 WL 878496, at *2 (M.D. Ga. Mar. 7, 2016) (relying on *United States v. Proch* to take judicial notice of Google Maps as a source whose accuracy cannot be reasonably questioned).

[36] Martin Dep., 29:15-24.

Subject Guardrail
September 2017
Google Street View

PLAINTIFF'S EXHIBIT 3

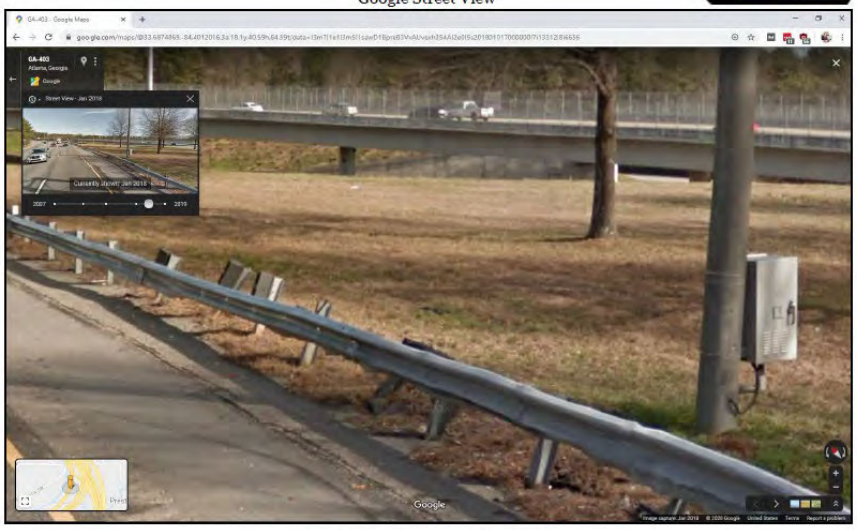


https://www.google.com/maps/@33.6878073,-84.4011539,3a,25.1y,159.69h,87.37t/data=!3m7!1e1!3m5!1svT_bvu70zbjhTj5PPBahPg!2e0!5s20170901T000000!7i13312!8i6656

[37]

Subject Guardrail – Zoomed In
January 2018
Google Street View

PLAINTIFF'S EXHIBIT 5



https://www.google.com/maps/@33.6874869,-84.4012016,3a,18.1y,40.59h,84.59t/data=!3m7!1e1!3m5!1sawD1BpreB3VvAUvexh354A!2e0!5s20180101T000000!7i13312!8i6656

[38]

[37] Martin Robbins 30(b)(6) Dep., 196:20-197:20; Anderson 30(b)(6) Dep., 23:2-25; Martin Dep., 29:6-14; Kent Dep., 24:6-24; Thrasher Dep., 34:17-35:4 (Ex. U).
[38] Martin Robbins 30(b)(6) Dep., 198:14-199:4; Anderson 30(b)(6) Dep., 24:22-25:13; Martin Dep., 33:20-34:6; Kent Dep., 25:13-26:2; Thrasher Dep., 39:12-40:5.

On April 18, 2018, a GDOT employee emailed a photograph of the subject guardrail to Arcadis. By April 18, 2018, the subject guardrail was nearly flattened in places:

[39]

On April 20, 2018, Arcadis gave Martin Robbins notice that the subject guardrail was nonfunctional and that it needed to be repaired no later than May 11, 2018.[40] Martin Robbins did not repair the subject guardrail until June 4, 2018, 45 days later.[41] The subject collision occurred on June 3, 2018.

Really, Martin Robbins knew about the subject guardrail's disrepair long before April 20, 2018 because they drove past it hundreds of times in the ten months preceding this wreck, and even worked on other damaged guardrail in the vicinity. [42] Instead of reporting the subject

[39] Plaintiff's Trial Ex. 221.
[40] Martin Dep., 34:18-22, 37:9-11; Flanders 30(b)(6) Dep., 42:4-7.
[41] Martin Robbins 30(b)(6) Dep., 204:15-17.
[42] Martin-Robbins Resp. to Pl's 4th Req. for Admissions, No. 10, 12, 13-17, 19-30, 35-37.

guardrail, Martin Robbins left the subject guardrail in place for *at least* ten months without making any repairs.

Defendants collectively did too little, too late.

2.4. Martin Robbins' "too busy" defense.

Martin Robbins proclaims that it is "one of Georgia's largest Guardrail contractors."[43] Despite this proclamation, Martin Robbins now claims that it was not able to timely repair the nonfunctioning guardrail because of an alleged increase in its workload.[44] In other words, Martin Robbins claims that it was too busy to do its job. That is a disputed factual defense that affords no ground for summary judgment because at this stage, facts are viewed and determinations of credibility are made in favor of the non-movant. Moreover, Martin Robbins' "too-busy" defense rings hollow for three reasons.

