

**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,)
vs.)
MARTIN-ROBBINS FENCE COMPANY,)
GEORGIA DEPARTMENT OF)
TRANSPORTATION, ARCADIS U.S., INC.,)
and JOHN DOES 1-10,)
Defendants.)

Civil Action
File No.: ██████████

██████████ AND ██████████)
Plaintiffs,)
vs.)
GEORGIA DEPARTMENT OF)
TRANSPORTATION; MARTIN-ROBBINS)
FENCE COMPANY; and ARCADIS U.S.,)
INC.,)
Defendants.)

Civil Action
File No.: ██████████

**DEFENDANT ARCADIS U.S., INC.’S REPLY IN SUPPORT OF ITS MOTION TO
EXCLUDE EXPERT TESTIMONY OF HERMAN HILL, P.E.**

COMES NOW, Defendant Arcadis U.S. (“Arcadis”) and files this Reply in Support of Its Motion to Exclude Expert Testimony of Herman Hill, P.E., showing the Court as follows:

INTRODUCTION

Mr. Hill has been designated by Plaintiffs to offer opinions as to the fault and liability of all three Defendants (GDOT, Martin-Robbins, and Arcadis). As shown herein, Mr. Hill’s

testimony as to Arcadis should be excluded for failing to meet the requirements as established under O.C.G.A. § 24-7-702 and the relevant case law interpreting admissibility of expert opinion testimony.

In evaluating the admissibility of expert testimony, the trial court must act as a “gatekeeper” to ensure that the proffered opinions are both reliable and the proper subject of expert testimony. Whether, and to what extent, a defendant owes a legal duty to a plaintiff is a question of law for the court. In the absence of a legally cognizable duty, there can be no fault or negligence on the part of the defendant.

With regard to Arcadis, in its Motion for Summary Judgment, Arcadis showed that it had no legal duty (arising from any source, including the contract between GDOT and Arcadis, the voluntary undertaking doctrine, or “industry standards”) to see and report the subject guardrail any earlier than Arcadis reported it on April 20, 2018.

Plaintiffs attempt to establish the existence of the legal duty at issue in this case – **that Arcadis had a legal duty to identify and report the subject guardrail earlier** – through the expert testimony of Mr. Hill. However, Plaintiffs’ effort to establish a non-existent legal duty through expert testimony fails because it is well-settled that what duty a defendant owes, and the scope of such duty, is a question of legal policy to be decided by this Court as an issue of law, and not by an expert. The sole source of the contention that Arcadis had a legal duty to see and report the subject damaged guardrail earlier is Herman Hill. However, Plaintiff’s effort to establish a non-existent legal duty through expert testimony fails because **Georgia law is clear that a plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law.**

Mr. Hill's opinions **that Arcadis had a legal duty to identify and report the subject guardrail earlier** – are Mr. Hill's personal wish-list as to heightened performance standards but, as shown in Arcadis' Motion for summary judgment, **do not arise from the contract, the voluntary undertaking doctrine, or "industry standards"**. As such, Mr. Hill's opinions **that Arcadis had a legal duty to identify and report the subject guardrail earlier** must be excluded as a matter of law because they seek to invoke a heightened duty of care, not required by the contract, the voluntary undertaking doctrine, or "industry standards". This Court should act as gatekeeper to exclude Mr. Hill's expert testimony that seeks to establish a heightened legal duty as to Arcadis that does not exist, but for his improper and unsupported opinions. Plaintiffs' attempts to establish a heightened legal duty (that otherwise does not exist) through expert testimony should not be allowed as a matter of law. As such, Mr. Hill's opinions **that Arcadis had a legal duty to identify and report the subject guardrail earlier** must be excluded by this Court. In so doing, Mr. Hill's related opinions that Arcadis failed to inspect and monitor guardrails as required by the contract, the voluntary undertaking doctrine, and "industry standards," must similarly be excluded, as such opinions are premised upon Mr. Hill's attempt to establish, by expert testimony, a non-existent legal duty.

Mr. Hill's opinions as to "industry standards" – as set forth in his Second Supplemental Affidavit dated December 1, 2021 - must be excluded because such opinions are not based on upon sufficient facts or data and are not the product of a reliable methodology, as required under O.C.G.A. § 24-7-702(b)(1) and O.C.G.A. § 24-7-702(b)(2).

