

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

██████████, as administrator of
the estate of ██████████ 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.: ██████████

**PLAINTIFF'S CONSOLIDATED RESPONSE IN OPPOSITION OF DEFENDANTS'
MOTIONS TO EXCLUDE TESTIMONY OF HERMAN HILL, P.E., P.T.O.E.**

Rule 702 governs the admissibility of expert testimony. O.C.G.A. § 24-7-702. Because Mr. Hill's testimony satisfies the three-part test of Rule 702(b), he can testify. At this stage, that completes the analysis.

Defendants' lengthy briefs are filled with challenges to the permissibility of individual statements that defense counsel elicited from Mr. Hill in their *338-page* deposition of him. Those challenges are misguided. But even if they were correct, most of Defendants' challenges do not relate to Rule 702 – they relate to ancillary issues that defense counsel elected to inquire into during their 8-hour deposition of Mr. Hill. Defendants' remedy for the alleged improprieties would be to object at trial to any individual questions that Defendants considered improper – not the exclusion of Mr. Hill entirely, which is what Defendants now seek. In other words, most of

Defendants' attacks on Mr. Hill should be raised, if at all, as objections at trial, not in a *Daubert* motion.

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.

Instead of timely identifying and repairing damaged guardrail, Defendants left a section of guardrail on I-85 in "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 the contractually-required 21 days. When a vehicle struck that guardrail 45 days later on June 3, 2018, the guardrail was still nonfunctional and could not keep the vehicle in the roadway. Because the guardrail was already damaged, the vehicle ramped over it and slammed 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

Plaintiff filed this Renewal Action on September 30, 2020. Plaintiff attached the expert affidavit of Professional Engineer Herman Hill to her Complaint describing the ways in which Defendants failed to properly maintain the subject guardrail, including the failure to timely identify, report, and repair the subject guardrail.

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).

Mr. Hill is the leading expert on traffic engineering and highway maintenance in the State of Georgia. As the Georgia Court of Appeals has explained in a decision affirming the admission of Mr. Hill's engineering testimony, Mr. Hill's qualifications include "advanced degrees in civil engineering and public administration, professional engineer's license, certification as a professional traffic operations engineer, fifteen years' experience working at DOT, and eight years' experience at the local government level." *Georgia Dep't of Transp. v. Miller*, 300 Ga. App. 857, 861 (2009). State and federal courts in Georgia routinely deny motions seeking to prohibit Mr. Hill, an eminently qualified traffic engineer, from testifying. *See, e.g.*, Order Denying Motion to Exclude Herman Hill, *Roberson v. DOT*, Civil Action No. 13V-308, December 18, 2015, Devane, J. (Ex. C); Order Denying Motion to Exclude Herman Hill, *Brown v. DOT*, Civil Action File No. 05-V-0973534-F, February 28, 2008, Forsling, J. (Ex. D); Order Denying Motion to Exclude Herman Hill, *Nixon v. Zurich Am. Ins. Co.*, No. 15-34 (M.D. Ga. Apr. 19, 2016) (Ex. E); *see also Miller*, 300 Ga. App. at 861 (2009); *Haynes v. Lawrence Transp. Co.*, No. 13-4292, 2015 WL 5601942, at *7 (N.D. Ga. Mar. 24, 2015) (order denying motion to exclude Mr. Hill from testifying).

Mr. Hill offers highway maintenance opinions in this case. Critically, and contrary to Defendants' assertions, Plaintiff has not made a roadway design claim and does not intend to elicit any testimony from Mr. Hill relating to roadway design. Drawing on his extensive traffic engineering experience (including 15 years of working at GDOT), relevant documentary evidence, deposition testimony, and his engineering judgment, Mr. Hill's opinions include the following:

- Defendants failed to adequately maintain the subject guardrail by failing to timely inspect and repair it.²
- Martin Robbins and GDOT “failed to adequately monitor, inspect, maintain, or repair the subject guardrail or make necessary changes to eliminate or minimize its dangerous condition.”³
- “The industry standard for repairing non-functional guardrail is to make the repairs within 21-days of notice . . . as shown by the repair timeline in GDOT’s contract with [Martin Robbins].”⁴
- Because Martin Robbins failed to repair the subject guardrail within the 21-day time frame, Martin Robbins failed to comply with the industry standard.⁵
- “[T]he industry standard for reporting damaged, state-owned guardrail is to report it on the same day as it is identified.”⁶
- “The notice provided by Arcadis was not reasonably prompt.”⁷
- Because Arcadis failed to timely locate and report the subject guardrail, it failed to comply with the industry standard.⁸
- Defendants’ acts and omissions “contributed causally to the [REDACTED] death.”⁹

² See 07/24/19 Hill Aff. at ¶ 8(d) (Ex. F)

³ 07/24/20 Hill Aff. at ¶ 8(d).