First, Martin Robbins had been failing to timely repair guardrail for a long time before it claims that it became "too busy" to perform its duties. In March 2018, Martin Robbins claims that GDOT's requests "suddenly and unexpectedly spiked." Opp. Br. 4. However, dating back to September of 2016 – *two years* before the alleged spike – Martin Robbins was already failing to timely repair damaged guardrail.[45] For example, on September 9, 2016, GDOT expressed the following concern in a letter to Martin Robbins:

Dear Mr. Wilkerson:

The Department is concerned with Martin-Robbins performance with repairing attenuators, guardrail, and cable barriers in the time frames stated within the contracts. Please provide the Department with your plan of action to repair attenuators, guardrail, and cable barriers within the time frames stated within the contracts. Martin-Robbins is expected to provide all

[46]

[43] Martin Dep., 11:22-25; Plaintiff's Trial Ex. 17.
[44] Martin Robbins 30(b)(6) Dep., 230:22-231:9.
[45] Moore 30(b)(6) Dep., 54:25-55:11 (reviewing default letter dated 09/09/16).
[46]Moore 30(b)(6) Dep., 54:25-55:11; *see also* Pl.'s Trial Ex. 30.

In the twenty-one months leading up to the subject wreck, GDOT had sent Martin Robbins at least **five letters** and **thirteen emails** complaining about the failure to timely repair damaged guardrail.[47] On April 17, 2018, less than two months before Ms. [redacted] died, GDOT once again told Martin Robbins that it was failing to meet its obligations under the contract.[48] On May 15, 2018, GDOT yet again told Martin Robbins that it was failing to timely repair damaged guardrail and therefore in default of the contract.[49] In sum, Martin Robbins' failure to timely repair guardrail was not a "new" issue related to any spike in repair requests – Martin Robbins had been failing to perform its duties for years. The problem wasn't the workload – the problem was Martin Robbins.

Second, during the same period in which Martin Robbins now claims it was overwhelmed with work, *it was bidding for additional jobs from GDOT*.[50] In other words, during the exact same period in which Martin Robbins now claims that it was too busy to repair the subject guardrail, *Martin Robbins was asking for more work*. Martin Robbins' bids for additional work included sworn representations to GDOT that Martin Robbins' "current capacity" for work exceeded ten-figure amounts.[51] For example, in both April 2018 and June 2018 – during the time in which Martin Robbins now claims to have been too busy to repair the subject guardrail – Martin Robbins submitted bids to GDOT in which it certified that *it had the*

[47] *See* Moore 30(b)(6) Dep., 56:17-60:15 (testifying about default letters sent on 09/09/16, 03/27/17, 04/27/17, 04/17/18, and 05/15/18); *see also* Moore 30(b)(6) Dep., 63:22-70:25 (testifying about thirteen "delinquency" emails to Martin Robbins).
[48] Moore 30(b)(6) Dep., 59:15-60:9; Plaintiff's Trial Ex. 34.
[49] Moore 30(b)(6) Dep., 60:12-:61:8, 62:5-15; Plaintiff's Trial Ex. 35.
[50] Martin Dep., 41:13-17, 42:16-50:7; Pl.'s Trial Ex. 20-27.
[51] Martin Dep., 42:16-50:7; Pl.'s Trial Ex. 20-27.

capacity to handle an additional $13.8 million worth of government contracts.[52] In September 2018, only three months after Ms. [redacted] death, Martin Robbins certified to GDOT that *it had the capacity to handle an additional $17.8 million worth of government contracts.*[53] In other words, during the period in which Ms. [redacted] was killed and in which Martin Robbins now claims that it was too busy to fix the subject guardrail, Martin Robbins swore to GDOT that it had the ability to perform an additional $17.8 million worth of work. If Martin Robbins was actually overwhelmed, it could have (and should have) focused on its existing obligations, like repairing the subject guardrail, instead of bidding for new contracts.

