

IN THE COURT OF APPEALS
STATE OF GEORGIA

JIM D. MARTIN and DEBORAH
C. MARTIN, as the Natural
Parents of Tonya Ann Martin,
as the Sole Survivors of
Tonya Ann Martin, and as the
Co-Administrators of the
Estate of Tonya Ann Martin,
Deceased,

Appellants,

v.

THE GEORGIA DEPARTMENT OF
TRANSPORTATION, MARTY
LONG, and CARROLL &
CARROLL OF MACON, INC.,
a Georgia Corporation,

Appellees.

Appeal No. A04A1669

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CLERK COURT OF APPEALS OF GA

**APPELLANTS' RELY BRIEF TO BRIEF OF
APPELLEE GEORGIA DEPARTMENT OF TRANSPORTATION**

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APPELLANTS' REPLY BRIEF TO BRIEF OF APPELLEE
GEORGIA DEPARTMENT OF TRANSPORTATION

COME NOW Jim D. Martin and Deborah C. Martin, as the Natural Parents of Tonya Ann Martin, as the Sole Survivors of Tonya Ann Martin and as the Co-Administrators of the Estate of Tonya Ann Martin, Appellants herein ("Plaintiffs"), and respectfully submit their Reply Brief to the Brief of Appellee Georgia Department Of Transportation ("DOT") and show this Honorable Court as follows:

I. INTRODUCTION AND STATEMENT OF FACTS

The DOT's Brief attempts to demonstrate that the DOT had neither the power, nor the authority, to enter into the subject contract with Butts County for the repaving of Barnetts Bridge Road, the county road where Tonya Martin died. The DOT argues that it had no duties or responsibilities under the DOT Contract with Butts County other than writing checks. Moreover, the DOT appears to ignore the terms of its own contract, its Standard Specifications and Supplemental Specifications, as well as fundamental legal issues regarding the DOT's statutory powers, regulatory functions and the legal effect of the DOT's regulations. Further, the DOT misapprehends that Plaintiffs are seeking to hold the DOT responsible for the negligent acts of the other Appellees. DOT Brief, pp. 7-10. Plaintiffs have asserted direct claims against the DOT for its own independent negligence, and do not seek to impute the liability of CCMI or Long to the DOT.

The DOT and Butts County entered into an agreement whereby Butts County, as the contractor, was to perform work in accordance with the DOT Contract and the DOT's Standard Specifications and Supplemental Specifications. The "Work" under the DOT Contract was the resurfacing and striping of several "Roadways"¹, including Barnetts Bridge Road, and all matters incidental thereto. R-828. The County was paid a "unit cost" by the DOT for each pay item. Paragraph 6 of the DOT Contract provides that:

THE WORK SHALL BE DONE IN ACCORDANCE WITH THE LAWS OF THE STATE OF GEORGIA AND TO THE SATISFACTION OF THE DEPARTMENT OF TRANSPORTATION. THE DECISION OF THE CHIEF ENGINEER UPON ANY QUESTION CONNECTED WITH THE EXECUTION OR FULFILLMENT OF THIS AGREEMENT AND THE INTERPRETATION OF THE SPECIFICATIONS OR UPON ANY FAILURE OF DELAY IN THE PROSECUTION OF THE WORK BY THE COUNTY SHALL BE FINAL AND CONCLUSIVE.

R-616.

¹Under the DOT Specifications, a "Roadway has two components; the traveled way and the shoulder, which is "that portion of the Roadway contiguous with the Traveled Way ... " R-1254, §101.80 and §101.56.

The DOT Contract was a LARP or PR Contract, both of which require the DOT engineers to be responsible for the design, engineering and the supervision of the DOT Contract and the Repaving Project. Ga.Comp.R. & Regs. §672-12-.11(LARP) and §672-12-.12(PR). As such, the DOT had the responsibility to supervise the Repaving Project and to insure that the engineering and design work, including the shoulder rebuilding and traffic control devices, were done in accordance with generally accepted design and engineering standards and practices in place at the time of the preparation of the plans and designs for the Repaving Project. R-1229-30. The undisputed record evidence shows that the DOT failed to properly discharge its duties.