⁴ See 12/01/21 Hill Aff. at ¶ 5 (Ex. G).

⁵ See 12/01/21 Hill Aff. at ¶ 12-15.

⁶ See 12/01/21 Hill Aff. at ¶ 19.

⁷ See 11/11/20 Hill Aff. at ¶ 12 (Ex. H).

⁸ See 12/01/21 Hill Aff. at ¶¶ 19-23.

⁹ 07/24/20 Hill Aff. at ¶ 8(h).

Mr. Hill's expert testimony is admissible. Mr. Hill is qualified; his opinions are reliable; and his opinions will be helpful to the jury. *See* § 24-7-702. The Court should deny Defendants' motions to exclude Mr. Hill's expert testimony.

2. Legal Standard

Code Section 24-7-702¹⁰ and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), govern the admissibility of expert testimony.¹¹ The purpose of the inquiry under Rule 702 "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

The admissibility standards of Rule 702 are not, however, a substitute for the adversarial

¹⁰ Subsection (b) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

¹¹ The General Assembly has explicitly stated that courts applying O.C.G.A. § 24-7-702 in civil cases "may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases." O.C.G.A. § 24-7-702(f) (emphasis added).

process. Instead, cross-examination and the introduction of contrary evidence are the “appropriate means” of attempting to attack expert evidence. *Daubert*, 509 U.S. at 596. “Where the expert’s testimony has a reasonable factual basis, a court should not exclude it. Rather, it is for opposing counsel to inquire into the expert’s factual basis.” *United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1040 (11th Cir. 1988). That is why the “case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.” *Kilgore v. Reckitt Benckiser, Inc.*, 917 F. Supp. 2d 1288, 1293 (N.D. Ga. 2013) (quoting Fed. R. Evid. 702 advisory committee’s note to 2000 amendments).

To be admissible, an expert’s opinions generally must meet three requirements: (1) the expert must be qualified to give his or her opinions; (2) the opinions must be reliable; and (3) the opinions must be helpful to the jury. *See Kilgore*, 917 F. Supp. 2d at 1292 (citing *City of Tuscaloosa v. Harcross Chems., Inc.*, 158 F. 3d 548, 562-63 (11th Cir. 1998)); *see also* O.C.G.A. § 24-7-702.

3. Argument

Mr. Hill’s expert opinions meet the requirements governing the admissibility of expert testimony. Specifically, Mr. Hill is qualified to give his opinions; his opinions are reliable; and his opinions would be helpful to the jury. *See Kilgore*, 917 F. Supp. 2d at 1292; *see also* O.C.G.A. § 24-7-702. Because Mr. Hill’s expert testimony satisfies each element of Rule 702, Defendants’ motions should be denied.

3.1. Mr. Hill is Eminently Qualified to Testify Regarding Highway Maintenance.

For good reason, neither GDOT nor Arcadis challenge Mr. Hill's qualifications to testify about the inspection and maintenance of the state highway system. Mr. Hill is a foremost authority on these topics. He is qualified. That is undeniable.

Mr. Hill graduated from Georgia Tech with a Bachelor's Degree in Civil Engineering.¹² He received his Master of Science in Civil Engineering from Georgia Tech, as well.¹³ Mr. Hill is a professional engineer licensed in Georgia and nine other states.¹⁴ He is certified as a Professional Traffic Operations Engineer (or P.T.O.E.), which is "a powerful demonstration of requisite knowledge, skill, and ability in the specialized application of traffic operations engineering."¹⁵

Mr. Hill has experience in the guardrail industry – contrary to Martin Robbins' representations. As to Mr. Hill's guardrail-specific experience, for more than a decade, Mr. Hill worked for several local governments in Floyd County and metro Atlanta. While employed by Floyd County, Mr. Hill was the Public Works Director.¹⁶ Importantly, in that role, Mr. Hill was responsible for all types of county road maintenance and work scheduling.¹⁷ As the Public Works Director, Mr. Hill administered contracts with guardrail contractors.¹⁸ In other words, Mr. Hill has industry-specific knowledge and experience with guardrail repair, including scheduling guardrail work and making sure the guardrail work was done properly. That is what this case is about. Mr. Hill also worked as a traffic engineer for GDOT for 15 years.¹⁹ During

¹² See CV of Mr. Hill (Ex. I).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; see also Transportation Professional Certification Board, Inc., Professional Traffic Operations Engineer (PTOE), available at <https://www.tpcb.org/certification/ptoe/>.

¹⁶ Hill CV at 2; see also Hill Dep., 99:15-24 (Ex. J).

¹⁷ Hill CV at 2.

¹⁸ Hill CV at 2.

¹⁹ *Id.*

his 15 years with GDOT, Mr. Hill became familiar with GDOT's highway maintenance policies and procedures.²⁰ That experience is relevant to this case, which is about highway maintenance.