Additionally, Mr. Hill's opinions as to nuisance – as set forth in his Second Supplemental Affidavit dated December 1, 2021 - must be excluded. His opinion that Arcadis had control over the subject guardrail must be excluded because, just as a plaintiff cannot, with respect to a

negligence claim, establish a legal duty that otherwise does not exist through an expert, a plaintiff similarly cannot, with respect to a nuisance claim, establish the legal element of control through an expert when such control does not otherwise exist. Mr. Hill's opinion that Arcadis had a legal duty to abate the nuisance should be excluded because, as shown in Arcadis' reply in support of its Motion for Summary Judgment, Arcadis had no legal duty to identify and report the subject guardrail any earlier. The **only** source for the purported legal duty at issue in this case – that Arcadis had a legal duty to identify and report the subject guardrail earlier than it did – is Herman Hill. Such duty does not arise under the contract, statute, or common law principles recognized in case law. Any opinion that Arcadis had a legal duty to abate the nuisance – that is based upon the contention that Arcadis had a legal duty to identify and report the subject guardrail earlier – must be excluded because Arcadis had no such legal duty. A plaintiff cannot establish a non-existent legal duty through expert testimony.

Moreover, any opinion that Mr. Hill may offer in the future – that Arcadis had a legal duty to ensure Martin-Robbins repaired the subject guardrail within 21 days – must be excluded. **Plaintiffs' expert, Herman Hill, has offered no opinion thus far stating that Arcadis had a purported duty to ensure that Martin Robbins repaired the subject guardrail within 21 days.** If this Court agrees with Arcadis' position, as articulated in its reply in support of its Motion for Summary Judgment in the [REDACTED] matter, that Arcadis had no legal duty to ensure that Martin-Robbins met the 21-day repair deadline, then Arcadis asks this Court to enter an Order prohibiting Mr. Hill from offering any such opinion in the future.

Lastly, Arcadis stands by its additional arguments set forth in its initial Motion to Exclude Herman Hill, that were not addressed by Plaintiffs in their consolidated response brief in opposition to Arcadis' Motion to Exclude:

- Mr. Hill’s opinions as to Arcadis, including Mr. Hill’s opinions as to the ultimate issues (the fault or negligence of Arcadis), should be excluded because such opinions are not the proper subject of expert testimony;
- Mr. Hill’s opinions as to Arcadis that set forth improper legal conclusions should be excluded. Mr. Hill’s opinions as to his interpretation of Arcadis’ duties under the contract, that Arcadis’s notice was not “reasonably prompt” and that Arcadis “[a]cted negligently, wantonly, willfully, or recklessly”, are just a few examples of his opinions that constitute impermissible legal conclusions and must be excluded;
- Mr. Hill’s opinions as to Arcadis (including the opinions that Arcadis was negligent, that Arcadis failed to live up to its contractual obligations, and that Arcadis failed to inspect guardrails as required by unspecified and unidentified “generally accepted standards of the time”) should be excluded because such opinions are not based on upon sufficient facts or data and are not the product of a reliable methodology under O.C.G.A. § 24-7-702(b)(1) and O.C.G.A. § 24-7-702(b)(2); and
- Mr. Hill’s testimony with respect to Arcadis should be excluded because, even if it is admissible, it should nevertheless be excluded under O.C.G.A. § 24-4-403 because its probative value would be outweighed by its prejudicial effect.

The above additional arguments are set forth in Arcadis’ initial Motion to Exclude Herman Hill, and are incorporated in their entirety, as if fully set forth herein.

ARGUMENT AND CITATION OF LEGAL AUTHORITY

I. Mr. Hill’s Opinions As To Arcadis Must Be Excluded as a Matter of Law Because Such Opinions Seek To Invoke a Non-Existent Legal Duty.

In evaluating the admissibility of expert testimony, the trial court must act as a “gatekeeper” to ensure that the proffered opinions are both reliable and the proper subject of expert testimony. Whether, and to what extent, a defendant owes a legal duty to a plaintiff is a question of law for the court. *See Dutt v. Mannar and Company, LLC*, 354 Ga. App. 565, 566 (2020). “Whether a duty exists upon which liability can be based is a question of law.” *Martin v. Ledbetter*, 342 Ga. App. 208, 211 (2017). “In the absence of a legally cognizable duty, there can be no fault or negligence.” *Id.*

With regard to Arcadis, in its Motion for Summary Judgment, Arcadis showed that it had no legal duty (arising from any source, including the contract, the voluntary undertaking doctrine, “generally accepted standards of the time” or “industry standards”) to see and report the subject guardrail any earlier than Arcadis reported it.

