IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

[redacted], as administrator of the estate of [redacted] and as guardian of J.H. and T.H., *Plaintiff*, v. MARTIN-ROBBINS FENCE COMPANY, GEORGIA DEPARTMENT OF TRANSPORTATION, ARCADIS U.S., INC. and JOHN DOES 1-10, *Defendants.*	Civil Action No.: [redacted]
[redacted] and [redacted] *Plaintiffs*, v. GEORGIA DEPARTMENT OF TRANSPORTATION and MARTIN-ROBBINS FENCE COMPANY, and ARCADIS U.S., INC. *Defendants.*	Civil Action No.: [redacted]

DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND BRIEF IN SUPPORT THEREOF

COMES NOW Defendant Georgia Department of Transportation ("GDOT") and files this Motion to Dismiss and Brief in Support for lack of subject matter jurisdiction under O.C.G.A. § 9-11-12(b) (1), and shows this Court as follows:

Plaintiffs [redacted] ("Plaintiffs") are functionally seeking to hold GDOT responsible for the acts of GDOT's independent contractors

Martin-Robbins Fence Company ("MR") and Arcadis U.S. ("Arcadis"), private entities with whom GDOT has contracted with. Plaintiffs' [redacted] First Amended Complaint, dated October 1, 2020, attached hereto as Exhibit 1. The [redacted] Complaint and the [redacted] Complaint, [redacted] Renewal Complaint, attached hereto as Exhibit 2, [redacted] First Amended Complaint, attached hereto as Exhibit 3, in this consolidated case[1] seek to recover damages for personal injuries claims and a wrongful death claim in connection with a fatal motor vehicle accident on June 3, 2018 in Fulton County along Georgia State Highway I-85, southbound, near Exit 76, that involved a guardrail.[2] MR installed and maintained the subject guardrail system. Arcadis, a GDOT consultant and independent contractor, contracted with GDOT to inspect and monitor guardrail systems, including the subject guardrail. Discussion, *infra*.

Plaintiffs claim that the accident happened in the manner it did because the guardrail with which the [redacted] vehicle interacted was "nonfunctional." Compl. ¶¶ 4-6, 20. Plaintiffs also allege that a camera pole was inappropriately located within the clear zone. Compl. ¶¶ 34-36. As discussed below, Plaintiffs' expert witness, Herman Hill, P.E., provided testimony, affidavits, and notes in which he criticized, *inter alia*, GDOT's choice of the type of guardrail at the location, maintenance and inspection of the guardrail, and the proximity of the pole to the guardrail. Hill claims that his opinions are in the area of "operations" and not related to the roadway's design.

---

[1] As a substantive matter the Complaints contain the same allegations. Therefore, in this motion they will be cited to collectively, as appropriate. In addition, on October 1, 2020, Plaintiffs [redacted] filed their First Amended Complaint, which, *inter alia*, added Arcadis U.S., Inc. as a defendant. On March 5, 2020 Plaintiff [redacted] filed a "Renewal Complaint." And, on September 30, 2020 Plaintiff [redacted] filed a First Amended Complaint which added Arcadis U.S., Inc. as a Defendant to her lawsuit.

[2] A guardrail is "a longitudinal barrier to separate traffic from roadside obstacles or hazards." A W-beam guardrail is "a guardrail that is shaped like a 'W.'" Deposition of Joe Kent, P.E., August 19, 2021, 14:18-25.

As discussed, *infra*, those of Plaintiffs' claims which concern the choice of guardrail, its proximity to the pole, the use of warning devices or signage, and/or the design of the clear zone all require admissible expert testimony to support Plaintiffs' burden of proof to effect a waiver of sovereign immunity pursuant to the "design exception" of the Georgia Tort Claims Act ("GTCA"). And, with respect to Plaintiffs' claims concerning the maintenance or inspection of the subject guardrail, and the decisions concerning warning devices to alert motorists to a damaged guardrail, such claims and decisions all relate to alleged actions or omissions contractually delegated to MR or Arcadis. Plaintiffs in effect seek to hold GDOT responsible for the manner in which MR and/or Arcadis performed their respective contractual duties. But, the State has preserved its immunity for any torts committed by MR or Arcadis, because they are defined as independent contractors pursuant to the contractual terms.[3] These claims are also barred by sovereign immunity pursuant to the GTCA's "licensing powers or functions exception O.C.G.A. § 50-21-24(9), and the "inspection exception," § 50-21-24(8).

I. RELEVANT FACTS

A. The Subject Accident.

On June 3, 2018, Plaintiff [redacted] was traveling south on I-85 near the Metropolitan exit at approximately mile marker 76.5, and lost control of her vehicle, which then slid up the roadway and allegedly interacted with a guardrail. The vehicle then struck a concrete camera pole approximately eight feet from the roadway. Decedent [redacted] was the front

[3] Plaintiffs also offer Hill's testimony to interpret the MR and Arcadis Contracts to opine that GDOT is responsible for inspecting, maintaining, and/or repairing the guardrail. GDOT discusses in its Motion to Exclude Hill's expert testimony why Hill's opinions and testimony do not support Plaintiffs' attempt to hold GDOT liable for MR and/or Arcadis's torts. *See* GDOT MTE at 10-20.

seat passenger in Plaintiff [redacted] vehicle at the time of this crash. *See* Compl. ¶¶ 16, 34-37 (alleging that the vehicle struck the pole because the guardrail allegedly was nonfunctional); *see* Redacted Georgia Motor Vehicle Crash Report No. 18154201300 ("Accident Report"), attached hereto as Exhibit 4; Affidavit of Herman A. Hill, July 24, 2019, ¶ 7, attached hereto as Exhibit 5.

Plaintiffs' claims against GDOT, include, *inter alia*, that GDOT knew the guardrail was in poor condition and failed to repair it, allegedly in violation of "generally accepted maintenance, inspection, construction, and design standards of the time." Compl. ¶ 26; *id*. ¶ 31. Plaintiffs also allege that GDOT failed to use warning devices such as "traffic drums, cones, or other means" to alert motorists to the nonfunctional guardrail." *Id*. ¶ 29; *see also id*. ¶ 46. Plaintiffs also claim design defects with respect to the roadway's "clear zone" and the placement of a camera pole within the clear zone, which the subject vehicle struck. *Id*. ¶¶ 36; 46(h). Plaintiffs also allege what appear to be claims for negligent supervision, that GDOT:

> failed to ensure that Martin-Robbins properly maintained and repaired the subject guardrail; failed to ensure that Arcadis properly monitored guardrail and gave prompt notices of damaged guardrail; failed to ensure that the subject guardrail was properly maintained and repaired; . . . [and] continued, maintained and/or failed to abate a continuous hazardous condition that caused an injury, such that the subject guardrail was a nuisance under Georgia law . . ..