Drawing on this extensive professional experience, Mr. Hill has been recognized as an expert by dozens of courts and has testified *in more than 170 trials*.

The Georgia Court of Appeals long ago gave its stamp of approval to Mr. Hill. *E.g.*, *Miller*, 300 Ga. App. 857; *see also Delson v. Georgia Dep't of Transp.*, 295 Ga. App. 84, 85 (2008) (relying on Mr. Hill's testimony about guardrail in denying GDOT's motion for summary judgment). In *Georgia Department of Transportation v. Miller*, the Court of Appeals affirmed the trial court's decision to admit Mr. Hill's expert testimony over GDOT's objection. 300 Ga. App. at 861. In that case, like the present case, Mr. Hill gave opinions regarding the inadequacy of highway maintenance inspections. *Id.* at 860. The Court of Appeals held that Mr. Hill's "qualifications were presented to the trial court, including his advanced degrees in civil engineering and public administration, professional engineer's license, certification as a professional traffic operations engineer, fifteen years' experience working at DOT, and eight years' experience at the local government level. *Hill testified based on his personal knowledge of DOT's manuals and inspection policies.*" *Id.* at 861 (emphasis added). The Court of Appeals explicitly held that GDOT "failed to show how the trial court abused its discretion in allowing Hill to testify as an expert." *Id.* (emphasis added). The Court of Appeals further stated that GDOT's "challenge to Hill's conclusions goes to the weight of his testimony, not the admissibility." *Id.*

Mr. Hill is qualified to give expert testimony in this case. As the Court of Appeals held in *Miller*, Mr. Hill has extensive personal knowledge and experience with highway maintenance

²⁰ *Id.*

(including 15 years with GDOT and 8 years with Floyd County). *See id.* In other words, he possesses the requisite skills, knowledge, experience, and education to qualify as a highway maintenance expert. O.C.G.A. § 24-7-702. Therefore, Mr. Hill can offer opinions regarding the guardrail industry standards and whether the Defendants' work (or more aptly, *lack of work*) complied with those industry standards. Mr. Hill's qualifications and personal work experience form the basis of his opinions in this case. *See, e.g., Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 337 Ga. App. 638, 647 (2016) ("The relevant reliability concerns may focus upon personal knowledge or experience."); *see also Tampa Bay Water v. HDR Eng'g, Inc.*, 731 F.3d 1171, 1185 (11th Cir. 2013) (explaining that a trial court is authorized to "consider [an expert's] credentials in evaluating whether his methodology was reliable") (abrogated on other grounds).

3.2. Mr. Hill's Opinions Are Reliable.

“[T]he trial court has broad discretion in deciding how to assess the reliability of expert testimony.” *Wilson v. Redmond Constr., Inc.*, 359 Ga. App. 814, 820 (2021) (quoting *Smith v. CSX Transp., Inc.*, 343 Ga. App. 508, 512 (2017)). Typically, “[t]he reliability inquiry focuses on the principles and methodology underlying the expert’s opinion, not the expert’s conclusions.” *Sec. & Exch. Comm’n v. Avent*, 2018 WL 8996270, at *2 (N.D. Ga. Mar. 15, 2018) (citing *Daubert*, 509 U.S. at 595). This Court has “considerable leeway in deciding which tests or factors to use to assess the reliability of an expert’s methodology.” *Wilson*, 359 Ga. App. at 820 (quoting *Smith*, 343 Ga. App. at 512). “As a general rule, ‘the reliability threshold is a low one.’” *Nykiel v. Borough of Sharpsburg*, No. 08-0813, 2010 WL 1997574, at *2 (W.D. Pa. May 18, 2010) (internal citation omitted).

To reach his opinions, Mr. Hill utilized a reliable, accepted, and federal-appellate-court-approved methodology for traffic engineering experts. *See, e.g., Lawes v. CSA Architects & Engineers LLP*, 963 F.3d 72, 102 (1st Cir. 2020) (*reversing* trial court for excluding testimony of plaintiff’s traffic engineering expert where the expert employed a “straightforward” traffic engineering methodology substantially the same as the methodology Mr. Hill (and GDOT’s expert, Joe Kent, employed in this case).

First, Mr. Hill reviewed materials from expert accident reconstructionist Dr. Nicholas Earnhart, Ph.D.’s thorough inspection of the subject guardrail, the crash site, and the Kia Sorrento. Those materials included photographs of the subject guardrail and photographs of the Kia Sorrento taken after the wreck. Experts are, of course, allowed to rely on the opinions and materials of other experts. *See Coleman v. Fortner*, 260 Ga. App. 373, 376 (2003) (“Under Georgia law, it is well settled that an expert may rely on the reports of others in formulating his opinions.”); *accord Evans v. Dep’t of Transp.*, 331 Ga. App. 313, 319 n.3 (2015) (“[A] witness testifying as an expert ‘may rely on information he received from other people. . .’”).