Although the DOT Contract had specific pay items, the agreement also imposes obligations and duties on Butts County (and its subcontractors), which are not related to the specific pay items, e.g. traffic control, safety, and erosion control. Here, the installation of warning signs or "traffic control devices" was required under the DOT Specifications. R. 1254, Section 104.05. The activities were requirements of the work and were subject to the DOT's control, supervision and approval.

The original DOT Contract called for the repaving of a portion of Barnetts Bridge Road. While the work was in progress, the project was extended to include the stretch of road south of Barnetts Bridge to Jackson Lake Inn Road ("Extension"). R-932, p.

82. The actual repaving work done on the Extension was completed either two weeks or over a month prior to the signing of the Extension Agreement. R-933, p. 232-233, 241. Tonya Martin was killed on the Extension portion of Barnetts Bridge Road. From the time CCMI paved the Extension on December 15, 1999 (or January 7, 2000) until the time of Tonya Martin's wreck on May 31, 2000, **no warning or safety signage was present along the Extension**, even though the presence of low and soft shoulder signs and/or shoulder drop-off signs were required by the DOT Contract and DOT Specifications due to the presence of the dangerous drop-off caused by the repaving.² R-1223; R-378, pp. 40-41, 80. Consistent with the terms of the DOT Contract and the DOT Standard Specifications, the DOT requires appropriate signage to be in place and approved by the DOT before a contractor may begin or continue a construction project. The DOT failed to follow its own procedure by instructing CCMI to repave the Extension in the absence of appropriate warning signage. R-378, pp. 40-41; R-932 pp. 173-176; R-932, pp. 41-42.

The DOT performed its final inspection of the Repaving Project on June 16, 2000, which was after the wreck that killed Tonya Martin. R-933, p. 241. Prior to the final inspection, the

² During this same time period no shoulder rebuilding had occurred on Barnetts Bridge Road.

DOT continued to maintain jurisdiction and control over Barnetts Bridge Road until it sent its final acceptance letter to Butts County on August 7, 2000. R-933, pp. 84-85.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The DOT Had the Statutory Authority to Design, Engineer and Supervise the Project.

The DOT suggests that it never has authority or obligations with respect to county roads such as Barnetts Bridge Road. Several provisions of the Georgia Code of Public Transportation, O.C.G.A. §32-1-1 et seq. ("GCPT"), give the DOT authority over public roads, which are not part of the state highway system. Not only did the DOT have the authority and power to participate in the Repaving Project involving Barnetts Bridge Road and the Extension, but it also had the duty to design, engineer and supervise same, which it failed to do.

To have a proper understanding of the DOT's powers and duties, one must review the following definitions and code sections of the GCPT, and construe them together. Contrary to the DOT's insinuation, the definition of "Public Road" in the GCPT is not solely limited to highways. DOT Brief, p. 12. The term "Public Road" includes roads open to the public in any county including the surface, shoulders and sides. O.C.G.A. §32-1-3(24). "Construction" includes: ... the paving, striping, ... or other major improvement of a substantial portion of an existing

public road together with all activities incident to any of the foregoing. O.C.G.A. §32-1-3(6) (emphasis added). The work undertaken on Barnetts Bridge Road was "construction" because the entire road was repaved. The DOT's reliance on the untimely affidavit of its engineer cannot defeat the plain language of the statute by claiming that the work was forbidden maintenance. DOT Brief, pp. 13-14. The entire length of Barnetts Bridge Road was repaved and restriped, exceeding the "substantial portion" requirement for construction under the statute, thereby establishing that the Repaving Project was "construction".

Contrary to the DOT's assertions, the DOT has the power to maintain county roads. O.C.G.A. §32-2-2 identifies the general powers of the DOT. While it is true that the DOT's primary focus is the state highway system, the DOT is responsible for other work that the DOT is authorized by law to perform:

The department shall plan, designate, improve, manage, control, construct, and maintain a state highway system and shall have control of and responsibility for all construction, maintenance³, or any other work upon the state highway system and all other work which may be

³ "Maintenance" is defined as preservation of a public road, including repairs and resurfacing not amounting to construction. O.C.G.A. §32-1-3(15).

designated to be done by the department by this title
or any other law.