Id. ¶¶ 46-47. Plaintiffs also allege claims for "nuisance" related to the guardrail's allegedly hazardous condition. *Id*. ¶ 46(j).

GDOT filed its Answer on February 5, 2021, denying the material allegations of the Complaint and asserting various defenses, including that the State has preserved its sovereign immunity with respect to Plaintiffs' claims against GDOT. GDOT's Answers to Plaintiff [redacted] First Amended Complaint, Plaintiff [redacted] Renewal Complaint, and Plaintiff [redacted] Amended Complaint attached here to as Exhibits 6,7, and 8.

B. GDOT's Contracts With Martin-Robbins And Arcadis.

GDOT entered into an Open Agency Service Contract with Martin-Robbins on or about September 15, 2017 (48400-410-DOT00000985-001), which covered, *inter alia*, certain guardrail and maintenance services ("the MR contract"). Deposition of Herman Hill,[4] P.E., May 5, 2021, with Ex. 10, attached here to as Exhibit 9; *see* Deposition of Andy Doyle[5], November 2, 2021, 19-20:6; 24:12-20, (GDOT expert witness and GDOT State Maintenance Engineer as of 2017). As is standard with GDOT's contracts with independent contractors, the MR Contract incorporated GDOT's Standard Specifications ("SS") (*see* Scope of Services at III (B)), which provide that MR is an independent contractor of GDOT.[6] *See* SS § 101.16. MR's contractual responsibilities included maintaining and repairing the subject guardrail. MR also was responsible for "furnish[ing], install[ing] and maintain[ing] all necessary and required barricades signs and other traffic control devices in accordance with these Specifications, Project Plans, . . . and the MUTCD, and [to] take all necessary precautions for the . . . safety of the public." SS § 107.09. (Ex. 10, Doyle Dep. 25-26:2; 30:3-20.)

The Contract includes a "Notice to Proceed" clause (SS § 101.16), which operates as a permit allowing the contractor — here, MR — to begin and conduct work on the Project. *See* SS § 101.41 (defining "Notice to Proceed" as: "Written notice to the Contractor to proceed with the Contract Work"); § 101.16 (defining Contract); "Project" refers to, *inter alia*, MR's contractual duties to "repair, replace, and document . . . damaged guardrail components." *See* §101.77 (defining Work as, *inter alia*, what is needed to "success [fully] complet[e]" the Project"); Hill

[4] Cited portions of Mr. Hill's deposition are attached hereto as Exhibit 9.
[5] Cited portions of Mr. Doyle's deposition are attached hereto as Exhibit 10.
[6] Provided in: http://www.dot.ga.gov/ PartnerSmart/ Business/ Source/Pages/ Specifications.aspx; http://www.dot.ga.gov/ PartnerSmart/Business /Source /specs/ ss101.pdf;http://www.dot.ga.gov/PartnerSmart/Business/Source/specs/ss108.pdf).

Dep. Ex. 10, Section V (A); SS § 101.47 at Exhibit 9. Under "Scope of Work," the Contractor is responsible for maintaining the Project until acceptance, including maintaining "guard rails" in "safe and satisfactory condition." *See* Section 104.05(A); *see also* § 105.14 ("The Contractor shall maintain the project during construction and until the Project is accepted."); *id*. § 108.02.

Once the Notice to Proceed was issued, MR took possession and control of the Project (including the subject accident location), and GDOT's contractual rights and role with respect to governing that work are limited to administering and enforcing the contract, including GDOT's right to withdraw the contractor's authorization to perform the Work on the Project under certain circumstances pursuant to the contractual terms. *See* §105 ("Control of Work"); *id*. § 105.10 (noting that GDOT inspectors are authorized to inspect the Work but are not authorized to "issue instructions contrary to the Plans and Specifications or to act as foreman for the Contractor"). (Ex. 10, Doyle Dep. 34:15-16; 37-38:13.)

(in his role at GDOT, he never had anyone report to him related to the MR Contract concerning "inspection of guardrail, installation or repair); *id*. at 55 l. 23-57 l. 8 (explaining that GDOT has the option to terminate the contract but attempts not to exercise that option).

GDOT employees were not required to monitor the Work on-site or make day-to-day decisions concerning work performance; rather, this was MR's responsibility. *See* SS § 107.17; *id*. § 107.07 (providing that MR is responsible for public safety "along the highway and the protection of persons and property"); *see also* Contract §XVII(A) (providing, with respect to "Inspections" that the State Engineer "inspects the Work after the contractor's notification to the Engineer that it is complete" and can then accept or reject it).

As Andy Doyle testified, referring to the MR Contract:

> It was [MR's] jobsite. The first people out there to repair the guardrail should have been [MR]. If anybody else . . . GDOT . . . went out there to work on it . . .

> [MR] would have probably had concerns with us getting in their way or having problems in the contract.
>
> (Ex. 10, Doyle Dep. 55:5-22.)

GDOT's 2016 contract with Arcadis, Professional Services Agreement, ID No. TOOMT16011064, required Arcadis, as a GDOT consultant and independent contractor, to inspect and monitor "guardrails within the state highway system" including the subject guardrail. *See* Deposition of Kevin Wilson[7], dated May 13, 2021, 16:5-8 (GDOT District Maintenance Contract Manager for District 7); (Ex. 11, Wilson Dep. 20:3-11; 113-115:16; 138:4-23.); (Ex. 10, Doyle Dep. 32:13-17; 33:12-14.) (testifying that the purpose of the Arcadis Contract was to have a "second set of eyes" concerning "guardrail strikes"). The Arcadis agreement also incorporated the Standard Specifications discussed above. By alleging that GDOT breached it duties to monitor, maintain and/or inspect the guardrail installed at the subject location (Compl. ¶¶ 30-34), Plaintiffs in effect seek to hold GDOT responsible for the manner in which MR and/or Arcadis performed their respective contractual duties. But, the State has preserved its immunity for any torts committed by MR or Arcadis, because they are defined as independent contractors pursuant to the contractual terms.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. Background.

The Georgia Constitution expressly preserves the State's sovereign immunity and makes it clear that it "can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is waived and the extent of such waiver." Ga. Const. of 1983,

[7] Cited portions of Mr. Wilson's deposition are attached hereto as Exhibit 11.

Art. I, Sec. II, Par. IX (e). The General Assembly passed such an act in 1992, the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, et seq. *See Datz v. Brinson*, 208 Ga. App. 455, 455-56 (1993).

In passing the GTCA, the General Assembly recognized the "inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity." O.C.G.A. § 50-21-21(a). Further, due to the unique nature of government, "[t]he exposure of the state treasury to tort liability must therefore be limited." *Id*. Thus, the General Assembly declared as a matter of public policy that "the state shall only be liable in tort actions within the limitations of this article and in accordance with the fair and uniform principles established in this article." *Id*.