Second, Mr. Hill reviewed extensive documentary evidence in the case. For example, Mr. Hill reviewed the Georgia Uniform Motor Vehicle Report related to the June 3, 2018 collision that killed [REDACTED], police photographs from the crash site, and Google aerial/street view photos of the subject guardrail.²¹ Mr. Hill also reviewed Atlanta Police Department body camera footage from the scene of the wreck and the documents produced by GDOT, Martin Robbins, and Arcadis, which included the relevant contracts and correspondence related to identifying and repairing damaged guardrail.²²

²¹ Excerpts from Mr. Hill’s Deposition Notebook, Tab 2, p. 6 (Ex. K).

²² Excerpts from Mr. Hill’s Deposition Notebook, Tab 2, p. 6.

Third, Mr. Hill reviewed relevant testimony in the case.²³ For example, Mr. Hill reviewed the Rule 30(b)(6) deposition of Frank Flanders (Assistant State Design Policy Engineer), Jason Moore (District 7 Maintenance Manager), and Treasury Young (Chief Procurement Officer) for GDOT, the deposition of Thomas Martin (the owner of Martin Robbins), and the deposition of Derrick Wilkerson (a project manager for Martin Robbins).²⁴

Fourth, Mr. Hill reviewed relevant portions of the Georgia DOT Standard Specifications, Georgia DOT Scope of Services for Maintenance management and Design Services, and other pertinent authorities.

Fifth, drawing on his extensive knowledge and experience with respect to traffic engineering and highway maintenance, and the evidence in this case, Mr. Hill relied on his specialized knowledge of GDOT's inspection policies to form his opinions.²⁵ Notably, the Court of Appeals has authorized Mr. Hill's expert testimony "based on his personal knowledge of DOT's manuals and inspection policies." *Miller*, 300 Ga. App. at 861. This case is no different.

Mr. Hill followed an engineering methodology that courts (including the Georgia Court of Appeals) routinely conclude is reliable. *E.g.*, *Miller*, 300 Ga. App. at 861. When assessing the admissibility of expert engineering testimony, courts agree that "an engineer's use of techniques of visual inspection, code review, and reliance on experience and expertise can satisfy the *Daubert* reliability prong." *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 2019 WL 2013007, at *4 (S.D. Fla. Mar. 11, 2019) (quoting *Clena Investments, Inc. v. XL Specialty Ins.*

²³ Excerpts from Mr. Hill's Deposition Notebook, Tab 2, p. 6.

²⁴ *Id.*

²⁵ 07/24/20 Hill Aff. ¶ 5 ("I have actual professional knowledge and experience in the area of practice and specialty in which the opinion is given, which is transportation and traffic engineering, as well as highway design, traffic operations, construction, inspection and maintenance.").

Co., 280 F.R.D. 653, 664 (S.D. Fla. 2012) (finding that a structural engineer’s “experience as an engineer and his visual inspection of the Property lay a permissible foundation” for his opinions as to causation of roof damage) (quotation marks omitted)); *see also Holman v. State Farm Fire and Cas. Co.*, 2015 WL 12803770, *7 (N.D. Ala. Jan. 12, 2015) (finding that an engineer’s “methodology is sufficiently reliable” when it is based on an inspection and the expert applied “knowledge and experience of structural engineering to reach his conclusion” as to cause of cracks in basement wall).

Indeed, the United States Court of Appeals for the First Circuit recently *reversed* a trial court for excluding the expert testimony of a traffic engineer in a personal injury case who employed substantially the same methodology that Mr. Hill employed in this case. In *Lawes v. CSA Architects & Engineers LLP*, 963 F.3d 72, 102 (1st Cir. 2020), the First Circuit held that a highly qualified and experienced traffic engineer’s “straightforward” methodology was reliable. *Id.* That methodology included: (1) “visiting the scene” of the collision; (2) reviewing relevant documents, such as the police accident report, and photographs; and (3) reviewing deposition testimony. *Id.* Holding that the trial court “***abused its discretion*** in excluding [the traffic engineering expert’s] testimony under Rule 702,” the federal appellate court reversed. *Id.* at 109 (emphasis added). Just as the traffic engineering expert’s testimony in *Lawes* was based on a reliable methodology and admissible, so too is Mr. Hill’s expert testimony. Because Mr. Hill is qualified and he used a reliable and accepted methodology, his testimony and opinions are admissible.

Because Mr. Hill’s opinions are based on a careful review of this case and his decades of education, training, relevant experience, those opinions are decidedly not “ipse dixit”, as Defendants mistakenly assert. *See, e.g.,* GDOT Opp. Br. at 6; MR Opp. Br. at 16.