O.C.G.A. §32-2-2(a)(1)(emphasis added). Thus, if the GCPT or any other law permits the DOT to perform any other work, whether it be on or off the state highway system, the DOT has the authority to perform same, including maintenance work on a county road, and the DOT would have control and responsibility over such work.

Two additional subsections of O.C.G.A. §32-2-2 confer powers and duties to the DOT with respect to public county roads. Under O.C.G.A. §32-2-2(a)(3), the DOT is required to:

provide for surveys, plans, maps, specifications, and
other things necessary in designating, supervising,
locating, abandoning, relocating, improving,
constructing, or maintaining ... or in doing such other
work on public roads as the department may be given
responsibility for or control of by law.

O.C.G.A. § 32-2-2(a)(3)(emphasis added). The foregoing code section requires the DOT to supervise and provide for all things necessary on works such as the Repaving Project in the present case.

O.C.G.A. §32-2-2(a)(5) is the statutory authority allowing the DOT to enter into contracts with counties to plan, design, inspect and control the construction or maintenance of county roads such as the DOT Contract with Butts County. In addition to

O.C.G.A. §32-2-2(a)(5), the DOT had the power to enter into the DOT Contract with Butts County and control the Repaving Project under O.C.G.A. §32-5-21(5), which requires the DOT to perform work or designate work to be done in connection with the State Public Transportation Fund. O.C.G.A. §32-5-21(5) is the statutory authority for the PR and LARP programs. The DOT regulations promulgated on the basis of O.C.G.A. §32-5-21 require that the DOT engineer and supervise all such contracts. Ga. Comp. R. & Regs. §672-12-.11 and §672-12-.12. As such, the DOT was responsible for insuring the placement of warning signs and the rebuilding of the road shoulders as to the subject Repaving Project under O.C.G.A. §32-2-2(a)(1) and (3).

Since the DOT has the express authority, as shown above, to control, design, engineer and supervise county public road projects, the DOT's assertion that it is not permitted to perform work on county roads and that it was solely the duty of Butts County to rebuild the shoulders and place traffic control devices and warning signs is wholly without merit. The DOT's argument would render O.C.G.A. §32-2-2(a)(1) and (3) nugatory.

The DOT states that "Butts County's statutory duties, including the control of and responsibility for all construction and maintenance on Barnetts Bridge Road, did not shift to the DOT by contract." DOT Brief, p. 13. Whether or not duties shifted, Bryan Roberts testified that construction could not begin without

DOT approval, and that the DOT could stop the progress of work. R-932, p. 42. The DOT Contract required that the "work shall be done in accordance with the laws of the State of Georgia and to the satisfaction of the [DOT]" and that the decision of the DOT's chief engineer "upon any question connected with the execution or fulfillment of this agreement ... shall be final and conclusive." Until final inspection and acceptance of the work, this was a DOT construction site by law, by the DOT's Contract, by the DOT's Specifications, and its own regulations, and all defendants acted accordingly.

B. The PR and LARP Regulations are Law.

The DOT contends that the PR and LARP regulations, which require the DOT to engineer and supervise PR and LARP projects (Ga. Comp. R. & Regs. §672-12-.11 and §672-12-.12), are without the force of law because they are administrative or procedural only. DOT Brief pp. 16-20. The DOT illogically contends that the engineering and supervision apply only to the pay items, even though the express language of the regulations state that the contracts, not the pay items, are to be engineered and supervised.

To support its proposition that Ga. Comp. R. & Regs. §672-12-.11 and §672-12-.12 are administrative or procedural only, the DOT cites to the introduction of the Georgia Administrative Procedure Act ("APA"). DOT Brief, p. 19. The APA governs the

rule-making activities of the state government so as not to violate constitutional principles, but not the effect of the rules. Contrary to the DOT's argument, a valid administrative rule has the same force and effect as the statutory scheme upon which it is predicated. In short, a regulation is law just as a judicial decision or statute is law. Dep't of Human Resources v. Anderson, 218 Ga. App. 528 (1995). For an administrative rule to be valid, it must be authorized by statute and be reasonable. Anderson at 528; Georgia Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc., 234 Ga. 30 (1975). The PR and LARP regulations satisfy these criteria. Through O.C.G.A. §32-2-2(b), the Legislature enabled the DOT to issue regulations with its other powers, and the DOT is estopped to contend that its own rules and/or regulations are unreasonable. Therefore, the regulations impact the DOT three ways: they are part of the state law; they bind the DOT under paragraph 6 of the DOT Contract, and they require the DOT to execute its powers under O.C.G.A. §32-2-2(a)(1), (3) and (5).