The sovereign immunity of a state agency is not an affirmative defense going to the merits of the case, but raises the issue of the trial court's subject matter jurisdiction to try the case. *See McConnell v. Dep't of Labor*, 302 Ga. 18, 19 (2017) (stating that sovereign immunity issues should be resolved before the merits of a case are considered). *Board of Trustees of Ga. Military College v. O'Donnell*, 352 Ga. App. 651, 653-54 (2019). And, a waiver of sovereign immunity must be established by the party (here, the Plaintiffs), seeking to benefit from that waiver. *Beasley v. Dep't of Corr.*, 360 Ga. App. 33, 34 n. 2 (2021) (citing cases); *Murray v. Ga. DOT*, 284 Ga. App. 263, 265 (2007). In resolving a motion to dismiss under O.C.G.A. § 9-11-12(b) (1), the trial court may consider evidence outside the pleadings to determine jurisdiction. *See Britt v. Jackson*, 348 Ga. App. 159, 162 (2018); *Farmer v. Ga. Dept. of Corr.*, 346 Ga. App. 387, 394-95 (2018); *James v. Ga. Dep't of Pub. Safety*, 337 Ga. App. 864, 867-68 (2016); *see also Dep't of Cmty. Health v. Data Inquiry, LLC*, 313 Ga. App. 683, 683 n.1 (2012) ("Under Georgia law, sovereign immunity is immunity from suit, rather than a mere defense to liability, and is effectively lost if a case is erroneously permitted to go to trial.").

And, the issue of whether sovereign immunity has been waived is not a jury question, but is purely a "matter of law" that must be decided by this Court. *Balamo*, 343 Ga. App. at 170; *see also Dep't of Public Safety v. Johnson*, 343 Ga. App. 22, 25 (2017) (explaining that, regardless of whether a trial court rules on the sovereign immunity challenge "before trial or defers it until trial on the merits . . . the determination is for the trial court, not the jury"); *see McConnell,* 302 Ga. at 18-19 (stating that sovereign immunity issues should be resolved before the merits of a case are considered).

B. The State Has Preserved Its Sovereign Immunity Under O.C.G.A. § 50-21-24.

While granting a limited waiver of sovereign immunity, the GTCA maintains sovereign immunity for losses resulting from certain types of conduct, and for certain governmental services and functions, as set forth in O.C.G.A. § 50-21-24 (Exceptions to State Liability). These exceptions to state liability are limitations to the waiver of sovereign immunity provided under the GTCA and define specific areas subject to such limitations. *Id*.; *see also Lewis v. Ga. Dep't of Human Res.*, 255 Ga. App. 805, 809-10 (2002).

In short, the State "shall have no liability for losses resulting from" the various governmental functions and services for which the General Assembly has chosen to maintain sovereign immunity. O.C.G.A. § 50-21-24. Thus, the focus is on what caused the loss. *See Georgia Military College v. Santamorena*, 237 Ga. App. 58, 60-61 (1999). In other words, plaintiffs must demonstrate not only that the subject accident resulted from tortious conduct attributable to GDOT, they must also demonstrate that this conduct is not encompassed within one of the exceptions for which the State's sovereign immunity has been retained. If the court finds that an exception to the waiver of sovereign immunity applies, then plaintiff's claims are

barred by the doctrine of sovereign immunity. *In re Carter*, 288 Ga. App. 276, 283 (2007) ("The party seeking to benefit from a waiver of sovereign immunity has the burden to establish waiver, and any suit brought to which an exception applies is subject to dismissal pursuant to O.C.G.A. § 9-11-12 (b) (1) for lack of subject matter jurisdiction.").

C. <u>Plaintiffs' Professional Negligence Claims.</u>

As discussed below, in order to effect a waiver of sovereign immunity in this case under the GTCA's design exception (O.C.G.A. § 50-21-24(10), the Plaintiffs must offer applicable and mandatory laws, standards, and/or guidelines related to their professional negligence claims which GDOT negligently failed to meet. Here Plaintiffs allege negligence with respect to the design of the guardrail at the accident location, the design choices made concerning warning devices or signage, and the design choices related to the "clear zone," including the placement and location of the pole therein.

Plaintiffs allege that GDOT:

> failed to maintain and inspect the guardrail … by the generally accepted … *design standards of the time*: failed to ensure that Martin-Robbins properly maintained and repaired the subject guardrail: . . . put the camera pole too close to the roadway, given the condition of the guardrail: failed to maintain an adequate clear zone in the area of the subject collision: failed to warn traffic of the danger despite policies, guidelines, standards, and generally accepted practices requiring such a warning: . . .

Id. ¶ 46 (emphasis added). See also Compl. ¶¶ 26, 29, 36. Those of Plaintiffs' claims related to the design of the guardrail and the subject roadway sound in professional negligence, as discussed below. Indeed, Plaintiffs specifically cite the GTCA's design exception. [redacted] First Amended Compl. ¶ 47(d) – Exhibit 1.

As discussed below, there is no evidence that GDOT failed to design the subject location, including the design of the clear zone, the location of the pole, and its choices of warning or

traffic control devices, in substantial compliance with generally accepted engineering and design standards in effect during the relevant time periods – i.e.: (1) when the guardrail was installed; and/or (2) when the pole was placed along the roadway. As a result, these claims should be dismissed because Plaintiffs have failed to meet their burden of proof pursuant to the GTCA's design exception, which requires expert testimony to support these professional negligence claims.

C. Plaintiffs' Expert's Opinions.

As explained above, certain of Plaintiffs' claims involve professional engineering and design standards and concepts that would not be within the knowledge of the average layperson.[8] In this case, these include: design and placement of the surveillance pole, design and placement of the guardrail, and design of the roadway itself. Under Georgia law, Plaintiffs thus must provide expert testimony to support their burden of proof to effect a waiver of sovereign immunity with respect to these claims.

Mr. Hill provided two affidavits (July 24, 2019 attached as Exhibit 5 and November 13, 2020 attached as Exhibit 12), and notes and preliminary opinions. (Ex.9, Hill Dep. Ex. 5). Hill testified at his deposition that he is not offering any design opinions in this case, whether with respect to the design of the guardrail, the subject roadway (including the clear zone), or GDOT's design-related decisions concerning warning devices, if any. Indeed, he testified that he would "not say" or "discuss" "anything . . . about the design" or any alleged design defect in the "State highway where this accident happened." Hill contended that his opinions relate to the operational aspects of the highway as opposed to its design. (Ex. 9, Hill Dep. 47-49:12; *id*. at 49-51:25) (opining that, given the way motorists travel through the roadway's four lanes, as well as

[8]Plaintiffs in their Complaint explain that Hill's affidavit is attached to the Complaint if deemed necessary pursuant to O.C.G.A. § 9-11-9.1. Compl. ¶ 11.

the condition of the roadway's curvature, the guardrail system from an "operational" and safety standpoint must be "perfectly maintained at all times" and "in exact right conditions"); (Ex. 5, Hill Aff. ¶ 8(f)) (opining on the pole's placement); (Ex. 9, Hill Dep. 81:6-16) (testifying that he has provided all his expert opinions and does not plan to do any more expert witness work on the case).