As an initial matter, Defendants disregard black-letter law holding that the reliability of an expert's testimony can be established based on the "expert's personal knowledge or experience." *Ma v. Equifax Info. Servs., LLC*, 288 F. Supp. 3d 1360, 1366 (N.D. Ga. 2017) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)). When an expert, such as Mr. Hill, has "accumulated a wealth of personal knowledge and experience" related to the subject matter of the expert's testimony, the expert's testimony is "sufficiently reliable" to satisfy O.C.G.A. § 24-7-702. *Id.* The Georgia Court of Appeals has long recognized that "the relevant reliability concerns may focus upon personal knowledge or experience." *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 337 Ga. App. 638, 647(2016) (quoting *Brady v. Elevator Specialists, Inc.*, 287 Ga. App. 304, 306 (2007)). In short, "so long as an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion goes to the weight and credibility of the testimony, not its admissibility." *Id.* (citation and quotation marks omitted).

There is no question Mr. Hill has vast amounts of personal knowledge and experience regarding traffic engineering, highway maintenance, the administration of guardrail contracts, and GDOT's policies and procedures. Georgia courts routinely recognize that fact. *See, e.g., Miller*, 300 Ga. App. at 861. Because of Mr. Hill's experience and reliable methodology, Defendants' attacks (to the extent they have any basis at all) "go to the weight of his testimony, not the admissibility." *Id.*

3.3. Mr. Hill's Opinions Will Be Helpful to the Jury.

In addition to being admissible, Mr. Hill's testimony will be helpful to the jury. Expert testimony is helpful to the trier of fact if "concerns matters that are beyond the understanding of the average lay person." *Kilgore v. Reckitt Benckiser, Inc.*, 917 F. Supp. 2d 1288, 1292 (N.D. Ga. 2013) (quotation marks and citation omitted). In other words, an expert's testimony helps the jury where it is based on "specialized knowledge." *Miller*, 300 Ga. App. at 861. There is no dispute that traffic engineering and highway maintenance standards are beyond the understanding of the average lay person. *E.g., Miller*, 300 Ga. App. at 861 (holding that the trial court properly allowed Herman Hill's testimony because "Hill's testimony was based on his specialized knowledge of DOT policies and procedures, which would 'assist the trier of fact . . . to understand the evidence."); *see also Delson*, 295 Ga. App. at 85 (relying on Mr. Hill's expert testimony about guardrails to deny GDOT's motion for summary judgment); *Dep't of Transp. v. Blair*, 220 Ga. App. 342, 343 (1996) (allowing testimony from a traffic engineer in a negligent maintenance case against GDOT).

In this case, exactly like in *Miller*, Mr. Hill's opinions are based on his "specialized knowledge of DOT policies and procedures." Therefore, as the Court of Appeals held in *Miller*, Mr. Hill's expert testimony will be very helpful to the jury at trial.

3.4. A Rule 702 Motion is Not the Proper Vehicle for Defendants' Arguments.

Mr. Hill passes the test under Rule 702 because he is eminently qualified, his opinions are reliable, and his opinions will help the jury. Realizing the futility of attacking Mr. Hill's ability to testify under Rule 702, Defendants use their motions to couch trial objections to specific testimony from Mr. Hill's 8-hour, 338-page deposition. That is not the proper basis for a Rule 702 motion.

The Court's role as the "gatekeeper" does not mean that the Court has to rule in advance on every question that could conceivably be asked and every answer that could conceivably be given. "Gatekeeper" just means applying Rule 702. "[V]igorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Haynes v. Lawrence Transp. Co.*, 2015 WL 5601942, at *2 (N.D. Ga. Mar. 24, 2015); accord *Daubert*, 509 U.S. at 113 ("Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising 'general acceptance' standard, is the appropriate means by which evidence based on valid principles may be challenged.").

In *Haynes*, the defendants tried to do exactly what Defendants in this case do – i.e., exclude specific opinions despite Mr. Hill's indisputable qualifications. 2015 WL 5601942. For example, in *Haynes*, the defendant sought the exclusion of Mr. Hill's opinion that a truck driver "ignored a warning sign." *Id.* at *5. The district court found that Mr. Hill's opinion was reliable based on his experience and observations and that the defendant's "concerns [could] be better handled on cross examination." *Id.* The defendants also sought the exclusion of Mr. Hill's opinion that the truck driver's pre-trip inspection did not meet the industry standard. *Id.* The Court denied the motion because "Mr. Hill [was] basing his opinions on photographs of the truck after the incident and his understanding of a careful pre-trip inspection." *Id.* Once again, because "Mr. Hill's methodology and approach [were] sound," the Court held that it was "an issue that can also be better handled by cross examination." *Id.*

This case is no different from *Haynes*. Here, much like in *Haynes*, Defendants seek to exclude specific testimony from Mr. Hill. Defendants have taken a 338-page deposition, and

now claim that because some of the opinions *that they elicited* constitute legal conclusions, Mr. Hill should be barred from testifying. That does not make sense. Plaintiff does not intend to elicit legal conclusions from Mr. Hill at trial, even if that is what Defendants did at his deposition. Rather, Plaintiff intends to ask Mr. Hill about the industry standards surrounding guardrail and whether Defendants met those standards. If a party attempts to elicit an opinion from Mr. Hill at trial that is inadmissible on the grounds that it constitutes a legal conclusion or for some other reason, Defendants' remedy is to object — not to have all of Mr. Hill's testimony excluded in advance, which is what they now seek.

