No. A23A0404

In the
Court of Appeals of Georgia

Cynthia J. Munro, et al.,
Appellants,
v.

Georgia Department of Transportation,
Appellee.

On Appeal from the State Court of Colquitt County
State Court Case No. 2018SC3859

BRIEF OF APPELLEE GEORGIA DEPARTMENT OF TRANSPORTATION

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INTRODUCTION

Appellants Cynthia and John Munro's daughter tragically died in a car accident at the intersection of State Route 37 and Thigpen Trail in Colquitt County. The accident occurred because their daughter's friend and driver failed to stop at a stop sign, proceeded into the intersection, and collided with an oncoming tractor trailer that was speeding. If the driver had stopped at the stop sign, and if the tractor trailer had complied with the speed limit, then the accident would have never happened. R-352, 1372.

Despite this, the Munros seek to hold Appellee Georgia Department of Transportation ("GDOT") liable for their daughter's death. Their theory is that, because State Route 37 and Thigpen Trail intersect at a 60-degree angle instead of a 90-degree angle, their daughter's friend (who has no memory of the accident) would have been unable to see the oncoming tractor trailer. But the Munros' theory suffers from a fatal flaw: it is barred by the State's sovereign immunity.

Generally speaking, the Georgia Tort Claims Act waives the State's sovereign immunity "for the torts of state officers and employees while acting within the scope of their official duties or employment." O.C.G.A. § 50-21-23(a). But the Act contains an important caveat, which is that the waiver is "subject to all

exceptions and limitations set forth in [the Act]." *Id.* (emphasis added). One of those exceptions—commonly referred to as the "plan or design exception"—says that the State "shall have no liability for losses resulting from …. [t]he plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design." O.C.G.A. § 50-21-24(10).

To avoid the application of the "plan or design exception," the Munros must prove, by a preponderance of the evidence, that GDOT's design of the intersection did not substantially comply with the applicable design standards. But they have failed to meet this burden for at least three reasons. *First*, they seek to apply design standards from 1931, when State Route 37 was constructed. But the record is devoid of any evidence that the intersection (and the 60-degree angle) actually existed in 1931. The record instead shows that the current configuration of the intersection is the result of two projects GDOT completed in 1956 and 1960. *Second*, the Munros' expert was not a licensed engineer in 1931 (or 1956 and 1960), and so his testimony about the applicable design standards is inadmissible. *See* O.C.G.A.

§ 24-7-702(c)(1) (stating that expert opinions are admissible in professional malpractice cases only if the expert "[w]as licensed … to practice his or her profession … at such time" of the alleged negligence). *Third*, the design standard that was in effect in 1956 and 1960 permitted "[a]ngles above *about* 60 degrees." R-327 (emphasis added). GDOT "substantially complied" with this standard—which is all the exception requires—because State Route 37 and Thigpen Trail intersected at 60 degrees. For all three reasons, the Munros cannot defeat the application of the "plan or design exception."

The Munros nonetheless attempt to evade the exception through several misplaced—albeit creative—arguments. They argue that GDOT had a duty to "fix" the intersection, make it safer, and mitigate the effect of the acute angle by removing the vegetation on State Route 37, installing warning devices, and using speed breakers. But the "plan or design exception" insulates GDOT from liability not only for its allegedly defective intersection, but also for its failure to upgrade the intersection or make it safer, whether by eliminating the vegetation, implementing warning devices and speed breakers, or otherwise. *See, e.g.*, *Murray v. Ga. Dep't of Transp.*, 284 Ga. App. 263, 267 (2007) (explaining that the "plan or design exception" "also

rendered [GDOT] immune from any claim that it proximately caused the fatal accident because it negligently failed to upgrade the design of the intersection … to make it safer").

For these reasons, the Tort Claims Act's "plan or design exception" bars the Munros' suit against GDOT. The trial court correctly dismissed the case on that basis, and this Court should affirm.