Third, even if Martin Robbins was too busy to repair the subject guardrail, the Contract explicitly provided a remedy for this problem – Martin Robbins was to present a qualified subcontractor for GDOT's approval to help with the work.[54] The undisputed evidence shows that Martin Robbins *never* presented a subcontractor to GDOT.[55]

3. Legal Standard

"When ruling on a motion for summary judgment, the trial court should give the party opposing the motion the benefit of all reasonable doubt, construing the evidence most favorably toward the opposing party." *Bulloch S., Inc. v. Gosai*, 250 Ga. App. 170, 170 (2001). In evaluating a motion for summary judgment, a trial court "may not weigh conflicting evidence or determine the credibility of witnesses." *Ferros v. Georgia State Patrol*, 211 Ga. App. 50, 51

[52] Martin Dep., 47:13-15 ("Q. Do you agree that the words to the left of $13,853,945.60 are 'my current capacity is'? A. Yes."); *see also* Martin Dep., 48:20-22 ("Q. And what number did you write next to my current capacity is? A. 13,853,946.").
[53] Martin Dep., 50:5-7 ("Q. What did you write next to my current capacity is? A. 17,826,796.").
[54] Plaintiff's Trial Ex. 12 at 5 (Art. 108).
[55] Moore 30(b)(6) Dep., 73:20-24 ("Q. Did Martin-Robbins ever present a subcontractor for GDOT's approval? A. No."); Martin Robbins 30(b)(6) Dep., 178:23-179:22.

(1993) (citations omitted). Summary judgment for a defendant is only proper when, after viewing the evidence *in favor of the plaintiff*, no genuine issues of material fact exist. *Gosai*, 250 Ga. App. at 170. Here, the evidence supporting Plaintiff's claims is overwhelming.

4. Argument

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

4.1. Martin Robbins negligently performed a voluntary undertaking.

Martin Robbins is liable because the evidence shows it failed to use reasonable care to perform its voluntary undertaking of timely repairing damaged guardrail for the protection of the traveling public. Martin Robbins' motion makes no mention of its liability based on its negligent undertaking, although Plaintiff clearly pleaded it.[56] By failing to address its negligent undertaking, Martin Robbins has conceded the viability of this claim as a matter of law. *Little v. All. Fire Prot., Inc.*, 291 Ga. App. 116, 119 (2008).[57] Nonetheless, in an abundance of caution, Plaintiff addresses the merits of that claim.

[56] *See* Pl.'s FAC ¶ 46(d) ("Martin-Robbins is liable because it . . . undertook to repair guardrails such as the subject guardrail, but negligently performed that undertaking.").
[57]

A contractor who undertakes to render services may be held liable for injury to third persons under certain situations. *See Huggins v. Aetna Cas. & Sur. Co.*, 245 Ga. 248, 248 (1980). Georgia has long adopted the doctrine of "negligent undertaking" under Section 324A of the Restatement (Second) of Torts. *Id.* Under Section 324A of the Restatement of Torts,

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

Huggins, 245 Ga. at 248; *see also Urban Services Group, Inc. v. Royal Group, Inc.*, 295 Ga. App. 350, 351-352 (2008); *Allstate Ins. Co. v. Sutton*, 290 Ga. App. 154, 158 (2008); *Blossman Gas Co. v. Williams*, 189 Ga. App. 195, 197-198 (1988). Under Section 324A, omissions, as well as affirmative acts, can give rise to liability of third parties. *Urban Services*, 295 Ga. App. at 352. "'[A]ny undertaking to render services to another,' including a 'failure to exercise reasonable care to complete it . . .' can give rise to liability." *Id.* (citations omitted).

Martin Robbins is liable for negligently performing a duty owed by GDOT and for increasing the risk of harm to Plaintiff under subsections (b) and (a) of § 324A, which are addressed in that sequence below.

4.1.1. Martin Robbins' negligently performed a duty owed by GDOT.

> Nothing ... places a burden on a plaintiff to respond to issues which are not raised in the motion for summary judgment or to present his entire case on all allegations in the complaint—even on issues not raised in the defendants' motion. Indeed, until appellees pierce the allegations of the complaint on a particular issue, plaintiff is neither required to respond to the motion on that issue[ ] nor required to produce evidence in support of his complaint on that issue.

Little v. All. Fire Prot., Inc., 291 Ga. App. 116, 119 (2008).

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

Further, the undisputed evidence shows that GDOT is responsible for maintaining the state highway system, including guardrail.[58] However, GDOT is free to delegate its duties among contractors, as it did here.[59] As to guardrail repair, GDOT contracted Martin Robbins to perform that function.[60] Therefore, Martin Robbins undertook "to perform a duty owned by

[58] Wilson Dep., 137:3-20
[59] Wilson Dep.137:23-138:3; O.C.G.A. § 32-2-2 ("The department shall have the authority to…enter into contracts…with any person…for the construction or maintenance of any public road.").
[60] Martin Robbins 30(b)(6) Dep., 174:9-12; Martin Dep., 10:13-18.