3.5. Defendants' critiques of Mr. Hill do not withstand scrutiny.

3.4.1. Mr. Hill's opinions on the "ultimate issue" are admissible.

Experts may offer reliable opinions even if those opinions address "the ultimate issue." O.C.G.A. § 24-7-704(a) ("[T]estimony in the form of an opinion or inference otherwise admissible *shall not be objectionable because it embraces an ultimate issue* to be decided by the trier of fact."); *Spires v. Thomas*, 2021 WL 5767820, at *3 (Ga. Ct. App. Dec. 6, 2021). Therefore, Mr. Hill's opinions are not excludable even if they go "to the ultimate issues," as Arcadis erroneously asserts. Arcadis Mot. at 11-12. "[E]xpert opinion testimony on issues to be decided by the jury, *even the ultimate issue*, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the layman." *Spires*, 2021 WL 5767820, at *3 (quoting *Fortner v. Town of Register*, 289 Ga. App. 543, 546 (2008)) (emphasis added). The question is whether the opinion requires "scientific, technical, or other specialized knowledge" to be explained to the jury. *Id.* (quoting O.C.G.A. § 24-7-702(b)).

The recent decision of *Spires v. Thomas* also demonstrates that Mr. Hill's opinions are admissible because they require specialized knowledge. In *Spires*, the plaintiff was catastrophically injured as he was walking down the road and a vehicle hit him. *Id.* In response to the defendant's motion for summary judgment, the plaintiff filed an affidavit of an expert accident reconstructionist. *Id.* at *2. The plaintiff's expert opined that "[the defendant] had a duty to stop as close to the scene as possible and her failure to do so 'may have undermined the scene evidence and investigation . . .'" *Id.* (quoting expert affidavit). In other words, the plaintiff's expert testified about the defendant's duty and the consequences of breaching of that duty. *Id.* The trial court excluded the expert's testimony, as Defendants argue should be done here, but the Court of Appeals *reversed* the trial court. *Id.* at *3. The Court of Appeals found that the testimony was proper because it required specialized knowledge, which was "beyond the ken of the layman." *Id.*

Here, like in *Spires*, Mr. Hill's opinions regarding the Defendants' various breaches of duties are admissible because his conclusions are ones that "jurors would not ordinarily be able to draw for themselves." *Id.* The best illustration is Mr. Hill's opinion about Arcadis' failure to report the subject guardrail. The evidence shows that Arcadis notified Martin Robbins about the subject guardrail on April 20, 2018, and Martin Robbins repaired the subject guardrail 45 days later, on June 4, 2018.²⁶ Mr. Hill opined that the industry standard required that damaged guardrail be reported on the same day that the contractor observed the damage. Mr. Hill's opinion is supported by a meeting that took place on March 13, 2018 between Arcadis and GDOT, as memorialized in the meeting minutes shown below.

²⁶ Martin Dep., 34:18-22, 37:9-11 (Ex. L); Flanders 30(b)(6) Dep., 42:4-7 (Ex. M); Martin Robbins 30(b)(6) Dep., 204:15-17 (Ex. N).

Discussion:

How will the information flow from initial findings to the contractor and through the invoicing process?

Conclusions:

Reports will be sent by Arcadis inspectors and GDOT staff to D7Guardrail@dot.ga.gov. Linda and Jordan will compile a spreadsheet of damaged locations and email to Kelvin daily. Kelvin will email the spreadsheet to Martin Robins (contractor) on the same day and CC Linda and Jordan. Once the repairs are complete, the contractor will email Kelvin with pictures and GPS coordinates. The repairs will be verified primarily by Geno Crawford (Arcadis inspector). Other inspectors may verify repairs as needed. Invoices will be verified by Linda and Jordan.

27

Mr. Hill opines that Arcadis' breach of the industry standard was the reason the subject guardrail was nonfunctional at the time of the subject wreck. That is a reliable opinion. To illustrate, Martin Robbins took 45 days to repair the subject guardrail. Therefore, if Arcadis had reported the damage to the subject guardrail on April 18, 2018, when it first learned about the damage to the subject guardrail (as required by the industry standard), then ██████████ would not have been killed because the guardrail would have been repaired by June 2, 2018 (i.e., forty-five days later), which was one day before the subject collision. If Arcadis had reported the subject guardrail even the day *after* it learned of the damage, on April 19, 2018, ██████████ would still have survived because the guardrail would have been repaired by June 3, 2018, which was the day of the subject collision. But Arcadis did not. Instead, Arcadis drove past the subject guardrail numerous times without reporting it. Once the damage to the subject guardrail was reported (*by GDOT, not Arcadis*), Arcadis still waited two days to report it to Martin Robbins. Mr. Hill relied on his specialized knowledge of and experience with highway maintenance to arrive at the conclusion that Arcadis' delay violated the industry standard. Because Mr. Hill's opinions required his specialized knowledge, those opinions form conclusions that a juror might

²⁷ Pl.'s Trial Ex. 200 (Ex. O).