C. The DOT Was to Supervise, Design and Engineer the Project and Is Liable for Its Failure to Do So.

The DOT denies responsibility for its failure to properly supervise, design and engineer the Repaving Project by insuring the presence of appropriate signage on the Extension and insuring the timely rebuilding of the road shoulders for the safety of the traveling public, including Tonya Martin. The DOT Contract

required the placement of signage, pavement markings and traffic control devices ... (R-1454, §104.05), the applicable regulations required the DOT to engineer and supervise the Repaving Project (Ga. Comp. R. & Regs. §672-12-.11 and §672-12-.12), and the DOT had a statutory duty to manage and control the Repaving Project (O.C.G.A. § 32-2-2(a)(1), (3) and (5)).

In the case of Department of Transportation v. Brown, 267 Ga. 6 (1996), the Georgia Supreme Court explained that when the design standard exception is an issue, as in this case, the plaintiff can establish a jury question and the DOT has no sovereign immunity, when evidence exists that the design violated generally accepted engineering standards. The Georgia Supreme Court in Brown found that such evidence meets the requirements of the Georgia Tort Claims Act and held that the trial court did not err when it denied the DOT's motion for a directed verdict. Here, the DOT has offered absolutely no evidence to controvert the testimony of Plaintiffs' expert, Dr. Joseph Wattleworth. Dr. Wattleworth testified that the DOT failed to adhere to the appropriate design and engineering standards with respect to signage and traffic control devices. R-1226, 1228-30.

In the face of its clear mandate to control, design, engineer and supervise the Repaving Project, as well as the holding in Brown, the DOT attempts to bolster its tenuous argument by relying upon cases that relate to the placement of

traffic control devices at railroad crossings. Kitchen v. CSX Transp., Inc., 265 Ga. 206 (1995) and Evans Timber Co. v. Central of Georgia R.R. Co., 239 Ga. App. 262 (1999). Although Kitchen noted that, under the GCPT, the duty to maintain the public road and any warning devices leading to a former railroad overpass was exclusively that of the county, the DOT was nevertheless required to place and maintain traffic control devices on public roads in the state highway system. Kitchen, supra at 208. Evans Timber holds only that a railroad cannot be liable for the failure to install a protective device on a public grade crossing where the railroad has not been requested to do so by the appropriate governmental entity. Evans Timber Co., supra at 267. These cases are inapplicable to the facts of this case, as they do not speak to the DOT's duties by statute, regulation and contract to properly supervise, design and engineer the DOT Contract and Repaving Project on Barnetts Bridge Road.

The DOT's reliance on Murray v. Department of Transportation, 240 Ga. App. 285 (1999), an accident case concerning a road designed in the 1940's, is also misplaced. The DOT cites Murray for the proposition that moderate road improvements "need not address design issues outside the scope of the moderate improvements." Murray, 240 Ga. App. at 287. However, Murray and its related case, Daniels v. Department of Transportation, 222 Ga. App. 237 (1996), hold that the DOT need

not re-engineer a road when it performs an upgrade to the road. Murray, however, imposes a duty on the DOT, applicable here, since the placement of warning signs and traffic control devices are **directly within the scope of the work on Barnetts Bridge Road**. Indeed, in Murray this Court reversed the trial court for granting summary judgment in favor of the DOT in the face of an expert affidavit, citing the decision of the Georgia Supreme Court in Department of Transportation v. Brown, *supra*. In the present case, the trial court committed the same error. Because warning signs and traffic control devices were required by the DOT Contract, Specifications, Supplemental Specifications and DOT regulations, and because the dangerous drop-off was the direct result of the alleged "moderate improvement," the DOT is liable here. R-932, p. 47.