Plaintiffs attempt to establish the existence of the legal duty at issue in this case – **that Arcadis had a legal duty to identify and report the subject guardrail earlier** – through the expert testimony of Herman Hill, P.E. However, Plaintiffs’ effort to establish a non-existent legal duty through expert testimony fails because it is well-settled that what duty a defendant owes, and the scope of such duty, is a question of legal policy to be decided by this Court as an issue of law, and not by an expert. *See Diamond v. Department of Transp.*, 326 Ga. App. 189, 195 - 196 (2014). The sole source of the contention that Arcadis had a legal duty to see and report the subject damaged guardrail earlier is Herman Hill. However, Plaintiffs’ effort to establish a non-existent legal duty through expert testimony fails because **Georgia law is clear that a plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law.** *See Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008).

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

In *Nat. Foundation Co. v. Post, Buckley*, 219 Ga. App. 431, 435 (1999), a plaintiff attempted to establish a non-existent legal duty via expert testimony. *See id.* at 433-434. The Court of Appeals rejected plaintiff expert's effort to establish such a duty through expert testimony. The Court of Appeals stated, "We conclude as a matter of law that, under the attendant circumstances, appellees had no such legal duty toward appellant." *Id.* at 434. The Court further explained, that allowing experts to create legal duties that otherwise do not exist would "**remove the issue of legal duty from the breast of the court and vest it within the waiting grasp of the retained expert.**" *Id.* (emphasis supplied). The Court of Appeals upheld the trial court's order that the defendant was entitled to summary judgment notwithstanding plaintiff's expert testimony that defendant was chargeable with breach of duty, as what duty a defendant owes to plaintiff is a question of legal policy to be decided as an issue of law.

Mr. Hill's opinions **that Arcadis had a legal duty to identify and report the subject**

guardrail earlier – are Mr. Hill’s personal wish-list as to heightened performance standards but, as shown in Arcadis’ Motion for summary judgment, **do not arise from the contract, the voluntary undertaking doctrine, or “industry standards”**. As such, Mr. Hill’s opinions **that Arcadis had a legal duty to identify and report the subject guardrail earlier** must be excluded as a matter of law because they seek to invoke a heightened duty of care, not required by the contract, the voluntary undertaking doctrine, or recognized industry standards. This Court should act as gatekeeper to exclude Mr. Hill’s expert testimony that seeks to establish a heightened legal duty as to Arcadis that does not exist, but for his improper and unsupported opinions. Plaintiffs’ attempts to establish a heightened legal duty (that otherwise does not exist) through expert testimony should not be allowed as a matter of law. As such, Mr. Hill’s opinions **that Arcadis had a legal duty to identify and report the subject guardrail earlier** must be excluded by this Court.

In *Rios v. Norsworthy*, 266 Ga. App. 469, 473 (2004), the Court of Appeals upheld the exclusion of an expert that gave opinions as to the standards of care in the professional truck driving industry. *See id.* at 473. This trucking safety expert opined that standards of care in the industry require truck drivers to use rear and side view mirrors to be “constantly aware of other vehicles,” and that the defendant’s failure to meet this standard was a cause of the collision. *See id.* The Court of Appeals stated,

The trial court properly disregarded this opinion for two reasons. First, **the relevant standard of care was the duty to exercise ordinary care under the circumstances. Where the duty is that of ordinary care, Norsworthy cannot be found negligent merely because he could have prevented the collision if he had exercised a heightened degree of care.** (citation omitted). Second, expert opinion evidence is not admissible where the matter under consideration – whether Norsworthy exercised ordinary care to discover and avoid the collision – is not shrouded in the mystery of professional skill and beyond the ken of the average layman. (citation omitted).

Id. (emphasis supplied).