“not ordinarily be able to draw” for his or herself. *See Spires*, 2021 WL 5767820, at *3.

Therefore, they are admissible.

3.4.2. *Mr. Hill may validly tell the jury about prevailing industry standards, and Defendants’ arguments regarding “duty” are red herrings.*

Mr. Hill’s opinions about the guardrail industry standards are admissible. In the context of a negligent maintenance claim, an expert can testify about a contractor’s existing duty. *Mays v. Valley View Ranch, Inc.*, 317 Ga. App. 143, 149 (2012). Negligent maintenance claims arise “from [the] breach of a duty implied by law to perform the work in accordance with industry standards.” *Id.* (quoting *City of Atlanta v. Benator*, 310 Ga. App. 597, 605 (2011)). To that end, “expert testimony as to the practices of an industry are acceptable.” *Id.* Similarly, an expert can testify about the breach of an industry standard or duty. *Id.*; *see also Evans v. Med. Ctr. of Cent. Georgia*, 359 Ga. App. 797, 802 (2021) (reversing order granting summary judgment in light of testimony of “expert witnesses . . . that [the defendants’] breache[d] . . . the applicable standard of care”); *Toombs v. Acute Care Consultants, Inc.*, 326 Ga. App. 356, 361 (2014) (reversing trial court order that excluded “expert who could testify as to a breach of the applicable standard of care”).

That is Mr. Hill’s role in this case. Specifically, Mr. Hill offers opinions explaining the guardrail industry standard in Georgia and Defendants’ breaches of those standards. Mr. Hill opines that Defendants failed to adequately inspect and maintain the subject guardrail. In Mr. Hill’s opinion, had the defendants adequately inspected and maintained the subject guardrail, the guardrail would have been repaired before the subject wreck. That is not only based on Mr. Hill’s professional experience, but is also plainly true – the evidence is abundantly clear that although Arcadis was supposed to identify damaged guardrail and Martin Robbins was supposed

to repair it within a specified time frame, Arcadis let the guardrail sit in a nonfunctional condition for many months and then Martin Robbins failed make the repairs when the specified period. If Defendants had done their jobs, the guardrail would have been fixed, and that is the conclusion that Mr. Hill reached.

Mr. Hill does not attempt to create a legal duty where none previously existed. For that reason, the cases Defendants cite regarding duty are inapposite. For example, Defendants rely on *Diamond v. Department of Transportation* to contend that the Court must preclude Mr. Hill from testifying regarding their duties with respect to the subject guardrail.²⁸ 326 Ga. App. 189, 195 (2014). Contrary to Defendants’ representation in their briefs, *Diamond* does *not* address the “*admissibility*” of expert testimony. That case simply states that “an expert ‘affidavit does not, and cannot, *create* a legal duty where none existed before.’” 326 Ga. App. at 195 (emphasis added). In other words, an expert cannot impose a duty on a defendant where the law has not already created one. *Id.* In *Diamond*, it was undisputed that the wreck occurred on a county road and that Georgia “statutory and case law is clear that counties—not the DOT—have control of and responsibility for all construction, maintenance, or other work related to the county road system.” *Id.* (citation and quotation marks omitted).

Those facts render *Diamond* completely distinguishable from this case. Mr. Hill is not attempting to create a duty where none existed before. Rather, as detailed in Plaintiff’s responses to Defendants’ motions for summary judgment, Georgia statutory and case law is clear that Defendants *had a duty* to maintain the subject guardrail, which included timely inspections and repairs. As the Court of Appeals explained in *City of Fairburn v. Cook*, 188 Ga. App. 58, 64–65 (1988), GDOT “is required to provide ‘substantial maintenance activities and operations’”

²⁸ See Martin Robbins Mot. at 13.

for “those portions of the state highway system lying within the corporate limits of any municipality,” such as the subject guardrail. *Id.* (quoting O.C.G.A. § 32–2–2(a)(1)). That duty was created by law, not by Mr. Hill. Likewise, Martin Robbins and Arcadis clearly had duties to inspect and maintain the subject guardrail because (1) they assumed responsibility for maintenance of the subject guardrail under the Restatement of Torts § 324A, (2) they had a duty to perform its work in accordance with industry standards, (3) Plaintiff was a third-party beneficiary to the contracts, and (4) they had duties to avoid creating or maintaining a nuisance. Because Mr. Hill is not attempting to create duties where none exist, *Diamond* is inapposite.

