IN THE COURT OF APPEALS
STATE OF GEORGIA

CYNTHIA J. MUNRO et al.,

Appellants, Case No. A23A0404

v.

GEORGIA DEPARTMENT OF TRANSPORTATION,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANTS[1]

Introduction

Without any findings of fact or conclusions of law, and despite the fact that the Georgia Department of Transportation ("GDOT") *admits* that at least one of the Appellants' claims survives, the trial court summarily dismissed this case and tossed the Appellants out of court on the basis of sovereign immunity. While the Georgia Tort Claims Act, and the decisions of this Court, plainly set forth the

[1] Per the Court's November 10, 2022 Order, this supplemental brief is filed to provide citations to portions of the record that were originally transmitted in illegible form. R32 includes corrected pages from R18 and R19 (pp. 987-1064) that were illegible when originally transmitted from the trial court. Several typographical and formatting errors in citations are also corrected.

limited circumstances in which the State enjoys civil immunity, in granting GDOT's motion to dismiss for lack of subject matter jurisdiction, the trial court arbitrarily gave GDOT a get-out-of-jail-free card without any explanation or factual findings. A proper analysis of the law and facts shows that GDOT waived immunity due to its negligent inspection, design, and maintenance of the subject intersection at the crossroads of Thigpen Trail and Georgia State Road 37 ("GA 37") in Colquitt County, Georgia.

Based on these arguments, as set forth in detail below, the trial court's order dismissing the Munros' case should be reversed.

I. *Statement of Facts and Proceedings Below*[2]

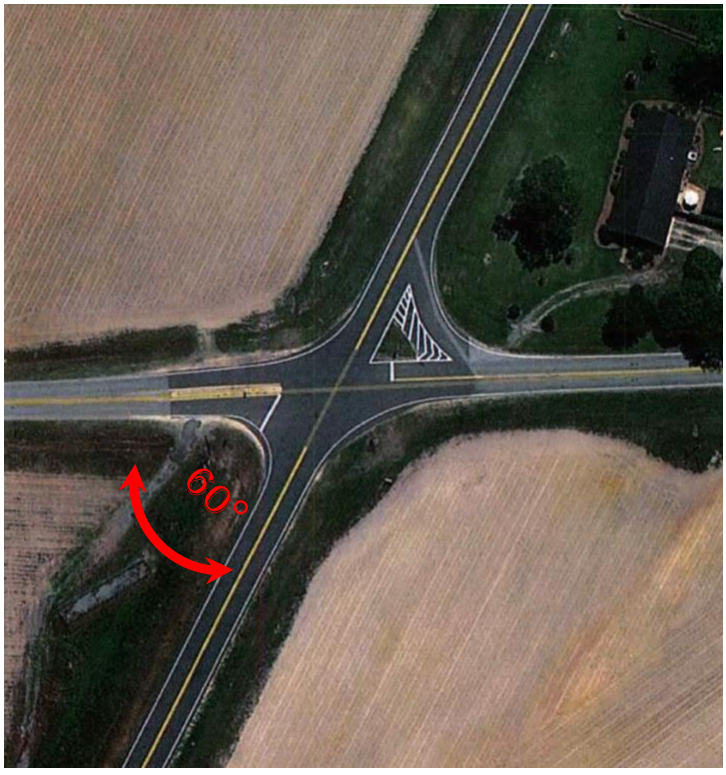
A. Statement of facts

This case arises from the tragic and preventable death of twenty-four-year-old Ashleigh Munro. On November 10, 2017, Ashleigh was the front-seat passenger in a 2006 Toyota RAV4 ("RAV4") riding southbound on Thigpen Trail approaching the intersection of GA 37 in Colquitt County. R2. 10. Traffic on

[2] The appellate record consists of 32 volumes: R1, the index, R2 through R28, the trial court record, T29., the transcript index, T30., the transcript of the May 2, 2022 motion hearing, R31, the record supplement index, and R32, the record supplement volume. Where appropriate, specific references are indicated parenthetically, including pages and line numbers with reference to internal deposition pagination.

Thigpen Trail was required to stop, while traffic on GA 37 was not. R2. 26-27; R19. 1067 (¶¶ 7, 9-10). At the intersection, due to sight difficulties resulting from the overgrown vegetation and the acute angle of the intersection, the RAV4 came to nearly a complete stop before proceeding into the intersection as a tractor trailer was also crossing the intersection on GA 37. R17. 928. The vehicles collided, and in the resulting collision Ashleigh suffered excruciating pain before finally succumbing to her injuries. R2. 15-16.

The intersection, which is owned, inspected, and maintained by the Georgia Department of Transportation ("GDOT"), intersects at an angle of exactly 60 degrees. R17. 872, 879 (32:12-25; 33:1-7; 58:3-19).



R15. 789 (degree markings added).

Skewed intersecting angles at 60 degrees or less create significant safety issues because vehicles are exposed to conflicting traffic for a longer time span, drivers are required to turn their heads considerably to see across the entire sight triangle, and lateral sight lines are often obstructed by the vehicle body. R32. 994 (¶ 16); *see also* R17. 871 (27:7-13), 927 (22:3-17). The angle is one problem with the intersection. But there was another. On the day of the collision, sight distance at the subject intersection was further obstructed due to an overgrowth of bushes, trees, and other vegetation located on left-hand side GA 37 in the east bound direction approaching Thigpen Trail. R17. 884 (79:4-19), 928 (27:15-25). By GDOT's own admission, the hazardous vegetation at the subject intersection was located in GDOT's right-of-way. R21. 1186 (25:13-24; 26:1-11).