STATEMENT

A. Factual Background

1. The Intersection

State Route 37 is a state-owned highway that runs east to west and was constructed in 1931. R-1198, 1644. Thigpen Trail is a county-owned road that runs from north to south. R-870, 1186.

In 1956, GDOT constructed the southern approach of Thigpen Trail to State Route 37. R-319, 461. And several years later, in 1960, GDOT constructed the northern approach of Thigpen Trail to State Route 37. *Id.* Thus, it was not until 1956 and 1960 that the intersection of State Route 37 and Thigpen Trail came into existence "as it is today." R-319.

State Route 37 and Thigpen Trail intersect at a 60-degree angle. R-198, 1380. The southbound portion of Thigpen Trail is controlled by a stop sign. R-330.

2. The Accident

On November 10, 2017, Sarah Williams was driving south on Thigpen Trail with the Munros' daughter, Ashleigh Munro, as a passenger. R-10. As Williams approached the intersection with State Route 37, she failed to come to a complete stop at the stop sign. R-1069. She instead proceeded into the intersection and collided with a tractor trailer that was speeding eastbound on State Route 37. R-11, 1482, 1471, 1477. Williams has no memory of the accident or how it occurred. R-1588, 1592.

3. Alleged Issues with the Intersection

Herman Hill, a former GDOT employee, is the Munros' expert. R-232. He opined that the 60-degree angle of the intersection is "very bad" because it hinders a driver's ability to see oncoming traffic. R-238. In particular, drivers must "turn their heads considerably" when looking for oncoming traffic, and their sight may be obstructed by a headrest or other parts of their vehicle. R-871. Hill proposed five solutions for the intersection: re-orient the roads so that they intersect at a 90-degree angle, install a traffic signal, eliminate *all* vegetation on State Route 37, erect a sensor-based electronic sign with lights that flash when it is unsafe to enter the intersection, and make the intersection a

four-way stop. R-242. As to the vegetation on State Route 37 in particular, Hill further explained that:

- "[I]f you're [going to] stick with that acute angle and present that hazard to motorists, at least keep the right-of-way absolutely clear. I mean, if you need to come out there with some material that just absolutely kills [] those weeds …. get it done." R-248
- "Another solution would be to level the quadrant adjacent to the southbound lane to provide clear and absolute view of approaching vehicles on State Route 37. That would be just simply eliminating any vegetation." R-242.
- "If there's vegetation, it needs to come out and some permanent solution to that be done." R-248

B. Proceedings Below

The Munros sued GDOT for allegedly failing to properly design, inspect, and maintain the intersection.[1] R.14. After the parties conducted discovery, GDOT moved to dismiss for lack of subject matter jurisdiction under the Tort Claims Act's "plan or design exception," O.C.G.A. § 50-21-24(10). R-225–286. GDOT

[1] The Munros also filed a separate lawsuit against the driver of the tractor trailer that is currently pending and heading to trial.

also: (1) moved to exclude Hill's opinions because, *inter alia*, he was not a licensed engineer when the intersection was constructed, (2) moved for summary judgment, arguing that the drivers' respective negligence caused the accident, and (3) moved to exclude evidence about other accidents at the intersection under 23 U.S.C. § 407. R-287–316, 416–421, 439–452.

The trial court held a hearing on GDOT's motion to dismiss for lack of subject matter jurisdiction and ultimately granted it. R-1792–1793. The order does not set forth the trial court's reasons for granting the motion, nor does it contain any fact findings. *Id.* The trial court then denied GDOT's remaining motions as moot. *Id.*

STANDARD OF REVIEW

A trial court's ruling on sovereign immunity grounds is reviewed *de novo*. *Brown v. Bd. of Regents of the Univ. Sys. of Ga.*, 355 Ga. App. 478, 479 (2020). Any factual findings "are sustained if there is evidence supporting them." *Id.*

ARGUMENT

I. The trial court correctly concluded that the Tort Claims Act's "plan or design exception" bars the case.

The Georgia Tort Claims Act is the "exclusive remedy" for torts allegedly committed by a state officer or employee, and it

provides a limited waiver of the State's sovereign immunity in certain situations. O.C.G.A. § 50-21-25(a). The question of whether sovereign immunity has been waived under the Tort Claims Act is a threshold issue that must be decided at the outset of the case.[2] *See, e.g.*, *McConnell v. Ga. Dep't of Labor*, 302 Ga. 18, 19 (2017).