[GDOT] to the [traveling public]."[61] *Huggins*, 245 Ga. at 248 (quoting Restatement 2d Torts § 324A). Because Martin Robbins' failure to exercise due care while discharging GDOT's duty caused the death of Ms. [redacted] and the catastrophic injuries to Mrs. [redacted] Martin Robbins is liable under subsection (b) of Section 324A of the Restatement of Torts. This scenario is *exactly* why Georgia courts adopted the Restatement of Torts. *See* Restatement (Second) of Torts § 324A ("This Section applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking . . . results in physical harm to the third person or his things.").

4.1.2. Martin Robbins' negligence increased the risk of harm.

In addition to subsection (b), Martin Robbins is also liable under subsection (a) of § 324A. Where a contractor's "negligent performance of his undertaking results in increasing the risk of harm to a third person, the fact that he is acting under a contract . . . **will not prevent his liability to the third person**." Restatement (Second) of Torts § 324A, cmt. c (emphasis added). Martin Robbins undertook the job of repairing damaged guardrails "for consideration" – i.e., pursuant to a contract and in exchange for money.[62] The services were rendered "for the protection of" third persons.[63] Therefore, Martin Robbins is liable to third parties injured from its "failure to exercise reasonable care" if its "failure to exercise reasonable care increase[d] the risk of such harm." *Huggins*, 245 Ga. at 248 (quoting Restatement 2d Torts § 324A). A contractor's act or omission increases the risk of harm where it "exposes the injured person to a

[61] Martin Dep., 16:15-23 ("Q. The question is do you agree that when Martin-Robbins agrees to install or maintain guardrail and gets paid to do that, Martin-Robbins has an obligation to GDOT **and to the public** to do its job correctly? A. **Yes**, we should do it correctly.") (emphasis added).
[62] Martin Robbins 30(b)(6) Dep., 174:23-175:2; Martin Dep., 10:13-18.
[63] Flanders 30(b)(6) Dep., 18:21-19:7; Martin Dep., 16:15-23 (Martin Robbins' duty to GDOT and the public).

greater risk of harm than had previously existed." *Herrington v. Deloris Gaulden*, 294 Ga. 285, 288 (2013).

Martin Robbins' failure to timely repair the subject guardrail increased the risk of harm to a motorist who struck it. Specifically, each time a car struck the guardrail, but Martin Robbins did not repair it, the guardrail became more dangerous. The undisputed record shows that the subject guardrail was nonfunctional dating back to at least August 2017 based on Google Maps images.[64] The condition of the subject guardrail worsened between August 2017 and June 2018 because of Defendants' failure to identify and report damage to it.[65] By April 2018, the subject guardrail was nearly flattened in places.[66] In other words, Martin Robbins' failure to repair the subject guardrail allowed the hazard to worsen, which "increase[d] the risk of . . . harm" to travelers like Ms. [redacted] and Ms. [redacted] Restatement (Second) of Torts § 324A(a). Therefore, Martin Robbins is liable under subsection (a) of the Section 324A of the Restatement of Torts. *See Williams*, 189 Ga. App. at 120 (holding that "[plaintiff's] injuries were a foreseeable consequence of [defendant's] failure to complete its voluntarily assumed duties . . . thus the trial court did not err by denying [defendant's] motion for a directed verdict.").

4.2. Martin Robbins failed to meet the industry standard.

Martin Robbins owed a common law duty to Plaintiff to perform work that conformed to the industry standard for a Georgia guardrail contractor. Under Georgia law, a contractor owes a duty to perform its work in accordance with industry standards. *Mays v. Valley View Ranch, Inc.*, 317 Ga. App. 143, 148 (2012). A negligent maintenance claim against a contractor arises

[64] Martin Dep., 29:15-24 (authenticating Pl.'s Trial Ex. 4); *see also* Martin-Robbins Resp. to Pl's 3rd Req. for Admissions, No. 2.
[65] *Id.*; *see also* Pl.'s Trial Ex. 1-5.
[66] Pl.'s Trial Ex. 1.

"'not from a breach of contract claim but from breach of a duty implied by law to perform the work in accordance with industry standards.'" *City of Atlanta v. Benator*, 310 Ga. App. 597, 605 (2011) (quoting *Rowe Dev. Corp. v. Akin & Flanders, Inc.*, 240 Ga. App. 766, 769 (1999)). A cause of action based on industry standards arises in tort and "'exists independently of any claim for breach of contract.'" *Id.*; *see also Schofield Interior Contractors, Inc. v. Standard Bldg. Co.*, 293 Ga. App. 812, 814 (2008).