GDOT originally designed and constructed the subject intersection in 1931 during the construction of GA 37. R21. 1198 (75:16-25; 76: 1-16); R22. 1282 (13:20-25), 1283 (14:1-9). GDOT traffic engineer Randy Rathburn testified that if the subject intersection was built according to GDOT's original design plans, he assumed the angle "would have been 60 degrees." R21. 1198 (76:5-16). While the subject intersection underwent improvement projects in 1956 and 1960, there is no indication that either project effected or modified the angle of the intersection as it

originally existed. R22. 1283 (14:25; 15:1-13); R32. 994 (¶ 14). Herman Hill, a well-known and respected expert on traffic engineering in the State of Georgia, stated by affidavit that GDOT failed to design the subject intersection in conformity with generally accepted engineering and design standards in effect at the time it was originally designed by failing to align the subject intersection to meet at or nearly at a 90-degree angle. R2. 30-36. While no nationally published design standards existed in 1931, Mr. Hill testified that he had personal knowledge of the generally accepted engineering and design standards in effect at the time the subject intersection was initially designed based on his review of the applicable industry standards pre-dating the intersection, as well as his education, training, and experience. R32. 987-995. Mr. Hill further attested that GDOT failed to adequately inspect the intersection to detect safety hazards and ensure compliance with appliable standards and regulations. *Id.* The failure to adequately inspect and maintain the intersection allowed the vegetation in the right of way to overgrow and further obstruct the sight lines at an already difficult intersection with a bad intersecting angle.

B. Proceedings below

Appellants, as the surviving parents of Ashleigh Munro, filed suit against GDOT on October 16, 2018. R2. 5. Appellants attached the expert affidavit of

Professional Engineer Herman Hill to their Complaint describing the ways in which the construction of the intersection violated generally accepted highway safety maintenance standards and engineering principles and failed to properly and timely identify and maintain the intersection in a safe condition. R2. 30-36. On November 18, 2021, Mr. Hill executed his second expert affidavit, which expanded upon his earlier opinions.[3] R32. 987-995.

On September 15, 2021, GDOT moved to dismiss for lack of subject matter jurisdiction pursuant to O.C.G.A. § 9-11-12(b)(1).[4] R7. 287-316. In support of its motion, GDOT attached a competing expert affidavit and claimed immunity from Appellants' negligent design and maintenance claims under the design standards exception. O.C.G.A. § 50-21-24(10). *Id.* GDOT did not, however, claim that any exception to the state's immunity waiver applied to Appellants' negligent inspection claim. On November 22, 2021, Appellants filed their brief in opposition to GDOT's motion to dismiss. R16. 805-827. In GDOT's reply brief in support of its motion to dismiss, GDOT expressly conceded that it had not preserved its

[3] *See Lennen v. Dep't of Transp*., 239 Ga. App. 729, 730 (1999) ("When the expert's affidavit is filed contemporaneously with the complaint, a plaintiff is allowed to supplement the affidavit if its sufficiency is challenged.").
[4] GDOT also contemporaneously filed a *Daubert* motion, a motion for summary judgment, and a motion in limine. Those motions were denied as moot and are not at issue here.

sovereign immunity to Appellants' negligent inspection claims pursuant to O.C.G.A. § 50-21-24(8). R23. 1341-1342.

The trial court held a hearing on GDOT's motion to dismiss on May 2, 2022. R28. 1733-1734. On June 21, 2022, the trial court granted GDOT's motion to dismiss in a cursory one-paragraph order lacking any factual findings or application of the law, and dismissing the entire case despite the fact that GDOT admitted that the entire case cannot be dismissed. R28. 1792-1793. The order also denied GDOT's other pending motions as moot. *Id.* On June 29, 2022, Appellants timely filed a notice of appeal. R2. 1-2.

C. Preservation of error

The enumeration of errors set forth below in Part Two were properly preserved for appeal through Appellants' Response to GDOT's Motion to Dismiss, R16. 805-827, and Responses in Opposition to GDOT's Motion to Exclude, Motion in Limine, and Motion for Summary Judgment, which Appellants expressly incorporated by reference. R16-19. 805-1064. These issues were also presented by Appellants' counsel at the oral argument on May 2, 2022. T30. 2-40.

II. Enumeration of Errors

1. The trial court erred in granting GDOT's motion to dismiss based on Appellants' negligent inspection claim.

2. The trial court erred in granting GDOT's motion to dismiss based on Appellants' negligent design claim.

This Court has jurisdiction over this appeal insofar as the action is not within the class of actions as to which original appellate jurisdiction is vested or exclusively vested in the Supreme Court of Georgia.

III. Argument and Citation of Authorities

A. Standard of Review

"Subject matter jurisdiction refers to the authority of a court to hear a specific claim[.]" *Spann v. Davis*, 312 Ga. 843, 851(2021). A motion to dismiss "asserting sovereign immunity is based upon the trial court's lack of subject matter jurisdiction, rather than the merits of the plaintiff's claim." *Ambati v. Bd. of Regents*, 313 Ga. App. 282, 283 (2011); O.C.G.A. § 9-11-12(b)(1). The Court reviews "a trial court's grant of a motion to dismiss on sovereign-immunity grounds de novo, bearing in mind that a motion to dismiss may be granted only when a plaintiff would not be entitled to relief under any set of facts that could be

proven in support of its claim." *Sadler v. Dep't of Transp*., 311 Ga. App. 601, 603 (2011) (Punctuation and footnotes omitted).