The Court of Appeals in *Rios* further held that the truck driving safety expert's additional opinions, that the driver did not use mirrors, that he was not attentive and alert, and that he may have been fatigued "either have no factual basis or constitute inadmissible speculation or conclusions without probative value." *Id.*

Here, just as in *Diamond*, *Nat. Foundation Co.*, *Lawson*, and *Rios*, cited above, Plaintiffs attempt to establish a non-existent duty through an expert. Plaintiffs' expert, Herman Hill, opines that Arcadis failed to inspect and monitor guardrails as required by the contract, the voluntary undertaking doctrine, and "industry standards," such that Arcadis should have seen and reported the subject guardrail prior to April 20, 2018. These opinions imply a duty to see and report all damaged guardrail that exists on the highways in District 7. Such a heightened legal duty was not required by the contract between Arcadis and GDOT. Herman Hill admitted in his deposition that the contract between Arcadis and GDOT contains no specifics as to time or performance requirements with respect to inspecting or reporting of guardrails.¹ Mr. Hill's opinions (including those purporting to interpret contractual requirements and referencing common law principles such as the voluntary undertaking doctrine and "industry standards") are Mr. Hill's personal wish-list as to heightened performance standards but are not required by the contract, the voluntary undertaking doctrine, or recognized industry standards, and go beyond the exercise of ordinary care.

Mr. Hill's opinions as to Arcadis' legal duty – that it was required to see and report the subject guardrail earlier – should be excluded because Mr. Hill improperly seeks to invoke a

¹ See H. Hill Depo., p. 271, lines 1-6 (Q: "Have you seen anything that outlines the kind of outline of services that you say you think should have occurred; have you seen any such thing? A: To this date, I'm not aware that I have seen that."); H. Hill Depo., p. 277, lines 21-25 (Q: "[T]here is nothing in the Contract that speaks to "reasonably prompt basis;" is there? A: I don't know that that -- those -- that phrase is there.").

heightened duty of care, over and above the exercise of ordinary care under the circumstances, that is not required by the contract, the voluntary undertaking doctrine or a recognized industry standard. *See Rios v. Norsworthy*, 266 Ga. App. 469, 473 (2004) (Relevant standard of care was duty to exercise ordinary care under the circumstances, and defendant cannot be found negligent for failure to exercise a heightened degree of care, despite expert testimony which attempts to set forth such a non-existent standard). As in *Diamond, Nat. Foundation Co., Lawson*, and *Rios*, cited above, such a heightened duty is improper and should not be presented to the jury.

This Court should act as gatekeeper to exclude Mr. Hill's expert testimony that seeks to establish heightened a legal duty as to Arcadis that does not exist, but for Mr. Hill's improper and unsupported opinions. *See Id.* This Court should decide, as a matter of law, that Arcadis had no legal duty to see and report the subject guardrail, and exclude Mr. Hill's improper opinions as to same. As such, Mr. Hill's opinions **that Arcadis had a legal duty to identify and report the subject guardrail earlier** must be excluded by this Court. In so doing, Mr. Hill's related opinions that Arcadis failed to inspect and monitor guardrails as required by the contract, the voluntary undertaking doctrine, and "industry standards," must similarly be excluded, as such opinions are premised upon Mr. Hill's attempt to establish, by expert testimony, a non-existent legal duty.

II. Mr. Hill's Opinions as to the "Industry Standard" Applicable to Arcadis – As Set Forth in His Second Supplemental Affidavit – Must Be Excluded.

In connection with Plaintiff's response in opposition to Arcadis' motion for summary judgment, Plaintiffs filed a supplemental affidavit of Herman Hill (dated December 1, 2021) in order to attempt to establish an "industry standard" to serve as the legal basis for the purported legal duty that Arcadis was required to see and report the subject guardrail earlier. However, Plaintiffs' efforts to establish such a legal duty via an "industry standard" fail.