To prevail on a negligent maintenance claim against a contractor, the plaintiff must show that a violation of industry standards caused the injury or harm.[67] *Benator*, 310 Ga. App. at 606. An "industry standard" is simply the "standard practice[] of an industry." *Monitronics Int'l, Inc. v. Veasley*, 323 Ga. App. 126, 141 (2013); *accord Thomas v. Metro. Atlanta Rapid Transit Auth.*, 300 Ga. App. 98, 103 (2009). It is not necessarily a specific code section or regulation (as Martin Robbins erroneously suggests). Opp. Br. at 11. One way a plaintiff can show the violation of an industry standard is by presenting testimony from an expert witness familiar with the standard practices of a particular industry. *Veasley*, 323 Ga. App. at 141; *Mays*, 317 Ga. App. at 149; *Thomas*, 300 Ga. App. at 103.

Here, the applicable industry is the Georgia guardrail industry, and the undisputed evidence shows that Martin Robbins failed to meet that industry's standard for repairing non-functional guardrail. In Georgia, GDOT bears responsibility for highway maintenance, including repairing damaged guardrail. *See* O.C.G.A. § 32-2-2.[68] There are no other entities responsible

[67] Martin Robbins does not – and cannot – challenge causation. The Fulton County Medical Examiner has averred that "[i]t is my opinion that [redacted] died due to generalized blunt force injuries as evidenced by injuries of her brain, lungs, liver, and spleen, and multiple skeletal fractures. Specifically, the cause of death was blunt force trauma when the Kia Sorrento hit the fixed utility pole off the shoulder of the highway." Sullivan Declaration ¶ 10.
[68] *See also* Second Supp. Hill Aff. ¶ 3.

for creating the time in which nonfunctional guardrail must be repaired.[69] For that reason, GDOT creates the industry standard for guardrail repair in Georgia.[70] In other words, as expert testimony in this case has established, "the industry standard in Georgia is what GDOT says it is."[71] Martin Robbins' corporate representative admitted the same when he testified that "[GDOT] set[s] the standards that we have to comply with."[72] The evidence shows that "[t]he industry standard for repairing non-functional guardrail is to make the repair within 21-days of notice. . ."[73] GDOT's expert also testified that, to best of his knowledge, 21 days is the standard timeline for repairing nonfunctional guardrail in all GDOT contracts.[74] As noted above, Martin Robbins did not meet this industry standard.

Georgia's industry standard for the repair of nonfunctional guardrail – i.e., repair within 21 days – is more lenient than the industry standards of other nearby states. For example, in South Carolina, a guardrail contractor must repair nonfunctional guardrail within 4 days of receiving notice.[75] In Tennessee, a guardrail contractor must repair nonfunctional guardrail within 2 days of receiving notice.[76] In Virginia, a guardrail contractor must repair nonfunctional guardrail "as soon as possible."[77] Because it took Martin Robbins ***forty-five*** days to repair the subject guardrail, Martin Robbins fell short of even Georgia's more lenient standard. Because evidence shows that Martin Robbins failed to meet the industry standard, summary judgment is inappropriate and Martin Robbins' motion should be denied.

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[69] Doyle Dep., 44:15-20.
[70] Second Supp. Hill Aff. ¶ 4; Martin Robbins 30(b)(6) Dep., 181:17-182:7.
[71] Second Supp. Hill Aff. ¶ 4.
[72] Martin Robbins 30(b)(6) Dep., 182:23-183:10.
[73] Second Supp. Hill Aff. ¶ 5.
[74] Doyle Dep., 44:3-6.
[75] 2nd Supp. Hill Aff. ¶ 8(a).
[76] 2nd Supp. Hill Aff. ¶ 8(b).
[77] 2nd Supp. Hill Aff. ¶ 8(c).

4.3. Martin Robbins' breached its duty to Ms. [redacted] as a third-party beneficiary of the contract.

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

Brazeman v. IPC International Corporation shows how a contract between private parties can benefit a group of people who are not parties to the contract. 2008 WL 11334073 (N.D. Ga. Aug. 25, 2008) (applying Georgia law). In *Brazeman*, the plaintiff was viciously beaten while he was inside Lenox Square Mall. *Id.* at *1–2. He filed a lawsuit against the mall's security company, alleging that he was a third-party beneficiary to the contract between the mall and the security company. *Id.* at *2. The security company, much like Martin Robbins, claimed that contract did not intend to create third-party beneficiaries. *Id.* The court disagreed, holding that the plaintiff was an intended beneficiary to the contract, and therefore denied the security company's motion for summary judgment. *Id.* at *4. In so doing, the Court looked to the language of the contract, which said: "**The [security services] shall be performed in such a manner as to minimize the possibility of any annoyance, interference, or disruption to the occupants of the Property *and their invitees***." *Id.* (bold in original, italics added). The Court found this language "evidence[ed] an intent to benefit third party invitees, such as plaintiff." *Id.*