The Tort Claims Act contains thirteen exceptions to its waiver of sovereign immunity. O.C.G.A. § 50-21-24. One such exception—the "plan or design exception"—says that "[t]he State shall have no liability for losses resulting from …. [t]he plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design." O.C.G.A. § 50-21-24(10). To defeat the application of this exception, the plaintiff must submit

[2] The Munros state multiple times in their brief that there are "fact issues" about whether sovereign immunity has been waived in this case that a jury should decide. Br. at 15, 18, 26, 30. But the question of whether sovereign immunity has been waived is never a jury issue. Instead, "[w]hen a ruling on a motion to dismiss based on jurisdictional grounds, the trial court must make the determination acting as the trier of fact." *Ga. Dep't of Transp. v. Thompson*, 354 Ga. App. 200, 206 (2020).

"expert testimony or other competent evidence" to show that "the plan or design was not prepared in substantial compliance with generally accepted engineering or design standards at the time such plan was prepared." *Ga. Dep't of Transp. v. Balamo*, 343 Ga. App. 169, 171 (2017). The burden of making this showing rests solely on the plaintiff. *Ga. Dep't of Transp. v. Thompson*, 354 Ga. App. 200, 207 (2020). And the plaintiff must do so by a preponderance of the evidence. *Id.*

The Munros have not—and cannot—meet this burden. As an initial matter, the parties dispute which date controls the "plan or design exception" analysis. The Munros contend it is 1931, when State Route 37 was constructed, while GDOT contends it is 1956 and 1960, when the northern and southern approaches of Thigpen Trail to State Route 37 were constructed. The Court need not, however, resolve this dispute because the Munros cannot overcome the exception under any of these dates for three reasons. *First*, they have failed to show that the intersection and the 60-degree angle existed in 1931. *Second*, even if they could make that showing, Hill's testimony about the applicable design standards is inadmissible. *Third*, GDOT substantially complied with the design standards that applied in 1956 and 1960.

A. There is no evidence that the intersection and 60-degree angle existed in 1931.

To meet their burden of showing that the intersection substantially complied with the design standards in effect in 1931, the Munros must first establish that the intersection—along with the 60-degree angle—actually existed on that date. But the Munros have failed to do so. Hill testified that, when he examined the 1931 plan, he did not see any intersections. R-245. And although GDOT's expert testified that he saw Thigpen Trail on the cover sheet for the 1931 plan, he did not testify to seeing the intersection or the 60-degree angle.[3] R-320. The Munros have therefore failed to show, by a preponderance of the evidence, that State Route 37 and Thigpen Trail intersected at a 60-degree angle in 1931.

B. Hill's expert testimony is inadmissible.

Even if the Munros could establish that the intersection and 60-degree angle existed in 1931, Hill's testimony about the design

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[3] In their brief, the Munros place much significance on the fact that GDOT's expert could not definitively say whether the 60-degree intersection existed before 1960. Br. at 17–18. But the Munros have the burden of proof, and simply poking holes in the testimony of GDOT's expert is not enough to satisfy that burden. Instead, they must affirmatively come forward with evidence showing that the 60-degree intersection existed in 1931, which they have not done.