Hill asserts in his Second Supplemental Affidavit that “GDOT told Arcadis to compile ‘strike reports’ of damaged guardrail locations and email those strike reports to GDOT daily.”² Hill further asserts that “[t]herefore, **the industry standard for reporting damaged, state-owned guardrail is to report it on the same day as it is identified.**”³

Herman Hill further states in his affidavit that, on March 14, 2018 an Arcadis inspector (Calvin Thrasher) stopped his vehicle to report a damaged guardrail across the interstate from the subject guardrail, and that, Arcadis should have identified the subject guardrail on March 14, 2018, at the latest.⁴ Hill concludes, “**to have complied with the industry standard [to report damaged guardrail on the same day as it is identified], Arcadis must have identified and reported the subject guardrail no later than March 14, 2018.**”⁵

A. A Preliminary Discussion in Meeting Minutes Cannot and Does Not Form the Basis of an “Industry Standard”.

Mr. Hill opines in his Second Supplemental Affidavit that “GDOT told Arcadis to compile ‘strike reports’ of damaged guardrail locations and email those strike reports to GDOT daily.”⁶ Hill further asserts that “[t]herefore, **the industry standard for reporting damaged, state-owned guardrail is to report it on the same day as it is identified.**”⁷

The meeting minutes relied upon by Mr. Hill to form the basis of his opinions regarding “industry standard” are from an early meeting between GDOT and Arcadis in which there was a preliminary discussion as to how the flow of information would occur in connection with Arcadis’ new role in assisting with the management of the Martin-Robbins contract.⁸ A preliminary

² H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶ 18.

³ H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶ 19 (emphasis supplied).

⁴ H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶ 21.

⁵ H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶ 22 (emphasis supplied).

⁶ H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶ 18.

⁷ H. Hill Second Supplemental Affidavit, dated December 1, 2021, ¶ 19 (emphasis supplied).

⁸ See Arcadis Meeting Minutes for meeting held on March 13, 2018, attached to Arcadis’ Motion for Summary Judgment Brief as Exhibit F.

discussion in Meeting Minutes cannot and does not form the basis of an industry standard. Mr. Hill's opinions as to "industry standard" must be excluded because such opinions are not based on upon sufficient facts or data. O.C.G.A. § 24-7-702(b)(1). Moreover, Mr. Hill's opinions as to "industry standard" are not the product of a reliable methodology. O.C.G.A. § 24-7-702(b)(2).

B. Mr. Hill's Opinion that Arcadis Had a Duty to Report Damaged Guardrail "Daily" and that the "Industry Standard" for Reporting Damaged Guardrail is Daily is Not Based Upon Sufficient Facts or Data and is Not the Product of Reliable Methodology.

In forming his opinion as to "industry standard," Mr. Hill relied on meeting minutes from an early meeting between GDOT and Arcadis in which there was a preliminary discussion as to how the flow of information would occur in connection with Arcadis' new role in assisting with the management of the Martin-Robbins contract. The Meeting Minutes state,

Reports will be sent by Arcadis inspectors and GDOT staff to D7Guardail@dot.ga.gov. **[Arcadis] will compile a spreadsheet of damaged locations and email to [GDOT] daily.** [GDOT] will email the spreadsheet to Martin Robins (contractor) on the same day and CC [Arcadis]."⁹

This meeting was very early on in the process and, in fact, the procedure was eventually worked out where it was later decided that Arcadis would compile and distribute the reports to Martin-Robbins on a weekly basis. Any initial requirement to send reports daily never came to fruition and, since the time Arcadis starting sending reports to Martin-Robbins, on April 2, 2018,¹⁰ the requirement has been *weekly*.

Mr. Hill's opinions as to "industry standard" – that damaged guardrail must be reported on the same day it is identified – must be excluded because it has no basis in fact or law. Such opinions are not based on upon sufficient facts or data. O.C.G.A. § 24-7-702(b)(1). Moreover,

⁹ *Id.* (emphasis supplied).

¹⁰ See Tony Hendon Depo., page 89, lines 24-25 – page 90, lines 1-4; page 94, lines 18-25.

Mr. Hill's opinions as to "industry standard" are not the product of a reliable methodology. O.C.G.A. § 24-7-702(b)(2).

C. Mr. Hill's Remaining Opinions as to "Industry Standard" Must Be Excluded Because They are Not Based Upon Sufficient Facts or Data and is Not the Product of Reliable Methodology

- 1) The "Industry Standard" Articulated – That Damaged Guardrail Must Be Reported on the Same Day It is Identified – Cannot and Does Not Serve as the Basis to Support Hill's Opinion that Arcadis Should Have **Identified** the Subject Guardrail as Damaged on March 14, 2018.