When ruling upon a motion to dismiss for lack of subject matter jurisdiction, the trial court is entitled to consider evidence outside the pleadings "to the extent that it shed[s] light on the trial court's jurisdiction over [Plaintiffs'] claims against the DOT." *Petree v. Dep't of Transp*., 340 Ga. App. 694, 699 (2017) (Citation and punctuation omitted). "When a defendant challenges a plaintiff's standing by bringing an OCGA § 9-11-12(b)(1) motion, the plaintiff bears the burden of establishing that jurisdiction exists*." Stillwell v. Topa Ins. Co.*, 363 Ga. App. 126, 127 (2022) (footnote omitted). However, the Court must construe the pleadings "in the light most favorable to the nonmoving party with any doubts resolved in that party's favor." *Douglas Cnty. v. Hamilton State Bank*, 340 Ga. App. 801, 801 (2017). Waiver of sovereign immunity ultimately rests on where the preponderance of the evidence lies. *Dep't of Transp. v. Thompson*, 354 Ga. App. 200, 207 (2020).

B. The State/GDOT's waiver of sovereign immunity

Under the Georgia Tort Claims Act, the State waives its sovereign immunity "for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances."

O.C.G.A. § 50–21–23(a). The "express purpose" of the Georgia Tort Claims Act "is to create a remedy for citizens injured by a governmental tortfeasor when in the past such a remedy was unavailable as a result of 'the strict application of the traditional doctrine of sovereign immunity.'" *Georgia Dep't of Transp. v. Brown*, 18 Ga. App. 178, 182 (1995) (quoting O.C.G.A. § 50–21–21(a)). This waiver, which would otherwise establish state liability equivalent to any private entity, is subject to thirteen exceptions. *See* O.C.G.A. § 50-21-24(1-13). Here, the trial court erred in dismissing Appellants' claims because GDOT waived immunity due to (1) its negligent inspection and (2) its design of the subject intersection. Each of these contentions is discussed below.

C. The trial court erred in granting GDOT's motion to dismiss based on Appellants' negligent inspection claim

The trial court erred in granting GDOT's motion to dismiss because GDOT waived its sovereign immunity due to its negligent inspection of the intersection to detect and correct hazards to health and safety, which was expressly alleged in the Complaint. R2. 11-16. For instance, the Appellants allege that the "DOT was and is responsible for the intersection's design, construction, inspection and maintenance and [] DOT knew, or should have known of the dangerous conditions of the intersection." R2. 11 (¶ 16). In its briefing before the trial court, GDOT

conceded that it had a duty to inspect the intersection, and admitted that it had not preserved any immunity for harms resulting from that duty:

> It is ***undisputed*** that a portion of the intersection and roadway at issue is State-owned as opposed to county-owned. GDOT MTD at 2, 14. GDOT ***does not dispute*** that it has the duty to inspect the state-owned portion of the intersection consistent with applicable inspection procedures and standards. And, ***GDOT does not claim in this motion that the State has preserved its sovereign immunity with respect to the "inspection exception."*** Plaintiffs have failed to prove any negligence on the part of GDOT in the way it inspected or maintained the state-owned portion of the intersection.

R23. 1341 (emphasis added).

The Georgia Tort Claims Act does provide an exclusion to the sovereign immunity waiver for certain inspections, but only those involving property "other than property owned by the state." O.C.G.A. § 50-21-24 (8). And because it acknowledges (and the evidence shows) that the area Appellants claim it negligently inspected was property owned by the state, this exception has no application. Instead, GDOT summarily concluded that Appellants "failed to prove any negligence on the part of GDOT in the way it inspected or maintained the state-owned portion of the intersection." R23. 1341. But even if this were true, which Appellants dispute, this argument would not be the proper subject of a motion to dismiss, and instead should be dealt with in a motion for summary

judgment.[5] In the context of a motion to dismiss, on the other hand, "issues of the waiver of sovereign immunity are issues of law for determination by the trial court…based upon the face of the complaint where the nature of the complaint indicates whether there is waiver with undisputed facts." *Dep't of Transp. v. Dupree*, 256 Ga. App. 668, 673 (2002), *disapproved on other grounds by Dep't of Transp. v. Thompson*, 354 Ga. App. 200 (2020). While GDOT argued that Appellants "failed to prove any negligence on the part of GDOT in the way it inspected or maintained the state-owned portion of the intersection," that was not the issue that the trial court ruled upon. "[T]he lack of subject-matter jurisdiction…is a matter in abatement, ***not a motion designed to test the merits of the claim***[.]" *Farmer v. Dep't of Corr.*, 346 Ga. App. 387, 395 (2018) (emphasis added). Because Appellants properly alleged that GDOT was liable based on its failure to inspect property owned by the state, the trial court's ruling in this regard was error.

Even without GDOT's concession, the evidence demonstrates that it failed to inspect its right-of-way for hazardous vegetation at the subject intersection. To overcome immunity under the inspection powers exception codified in O.C.G.A. §

[5] GDOT's motion for summary judgment was denied as moot.

50-21-24(8),[6] the Appellants must establish by a preponderance of the evidence that "the DOT's role included inspection of the State roadway and intersection itself to detect hazards or to determine compliance with laws, regulations, codes, or ordinances." *Dep't of Transp. v. Kovalcik*, 328 Ga. App. 185, 188 (2014). When the claim is grounded upon GDOT's failure to inspect its own right-of-way for hazardous vegetation, Appellants "must show that the vegetation extended into DOT's right-of-way." *Welch v. Georgia Dep't of Transp*., 283 Ga. App. 903, 906 (2007); *see also White v. Dep't of Transp.*, 337 Ga. App. 572, 574 (2016) (dismissing negligent inspection claim based on sovereign immunity because diseased tree was not located in GDOT's right-of-way).

GDOT traffic engineer Randy Rathburn expressly testified that it is GDOT's "responsibility to remove anything that could potentially cause sight distance issues." R21. 1185 (24:4-6). Mr. Rathburn further testified as follows:

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[6] O.C.G.A. § 50–21–24(8) provides:

> The [S]tate shall have no liability for losses resulting from: ... [i]nspection powers or functions, including ... making an inadequate or negligent inspection of any property ***other than property owned by the [S]tate*** to determine whether the property complies with or violates any law, regulation, code, or ordinance ***or contains a hazard to health or safety [.]***

(emphasis added).