Hill claimed to apply, *inter alia*, "accepted" principles of transportation and civil engineering and highway design, construction, and maintenance. (Ex. 5, Hill Aff. ¶ 8) But, Hill did not identify any mandatory standards (or any language in the MR Contract) that required the guardrails to be "perfectly" maintained, or "in exact right conditions." Hill also abandoned his opinion in his affidavit that GDOT should have used a Jersey type guardrail because it is heavier than the subject guardrail. (Ex. 5, Hill Aff. ¶ 8(g)); (Ex. 9, Hill Dep. 180-182:24) (Ex. 12, Hill Aff.)

With respect to Plaintiffs' claims concerning GDOT's alleged oversight of MR's and Arcadis's contractual responsibilities, Hill agrees that GDOT is permitted to delegate the guardrail-related work at issue in this case to these independent contractors. (Ex.5, Hill Aff. ¶ 7(f)-(g), 8(a)-(b)); GDOT MTE (Hill), at 11, 14-15. Hill criticizes how GDOT fulfilled its contractual responsibilities as discussed below, (Ex. 9, Hill Dep.). *(*GDOT MTE at 15-19.)

Hill's "observations" (Ex. 9, Hill Dep. Ex. 5) are as follows:

1. GDOT under "32-2-2 . . . shall be in control of and responsibility for all construction and maintenance or other work upon the state highway system." Hill Prelim Op'n, Observation 1.

2. GDOT "must manage" its independent contractors and "must have in place an active review process . . . to assure the public funding is being efficiently and effectively use. The record shows GDOT failed on this point based on work performed by Arcadis and Martin Robbins;" (Observations 3-4); and

3. GDOT "failed to have knowledge of the failures of their chosen consultants/contractors which is horribly wrong since the users of the state highway system were being short changed." *Id*. No. 5.

Hill's "preliminary opinions" (Ex. 9, Hill Dep. Ex. 5), are as follows:

1. GDOT "failed to provide adequate services in accordance with their management and work responsibilities and actions based on the contractual obligations."

2. "The project concept was developed statewide and was expected to be better than GDOT personnel handling same process. Whatever the reasoning provided for the failure of this contract…GDOT, Arcadis and Martin Robbins all failed. Prior to Contract Award, neither [GDOT], Arcadis, or Martin Robbins supplied any documents suggesting the contract was unable to be managed or implemented as written."

Prelim. Op'ns 1-2. As support, Hill opines that: "Either of the parties had ability to know and foresee a problem with the concept and make changes in scope prior to the contract bidding." *Id*. at 2(a). Hill also opinions that there is no "documentation" that any party "raised hand" to question the ability" to "produce quality changes to guardrail maintenance" …question the ability of quality inspections…. [or] … to suggest the guardrail hardware or end terminals would be unavailable as needed." *See id*. at 2, (Ex. 9, Hill Dep. 78-79 :10.) (referring Prelim. Op'ns No. 2) Hill concludes: "Yet, all three entities entered these contracts with specific detail time requirements for performance yet no evidence in writing has been supplied to document questions about ability to accomplish prior to award." Prelim. Op'ns No. 2(e).

As to causation, Hill opines: "If . . . GDOT had done [its] job, then the guardrail that the Kia Sorrento contacted would have been in good repair and this collision would have been far less severe." Prelim. Op'ns No. 3. According to Hill, GDOT's "job" was to

> hire consultants and contractors to perform the work that bad been done by GDOT personnel with expectation it would be accomplished more quickly and efficiently . . .. The effect was to employ outside personnel and equipment but with the same nagging problem of damaged guardrail at critical locations with long delays in replacement . . .And nobody raised hand and said this is wrong.

Prelim. Op'ns ¶ 3(b)-(d)). Hill's opinions do not support Plaintiffs' burden of proof in this case. And, Plaintiffs have no expert testimony supporting those of their professional negligence claims related to design defects, because Hill testified he is not providing design-related opinions.

For all these reasons and the reasons below, the Court should grant GDOT's motion to dismiss for lack of subject matter jurisdiction.

D. GDOT Has Preserved Its Sovereign Immunity For the Torts of Independent Contractors.

Plaintiffs argue that the State should be liable for alleged torts committed by MR and/or Arcadis. But the State has preserved its sovereign immunity with respect to any tortious acts or omissions of its independent contractors. This includes any failure by the contractor to follow the contract terms or any alleged negligence in the manner the contractors carried out their contract duties.

The Transportation Code, O.C.G.A. § 32-2-2(a) (1), does not prohibit GDOT from delegating these responsibilities to a private contractor. *See Ga. DOT v. Wyche*, 332 Ga. App. 596, 599-600 (2015). GDOT's involvement was limited to administering the contracts at issue and inspecting these independent contractors' work per the contractual terms. Thus, any alleged breaches of these duties were the result of actions or omissions of persons other than "state officers or employees" and are not imputable to GDOT for the purpose of establishing a waiver of sovereign immunity. O.C.G.A. § 50-21-22 (7); *see Johnson v. Ga. Dept. of Human Resources*, 278 Ga. 714, 716 (2004); *Wyche*, 332 Ga. App. at 601.

Further, under the GTCA, state agencies may be held liable only to the extent that "a private individual or entity would be liable under like circumstances." O.C.G.A. § 50-21-23(a); O.C.G.A. § 50-21-21(a). Thus, if a private entity cannot be held liable for such claims, neither

can GDOT. In particular, a landowner is not liable, with certain statutory exceptions provided under O.C.G.A. § 51-2-5, for unsafe conditions on the premises that are in the contractor's possession, or for the contractor's torts. *Ramcke*, 306 Ga. App. at 739; *Grey v. Milliken & Co.*, 245 Ga. App. 804, 805 (2000).

Moreover, O.C.G.A. § 51-2-5, including the exceptions therein, does not appear to apply to the State. Rather, "[s]overeign immunity . . . may be waived 'only as provided by the Legislature in a tort claims act or an act of the Legislature which specifically provides that sovereign immunity is waived and sets forth the extent of such waiver.'" *Georgia Department of Natural Res. v. Center for a Sustainable Coast, Inc.*, 294 Ga. 593, 602 (2014) (citation omitted). Accordingly, to waive sovereign immunity for the State's alleged violation of a statute such as O.C.G.A. § 51-2-5, the Georgia legislature must specifically provide for such a waiver. *See, e.g., Hughes v. Ga. Dep't of Corrections*, 267 Ga. App. 440, 442 (2004). Because O.C.G.A. § 51-2-5 does not contain any such waiver, it should not apply to the State.