In this case, just like in *Brazeman*, the intention to benefit the traveling public is clear on the face of the contract. First, Martin Robbins' contract with GDOT makes several explicit

references to protecting the "traveling public," just as the security contract in *Brazeman* expressly referred to the occupants of the premises "and their invitees." For example, Martin Robbins had an obligation to perform its work in a way to minimize inconvenience to and keep "the traveling public" safe:

> **X. LIMITATION OF OPERATIONS:**
>
> A. **Scheduling**
>
> 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.

Pl.'s Trial Ex. 12 at 62. Once Martin Robbins completed work under the contract, it had an obligation to leave the site safe for "the traveling public."

> d. Submit damage report along with photographs to the Engineer to verify, (Engineer will verify the damage report, prior to repairs or replacement being accomplished)
>
> e. Perform repairs within time limits, including appropriate Traffic Control,
>
> f. Perform site clean-up and leave site safe for the traveling public.
>
> 2. **Impact Attenuator**

Pl.'s Trial Ex. 12 at 60. Similarly, the contract obligated Martin Robbins to "[a]lways leave the project in a manner that will be safe to *the traveling public* and which will not impede motorists." *Id.* at 64. In sum, just as the contract in *Brazeman* intended to benefit third parties because it referred to performing services for occupiers of the property "*and their invitees*," the contract here intended to benefit third parties because it (repeatedly) referred to performing services to protect the "*the traveling public*." Therefore, in this case as in *Brazeman*, Defendant's motion for summary judgment should be denied. *E.g.*, *Green v. Pateco Servs., LLC*, 348 Ga. App. 132, 133–34 (2018) (reversing trial court's entry of summary judgment based on several provisions evidencing an intent to protect others from injury).

Second, the subject contract expressly shifted the statutory duties that GDOT owed to the traveling public *onto Martin Robbins*. Phrased differently, Martin Robbins contractually assumed GDOT's duties in return for financial compensation. The contract said:

> G. **Obligations Owed to Third Parties.**
>
> 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 will not have any obligations with respect thereto.

Pl.'s Trial Ex. 12 at 44. This provision shifts "**all** obligations owed to third parties" *from* GDOT *to* Martin Robbins. *Id.* "*[A]ll* obligations" includes GDOT's statutory obligation to maintain guardrail along the state highway system. *See* O.C.G.A.§ 32-2-2.[78] Martin Robbins contractually assumed that duty. Because Martin Robbins *contractually assumed* GDOT's obligation to the traveling public to maintain guardrail along the state highway system, Martin Robbins *owed* that duty to the traveling public, including Ms. [redacted] and Ms. [redacted] Martin Robbins breached that duty.

GDOT's expert has admitted that the contract intended to provide a benefit to the "traveling public":

> Q. Would it be fair to say that at least one purpose of this maintenance contract is to benefit the traveling public?
>
> A. I think you could draw that conclusion.[79]

Because Ms. [redacted] was a member of the "traveling public," she was a third-party beneficiary to the contract.

City of Atlanta v. Benator is distinguishable on multiple grounds. In *Benator*, a group of plaintiffs filed a class action against the City of Atlanta and its contractors based on routine overcharges for water. 310 Ga. App. at 597, disapproved on other grounds by *Fed. Deposit Ins. Corp. v. Loudermilk*, 305 Ga. 558 (2019). The Court of Appeals found that the class failed to

[78] *Accord* Flanders 30(b)(6) Dep., 18:23-19:1 ("Q. Would it be fair to say that GDOT owes a duty to the traveling public to maintain the guardrails within the state highway system? A. Yes.").
[79] Doyle Dep., 49:20-25 (objection omitted).

adequately allege a breach of contract claim because the contracts did not explicitly confer a benefit onto the class members. The Court found that the benefits of the contract were incidental and held that "[m]erely entering into a contract for the benefit of the public does not create third-party beneficiary status under Georgia law.'" *Id.* at 604.

The contract in this case is not like the one at issue in *Benator* for two reasons. First, in *Benator*, the contractual provision read, "[t]he Contractor is responsible for ensuring that all City customers and their properties are treated with respect and consideration and providing professional customer service." *Id.* That is, the contract made no promise to protect or to benefit the public – only to treat them with "respect and consideration." Stated differently, any benefit to the public under the contract in *Benator* was truly incidental to the performance of the contract. Here, however, the contract between GDOT and Martin Robbins explicitly recites obligations to keep the "traveling public" safe in multiple places. Keeping the traveling public safe is what the contract was about, and it is what this case is about.