Q. Okay. And then with respect to the photograph that was taken within days of the intersection collision involving Ashleigh Munro, there is the presence of overgrowth, bushes, trees in the DOT right-of-way on 37 West, is there not?

A. There does appear to be bushes and -- and -- and growth on the right-of-way.

Q. Okay. And the elimination of those bushes, overgrowth, trees, shrubbery on 37 West would have -- is there any question in your mind that would have been -- would have increased a motorist's visibility since you're removing a potential obstruction? Is there any --

A. Potentially, they could be, as long as it's -- if it's within their line of sight.

Q. …[W]hen you don't have the bushes there, when you don't have the shrubs there, when you don't have the overgrowth there, you are eliminating a potential condition that could impact sight visibility and the safety of the general motoring public; would you agree with that?

A. That's true, yes, sir.

Q. And all that is part and parcel of the Georgia Department of Transportation's responsibility of maintaining -- of maintaining the public roads and highways for the safety of the general public, true?

A. Yes, sir.

R21. 1186 (25:21-25; 26:1-25; 27:1-7).

In contrast with *Welch*, where the Court found that there was no definite evidence that overgrown vegetation at an intersection extended into GDOT's right-

of-way, 283 Ga. App. at 906-907, GDOT's own engineer expressly admitted that the hazardous vegetation at issue was located in GDOT's right-of-way at the subject intersection. In addition to Rathburn's testimony, Herman Hill opined that the vegetation located in GDOT's right-of-way at the subject intersection contributed to obstructing sight distance of the RAV4. R17. 884 (79:4-19). Accordingly, based on expert testimony and GDOT's own words, the inspection powers exception under O.C.G.A. § 50–21–24(8) does not apply to GDOT's negligent inspection of the hazardous vegetation located in GDOT's right-of-way at the subject intersection. And therefore, the trial court erred in granting GDOT's motion to dismiss this claim based on sovereign immunity.

D. The trial court erred in granting the GDOT's motion to dismiss based on Appellants' negligent design claim

The trial court erred in finding that Appellants' suit was barred by the highway design standards exception of the GTCA. The Georgia Tort Claims Act provides that the State has no liability for the plan or design of a highway if the plan or design was "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). "[W]here [expert testimony] is presented that 'some of [GDOT's] actions and failures to act…violated generally accepted engineering standards,...an issue of fact exists on the question of whether [GDOT] violated

generally accepted engineering standards, thus removing it from the protection of the design standards exception.'" *Georgia Dep't of Transp. v. Heller*, 285 Ga. 262, 265 (2009) (quoting *Dept. of Transp. v. Brown*, 267 Ga. 6, 8(2) (1996)) (cleaned up). Appellants submitted the competent testimony of professional engineer Herman Hill, who testified that GDOT's design of the subject intersection with a skewed intersecting angle of 60-degrees failed to comply with the generally accepted engineering and design standards in effect in 1931, 1954, and 1960.

While it is not clear on what grounds the trial court based its determination that GDOT had preserved sovereign immunity, a proper analysis of the law and facts shows that GDOT waived immunity.

1. The 1931 standards

Even though the subject intersection was originally designed in 1931, GDOT grounded its trial court arguments on the mistaken belief that the only applicable design standards were those in effect at the time GDOT modified the intersection in 1954 and 1960.[7] While GDOT acknowledges that the angle of the intersection is

[7] As discussed in the following section, dismissal was improper under the design standards applicable at any of the relevant time periods, because the intersection does not comply with the generally accepted engineering standards in 1954 or 1960 that GDOT claims apply.

the main design element at issue, GDOT's own expert engineer, Brent Story testified to the following:

> Q. And did those plans create that angle, or was the angle existing at the time of the work in 1960?
>
> A. That I do – ***I do not know if it existed prior to 1960***. But those plans constructed the intersection as it is today.
>
> …
>
> Q. Okay. Have you seen the 1931 plans for this roadway?
>
> A. I – I probably looked at a cover sheet of that when we were researching for plans of the intersection.

R22. 1282 (13:4-24) (emphasis added).

> Q. …In 1931, if the angle of the intersection at that time is the same as it was in 1960, does that change your opinions as to what design standards would apply to this intersection?
>
> A. No. it does not.
>
> Q. And why not?
>
> A. Because the 1956 and 1960 plans constructed Thigpen Trail, and they represent what's out there today. So my opinions are based on the latest evidence that I have on what actually constructed Thigpen Trail as it intersects State Route 37.

R22. 1283 (15:3-13).

Significantly, immunity does not extend to road design issues that are not substantially affected during road improvement projects. *Steele v. Georgia Dep't of Transp*., 271 Ga. App. 374, 379 (2005). And since Mr. Story readily admitted he

"[did] not know if the [60-degree intersection angle] existed prior to 1960," he cannot competently testify that the 1956 or 1960 plans substantially affected or modified the angle of the intersection as it originally existed.[8] Accordingly, Mr. Story cannot competently testify that the GDOT and AASHO geometric design standards from 1953 and 1954 apply to this intersection. Moreover, because Mr. Story did not contradict or challenge any opinions regarding the generally accepted engineering and design standards in 1931, Mr. Hill's opinion as to the applicable standards in effect at the time the design of the subject intersection was originally completed in 1931 was and remain unopposed. At most, Mr. Story's testimony creates a jury question regarding the applicable standards for the intersection. *See, e.g.*, *Murray v. Dep't of Transp.*, 240 Ga. App. 285, 287 (1999) ("The affidavits submitted by the DOT establish only that there is conflicting expert testimony, which is not sufficient to show there is no triable issue of fact."); *Lennen v. Dep't of Transp.*, 239 Ga. App. 729, 730 (1999) ("[T]he existence of conflicting expert testimony as to whether DOT complied with the applicable engineering standards would preclude the total grant of summary judgment…").