Accordingly, this Court should dismiss the Complaints to the extent that Plaintiffs' negligence claims seek to hold GDOT responsible for any acts or omissions of its independent contractors.

E. The State Has Preserved Its Sovereign Immunity Under the "Licensing Exception" and "Inspection Exception" O.C.G.A. §§ 50-21-24 (9) & (8).

The licensing exception, O.C.G.A. § 50-21-24(9), provides that the State "shall have no liability for losses resulting from:" "Licensing powers or functions, including, but not limited to, the issuance, denial, suspension, or revocation of or the failure or refusal to issue, deny, suspend,

or revoke any permit, license, certificate, approval, order, or similar authorization." The "inspection exception" provides that the State has preserved its immunity with respect to:

> Inspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety . . .

O.C.G.A. § 50-21-24 (8).

Turning first to the licensing exception, it "is not strictly limited to decisions related to permits or licenses. Instead, it also applies as to decisions relating to issuance, denial, suspension, or revocation of approvals." *Ga. DOT v. Owens*, 330 Ga. App. 123, 137 (2014). Indeed, it immunizes "virtually any action [GDOT] could take regarding" an authorization or approval." *Wyche*, 332 Ga. App. at 603-04; *Ga. Dep't of Transp. v. Cox*, 246 Ga. App. 221, 224 (2000).

By virtue of GDOT's Contract with MR and Arcadis -- and its issuance of a Notice to Proceed -- (as discussed, *supra*), GDOT "authorized" or "permitted" MR (and Arcadis) to perform work on I-85. GDOT's role was limited to inspecting to ensure that GDOT received the work for which it had contracted and to suspend the parties' authorizations if GDOT was aware of a breach. *See* Discussion, *supra*, at 4-7. As the *Lewis* Court explained, in a case where a private personal care home licensed by the Georgia Department of Human Resources allegedly failed to comply with DHR regulations, resulting in injury to a resident:

> Consideration of the requirement that the act must be that of the state and not of a third party in order for the state to be held liable [under the GTCA] leads naturally to the conclusion that the state cannot be held liable in this case because its failure to enforce the . . . regulations was not the proximate cause of the [plaintiffs' decedent's] death.

Lewis v. Ga. Dep't of Human Res., 255 Ga. App. 805, 808 (2002). Likewise, this exception has been applied to bar claims against GDOT for its alleged negligence in approving plans concerning construction or installing traffic control devices on state owned property: *DOT v. Bishop*, 216 Ga. App. 57, 58 (1994) (GDOT's issuance of a permit for the construction of a wall on a state route right of way that allegedly interfered with a driver's view of oncoming traffic); *Sadler v. Dept. of Transp.*, 311 Ga. App. 601, 606-07 (2011) (permit exception barred claim based on GDOT's failure to install a traffic signal at an intersection on a state route); *see also Dept. of Transp. v. Kovalcik*, 328 Ga. App. 185, 190-91 (2014) (GDOT immune to claims relating to the inspection and approval of design plans for a state route designed by a private contractor); *Dept. of Transp. v. Cox*, 246 Ga. App. 221, 224 (2000) (issuance of permit to a shopping center to build a commercial driveway on a state route).

In short, Plaintiffs' claims here against GDOT are derivative of claims they would allege against MR or Arcadis. They are not alleging that GDOT was actively negligent with respect to installing, maintaining, repairing and inspecting the guardrail, only that GDOT failed to catch or act upon the alleged negligence of MR or Arcadis. *See, e.g.*, Compl. ¶¶ 46 (d)-(f); *Ga. DOT v. Wyche*, 332 Ga. App. 596, 603-04 (2015) ("Accordingly, whether Wyche's claims are characterized as either claims that the DOT negligently approved [MR's] paving project or negligently inspected the project, they are barred under the doctrine of sovereign immunity.").

Thus, even if, hypothetically, GDOT had failed to suspend the contracts at issue, the State still would have preserved its immunity pursuant to O.C.G.A. § 50-21-24(9), particularly given this exception's broad construction by Georgia courts. *See Sadler*, 311 Ga. App. at 606-07; *see also Murray v. Ga. Dep't of Transp.*, 284 Ga. App. 263 (2007) (licensing exception applied to allegations that, after authorizing installation of a traffic light at an intersection, GDOT's delayed

installation led to an accident there); *Reidling v. City of Gainesville*, 280 Ga. App. 698, 700, 703 (2006) (The exceptions in O.C.G.A. § 50-21-24(8)&(9) precluded plaintiffs' claim that GDOT either negligently approved the contractor's proposed disposal site for excess fill soil or that it negligently inspected the disposal site after approving it.).

And, even if Plaintiffs' claims were read to allege that GDOT negligently supervised MR's or Arcadis's work, such claims also would be barred by sovereign immunity. *See Sommers Oil Co. v. Georgia Dep't of Agric.*, 305 Ga. App. 330, 331-32 (2010) (holding that, although plaintiff "couched its claim as a claim for negligent supervision," the essence of the claim involved defendant's failure to properly inspect the fuel stations at issue and failure to revoke their permits, thus barring such claims under both O.C.G.A. § 50-21-24 (8) & (9)).

Turning to the "inspection exception," even though the subject accident occurred on a state highway, and inspection of State property is excluded from O.C.G.A. § 50-21-24 (8), the exception applies here. Plaintiffs are not contending that GDOT was negligent in inspecting State property, but rather that GDOT was negligent in not adequately inspecting the work being performed by MR and/or Arcadis. *See* SS §107.09; *see also* SS § 105.10 (GDOT cannot act as MR's "foreman").

In *Comanche Construction, Inc. v. Ga. Dept. of Transp.*, 272 Ga. App. 766 (2005), for example, the Court held that the State preserved its sovereign immunity because GDOT's review and approval of Comanche's traffic control plan and its subsequent inspection of the route during construction fell within the inspection exception. *Id*. at 768-69. And this was so even though GDOT conditioned its approval on making changes affecting the signage. *Id*. at 769. The court emphasized that to hold otherwise would "eviscerate the exception … in any case where the

State discovers, through its inspection, some type violation or inadequacy that requires corrective action." *Id.*

And, in *DOT v. Jarvie*, 329 Ga. App. 681 (2014), *overruled on other grounds by Rivera v. Washington*, 298 Ga 770 (2016), GDOT contracted with Seaboard Construction Co. for a road- widening project on I-95. *Id*. *Jarvie* was killed while a passenger in a vehicle that struck the rear of a dump truck operated by a Seaboard subcontractor that was exiting a median stockpile and entering the highway. *Id*. The plaintiffs alleged that the stockpile site lacked sufficient traffic control safety features, such as "proper warning signs." *Id*. at 681-82. As here, the *Jarvie* plaintiffs alleged that GDOT allowed the independent contractor to conduct its work in a dangerous manner and failed to properly monitor its work. *Id*. at 684.