Even if a preliminary discussion in Meeting Minutes can form the basis of an industry standard, an industry standard speaking to the timing of a *reporting* requirement has nothing to do with a requirement to *identify* damaged guardrail in the first place. Hill has not offered *any* industry standard to support his opinion that Arcadis had a legal duty to see the subject damaged guardrail in the first place. The "industry standard articulated" – that damaged guardrail must be reported on the same day it is identified – cannot and does not serve as the basis to support Hill's opinion that Arcadis should have *identified* the subject guardrail as damaged no later than March 14, 2018. Such opinions are not based on upon sufficient facts or data. O.C.G.A. § 24-7-702(b)(1). Moreover, Mr. Hill's opinions as to "industry standard" are not the product of a reliable methodology. O.C.G.A. § 24-7-702(b)(2).

- 2) The "Industry Standard" Articulated – That Damaged Guardrail Must Be Reported on the Same Day It is Identified – Cannot and Does Not Serve as the Basis to Support Hill's Opinion that Arcadis Should Have **Reported** the Subject Guardrail as Damaged on March 14, 2018.

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

as the basis to support Hill’s opinion that Arcadis should have *reported* the subject guardrail as damaged no later than March 14, 2018. Such opinions are not based on upon sufficient facts or data and are not the product of a reliable methodology. O.C.G.A. § 24-7-702(b)(1) and O.C.G.A. § 24-7-702(b)(2).

As such, Herman Hill’s supplemental affidavit cannot and does not establish an “industry standard” to serve as the legal basis for the purported legal duty that Arcadis was required to see and report the subject guardrail earlier than April 20, 2018. Mr. Hill’s opinions as to “industry standard” must be excluded because they are not based on upon sufficient facts or data and are not the product of a reliable methodology. O.C.G.A. § 24-7-702(b)(1) and O.C.G.A. § 24-7-702(b)(2).

III. Mr. Hill’s Opinions As to Arcadis’ Liability for Nuisance – As Set Forth in His Second Supplemental Affidavit – Must Be Excluded.

A. Mr. Hill’s Opinion as to Arcadis’ Control, Set Forth In His Second Supplemental Affidavit, Should Be Excluded.

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

Hill opines that “GDOT hired Arcadis to identify and report damaged guardrail, including the subject guardrail. Therefore, Arcadis had control over the subject guardrail.” However, just as a plaintiff cannot, with respect to a negligence claim, establish a legal duty that otherwise does not exist through an expert, a plaintiff similarly cannot, with respect to a nuisance claim, establish the legal element of control through an expert when such control does not otherwise exist. *See Adams v. APAC-Georgia*, 236 Ga. App. 215, 217 (1999); *Nat. Foundation Co. v. Post, Buckley*, 219 Ga. App. 431, 435 (1995); *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008)

(A plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law.). The same principle should apply with respect to establishing the element of control in a nuisance action.

B. Mr. Hill’s Opinion that Arcadis Had a Legal Duty to Abate the Nuisance Should Be Excluded.

A defendant must have a “legal duty to terminate the cause of the injuries” sustained by plaintiff to be liable under a nuisance claim. *Briggs & Stratton Corp. v. Concrete Sales & Services, Inc.*, 971 F. Supp. 566, 573 (M.D. Ga. 1997). Here, Arcadis had no legal duty to identify and report the subject guardrail any earlier than it did. As such, Arcadis had no legal duty to abate the purported nuisance.

Mr. Hill’s opinion that Arcadis had a legal duty to abate the nuisance should be excluded because, as shown in Arcadis’ reply in support of its Motion for Summary Judgment, Arcadis had no legal duty to identify and report the subject guardrail any earlier. The **only** source for the purported legal duty at issue in this case – that Arcadis had a legal duty to identify and report the subject guardrail earlier than it did – is Herman Hill. Such duty does not arise under the contract, statute, or common law principles recognized in case law. **Georgia law is clear that a plaintiff cannot establish a legal duty through expert testimony, when such purported legal duty does not otherwise exist under Georgia law.** See *Adams v. APAC-Georgia*, 236 Ga. App. 215, 217 (1999); *Nat. Foundation Co. v. Post, Buckley*, 219 Ga. App. 431, 435 (1995); *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008). Any opinion that Arcadis had a legal duty to abate the nuisance – that is based upon the contention that Arcadis had a legal duty to identify and report the subject guardrail earlier – must be excluded because, as shown in Arcadis’ Reply In Support of Its Motion for Summary Judgment, Arcadis had no such legal duty. A plaintiff cannot establish a non-existent legal duty through expert testimony.