[8] GDOT traffic engineer Randy Rathburn testified that if the subject intersection was built according to GDOT's original design plans, he assumed the angle "would have been 60 degrees." R21. 1198 (76:5-16).

Contrary to Mr. Story's position, Mr. Hill's affidavit attests that "[w]hen the Georgia Department of Transportation originally designed the subject intersection in 1931, the generally accepted engineering and design standards were to align intersecting roadways at or nearly at a 90-degree angle." R32. 993 (¶ 13). Mr. Hill's expert opinion is based on his "personal knowledge of the generally accepted engineering and design standards in effect at the time the design of the subject intersection was originally completed in 1931." *Id.* (¶ 12); *Murray*, 240 Ga. App. at 287 ("The [Plaintiffs] have submitted [expert] testimony by affidavit, and a statement in an affidavit that it is based on personal knowledge is generally sufficient."). Mr. Hill's personal knowledge is based upon his review of "[p]re-1932 road design publications regarding the generally accepted engineering and geometric design standards for intersections." R32. 993 (¶ 8); *see also* R17. 874 (40:24-25; 41:1-25); 875 (42:1-25; 43:1-25; 44:1-24: 45:1-5) (overviewing road design publications from 1921, 1922, 1928, 1929, and 1931); *see also Murray*, 240 Ga. App. at 287 ("There is…no evidence presented here that the expert relied solely on a document that postdated the highway design."). During Mr. Hill's deposition, in response to inquiries regarding the publications relied upon in forming his opinions, Mr. Hill testified as follows:

> Q. And do you have an AASHTO[9] requirement that is cited on page 4 of Exhibit 7?
>
> A. I don't have an AASHTO requirement because when these were designed – when these plans were done…it was all AASHO in the first place, or either some other source. But…what we listed a while ago about other topics and other papers that I've got in my notebook here showing what the industry comments and standards are with regard to acute angle intersections – as you probably know…AASHO, at that time, had not produced at least a national type of policy. However, there were plenty of – as these papers here indicate, there's plenty of information in various papers and textbooks that were explaining how these things should be handled, and so that would be my source…and that's solid stuff.

R17. 880 (63:10-25).

> …
>
> A. …you already know that there was not an AASHO publication for 1930. So what we did, and what I did is I'm using published literature that is establishing what the industry standards and thoughts and processes were at that time…

R17. 880 (65:16-20).

In addition to his "review of the applicable industry standards for the time period, this knowledge is based [upon his] education, training, and experience." R32. 993 (¶ 12); *see also Reidling v. City of Gainesville,* 280 Ga. App. 698, 702

[9] AASHTO is the "American Association of State Highway and Transportation Officials," the organization that issues roadway construction and design standards in the U.S. It was founded as AASHO ("American Association of State Highway Officials") in 1914 and changed its name to the current version in 1973.

(2006) (holding GDOT waived sovereign immunity where plaintiff submitted affidavit that said, "based on [the expert's] education and background," GDOT's failure "to consider the impact of depositing...excess fill soil [on property]...constituted a failure to comply with accepted engineering and design standards").

After establishing the applicable standard, Mr. Hill attested that GDOT's "original 1931 design of the subject intersection…violated generally accepted engineering and design standards by failing to align the intersection to meet at or nearly at a 90-degree angle." R32. 994 (¶ 17). Mr. Hill further opined that GDOT's ongoing failure "to update the design of the subject intersection in order to realign the intersecting angle closer to 90-degrees…is currently in violation of generally accepted engineering and design standards." *Id.*; *see also Dep't of Transp. v. Brown*, 267 Ga. 6, 8 (1996) (holding, in case in which MUTCD[10] did not contain generally accepted design standards on the relevant question, that expert testimony "that some of DOT's actions and failures to act...violated generally accepted engineering standards" was sufficient to show waiver of sovereign immunity). Accordingly, despite GDOT's suggestions to the contrary, Mr. Hill's testimony

[10] "Manual on Uniform Traffic Control Devices."

plainly establishes the applicable generally accepted design standards. Therefore, immunity is waived and GDOT's motion should be denied.

2. The 1956 and 1960 standards

GDOT claims that the generally accepted engineering standards in effect in 1956 and 1960 apply to this intersection. Even if this Court agrees and finds that the applicable engineering and design standards are those in effect at the time the intersection underwent improvement projects in 1956 and 1960, GDOT's design ***still*** violated those standards. According to GDOT, "a 60 degree angle is within the range of standards published by AASHO…for geometric design of intersections both as of the date of design and at the date of the subject accident." R7. 279. But as Hill stated by affidavit, "[w]hen the subject intersection… underwent improvement projects in 1956 and 1960, the generally accepted engineering and design standards were for intersecting roads to meet at or nearly at right angles, and deviations were only permissible if ***above*** 60-degrees." R32. 994 (¶ 15) (emphasis added); *see also* R17. 880 (64-65).[11] The testimony of Brent Story, GDOT's engineering expert, supports this contention as well.

[11] *See also He-Po Gas, Inc. v. Roath*, 87 Ga. App. 827, 828 (1953) ("The intersection involved is not an ordinary intersection where two streets intersect at a ninety-degree angle but is one where the streets intersect more in the shape of an 'X.'").