The Court held:

> the conduct in this case amounts to oversight of construction activities for purposes of administering the contract, and it does not amount to an inspection of State property for regulatory compliance or safety hazards as contemplated by the language of OCGA § 50-21-24 (8). Absent a clear legislative directive, we decline to extend the waiver of sovereign immunity to include independent contractors' conduct even if a State actor in some way attempts to ensure that contractors are operating safely on a State-approved project.

Jarvie, 329 Ga. App. at 684. Further, given the GDOT contract at issue there, the State also preserved its immunity under O.C.G.A. § 50-21-24 (9). *Id*. Following these cases, Plaintiffs cannot meet their burden of proof to effect a waiver of sovereign immunity and hold GDOT liable in negligence for the guardrail's condition at the time of the subject accident.

Hill's expert testimony and opinions offered by Plaintiffs to support their claims of negligent maintenance and inspection of the guardrail do not support Plaintiffs' burden of proof under the GTCA. To prove a claim of negligent maintenance, Plaintiffs must show: "breach of duty by the DOT" including "evidence of the proper maintenance standard, the deviation from

that standard, and the causal connection between the deviation and the collision." *Johnson v. Georgia Dep't of Transp.*, 245 Ga. App. 839, 839 (2000); *See* Compl. ¶ 46(k) & n.1. But here, GDOT was not required to maintain the guardrail to any particular standard because it delegated its maintenance and inspection duties to MR and Arcadis under the Contracts.

Hill opines that GDOT's duties to maintain and inspect the guardrail is found in O.C.G.A. § 32-2-2(a) (1).(Ex.9, Hill Dep. 70-74:13.) (referring to Hill Dep. Ex. 5 under "GDOT's Duties"), That is, despite the Contracts and GDOT's delegation of the guardrail-related responsibilities to these independent contractors, according to Hill, O.C.G.A. § 32-2-2 provides a basis for holding GDOT liable for their allegedly tortious acts or omissions. First, the responsibilities referenced in O.C.G.A. § 32-2-2(a)(1) do not affect, much less override, GDOT's sovereign immunity under the GTCA, including with respect to the licensing, inspection and design exceptions.

Further, under the GTCA, state agencies may be held liable only to the extent that "a private individual or entity would be liable under like circumstances." O.C.G.A. § 50-21-23(a); O.C.G.A. § 50-21-21(a) ("it is declared to be the public policy of this state that the state shall only be liable in tort actions within the limitations of this article and in accordance with the fair and uniform principles established in this article") (emphasis added). Thus, if a private entity cannot be held liable for such claims, neither can GDOT. And, "[s]overeign immunity . . . may be waived 'only as provided by the Legislature in a tort claims act or an act of the Legislature which specifically provides that sovereign immunity is waived and sets forth the extent of such waiver.'" *Center for a Sustainable Coast, Inc.*, 294 Ga. at 602 (quoting *Johnson*, 278 Ga. at 715). *Georgia DOT v. Smith*, 314 Ga. App. 412, 419 (2012) (GDOT should not "be held to a higher

standard of care [than private individuals or entities] by reason of its responsibility to plan, manage, and maintain the state highway system under OCGA § 32-2-2").

Second, section O.C.G.A. § 32-2-2(b) provides for GDOT's discretion with respect to how it discharges the responsibilities described in subsection (a):

> [i]n addition to the powers specifically delegated to it in this title, the department shall have the authority to perform all acts which are necessary, proper, or incidental to the efficient operation and development of the department and of the state highway system and of other modes and systems of transportation; and this title shall be liberally construed to that end. . . .

Id. (emphasis added). It follows that, by definition, O.C.G.A. § 32-2-2 does not impose on GDOT any extra-contractual duties or responsibilities that would support a claim for negligent maintenance or inspection in this case, given the Contracts as well as the State's preservation of sovereign immunity with respect to any tortious actions or omissions of independent contractors.[9]

Further, Hill cannot through his testimony impose a legal duty on GDOT that is not based upon the applicable statutes, regulations or policies, nor offer opinions concerning his own legal conclusions. Specifically, such testimony and opinions impermissibly usurp the jury's role in reaching its own conclusion, and are inadmissible. *Daimler-Chrysler Motors Co., LLC v. Clemente*, 294 Ga. App. 38, 57-58 (2008) (citing cases); *cf. Diamond v. Department of Trans.*, 326 Ga. App. 189, 195 (2014) (holding that an expert engineer's affidavit "does not, and cannot, create a legal duty where none existed before" and noting that Hill, plaintiff's expert, merely

[9] Plaintiffs cite *Ga. DOT v. Miller*, 300 Ga. App. 857 (2009) (Compl. ¶ 46(k) n. 1)), to allege that GDOT's decisions with respect to maintaining the allegedly nonfunctional guardrail was not protected by the discretionary function exception. First, GDOT arguments in this motion are not addressing the State immunity pursuant to the GTCA's discretionary function exception, O.C.G.A. §50-21-24(2). Second, *Miller* is distinguishable from this case because there, GDOT was responsible for maintaining the subject roadway and had not delegated its responsibilities to independent contractors, as here.

"refer[red] to OCGA § 32-2-2 (a) (1) . . . only for the general proposition that the DOT is obligated to plan, construct and maintain public highways"). Likewise, despite Hill's insistence that he is not providing any legal opinions in this case (*e.g.*, Ex. 9, Hill Dep. 74:14-16.); (GDOT MTE at 17), his conclusions that GDOT breached its duties to manage MR – or any entities with which it contracts -- under O.C.G.A. § 32-2-2, essentially amount to Hill's attempt to impose a self-created legal duty on GDOT. (GDOT MTE at 15-19.)

Thus, Plaintiffs cannot rely on Hill's opinions or testimony to support their burden of proof with respect to their negligent maintenance and inspection claims.

In short, the State has preserved its immunity for claims that relate to MR's or Arcadis's contractual responsibilities.

F. The State Has Preserved Its Sovereign Immunity Under the "Design Exception," O.C.G.A. § 50-21-24 (10).

Plaintiffs' claims concerning the subject roadway (related to the placement of the pole and the design of the clear zone) are barred under the "design exception," O.C.G.A. § 50-21-24(10). *See, e.g.*, Compl. ¶¶ 36, 46(c), (g)-(i); ¶ 51. O.C.G.A. § 50-21-24(10) provides that the State shall have no liability for losses resulting from:

> The 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.