Contrary to the DOT's assertion, the repaving standards were violated when the work was not done in conformity with the DOT Contract, which specifically required the placement of warning signs and traffic control devices. R-933, pp. 15, 20, 136, 172; R-932, pp. 42, 62, 91; R-480, No. 18 and 19.

Citing Maqueur v. Department of Transportation, 248 Ga. App. 575 (2001), the DOT contends that it is immune from liability under the inspection power. The DOT's argument ignores its mandate under O.C.G.A. §32-2-2(a)(1) and (3), which requires the DOT to have control over, responsibility for, and supervision of

projects such as the Repaving Project, and ignores the DOT's duty by its own regulation to engineer and supervise the DOT Contract. Ga. Comp. R. & Regs. §672-12-.11 and §672-12-.12. None of these mandates are an exercise of the inspection power, nor were they applicable in Maqueur. In Maqueur, the only involvement alleged by the DOT with the project was its inspection of plans prepared by the county and inspection upon completion of the project. "[T]he basis of Maqueur's claim is that DOT violated a duty to notify the county that the road, as designed and as constructed, contained safety hazards." Maqueur, *supra* at 577. The court saw "no principled distinction between an inspection of physical property to determine whether it complies with accepted safety standards and an inspection of the construction plans to determine whether the property, once constructed, will comply with such standards." Id. Here, the record evidence demonstrates that the DOT had responsibility for engineering, designing and supervising the Repaving Project, and also that the DOT failed to adhere to generally accepted engineering and design standards, as in Brown.

Likewise, the DOT cannot rely on the financing regulatory activities exemption under the O.C.G.A. § 50-21-24(8) to escape liability. The clear import of the exemption applies to the Department of Banking and Finance and the Insurance Commissioner so those agencies will not be liable for the failure of banking,

savings and insurance institutions which they regulate, audit and inspect for soundness. Plaintiffs have never asserted that the DOT was negligent in financing regulatory activities, as financing regulatory activities has nothing to do with the death of Tonya Martin.

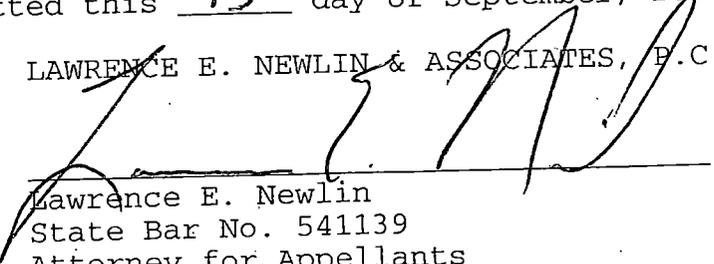
Brown, supra, holds that the DOT is liable for design and engineering defects inconsistent with generally accepted design and engineering standards. Under Brown, the placement of warning signs is a design issue for which the DOT can be liable. Given Dr. Wattleworth's testimony by affidavit, the jury must decide issues of negligence as to the DOT.

III. Conclusion.

Appellants respectfully request that this Honorable Court REVERSE the trial court's order granting the DOT's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (R-1420), and to REMAND this case to the trial court for a trial by jury as to the DOT.

Respectfully submitted this 13th day of September, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the within and foregoing APPELLANTS' REPLY BRIEF TO BRIEF OF APPELLEE GEORGIA DEPARTMENT OF TRANSPORTATION upon the following parties by regular mail:

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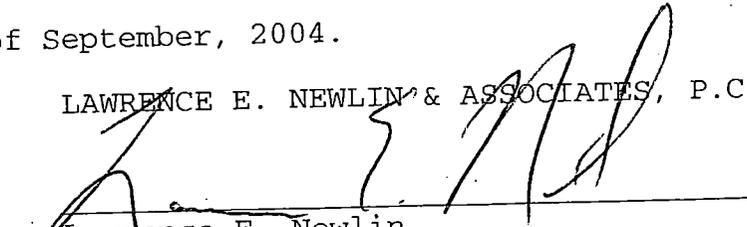
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