IV. Any Opinion Mr. Hill May Offer in the Future To Support the Contention Arcadis had a Legal Duty to Ensure Martin-Robbins Complied with the 21-Day Repair Deadline, Must Be Excluded.

Plaintiffs in the [REDACTED] matter baldly assert in their response brief to Arcadis' Motion for Summary Judgment that Arcadis had a "duty" to ensure that Martin-Robbins repaired the subject guardrail within 21 days.¹¹ As discussed in Arcadis' reply in the [REDACTED] matter, this contention is fabricated out of thin air, completely false, and not supported by any evidence. As an illustration of this point, this purported "duty" is not mentioned anywhere in Plaintiff's brief in the [REDACTED] action. Arcadis argues in its reply brief in the [REDACTED] matter that Plaintiffs have failed to set forth ANY evidence to support the erroneous contention that Arcadis had a duty to ensure Martin-Robbins met the 21 day deadline, and that, this purported "duty" must be disregarded in its entirety.

Plaintiffs' expert, Herman Hill, has offered no opinion thus far stating that Arcadis had a purported duty to ensure that Martin Robbins repaired the subject guardrail within 21 days. If this Court agrees with Arcadis' position, as articulated in its reply in support of its Motion for Summary Judgment in the [REDACTED] matter, that Arcadis had no legal duty to ensure that Martin-Robbins met the 21-day repair deadline, then Arcadis asks this Court to enter an Order prohibiting Mr. Hill from offering any such opinion in the future.

V. Arcadis' Additional Arguments Made in Its Initial Motion to Exclude Herman Hill Are Reasserted in Their Entirety, as Plaintiffs Did Not Address Most of Arcadis' Arguments in Their Consolidated Response Brief.

Arcadis stands by its additional arguments set forth in its initial Motion to Exclude Herman Hill, that were not addressed by Plaintiffs in their consolidated response brief in opposition to Arcadis' Motion to Exclude:

¹¹ It is undisputed that the contract between GDOT and Martin-Robbins required Martin-Robbins to repair non-functional guardrail within 21 days.

- Mr. Hill’s opinions as to Arcadis, including Mr. Hill’s opinions as to the ultimate issues (the fault or negligence of Arcadis), should be excluded because such opinions are not the proper subject of expert testimony;
- Mr. Hill’s opinions as to Arcadis that set forth improper legal conclusions should be excluded. Mr. Hill’s opinions as to his interpretation of Arcadis’ duties under the contract, that Arcadis’s notice was not “reasonably prompt” and that Arcadis “[a]cted negligently, wantonly, willfully, or recklessly”, are just a few examples of his opinions that constitute impermissible legal conclusions and must be excluded;
- Mr. Hill’s opinions as to Arcadis (including the opinions that Arcadis was negligent, that Arcadis failed to live up to its contractual obligations, and that Arcadis failed to inspect guardrails as required by unspecified and unidentified “generally accepted standards of the time”) should be excluded because such opinions are not based on upon sufficient facts or data and are not the product of a reliable methodology under O.C.G.A. § 24-7-702(b)(1) and O.C.G.A. § 24-7-702(b)(2); and
- Mr. Hill’s testimony with respect to Arcadis should be excluded because, even if it is admissible, it should nevertheless be excluded under O.C.G.A. § 24-4-403 because its probative value would be outweighed by its prejudicial effect.

The above additional arguments are set forth in Arcadis’ initial Motion to Exclude Herman Hill, and are incorporated in their entirety, as if fully set forth herein.

CONCLUSION

As outlined above, Mr. Hill’s testimony as to Arcadis should be excluded for failing to meet the requirements as established under O.C.G.A. § 24-7-702 and the relevant case law interpreting admissibility of expert opinion testimony.

This 17th day of January, 2022.

COPELAND, STAIR, KINGMA & LOVELL, LLP

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANT ARCADIS U.S., INC.'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE EXPERT TESTIMONY OF HERMAN HILL, P.E.** upon all parties to this matter by statutory electronic service, addressed to counsel of record as follows:

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This 17th day of January, 2022.

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