The design exception preserves the State's immunity from Plaintiffs' professional negligence claims unless the Plaintiffs establish, that GDOT's engineering and design choices concerning the type of guardrail used, the placement of the pole, the adequacy of the "clear zone" in the area of the subject accident, and GDOT's design choices with respect to what types of warning devices or signage to use (assuming, hypothetically, this was not MR's contractual

obligation), failed to substantially comply with "generally accepted engineering or design standards in effect" at the relevant time periods. *Id*.; *see Daniels v. Department of Transportation*, 222 Ga. App. 237 (1996); Discussion, *supra*. Plaintiffs have the burden of proof to effect a waiver of sovereign immunity, as they do with respect to the other GTCA exceptions discussed above. *See O'Hara v. GDOT*, 2007 Ga. App. LEXIS 1338, at *4 (2007).

Expert testimony is required with respect to these professional negligence claims related to engineering or design standards. *See Georgia Dep't of Transp. v. Balamo*, 343 Ga. App. 169, 171 (2017); *Reidling v. City of Gainesville*, 280 Ga. App. 698, 702 (2006); *Dept. of Transp. v. Mikell*, 229 Ga. App. 54, 56-59 (1997) (When a hazard results from allegedly negligent design or engineering, then the plaintiff's claim is one for professional malpractice.); *Johnson v. GDOT*, 245 Ga. App. 839 (2000). Non-engineers (*i.e.*, laypersons) do not have the engineering expertise to establish what the standard of care is (within the field of transportation engineering) for designing or locating a guardrail, the correct distance between a guardrail and a camera pole, or the design of the total roadside bordered area, *i.e.*, the clear zone, for the recovery of an errant vehicle, which depends on, *inter alia*, "roadside geometry." https://www.fhwa.dot.gov/programadmin/clearzone.cfm#.

Likewise, the uses of warning devices or signage also requires expert testimony. *DOT v. Cushway*, 240 Ga. App. 464, 465 (1999) (expert affidavit required pursuant to O.C.G.A. § 9-11-9.1, where contract between DOT and independent contractor provided that traffic control devices would be placed consistent with MUTCD "advisory" or "permissive" guidelines, which "necessarily involve the exercise of professional engineering judgment in their application"). As the *Mikell* Court explained:

> Because the plaintiffs are challenging the . . . the choice of traffic control devices which control it, they are asserting that the intersection is negligently engineered

> and designed. . .. Because the stop sign and stop line issues [within the relevant manual] fall within the advisory and permissive range, they are necessarily within the discretion of the DOT engineers and its employees. The exercise of such discretion involves the use of professional engineering judgment, and for that reason, it was incumbent upon the plaintiffs to present expert engineering testimony on this issue in order to establish the applicable standard of care and a breach thereof. This they failed to do.

Mikell, 229 Ga. App. at 57-58; *see also Bartenfeld v. Chick-fil-A, Inc.*, 346 Ga. App. 759, 761-65 (2018) (explaining that configuration of parking spaces, and the "propriety of [CFA's] choice among various mechanisms to use these specific wheel stops to prevent cars from encroaching beyond the parking spaces . . . are design and engineering decisions")? Likewise, here, even if, hypothetically, MR was not the responsible party, GDOT's choices as to whether to install warning devices near the guardrail involve engineering judgment and require expert testimony.

Here, Hill testified that he did not have any expert opinions concerning any alleged roadway design defects, which would include the use of warning devices and the design of the clear zone. GDOT MTE at 2-4, 7, 15; *cf*. Hill Aff. ¶ 8(g) (stating his opinions concerning the type of guardrail GDOT chose to use); *see id*. ¶ 5 (stating that his opinions are provided "in the area of practice and specialty" in which he has "professional knowledge," including "highway design" and "construction" and that he relied on the AASHTO design guide, as well as "other knowledge related to highway design . . . [and] construction"); *id*. ¶ 6 (stating that he relied on his "own knowledge of engineering [and] government regulations and standards" for the bases for his expert opinions). (Ex. 5, Hill Aff.)

Hill's opinions concerning the placement of the camera pole, relative to the guardrail, in the roadway's clear zone, relate to design and engineering standards because changing the location of the pole in the clear zone requires engineering judgment, despite Hill's characterization of the issue as related only to "traffic operations." *See generally DOT v. Balamo*,

343 Ga. App. 169, 173 (2017) (rejecting expert's characterization of roadway-related opinions as related only to maintenance rather than design, emphasizing: "The essence of Balamo's claim is that GDOT negligently designed the road, and he cannot avoid the State's immunity simply by describing it as something else."). Hill did not provide any laws, rules, standards or guidelines was with respect to how far this sort of pole should be placed from a guardrail, let alone whether there were any mandatory standards to which GDOT was required to adhere. Moreover, Hill conceded that he did not measure how far the camera pole was from the guardrail. (Ex. 9, Hill Dep. 139-140:21.); (Ex. 5, Hill Aff. ¶ 8(f).); *see also Balamo*, 343 Ga. App. at 172 (where Hill opined that the cross slope at issue should have been increased in order to "enable water to drain off the roadway more quickly," Court explained that, in addition to other issues with Hill's opinions, "the expert testified that he did not know the actual calculations of the cross slope in the relevant section of the highway"). (GDOT MTE at 7.)

Moreover, the design exception "render[s] the DOT immune from claims that it negligently breached a duty to improve or upgrade the original design and construction of the roadway to current design standards to make it safer." *Cox*, 246 Ga. App. at 223; *Daniels v. Dept. of Transp.*, 222 Ga. App. 237, 238-239 (1996); *Crooms*, 316 Ga. App. at 537-38.

With respect to the type of guardrail GDOT installed on the roadway (Ex. 5, Hill Aff. ¶ 8(g)), Hill opined that GDOT should have used a "Jersey" barrier instead of the subject guardrail but testified that this was not a design opinion but, rather, "operational:" "if you were not going to maintain it, then you should have used something that was better equipped for less maintenance. Obviously those temporary concrete barriers virtually no maintenance." (Ex. 9, Hill Dep. 62:4-22. *Cf. id*. at 180 l. 14-181 l. 25 (testifying that it was GDOT's "decision," "their road," "their business" as to whether to install a Jersey barrier). Thus, it is unclear whether Hill

is critical of GDOT's choice not to replace the subject guardrail with a Jersey barrier. To the extent he is critical, he appears to have abandoned any opinion that GDOT "should" have replaced the guardrail. Regardless, he testified to no mandatory design or engineering standard to which GDOT was subject in this regard.[10]

Plaintiffs' allegations that GDOT should have posted signage or other traffic control devices to warn motorists of the nonfunctional guardrail also concern design and engineering decisions, are governed by, among other standards, those found in the MUTCD, and, thus, also require expert testimony in support.[11] A number of Georgia cases are instructive on this point. In *Cushway*, 240 Ga. App. at 465-66, the decedent was killed when he crashed into a lighted drum placed as a traffic control device at the site of a construction project. The plaintiff claimed, *inter alia*, that advance warning signs were inadequate. As in this case, the contract at issue incorporated MUTCD standards. *Id*.; *see* Contract, Scope of Services at III (A). The *Cushway* Court explained that advisory and permissive MUTCD standards necessarily involve the exercise of professional engineering judgment in their application." *Dep't of Transp. v. Cushway*, 240 Ga. App. 464, 464-66 (1999).