Second, unlike the contract in *Benator*, Martin Robbins' contract with GDOT explicitly shifted GDOT's obligations to the traveling public *from* GDOT *to* Martin Robbins. Here, as explained above, the contract required Martin Robbins to satisfy "all obligations owed to third parties" so that "the state and the Department will not have any obligations with respect thereto." Because the contract in *Benator* did not contain an express provision shifting duties "owed to third parties" from one party to the other, *Benator* is distinguishable.

4.4. Martin Robbins' maintained a continuing nuisance.

The subject nonfunctional guardrail constituted a continuing nuisance. "A nuisance is anything that causes hurt, inconvenience, or damage to another . . ." O.C.G.A. § 41-1-1. An otherwise lawful act may constitute a nuisance where it causes damage to another. *Id.* A

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

The undisputed facts show that Martin Robbins created and maintained a nuisance. As to the first element – causing harm to another – the evidence shows that the nonfunctional guardrail caused Plaintiff's vehicle to ramp up into the concrete pole behind the guardrail.[80] A reasonably functional guardrail would have kept the vehicle in the roadway and away from the concrete pole with which it ultimately collided.[81] Therefore, the nonfunctional guardrail "cause[d] hurt, inconvenience, or damage to another . . ." as required by O.C.G.A. § 41-1-1.

As to the element of control, abundant evidence shows that Martin Robbins exercised control over the subject guardrail. The evidence shows that "GDOT had the power to hire contractors to repair damaged guardrail, including the subject guardrail. GDOT hired Martin

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

Robbins to repair damaged guardrail, including the subject guardrail.[82] Therefore, Martin Robbins had control over the condition of the subject guardrail."[83] GDOT's expert also testified that Martin Robbins exerted control over the subject guardrail.[84]

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

4.5. Martin Robbins is liable for punitive damages.

Punitive damages are appropriate because Plaintiff has presented evidence from which a jury could determine that Martin Robbins acted with the "entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1. "'Actions arising to a conscious indifference to consequences may authorize a finding of punitive damages.'" *Weller v. Blake*, 315 Ga. App. 214, 219 (2012) (citation omitted). Specifically, "[a] continuing nuisance will authorize a punitive damage award." *Id.* (citing *Tyler v. Lincoln*, 272 Ga. 118, 120 (2000)). "[W]hether the tort was sufficiently aggravating to authorize punitive damages is generally a jury question . . ." *Id.*

A jury could find that punitive damages are appropriate for two reasons. First, as discussed above, Plaintiff has presented evidence showing that Martin Robbins created and maintained a continuing nuisance. The Court of Appeals has held that continuing nuisances

[82] Martin Dep., 10:13-18.
[83] Second Supp. Hill Aff. ¶¶ 28-29.
[84] Doyle Dep., 54:6-21, 55:11-22.

authorize punitive damages. *Weller*, 315 Ga. App. at 219. Therefore, the question of whether punitive damages should be imposed is one for the jury.

Second, Martin Robbins had constructive knowledge of the subject guardrail long before the subject wreck, and its inaction despite that knowledge shows conscious indifference to the consequences. *See Jackson v. Waffle House, Inc.*, 245 Ga. App. 371, 373 (2000) (holding that constructive notice exists where a reasonable inspection would have revealed the hazard at issue). Martin Robbins knew that the condition of the subject guardrail and the roadway running along it were highly dangerous.[85] Specifically, since May 2015, Martin Robbins knew that the subject guardrail was "a high concern due to fatalities that have happen[ed]."[86] Further, the evidence shows that the subject guardrail was nonfunctional as early as August 2017 – *ten months before Ms.* [redacted] *died*.[87] Martin Robbins employees drove past the subject nonfunctional guardrail countless times between August 2017 and April 2018, but never reported or repaired it. Martin Robbins was specifically told on April 20, 2018 that the subject guardrail was "nonfunctional," but still failed to repair it within 21 days. In other words, Martin Robbins *knew* the subject guardrail was dangerous, and *knew* that it was in nonfunctional condition, but despite being aware of those risks, knowingly failed to fix the guardrail. A defendant's conscious disregard of a known risk authorizes punitive damages. *Weller*, 315 Ga. App. at 219.

4.6. Martin Robbins is liable for attorney's fees.

Georgia's attorney's fee statute provides:

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

[85] *See* Plaintiff's Trial Ex. 15.
[86] *Id.*
[87] Martin Robbins' Resp. to Pl.'s 4th RFAs, No. 2.