Mr. Story testified that his opinion regarding the applicable standards for the design of the subject intersection is based on a single page of the book titled, A Policy on Geometric Design of Rural Highway published in 1954. *See generally* R15. 782-783; R22. 1297-1298, 1300-1301. On the issue of intersection skew angles, the language in the 1954 publication upon which he relies is nearly identical to the 1965 version of the same publication. Specifically, Mr. Story testified as follows:

> Q. I'm reading from the beginning of this paragraph. And I think you'll remember this language that I said earlier it's pretty important because we're going to see it later. It says, "Regardless of the type of intersection, **it is desirable for safety and economy that intersecting roads meet at or nearly at right angles**," period. Did I read that correctly?
>
> A. Yes.
>
> Q. **So as of 1965, the generally accepted design standard for intersections was that they meet at or nearly at right angles?**
>
> A. That's written in the policy.
>
> Q. All right. Now, this is important. At the bottom of page 389, do you see this last sentence where it starts.
>
> A. Uh-huh (affirmative)
>
> Q. It says, "While a right-angle crossing normally is desired, some deviation is permissible. Angles ***above about 60 degrees*** produce only a small reduction in visibility, which often does not warrant realignment closer to 90 degrees." Did I read that correctly?

A. Yes.

Q. So this language does not say, "60 degrees is a minimum" correct?

A. It doesn't say that, no.

Q. It says, "Angles ***above*** 60 degrees"; right?

A. Yes.

Q. Our intersection is a 60-degree angle; right?

A. Right.

R22. 1297 (71:15-25; 72:1-22) (emphasis added). More importantly, GDOT's expert admits that the generally accepted engineering standards for intersections have always been that the intersecting roads should meet at or nearly at a 90-degree angle unless something prohibits a right-angled intersection:

Q. All right. And the truth is that it has always been the generally accepted design standard for intersections to meet at or near 90-degree angles; true?

A. As far back as the guidelines that I've looked at on older roadways, yes.

Q. So that is correct; right?

A. When it's practical to do so. AASHTO and AASHO always clarify that.

R22. 1299 (78:15-23). Thus, based on the very publication upon which Brent Story's entire expert opinion relies, the generally accepted engineering and design

standards were for intersecting roads to meet at or nearly at right angles, and deviations were only permissible if *above* 60-degrees. Furthermore, designing intersections to meet at or near 90 degrees is the appropriate standard "when it's practical to do so," and Story admitted he did not see anything in the 1960 plans for the subject intersection that would have made it impractical to create a 90-degree angle. R22. 1286 (27:7-10). Therefore, even if this Court finds that the applicable engineering and design standards are those in effect at the time the subject intersection underwent improvement projects in 1956 and 1960, GDOT's design still violated those standards, and this violation continues today.

3. Appellants' engineering expert is not required to base opinions on any published standards

Appellants have submitted Mr. Hill's second affidavit, which attests that "[w]hen the Georgia Department of Transportation originally designed the subject intersection in 1931, the generally accepted engineering and design standards were to align intersecting roadways at or nearly at a 90-degree angle." R32. 993 (¶ 13). Mr. Hill's expert opinion is based on his "personal knowledge of the generally accepted engineering and design standards in effect at the time the design of the subject intersection was originally completed in 1931." *Id.* (¶ 12). Mr. Hill's personal knowledge is based upon his review of "[p]re-1932 road design publications regarding the generally accepted engineering and geometric design

standards for intersections." R32. 992 (¶ 8). And, as has been shown, GDOT's own expert agrees.

GDOT should know that experts are not required to base their testimony regarding design standards upon any particular publication, such as the Manual on Uniform Traffic Control Devices ("MUTCD") or some other AASHTO publication. *See, e.g., Murray*, 240 Ga. App. at 287 (finding the testimony of the expert to be competent despite the nonexistence of published standards); *Hamilton-King v. HNTB Georgia, Inc*., 296 Ga. App. 864 (2009), *rev'd on other grounds*, 287 Ga. 641 (2010) (in a wrongful death case alleging negligent design of a bridge widening project, Court of Appeals noted that Section 1A-4 of the MUTCD specifically states that the manual is not a substitute for engineering judgment). Moreover, "[t]he affidavits submitted by the DOT establish only that there is conflicting expert testimony, which is not sufficient to show there is no triable issue of fact." *Murray*, 240 Ga. App. at 287 (citing *Lennen v. Dept. of Transp*., 239 Ga. App. 729 (1999)). Thus, at worst here, factual issues remain regarding whether GDOT's design decisions violated generally accepted engineering standards. *See Heller v. City of Atlanta*, 290 Ga. App. 345, 354 (2008) (liability under O.C.G.A. § 50–21–24(10) is "a matter for a jury to decide").

4. O.C.G.A. § 24-7-702(c)(1)

In its trial court motions, GDOT argued that Mr. Hill could not provide expert testimony in this case because he was not licensed as an engineer at the time GA 37 was designed and constructed. Specifically, GDOT reasoned that because Mr. Hill was not licensed as a professional engineer until 1969, which was after the roadway was designed, he cannot provide an expert opinion that the design of GA 37 fell below the applicable standard of care. For support, GDOT cited only medical malpractice cases and O.C.G.A. § 24-7-702.

Under O.C.G.A. § 24-7-702(c)(1), an expert in a professional malpractice action must be licensed at the time an alleged negligent act or omission occurred. However, unlike in the medical malpractice context, where a culpable act or omission is complete upon its occurrence, the failure to prepare an original road design in substantial compliance with generally accepted engineering or design standards constitutes an *ongoing* omission on the part of GDOT. *Lennen v. Dep't of Transp*., 239 Ga. App. 729, 730 (1999) (precluding summary judgment based on Herman Hill's testimony that the design was "not in compliance with [generally accepted engineering standards] for the period of 1965 to the present."); *cf. Murray v. Georgia Dep't of Transp*., 284 Ga. App. 263, 267 (2007) (holding that "[i]n the absence of any evidence that the design of the intersection failed to comply with

then existing engineering and design standards," O.C.G.A. § 50-21-24(10) "rendered the State DOT immune from any claim that it proximately caused the fatal accident because it negligently failed to upgrade the design of the intersection to higher standards to make it safer."). Indeed, the highway design standards exception to the Tort Claims Act provides "an exception ***only when*** there was no engineering design and planning malpractice by DOT." *Dep't of Transp. v. Dupree*, 256 Ga. App. 668, 677 (2002) (citation omitted) (emphasis added).