Likewise, in *Dep't of Transp. v. Mikell*, 229 Ga. App. 54, 57-58 (1997), discussed above, the Court held that the case concerned engineering judgment because it involved the choice of traffic control devices: "the court and jury are not permitted to speculate as to the standard against which to measure the acts of the professional in determining whether he exercised a reasonable degree of care." *Mikell*, 229 Ga. App. at 58; *see also Hamilton-King v. HNTB Ga.,*

[10] The choice of barriers on a highway is a matter of engineering judgment. *See generally* National Cooperative Highway Research Program Report 350: Recommended Procedures for the Safety Performance Evaluation of Highway Features (Transportation Research Board 1993).
[11] Chapter 2C.01 of the 2009 MUTCD provides that: "The use of warning signs shall be based on an engineering study or on engineering judgment." Ch. 2C.02 (01).

Inc., 311 Ga. App. 202 (2011) (holding that the plaintiffs' claims concerned professional negligence where they alleged that the defendants failed to plan and implement adequate lighting and signage at a construction site in compliance with generally accepted standards); *Balamo*, 343 Ga. App. at 174 ("to the extent that Balamo argues that GDOT was also negligent in failing to . . . install "slippery when wet" signs, those claims are design claims that are also barred because Balamo has not shown that . . . [this] option was industry standard at the time the road improvement at issue was designed"); *Dep't of Transp. v. Brown*, 267 Ga. 6, 7 (1996) ("the average layperson is not familiar with design and function features of traffic control devices").

Here, the Plaintiffs' have not produced and any expert testimony to support such claims and Plaintiffs' expert Mr. Hill have specifically stated he is not providing any design opinions in this case.

G. The State Has Preserved Its Sovereign Immunity For Claims of Personal Injuries Resulting from An Alleged Public Nuisance.

Plaintiffs in the [redacted] Complaint allege that GDOT "continued, maintained and/or failed to abate a continuous hazardous condition that caused an injury, such that the subject guardrail was a nuisance under Georgia law." Compl. ¶ 46 (j).[12] But the State has preserved its immunity for personal injuries resulting from an alleged nuisance. As the Court stated in *Beasley*, 360 Ga. App. at 37-38, affirming the trial court's dismissal of plaintiff's nuisance claim:

> It is well established that the "nuisance doctrine" for purposes of sovereign immunity allows the State to be held liable for "creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property." But this sovereign-immunity doctrine is firmly rooted in the concept that "the government may not take or damage private property for public purposes without just and adequate compensation." Importantly, personal injury for purposes of inverse condemnation based on a public nuisance does not "constitute personal property that can be taken," and so "[s]overeign immunity bars any

[12] GDOT denied these allegations in its Answers. See Exhibits 6, 7, and 8.

> action for personal injury or wrongful death … arising from nuisance or inverse condemnation." And here, we are dealing with personal injuries . . . .

Id. (citations omitted). Here, the negligence claims all relate to personal injuries, including the alleged economic damages, not the taking or damaging of private property. Compl. ¶¶ 6, 53-54. Therefore, [redacted] nuisance claims are barred by sovereign immunity and subject to dismissal.

[CONTINUED WITH SIGNATURE ON NEXT PAGE]

III. CONCLUSION

Based upon the foregoing, this Court should grant GDOT's Motion to Dismiss Plaintiffs' Complaint.

This 29th day of November, 2021.

Respectfully submitted,

CHRISTOPHER M. CARR 112505
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

RONALD S. BOYTER, JR. 073553
Senior Assistant Attorney General

/s/Kristine K. Hayter
KRISTINE K. HAYTER 108031
Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

KRISTINE K. HAYTER
Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334-1300
Telephone: (404) 458-3268
khayter@law.ga.gov

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that I have this date served a copy of **DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND BRIEF IN SUPPORT THEREOF**, File & Serve*Xpress* which will automatically send email notification of such filing to all Judges and opposing counsel of record:

James E. Butler, III, Esq.
Matthew R. Kahn, Esq.
Butler Law Firm
10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlerfirm.com
matt@butlerfirm.com
Attorneys for [redacted] Plaintiffs

Nick T. Protentis, Esq.
Miller Bonham, Esq.
Protentis Law LLC
5447 Roswell Rd. NE
Atlanta, GA 30342
nick@protentislaw.com
matt@protentislaw.com
Attorneys for [redacted] Plaintiffs

Brad C. Parrot, Esq.
Claire A. Williamson, Esq.
Hudson Parrott Walker, LLC
3575 Piedmont Road NE
Fifteen Piedmont Center, Suite 850
Atlanta, Georgia 30305
bparrott@hlpwlaw.com
cwilliamson@hlpwlaw.com
Attorneys for Defendant Martin-Robbins Fence Company

Kevin P. Branch, Esq.
Elenore C. Klingler, Esq.
McMickle, Kurey & Branch, LLP
217 Roswell Street, Suite 200
Atlanta, Georgia 30009
kbranch@mkblawfirm.com
eklingler@mkblawfirm.com
Attorneys for Defendant Martin-Robbins Fence Company

Kent T. Stair, Esq.
Sarah L. Bright, Esq.
Copeland, Stair, Kingma & Lovell, LLP
191 Peachtree Street, NE
Suite 3600
Atlanta, Georgia 30303
KStair@cskl.law
sbright@cskl.law
Attorneys for Defendant Arcadis U.S., Inc.

David R. Cook, Jr. Esq.
Antonio E. Veal, Esq.
Autry, Hall & Cook, LLP
3330 Cumberland Blvd.
Suite 325
Atlanta, Georgia 30339
cook@ahclaw.com
veal@ahclaw.com
Co-Counsel for Defendant GDOT

This 29th day of November, 2021.

/s/Kristine K. Hayter
KRISTINE K. HAYTER 108031
Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

KRISTINE K. HAYTER
Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334-1300
Telephone: (404) 458-3268
khayter@law.ga.gov