standards that applied in 1931 is inadmissible. Under Georgia's Rules of Evidence, expert opinions are admissible in professional malpractice cases only if the expert "[w]as licensed … to practice his or her profession … at such time" of the acts or omissions at issue. O.C.G.A. § 24-7-702(c)(1); *see also Craigo v. Azizi*, 301 Ga. App. 181, 186–87 (2009) (explaining that to comply with the licensing requirement, an expert "must be licensed and practicing (or teaching) … at the time the alleged negligent act occurred"). Yet, Hill did not become a licensed engineer until 1969. R-231. His testimony about the applicable design standards is therefore inadmissible under O.C.G.A. § 24-7-702(c)(1). Without Hill's testimony, the Munros necessarily cannot meet their burden under the "plan or design exception."[4]

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[4] The Munros further argue that, even if this statute bars Hill's expert opinions, those opinions nevertheless constitute "other competent evidence" that the Court may consider in its "plan or design exception" analysis. Br. at 30; *Balamo*, 343 Ga. App. at 171 (explaining that plaintiffs can overcome the exception by submitting "expert testimony or other competent evidence"). But evidence about what the "generally accepted" engineering design standards were in 1931 and whether GDOT breached them are matters of expertise that require expert testimony. *See, e.g.*, *Ga. Dep't of Transp. v. Cushway*, 240 Ga. App. 464, 464 (1999) (explaining that, because "the average layperson is not familiar with … design [issues]," cases against GDOT based on an allegedly negligent design require expert testimony).

To be sure, there are some GDOT cases where Hill (or other experts) provided testimony despite not being licensed when the roadway at issue was designed and constructed, and the Munros cite several of them in their brief. Br. at 29. But those cases were decided before O.C.G.A. § 24-7-702(c)(1) was enacted in 2011. Those cases therefore do not preclude the application of O.C.G.A. § 24-7-702(c)(1) to Hill's testimony.

C. The intersection substantially complies with the design standards in effect in 1956 and 1960.

In 1954, the American Association of State Highway Officials ("AASHO") published *A Policy on Geometric Design of Rural Highways*. R-461. The policy stated that, "[r]egardless of the type of intersection, it is desirable for safety and economy that intersecting roads meet at or nearly at right angles." R-327. The policy went on to clarify, however, that "[w]hile a right-angle crossing is desired, some deviation is permissible. Angles above *about* 60 degrees produce only a small reduction in visibility, which often do not warrant realignment closer to 90 degrees." *Id.* (emphasis added). In other words, even though right angles were ideal, angles above "about" 60 degrees were permitted. *Id.* Indeed, GDOT interprets this AASHO language to mean that "60

degrees is the starting point"—i.e., is the minimum angle that may be used at an intersection. *Id.*

The intersection of State Route 37 and Thigpen Trail complies with this AASHO policy because it contains a 60-degree angle. R-198, 1380. At the very least, the intersection "substantially complies" with AASHO, which is all that the "plan or design" exception requires. O.C.G.A. § 50-21-24(10).

II. The Munros' arguments on appeal are unpersuasive.

The Munros advance two main arguments on appeal to evade the application of the "plan or design exception." Neither of them are sufficient.

First, the Munros argue that GDOT had "a duty to remedy [the] dangerous situation" by installing warning devices and speed breakers and can be held liable for failing to do so. Br. at 32. They are incorrect. The "plan or design exception" not only exempts GDOT from liability for design deficiencies when the highway was designed in substantial compliance with existing design standards, it also exempts GDOT from liability for failing to upgrade the design, make the design safer, mitigate the effects of the design, or warn motorists about the design. *See, e.g.*, *Ga. Dep't of Transp. v. Cox*, 246 Ga. App. 221 (2000). This is because "if the DOT is exempt from liability for its initial design … it

would make little sense to permit liability for failing to change that initial design. Allowing liability in such cases would effectively eliminate the protection provided [GDOT] under [the "plan or design exception"]." *Id.* at 223; *see also Murray v. Ga. Dep't of Transp.*, 284 Ga. App. 263, 267 (2007) (explaining that the "plan or design exception" "also rendered [GDOT] immune from any claim that it proximately caused the fatal accident because it negligently failed to upgrade the design of the intersection … to make it safer").