Because the design of the subject intersection failed to comply with generally accepted engineering and design standards in effect at the time of construction, GDOT is liable for its ongoing failing to upgrade the design of the intersection to the correct standards. Mr. Hill, who has been a licensed traffic engineer since 1969, can competently testify regarding GDOT's negligent omission to remedy the defective design from 1969-present, which can only arise if the original was not in compliance with then existing engineering and design standards. Unsurprisingly, Georgia courts have repeatedly found engineering experts (including Herman Hill and GDOT's own experts) competent to offer

testimony on the generally accepted engineering standards applicable to highways and road designs completed long before the experts ever became licensed.[12]

Here, because there is evidence that the original design of the subject intersection failed to comply with existing engineering standards, GDOT is likewise not exempt from liability for its ***ongoing failure*** to upgrade its initial design. Indeed, "[t]he skewed angle of [the intersection] continues to create a safety problem with no safety changes which relate to sight distance." R17. 880 (37:2-5). Moreover, as has been shown, GDOT's engineering expert expressly conceded that the generally accepted engineering standards for intersections have always been that the intersecting roads should meet at or nearly at a 90-degree angle unless something prohibits a right-angled intersection. R22. 1299 (78:15-23); *cf. Dep't of Transp. v. Cannady*, 270 Ga. 427, 428 (1999) (GDOT conceded it had failed to maintain highway in accordance with the original 1931 plans). The Georgia Supreme Court "has made clear that where evidence is presented that 'some of DOT's actions and failures to act with regard to an area covered by the

[12] *See, e.g., Murray v. Dep't of Transp*., 240 Ga. App. 285, 287 (1999) (plaintiff's expert testifying on 1940 design standards); *Daniels v. Dep't of Transp.*, 222 Ga. App. 237, 238, (1996) (GDOT expert testifying on 1940 design standards); *Lennen v. Dep't of Transp*., 239 Ga. App. 729, 730 (1999) (Herman Hill testifying on 1965 design standards); *Dep't of Transp. v. Cox*, 246 Ga. App. 221, 223 (2000) (GDOT expert testifying on 1969 design standards).

design standards exception violated generally accepted engineering standards…an issue of fact exists on the question of whether DOT violated generally accepted engineering standards, thus removing it from the protection of the design standards exception of the Tort Claims Act.'" *Georgia Dep't of Transp. v. Heller*, 285 Ga. 262, 264 (2009) (quoting *Dept. of Transp. v. Brown*, 267 Ga. 6, 8 (1996)). Accordingly, because Mr. Hill is perfectly qualified to offer expert testimony on GDOT's ongoing, failure, GDOT cannot escape liability on this technicality defense.

However, even if this Court were to find that Mr. Hill's testimony cannot constitute "expert testimony" by a hyper technical reading of the rule, this Court can still find that Mr. Hill's expert opinions and supporting literature constitutes "competent evidence." The highway design exception to the Tort Claims Act requires that "expert testimony ***or other competent evidence***" be submitted to show that the plan or design was not prepared in substantial compliance with generally accepted engineering or design standards at the time the plan was prepared. *Dep't of Transp. v. Dupree*, 256 Ga. App. 668, 677 (2002); *see also Daniels v. Dep't of Transp.*, 222 Ga. App. 237, 238 (1996) ("In determining the extent of the DOT's liability under the Georgia Tort Claims Act, we must construe its provisions in a manner that will uphold it in every part."); *see also Lucas v. Beckman Coulter,*

Inc., 303 Ga. 261, 263 (2018) (In interpreting statutes, courts must "avoid a construction that makes some language mere surplusage.").

Georgia courts have long avoided statutory interpretations that lead to "unjust and absurd results" or "defeat[] the remedial purpose" of the statute. *See Hinton v. Interstate Guar. Ins. Co*., 267 Ga. 516, 518 (1997). If a Georgia citizen could never bring a claim against GDOT for violating generally accepted engineering standards for the sole reason that there are no living engineers that were licensed at the time of the original design, GDOT would have absolute immunity without any incentive or obligation to correct defective designs endangering Georgia citizens. This is an unreasonable and absurd consequence never intended by the Georgia General Assembly. *See Haugen v. Henry County*, 277 Ga. 743, 746 (2) (2004) ("The judiciary has the duty to reject a construction of a statute which will result in unreasonable consequences or absurd results not contemplated by the legislature."); *New Amsterdam Cas. Co. v. Freeland*, 216 Ga. 491, 495 (1960) ("Where the letter of the statute results in absurdity or injustice or would lead to contradictions, the meaning of general language may be restrained by the spirit or reason of the statute.").

Under a reasonable interpretation of the statute, Mr. Hill's expert testimony and supporting literature clearly constitute "competent evidence" of the generally

accepted engineering standards in effect at the time the subject intersection was originally designed or later modified, which still apply to this day.

5. Traffic control devices and speed breakers

GDOT argued that Appellants failed to establish any applicable standard regarding GDOT's breach of its duty to warn motorists by installing warning devices and speed breakers. R7. 305. But a traffic engineer has a duty to remedy a dangerous situation when that engineer knows or reasonably should know that traffic devices or signal timing need to be changed to meet current traffic conditions. R32. 992 (¶ 9). That duty arises out of the traffic engineer's continuing duty "to undertake remedial steps and measures in maintaining adequate and safe traffic control of the subject intersection and its immediate vicinity." *Id.* As Hill opines, "[t]he extensive accident history of the subject intersection…placed [GDOT] on notice that a dangerous condition or conditions existed at this intersection endangering the general motoring public." *Id.* ¶ 11.