3.4.3. *Mr. Hill may refer to the contract.*

An observation or opinion does not constitute a “legal conclusion” merely because it refers to a contract, as Defendants erroneously suggest. Mr. Hill’s experience in the highway-maintenance industry, including administering contracts for guardrail maintenance, enables him to refer to the parties’ contracts without offering inadmissible legal conclusions. Where the jury might not be familiar with a particular industry, expert testimony “is admissible to assist the trier of fact” as to the “practices and procedures” of that industry. *Camacho v. Nationwide Mut. Ins. Co.*, 13 F. Supp. 3d 1343, 1366 (N.D. Ga. 2014). To that end, where a dispute involves contractual terms in such an industry, an expert “may testify regarding what duties are owed” and whether certain conduct “complied with those duties without offering improper legal conclusions.” *Id.* In *Camacho*, for example, the district court concluded that “the average juror is not likely to be familiar with the practices and procedures involved in insurance claims handling . . .” *Id.* For that reason, the court allowed an expert to “testify regarding what duties are owed by an insurance company during the claims handling process and whether the actions of the insurance company complied with those duties . . .” *Id.*

This case is no different from *Camacho*. Instead of the insurance industry, the focus is the guardrail industry. Just like the expert in *Camacho*, Mr. Hill's insight into how the highway maintenance industry works does not become an inadmissible as "legal conclusion" merely because Mr. Hill refers to the parties' contractual language. The opposite is true – if Mr. Hill had *not* reviewed Defendants' contracts and referred to them in his testimony, his opinions might be excludable because they would not be based on the evidence. Imagine the motions to exclude that Defendants would file if Mr. Hill had failed to review the contracts that established the roles of Martin Robbins, Arcadis, and GDOT with respect to guardrail maintenance. Mr. Hill has to be familiar with that material. It makes no sense to criticize Mr. Hill for reviewing those contracts – he could not develop reliable opinions if he did not.

To illustrate, Mr. Hill had to review the contracts to understand that Arcadis was responsible for identifying and reporting damaged guardrail Martin Robbins was responsible for repairing damaged guardrail. Based on the division of labor outlined in the contracts, he was able to identify the applicable industry standard for each contractor and give an opinion as to how each contract failed to comply with the applicable standard. Mr. Hill's review of the contracts at issue is part of what makes his opinions reliable – it is not a basis for criticism.

4. Conclusion

Mr. Hill is an eminently qualified traffic engineer, his opinions are reliable, and his expert testimony will be helpful to the jury. Therefore, Rule 702(b) is satisfied. Plaintiffs respectfully request that the Court DENY Defendants' motions to exclude Mr. Hill's expert testimony.

Respectfully submitted this 21st day of December 2021.

BUTLER LAW FIRM

BY: /s/ Matthew R. Kahn

JAMES E. BUTLER, III

Georgia Bar No. 116955

MATTHEW R. KAHN

Georgia Bar No. 833443

10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlerfirm.com
matt@butlerfirm.com
(t) 678-940-1444
(f) 678-306-4646

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned has this day electronically filed the within and foregoing ***PLAINTIFF'S CONSOLIDATED RESPONSE IN OPPOSITION OF DEFENDANTS' MOTIONS TO EXCLUDE TESTIMONY OF HERMAN HILL, P.E., P.T.O.E.*** with the Clerk of Court using the Odyssey e-filing system as follows:

Brad C. Parrott, Claire A. Williamson,
Hudson Parrott Walker, LLC
Fifteen Piedmont Center
3575 Piedmont Road, Suite 850
Atlanta, Georgia 30305
*Attorneys for Defendant Martin-
Robbins Fence Company*

Kevin P. Branch
Elenore C. Klingler
McMickle, Kurey & Branch, L.L.P.
217 Roswell Street, Suite 200
Alpharetta, Georgia 30009
*Attorneys for Defendant Martin-
Robbins Fence Company*

Nick Protentis
Protentis Law
3545 Broad Street
Suite 80247
Atlanta, Georgia 30366
nick@protentislaw.com
Attorney for the [REDACTED] Plaintiffs

This 21st day of December 2021.

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

David R. Cook
Special Assistant Attorney General
Autry, Hall & Cook, LLP
3330 Cumberland Boulevard
Suite 325
Atlanta Georgia 30339
Attorney for Defendant GDOT

Kent T. Stair
Sarah L. Bright
Copeland, Stair, Kingma & Lovell, LLP
191 Peachtree Street NE, Suite 3600
Atlanta, Georgia 30303
kstair@cskl.law
sbright@cskl.law

/s/ Matthew R. Kahn
James E. Butler, III
Georgia Bar No. 116955
Matthew R. Kahn
Georgia Bar No. 833443
Butler Law Firm
10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlerfirm.com
matt@butlerfirm.com