O.C.G.A. § 13-6-11 (emphasis added).

Thus, Code Section 13-6-11 contemplates a three-prong test for the recovery of attorney's fees where *any evidence*, no matter how slight, tends to show: (1) the defendant has acted in "bad faith," (2) the defendant has been "stubbornly litigious," or (3) the defendant has caused the plaintiff unnecessary trouble or expense.[88] *Id.*; *see also City of Lilburn v. Astra Group, Inc.*, 286 Ga. App. 568, 571 (2007) (holding that "[e]ven slight evidence of bad faith can be enough to create an issue for the jury.").

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

4.6.1. Martin Robbins' bad faith.

"The bad faith referred to [in O.C.G.A. § 13-6-11,] in actions sounding in tort, means bad faith in the transaction out of which the cause of action arose." *Windermere*, 211 Ga. App. at 179. Evidence of bad faith exists where a party fails to conform to statutes or industry standards whose purpose is to benefit the injured party. *See Nash v. Reed*, 349 Ga. App. 381, 383 (2019). Where evidence of bad faith is presented, even if slight, the existence of a bona fide controversy is not dispositive of the claim for O.C.G.A. § 13-6-11 attorney's fees. *See Merlino v. City of Atlanta*, 283 Ga. 186, 190 (2008); *Latham v. Faulk*, 265 Ga. 107, 108 (1995); *see also*

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

Oglethorpe Power Corp. v. Estate of Forrister, 332 Ga. App. 693, 705 (2015) (quoting *Lamb v. State Farm Mut. Auto Ins. Companies*, 240 Ga. App. 363, 365 (1999)) (holding "the existence of a bona fide controversy negates the possibility of a statutory award only '[w]here bad faith is not at issue.'"); *Windermere*, 211 Ga. App. at 179

Here, Martin Robbins acted in bad faith in two ways. First, Martin Robbins violated a statute intended to protect the traveling public. Specifically, Martin Robbins' contract with GDOT shifted GDOT's duties under O.C.G.A. § 32-2-2 to Martin Robbins. That Code Section was indisputably enacted for the protection of the traveling public and includes the duty to maintain guardrails. Martin Robbins contractually assumed that duty and then breached it, thereby violating a statute enacted for the benefit of the traveling public and the injured parties.[89] Because Martin Robbins violated a duty created by a statute enacted for the benefit of the traveling public, summary judgment on Plaintiffs' § 13-6-11 claim is inappropriate. *Nash*, 349 Ga. App. at 383.

Second, Martin Robbins failed to perform its work in accordance with industry standards created to protect the traveling public. Guardrails are safety devices intended to protect motorists.[90] The industry standard for Georgia guardrail contractors requires a contractor to repair nonfunctional guardrail within 21 days of receiving notice. Martin Robbins failed to meet that industry standard. The failure to meet the industry standard caused Ms. [redacted] death. Therefore, under the binding authority of *Nash* and *Windermere*, the issue of bad faith must go to the jury.

4.6.2. Martin Robbins' stubborn litigiousness.

[89] Martin Dep., 34:23:35:2.
[90] Doyle Dep., 52:3-20.

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

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

The record contains abundant evidence of Martin Robbins' clear liability. It is undisputed that Martin Robbins failed to repair the subject guardrail within 21 days of receiving actual notice that the guardrail was nonfunctional, and that Martin Robbins's failure was a breach of duty. Further, witnesses on behalf of all parties have testified that the subject guardrail existed in a nonfunctional condition for at least ten months before the subject wreck[91] – meaning that Martin Robbins had constructive knowledge that the subject guardrail was nonfunctional ten

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

months before Ms. [redacted] died but did nothing about it. Despite this clear evidence, Martin Robbins has denied liability from the outset of this case.[92] A jury could reasonably find (and Plaintiff respectfully submits, *should* find) that Martin Robbins' denial of liability constitutes "stubborn litigiousness" because substantially all the witnesses have admitted that Martin Robbins was not doing its job. Notably, Martin Robbins completely failed to address Plaintiff's claim for negligent undertaking under the Restatement of Torts – a tacit admission that there was no bona fide controversy. Therefore, the jury could reasonably find that there was no bona fide controversy, and that Martin Robbins' insistence on disputing liability was a stubborn attempt to evade responsibility. For that additional reason, summary judgment on Plaintiffs' claims under § 13-6-11 is not appropriate.

5. <u>Conclusion</u>

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

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

[92] *See* Martin Robbins' Answer; *see also* Martin Dep., 25:20-26:21.

Respectfully submitted this 10th day of December 2021.

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CERTIFICATE OF SERVICE

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

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