In the trial court, GDOT further contended that Appellants were required to identify "mandatory" as opposed to "permissive" or discretionary standards which it "may" follow. R7. 305-307. Specifically, GDOT argued that "the decision to install a warning sign is a matter of design and involves GDOT's discretion and 'engineering judgment.'" *Id.*, p. 22 (citing the MUTCD). But both this Court and

the Supreme Court have rejected the argument that the MUTCD's identification of a warning sign or other traffic control device as an "option" absolves GDOT from liability for failing to implement that option. For example, in *Dep't of Transp. v. Brown*, the Supreme Court held that although the MUTCD "has the status" of "generally accepted engineering or design standards," the MUTCD "does *not* have the status of being the exclusive sources of engineering and design standards." 267 Ga. 6, 8 (1996) (emphasis added). The Court of Appeals held the same in *Department of Transportation v. Dupree*, 256 Ga. App. 668, 677 (2002) (abrogated on other grounds). *See also Sadler v. Dep't of Transp. of State*, 311 Ga. App. 601, 606 n.22 (2011) (citing *Dep't of Transp. v. Mikell*, 229 Ga.App. 54, 56(1)(a) (1997)). The mere fact that the MUTCD did not *require* GDOT to implement warning devices and speed breakers at the subject intersection does not mean it cannot be held liable for failing to do so. In Georgia, the MUTCD is not the last word with respect to generally accepted engineering or design standards.

Moreover, GDOT is simply wrong that Mr. Hill is precluded from testifying that it should have implemented warning devices and speed breakers merely because the MUTCD identifies them as "discretionary" or "optional." As the Georgia Court of Appeals has held and reaffirmed, when the MUTCD identifies a warning sign or traffic control device as "permissive" or an "option," a plaintiff

must establish through expert testimony that generally accepted engineering standards required the permissive condition to be followed. *Sadler v. Dep't of Transp. of State*, 311 Ga. App. 601, 606 n.22 (2011) (quoting *Dep't of Transp. v. Mikell*, 229 Ga. App. 54, 56 (1997)).[13] "Just as expert witnesses are competent to establish standards in other professional malpractice actions…we see no reason, and DOT has supplied none, why expert witnesses should not be competent to do so in actions against DOT for engineering malpractice." *Brown*, 267 Ga. at 8 (internal citation omitted). In short, to prove GDOT is liable for failing to implement these options, Appellants are merely required to introduce expert testimony.

Here, Herman Hill expressly testified that, in his professional opinion, GDOT "failed to assure the traffic controls for this intersection were maintained to provide every operator clear indication about lane paths and stopping points." R17. 878 (54:17-20). While GDOT argues that "Hill cannot through his testimony impose a legal duty on GDOT that is not based upon the applicable statues, regulations or policies," R7. 313, the use of "engineering judgment" is exactly

[13] While GDOT cites *Mikell* extensively in its trial court briefing, R7. 305-307, 313-314, the plaintiffs in that action failed to provide any expert testimony whatsoever. Accordingly, to the extent GDOT suggest *Mikell* supports its argument that "Hill cannot through his testimony impose a legal duty on GDOT," R7. 313, *Mikell* is inapposite.

what the MUTCD requires when a traffic engineer, such as Hill, forms an opinion about what traffic control devices should be used at a given intersection. As the MUTCD states, "engineering judgment should be exercised in the selection and application of traffic control devices." *See* MUTCD § 1A.09(3).[14] It would be unreasonable for an engineer to conclude that because the MUTCD lists a potential solution to a dangerous situation as an "option" instead of mandating the solution, the solution should not be recommended or implemented. If an "option"" listed in the MUTCD would cure or improve a dangerous condition and implementing the "option" is feasible, Mr. Hill is certainly competent to testify that the traffic engineer has the professional obligation to recommend the "option" be implemented or explore other possible solutions to the dangerous condition.

[14] In its entirety, that section states the following:

> The decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment. Thus, while [the MUTCD] provides Standards, Guidance, and Options for design and applications of traffic control devices, this Manual should not be considered a substitute for engineering judgment. Engineering judgment should be exercised in the selection and applications of traffic control devices, as well as in the location and design of road and streets that the devices complement.

See MUTCD § 1A.09(3).

Moreover, Georgia statutory and case law is clear that GDOT *had a duty* with respect to the traffic signals at the subject intersection. As the Court of Appeals explained in *City of Fairburn v. Cook*,[15] GDOT "is required to provide 'substantial maintenance activities and operations'" with respect to "erection and maintenance of official department signs." 188 Ga. App. 58, 64–65 (1988) (quoting O.C.G.A. § 32–2–2(a)(1)). "Traffic signals" fall within the scope of "official department signs." *Id.* Accordingly, GDOT's attempts at subverting these requirements should be denied.

Conclusion

The law, facts, and GDOT's own words show that GDOT waived immunity due to its negligent inspection, design, and maintenance of the subject intersection. Because the trial court has subject matter jurisdiction over Appellants' negligent design, maintenance, and inspection claims, the trial court erred in granting GDOT's motion to dismiss pursuant O.C.G.A. § 9-11-12(b)(1).

Therefore, respectfully, the trial court should be reversed.

Signatures on following page

[15] *Disapproved on other grounds by Dep't of Pub. Safety v. Ragsdale*, 308 Ga. 210 (2020).

Respectfully submitted this 30th day of December, 2022.

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

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to allow documents in a PDF format sent via email to suffice for service. I further certify that counsel have been served by this method contemporaneously or prior to filing this document.

This 30th day of December, 2022.

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