Thus, because the "plan or design exception" insulates GDOT from liability for the design of the intersection, it also insulates GDOT from failing to upgrade the intersection or make it safer, whether through warning devices, speed breakers, or otherwise.[5] *See, e.g.*, *Ga. Dep't of Transp. v. Crooms*, 316 Ga. App. 536, 542 (2012) (overruled on other grounds by *Rivera v. Washington*, 298 Ga. 770 (2016)) (concluding that, even if Interstate 20 "presented a

[5] It is unclear if the Munros are also asserting a stand-alone design claim—i.e., are arguing that GDOT should have installed warning devices and speed breakers in 1956 and 1960 (or, under the Munros' theory, in 1931). If so, then the "plan or design exception" still bars the stand-alone claim because the Munros have failed to identify the design standards that existed in 1956 and 1960 (or 1931) with respect to warning devices and speed breakers, and they have failed to show that GDOT did not substantially comply with those standards.

known hydroplaning hazard," GDOT is immune under the "plan or design exception" from any claim that it "negligently failed to take steps to make the roadway safer"); *Daniels v. Ga. Dep't of Transp.*, 222 Ga. App. 237, 238 (1996) (rejecting the plaintiff's argument that an intersection "created obvious safety hazards" and that GDOT therefore had a duty to upgrade the intersection to make it safer).

Second, the Munros contend that they have asserted a separate claim for GDOT's allegedly negligent inspection and maintenance of the vegetation on State Route 37. Br. at 11–15. They contend that this is a merits-based issue that does not implicate subject matter jurisdiction.[6] *Id.* But this too is incorrect. Although the Munros characterize this claim as a

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[6] The Munros also seem to suggest that the trial court may have dismissed their purported maintenance/inspection claim based on the Tort Claims Act's "inspection exception," O.C.G.A. § 50-21-24(8). This exception, however, does not apply to state-owned property, and State Route 37 is a state highway. As a result, GDOT did not raise this exception below, nor are they raising it on appeal. Because GDOT did not raise this exception below, the trial court's dismissal could not have been based on that exception. It should also be noted that the fact that the "inspection exception" is inapplicable does not mean that sovereign immunity has automatically been waived for the Munros' purported maintenance/inspection claim. Instead, the claim is barred by sovereign immunity under the "plan or design exception," as discussed below.

stand-alone inspection/maintenance claim, Hill's testimony shows that it is instead inextricably intertwined with their design claim. Hill testified that:

- "[I]f you're [going to] stick with that acute angle and present that hazard to motorists, at least keep the right-of-way absolutely clear" by "absolutely kill[ing] … those weeds." R-248.
- "Another solution [to the intersection's acute angle] would be to level the quadrant adjacent to the southbound lane to provide clear and absolute view of approaching vehicles on State Route 37. That would be just simply eliminating any vegetation." R-242.

In other words, the crux of Hill's testimony is that the vegetation should be completely removed as a *solution* to—or a way to mitigate the effects of—the intersection's 60-degree angle. As explained above, however, the "plan or design exception" exempts GDOT from liability not just for the design at issue, but also for its failure to take remedial measures to make the design safer or lessen its effects. *Cox*, 246 Ga. App. at 223. So because the intersection here substantially complied with AASHO's 1954 design standards, GDOT cannot be held liable for failing to make

the intersection safer by eliminating the vegetation on State Route 37. In short, the essence of the Munros' claim is that GDOT negligently designed the intersection and should have taken steps to make it safer, "and they cannot avoid immunity simply by describing it as something else"—i.e., as a "maintenance" or "inspection" claim. *Balamo*, 343 Ga. App. at 170. The trial court therefore correctly dismissed the Munros' purported inspection/maintenance claim based on sovereign immunity.

CONCLUSION

For the reasons set out above, this Court should affirm the judgment of the trial court.

Respectfully submitted.

This submission does not exceed the word count limit imposed by Rule 24.

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